Chapter 3 Understanding Impact

3.1 Adjusting the Lenses to Capture the Impact of SHRL

There is often a tendency to look at litigation through an unduly narrow frame. Our understanding of the impact of SHRL may depend in large part on the lenses through which we view it, what we are looking at, when and why. We might think of an old *camera obscura*, with its tiny hole that projects a single image into a darkened room. In this narrow frame, the tendency may be to focus on what happens inside the courtroom or the pleadings; as lawyers trained to carefully craft arguments and to analyse, persuade and manoeuvre our clients towards the light, we may be particularly prone to this. Or, even more commonly, the focus may be on judgment day, seen as the culmination of the litigation journey, when fates will be sealed and justice done. In this narrow and static view, the end point is the familiar photo of triumphant lawyers and clients on the steps of the court after judgment is rendered - the proverbial (and sometimes literal) champagne moment celebrating litigation 'success'.

We know of course that the reality is quite different. A winning judgement that remains (as many do) unimplemented may change little. A judgment, whether won or lost, that creates legal or political backlash, may aggravate the situation on the ground. Conversely, a losing case that exposes injustice and catalyses further action may ultimately be transformative. The need to rethink success in human rights litigation is plain: as Jules Lobel noted, we must be able 'to see the success without victory,' and conversely recognize that failure may follow fast on victory's heels.[1]

No one frame can capture the complexities of the impact that SHRL can have. In this chapter, I will suggest that to understand more accurately the significance of human rights litigation, we need to jettison the old *camera obscura*-and adopt more modern, sophisticated lenses.

First, we need a high-definition lens to enable us to pick out the detail in the picture and to study the diverse, multi-dimensional sites or levels of impact of SHRL. We need to consider impact on victims, survivors and their families and communities, on perpetrators and institutions, on the law and public policy, on attitudes, discourse, behaviour, and on fundamental principles such as rule of law and democracy.

Second, a long lens, or perhaps a time-lapse function, is needed to see how impact unfolds and evolves over time. We then capture not only the significance of the judgments themselves, but look beyond to see how the spectre of litigation may have begun to influence change before cases are even presented, how impact may arise or continue throughout the process at multiple stages, or only take effect long after judgment.

Third, a wide-angled lens is required to understand litigation in context. This reflects that the impact or influence of litigation will always depend on the context from which it

[1] Jules Lobel, *Success Without Victory; Lost Legal Battles and the Long Road to Justice in America*, New York, NYU Press (2004).

emerges and with which it interacts. Moreover, litigation is always located among other agents for change, such as civil society advocacy, education or legislative reform; they are crucial to the effectiveness of the litigation, and in turn the litigation often feeds into and catalyses these other processes.

Finally, the question of perspective cannot be ignored. It is critical to our choices as litigants, representatives and human rights defenders, to the outcomes we strive for, and it influences how we perceive impact. The starting point should be the perspective of the victim, in whose names cases are brought and to whom the process should, in principle, belong. At a minimum, for legal representatives with ethical duties to the victims, a priority should be to ensure that the immediate victims remain in the centre of our unfolding litigation picture. This does not preclude (with care and attention) a strategic approach that seeks to maximise the impact of litigation for a broader range of beneficiaries. But as litigation unfolds, we need to consider to what extent the process continues to be seen through the applicants' eyes, whether they remain in the centre of our litigation picture, or will they be expected to cede room to other factors, such as the impact on other victims and survivors, or the need to protect others in the future?[2]

Beyond the applicants to whom case belong, many other actors will bring diverse perspectives. Lawyers are only one set of important actors in SHRL and it should be recalled that there is much to be learned from a multi-disciplinary perspective.[3] As between lawyers and legal actors, those with different roles may also be differently positioned as to the way they consider impact, and the 'strategic litigation' enterprise in general. Private lawyers trained to strictly advance their client's interests may be less inclined to – or even understandably cautious of – the idea of the 'strategic' use of litigation and may not consider their role to assess 'impact' at all. NGOs and activists on the other hand may be attuned to how the case will affect a broader range of victims, or prevention and protection more generally, or have a specific interest in advancing particular issues or groups, the situation in particular states or regions, or other agendas. Legal academic commentators may tend (at times, but by no means always) to focus on jurisprudential or systemic impacts, or to shy away from questioning impact at all, given the methodological quagmire and its inherent resistance to analysis and proof.

The diverse perspectives brought by multiple actors are potentially complementary in fully understanding the difference that litigation makes, its potential and limitations. In viewing impact, we should endeavour to ensure that the full range of visions are reflected, and acknowledge that you cannot entirely take the photographer out of the photograph.

3.2 **Approaches to Impact and the Meaning of Success: Bursting the Bubble on the Champagne Moment**

Certain characteristics of SHRL impact come into focus when we view litigation through the three lenses set out (at 3.1) above.

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[2] See Chapter 9 on resolving conflicts and ensuring ethical and professional standards are met.

[3] The need for lawyers to reflect self critically on impact and to avoid assumptions concerning litigation's impact was noted in Chapter 1. On the importance of multi-disciplinary litigation teams see Chapter 9.

3.2.1 Impact as Multi-dimensional

Litigation can lead or contribute to many diverse levels of impacts in a variety of ways, some of which will be readily apparent, while others require closer enquiry. There are various ways to categorise and explore these levels of impacts, which have been used by commentators looking at the role of the courts in particular issues or contexts. This includes groupings based on broad *types* of impact (such as material and non-material, concrete and symbolic impacts, for example),[4] on *who or what* is affected (victims, perpetrators, the law, the courts themselves or the public for example), or on *how* litigation brings about change (such as through the 'unlocking', 'participation', 'reframing' or 'socio-economic' effects of national courts in economic and social rights cases.[5]) This book combines elements of each of these approaches. The framework set out in this study breaks impact down further by considering eight inter-related levels of impact: on victims, law, policy and practice, institutions, information-gathering and truth telling, social and cultural change, mobilisation and empowerment, and democracy and the rule of law. On each of these levels, as noted below, it considers how the impact may be positive or negative, or both, when viewed at different stages or from diverse perspectives.

Undoubtedly, impact can be direct, plainly visible and relatively incontrovertible. It may arise as the 'outcome' of a case as seen in examples of victim compensation paid diligently following a court order, the immediate impact of declaratory judgments or the development of the law through jurisprudence. There are examples of each of these direct and irrefutable changes brought about by litigation in the case studies in Chapters 4-8. More often than not, however, impact is indirect. Perhaps precisely as the link with litigation is more difficult to discern, and certainly to prove,[6] less direct and measurable impacts may tend to go unregistered. This is particularly so where impacts are distinct from the goals of the case, or are less positive in nature, such that there is less incentive for those involved to monitor and expose them.

Or it may simply be as some layers of impact are hidden or disguised at first sight and require more careful enquiry. The contribution of litigation to gradual processes of social, political, legal, or cultural change for example – shaping attitudes, discourse, and political space for example – are sometimes hardly perceptible and often impossible to quantify. They may nonetheless be among the most important ways in which litigation can help to change the human rights landscape, and understanding the contribution is essential if we are to appreciate the value of the litigation tool.

3.2.2 Appreciating the Contribution of Litigation in Context: the Wide-Angled View

[4] César Rodríguez Garavito and Diana Rodríguez Franco, 'Cortes y Cambio Social: Como la Corte Constitucional transformó el desplazamiento forzado en Colombia' (2010) Centro de Estudios de Derecho, Justicia y Sociedad, Dejusticia: The OSJI impact studies referred to in the Preface uses three heads - material, 'legal, judicial and policy', and 'non-material' impact.

[5] See also César Rodríguez Garavito and Diana Rodríguez Franco, *Radical Deprivation on Trial: the Impact pf Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge, Cambridge University Press, 2015).

[6] See the doubtful measurability of litigation at Section 3.3 below.

As noted above, the impact of litigation is impossible to understand out of context. Political and social context, and timing, have an immense influence on the impact that litigation can have. Perhaps the most fundamental dimension of the way we approach litigation impact relates to understanding how it grows from, interacts with and forms part of that broader *context*. Just as politics has often stymied litigation, directly and indirectly, changing political contexts, or moments of political openness and opportunity, have facilitated – or created the space for – effective litigation.[7] In turn, litigation has had a role in contributing to and consolidating political shifts and opportunities for more progressive litigation in the future.[8] In this complex area, where a vast medley of factors may contribute to change, context is the crucible from which litigation's impact will emerge and understanding it is critical to honest reflection on the role of litigation.

This dynamic relationship between context and litigation impact is clear from across the case studies. The Guatemalan peace process, or the enduring power of the perpetrators of the worst massacres, provides the substrate to the impacts (and limitations) of the Guatemalan genocide litigation in Chapter 5. Global geo-political realities impeding accountability in the 'war on terror' context, or resolution of land rights in Palestine under Israeli occupation, are an integral part of the impact story in those case studies in Chapters 6 and 8. Likewise, the eagerness of the state of Niger to (be seen to) meet its international obligations is the wind in the sails of anti-slavery initiatives in Niger following the Mani case at Chapter 4, while the context of entrenched slavery and discrimination provide resistance.

The case studies also reveal a second dimension to the deeply contextual nature of human rights litigation, which is that SHRL is almost always only one agent for change, alongside the other forms of advocacy, legal or political strategies by civil society organizations, activists, survivors, lawyers, international allies and others, that seek to respond to and address human rights violations. Litigation is very often just one component, and not necessarily the most impactful, and we must try then to understand the impact of litigation in this broader frame. The extent to which it contributes to and facilitates, or frustrates, these other processes, is likely to be critical to its ultimate utility. In practice, we often see strategic litigation on entrenched injustice – from apartheid South Africa to impunity in Argentina – prospering following long periods of national and international activism.[9]

It certainly follows naturally from the ambitious nature of some of the goals and impacts that SHRL may pursue as set out at section 3.5 below - social transformation, attitudinal change or confronting the deep-rooted fears and prejudices that underpin violations for example – that they go beyond the aspirations of any case or judicial determination. Litigation may be a catalyst, contributor or facilitator to such change, without necessarily being an identifiable (still less the sole) trigger. What we explore then may be not

[7] On apartheid South Africa, and the changing role of the judiciary in that context, see Richard Abel, *Politics by Other Means: Law in the Struggle Against Apartheid* (New York, Routledge, 1995). On interference with judicial processes and impact see case studies on arbitrary detention and rendition, and land rights in Palestine.

[8] As noted under Section 3.5, litigation may change the information available, the terms of the debate, or alter the political cost-benefit ratio in a way that indirectly influences the political context. See eg Chapter 7 case study on Argentinian litigation towards accountability for enforced disappearance during dictatorship.

[9] See Chapter 7 and Dugard and Langford, 'Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determinism' (2011) 27 South African Journal on Human Rights 39.

so much whether litigation provided a *solution* (which will only rarely be the case, given the broad-reaching social or political problems that underpin many rights violations), nor whether change is *caused* by or attributable to it, but rather the *contribution* - perhaps indirect and gradual - that litigation may have made alongside and relationship with other processes and factors.

Just as litigation's effect cannot be isolated from political and social movements, nor can it be fully understood by isolating particular individual cases or judgments. Impact may only come into focus as we consider clusters or series of cases, which alone may be of minor significance or represent small steps but considered together represent much larger strides forward.[10] As the massive body of litigation on disappearances in Argentina exemplifies (Chapter 7), it may be part of a multi-staged journey involving a series of litigation strategies that adjusted to opportunities and dodged obstacles to eventually have a wide-reaching impact. Each stage had a discreet impact but its true effect cannot be seen except by standing back and viewing the litigation in the context of the steady progress of the human rights and accountability struggle in that country more broadly. Certainly, it is not always the case: the *Hadijatou Mani v Niger* case study (Chapter 4) presents a prime example of the interactive power of a single case, producing multiple impacts at many stages, albeit in dynamic relationship with many enabling and contributing factors.

3.2.3 Impact over Time: The Threat of Litigation, the Power of the Process and the Longer term View

Assessing impact involves more than a snapshot of any one point of time. Looking only at when a case is won or lost or when judgments are implemented will reveal a very limited sense of impact. Rather, at one end of the spectrum, there are many examples of the *spectre* of litigation generating recognition and reactions of various types. One case study in Chapter 6 illustrates how securing access to lawyers at Guantanamo – opening up the site to the world's view and providing a link between detainees and the world – in *anticipation* of habeas litigation, was perhaps the most significant impact of that litigation, arguably more indeed than the 'historic' Supreme Court ruling that followed or the limited habeas hearings themselves.[11]

The desire to *avoid* litigation can itself be a powerful force for change, sometimes inducing or feeding significant change even before (or indeed absent) a case itself. This has impelled policy change in the hope of rendering the litigation moot, as when truth, justice and reconciliation processes have been pushed forward in part under the shadow of litigation.[12] Settlements have played an important role in inching towards accountability in Guatemala for example (where massacres litigation before the IACHR was suspended pursuant to an agreement that included promising accountability, and resumed when that agreement was not

[10] The tactical implications for litigation – and the advantages of series of cases - are discussed in Chapter 9.
[11] See Chapter 6 on Litigating the War on Terror.
[12] It has been suggested e.g. that the Kenyan Nyayo House torture litigation prompted advances in the Kenyan truth justice and reconciliation process; Helen Duffy, 'Strategic Litigation Impacts: Torture in Custody' Open Society Justice Initiative (Open Society Foundations, 2017) ('Litigating Torture in Custody' study).

met).[13] They have led to wide-reaching commitments to strengthen legal frameworks through ratifications or law reform.[14] The terms of settlements can be more far-reaching and significant in some cases than any judgment or remedies award - as the *Khadr* settlement, requiring an apology from the Canadian government, shows.[15] Conversely, the refusal to settle can itself speak volumes.[16]

At the far end of the spectrum, impact may be felt long after judgment is rendered; indeed there may be no identifiable end point to the process of gradual social change that the litigation pursued at all. This underscores the importance of long-term commitment and the engagement of multiple actors with relevant skills and capacity discussed in Chapter 9.

In between the threat of litigation and the very long-term implementation of judgments, is the often-neglected power of the process. This may take many forms and arise at multiple stages including through preparation, participation, and the conduct of proceedings. The case studies highlight evidence and information-gathering, the organisation and mobilisation of complainants and others – for litigation purposes but with broader benefits – the role of testimony and the public truth telling function of the litigation itself, among others.[17] Particular moments in the litigation process, especially public hearings, may also catalyse reactions. In my experience of international proceedings, it is quite common for sudden and surprising 'developments' to be announced by governments during or immediately before a hearing, often after years of delay and inertia, as they seek to avoid embarrassing exposure or international condemnation.[18]

Finally, impact is rarely linear, but reflected in a series of advances and setbacks, as all case studies illustrate. The challenge is often not in achieving, but in sustaining, impact. It is, moreover, commonly incremental in nature, as noted in relation to the contextual view above. Both features underscore the importance of not viewing impact and influence in any single moment but as they evolve over time.

3.2.4 Redefining 'Success'

As is already plain, positive impact is about much more than winning or losing a case and we need to shift focus from the steps of the courtroom on judgment day. What happens out of court, or in the proverbial 'court of public opinion' may be more important than what

[13] See the *Dos Erres* settlement and the dynamic with the *Plan de Sanchez* case in Chapter 5 on Genocide Litigation in Guatemala.

[14] See eg the friendly settlement in the early inter-state Turkish cases at the European commission on human rights which provided a framework for political commitments on legislative reform and ratifications; Duffy Litigating Toture in Custody, n 12.

[15] See Arbitrary Detention and Rendition in Chapter 6 - apology formed a crucial part of the June 2017 settlement of long-running domestic litigation in the Khadr case, arguably beyond what courts would have ordered at the end of the process.

[16] See Section 6, in the *Belhaj* rendition litigation in UK courts the government was willing to pay millions (the government actually paid out 2.2 million pounds in a similar case brought by Sami al-Saadi) but not three pounds and an apology as the applicant sought. The *Belhaj* claim for damages has been allowed to proceed (Supreme Court 2017), and is pending at July 2017.

[17] See eg the Mani (slavery) and Plan de Sanchez (genocide) case studies, Chapters 4 and 5, which illustrate all of these elements in different ways, or the debate over the role of litigation in the OPT.

[18] Examples of shifting government positions to avoid litigation, or in immediate anticipation of a hearing, are many; see eg *Metwalli v Egypt* before the AfCommHR in which Interights was involved, where a Muslim cleric imprisoned for views on interfaith marriage and conversion was released just before the session.

happens in the courtroom, or what is written in the judgment. We need to consider whether there really is 'success without victory,' and 'power [in] the losing case.'[19] A case may be successful for example if, as noted below, it forced open political space and debate, and exposed injustice, as a number of the case studies highlight, even if ultimately the claim failed in court.[20]

Judgments that ultimately find against applicants on the basis that the law so provides and the courts must apply it, may do so in terms that send strong messages from the judiciary to the other arms of government, catalysing democratic responses through law reform or policy change. Examples are multiple in the war on terror context, where UK courts have effectively reprimanded their own government, parliament, or indeed other states for action that curtailed rights, even while finding in their favour.[21] Moreover, even judgements that are not only unfavourable but appear unjust may in certain circumstances serve a function: exposing to public criticism and international scrutiny the extent of the denial of justice, or paving the way for international litigation or other forms of pressure for example.[22]

Conversely, a favourable judgment that is not implemented, at the end of a traumatising process, may be a success neither for the applicant nor for the rule of law more broadly. One case often cited in this context is the famous *Grootboom* South Africa Constitutional Court case affirming housing rights under the South African constitution. It was hugely significant in many ways, yet as a former colleague Iain Byrne wrote, it ends with the question '*Did Mrs Grootboom get her House*?'[23] (Of course she did not). Unimplemented judgments still make a difference, but whether they are 'successful' depends on what you ask, who you ask, and when.

Rejection by the state of a judicial decision, or refusal to implement, is a blow for the rule of law. However, even determining when judgments are 'followed' or given effect by states is a complex question. States before international human rights bodies generally state that they will implement a decision, and then may not do so fully (as case studies and implementation proceedings before the Committee of Ministers of the COE testify).[24] The reverse may also be true, whereby states may take the cases more seriously than their policy or posturing allows them to admit.[25] The fall-out from the ICJ judgment in the *Avena* case – wherein the ICJ ordered the United States to provide 'review and reconsideration' of the

[19] J. Lobel, *Success Without Victory*, n.1.
[20] See eg Chapter 8 Land Rights in Palestine case study.
[21] See examples from 'War on Terror' Litigation Chapter 6, where courts have reluctantly found against the applicants but sent often stern reprimands to the executive or to foreign executive en route. Examples from UK courts include references to 'handing the terrorists a victory that no act of theirs could achieve' by laws that restrict human rights (eg *A & Others v United Kingdom* App no. 3455/05, 19 February 2009, ECHR). In *Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWHC 152 [69] the court expressed disbelief that a 'democracy' would ask the courts in another to repress public passages concerning the applicant's torture.
[22] See OPT cases study: will Israeli decisions on non-justiciability have this effect? Judgments that are not implemented can however have multiple negative impacts for victims, and for the rule of law, as noted above.
[23] Iain Byrne, 'Did Mrs Grootboom get her House?'16(2) Interights Bulletin 2010.
[24] *Abu Zubaydah v Poland*, App no. 7511/13, 24 July 2014, ECHR, before the ECtHR in the rendition study – outstanding commitments have been made through the Council of Europe process of implementation, alongside little visible progress.
[25] See eg the multifaceted changes following the case despite US opposition: Karen Alter, Laurence Helfer and Mikael Helfer, 'How Context Shapes the Authority of International Courts' (2016) 79 Law and Contemporary Problems 1.

convictions and sentences of fifty-one Mexican nationals on death row whose consular rights it had violated – has been cited as an example which illustrates the complexity of the dynamic.[26] The United States announced that it disagreed with the ICJ's interpretation of the Vienna Convention on Consular Rights and the remedies the Court ordered, and withdrew its consent to ICJ jurisdiction over future disputes relating to the Convention. Despite this, a subsequent Presidential 'memorandum' explains decisions by reference to the United States 'discharg[ing] its international obligations' and referring to the *Avena* judgment.

Cases may, and often do, create a dynamic between the international judiciary, executive and domestic judiciary that is not apparent from the judgment or post-judgment rhetoric.[27] In this and myriad other ways, impact cannot be measured in the 'champagne moments' when litigation is 'won' or indeed in the whisky moments when cases are lost.

3.3 Monitoring and (the Challenge of) Measuring Impact

Evaluating effectiveness is essential in order to litigate responsibly and strategically, as discussed later in this book.[28] It is also an essential pre-requisite to learning lessons from the past and making choices about where and how to focus work in the future. As mentioned above, increasingly, it is necessary for organisations to account to funders and stakeholders, making–monitoring more common and in some ways more important for litigating organisations.[29]

For some forms of direct 'outcomes' from litigation, this may be relatively straightforward.[30] It must also be recognised however that, some of the levels of impact identified below are more resistant to measurement than others. Consider the sort of broad social change that SHRL may pursue, which is a generational process: at what point could one demonstrate with confidence, for example, that attitudes have changed or a rule of law culture has been strengthened? Even if we could, *how* would we show the impact or contribution of litigation to that gradual social change? Some changes may be more readily identified, but similarly difficult to attribute to litigation given that, as noted, the litigation is most commonly a contributor to diverse dimensions of long term change alongside other processes, rather than the direct producer of them.

It may be partly for this reason that matrices of measurement as such are perceived to be of limited utility and are not much relied upon by SHRL actors. Analyses of impact to date in particular contexts or in relation to particular rights have similarly distanced themselves from any attempt at 'quantification'.[31]

At the same time, these limitations and complexities around measurement make careful enquiry more, not less, important. Even if we cannot prove or attribute impact with any degree of certainty, we may still gain valuable insights from the (often neglected) careful questioning of those most affected, during and after the process, and by drawing into the

[26] *Ibid*.
[27] Examples in the case studies include Israeli courts responses to the Wall Advisory Opinion (ICJ) 2004.
[28] Chapter 9 Litigating Strategically and Meeting the Challenges.
[29] See personal reflection on this in the Preface on historic neglect, and see Chapter 9 on the importance of this as part of developing sound litigation strategy.
[30] See 3.2.1 above on examples of direct impact which are easier to demonstrate.
[31] See eg OSJI studies noted in the Preface, which adopt a similarly flexible approach to the one adopted here.

frame the experience and perspectives of multiple actors.[32] Myriad indicators of progress towards goals can be gleaned from, for example, changes in laws and policies on the subject matter of litigation, the transformation of jurisprudence and subsequent reliance on it, statements by political actors, media coverage and its content, patterns of changing behaviour or incidence of violations towards affected groups, or growing numbers of similar types of cases lodged in the future, among many others.

But caution is undoubtedly due. While efforts to ascertain the impact and influence of litigation is essential, acknowledgement by litigators, supporters and funders that to a large extent, the significance of SHRL is substantially immeasurable, is certainly preferable to distortion. We may never know for sure the full extent to which litigation shaped, contributed to or influenced some types of effective change (and should continue to explore effective theories or approaches to evaluation of relevance in this particular field).[33] But we can still learn from and reflect on different perspectives and available indicators of progress, however imperfect. In this spirit, the chapters that follow seek to make sensitive enquiries into the impact and influence of litigation in diverse contexts.

3.4. Classifications and Distinctions

In order to crystallise the types and levels of impact that litigation may have (identified in the next section, Chapter 3.5 below, and illustrated in the case studies in subsequent chapters), it is worth clarifying certain distinctions between SHRL impact and other terms closely associated with it.

3.4.1 Impact versus Goals

First of all (at the risk of stating the obvious), goals and impact are not the same. Goals are formulated by the parties and their lawyers – whether in a particular case or as part of a broader plan – and are the object of the litigants' intentional efforts and hopes. By contrast, impact emerges, and can be positive and negative, intended and unintended. Certainly, unfolding impacts may influence the (re)formulation of goals as the litigation advances.

The enquiry in this book is above all aimed at understanding what difference strategic human rights litigation actually makes – its impact – rather than the lofty, or indeed more modest, goals it may pursue at the outset. If we focus on goals and strategies at the outset of litigation, we may risk excluding from our analysis the many cases that have turned out with the benefit of hindsight to have had great impact on multiple levels, perhaps beyond what anyone could have anticipated at the time. We may also risk focusing on contexts where certain types of 'litigation strategies' can be developed, usually by NGO actors, but excluding the opportunity to learn from impact litigation by individuals and their lawyers in contexts

[32] In some cases their perceptions are themselves an important form of impact – whether the sense of identity or empowerment of particular victimized groups, or of being subject to oversight by potential perpetrators.

[33] There is no developed theory on how to evaluate litigation as such, for good reason. Various theories are used to evaluate human rights work in general, though their limits are widely acknowledged; the problem is not exclusive to SHRL. 'Theory of change' is referred to in setting up strategy in Chapter 9 and has relevant observations on evaluating effectiveness after the fact.

where civil society engagement and support is limited for a host of reasons including repression and lack of political space.[34] The focus on 'impact' rather than 'goals' as the essential issue may also reflect the reality, borne out by the case studies, that many of the most striking forms of litigation impact may not have figured as 'goals', or have been foreseen or perhaps even foreseeable, at the outset of the processes.

An assessment of goals, alongside foreseeable impact – positive and negative – is a critical starting point for any litigation, and must be constantly monitored and reappraised throughout the process (as discussed under 'Developing Strategy' in Chapter 9). Of course, the goals and impact are linked; not least, the impact on applicants is likely to be closely linked to the satisfaction, or not, of their (evolving) goals. Both goals and impact must be assessed from the varying perspectives of those involved in and affected by the process, as an essential prerequisite to giving meaningful advice and as we seek to avoid the common pitfalls of unfulfilled client expectations concerning the litigation process. While goals and impact do overlap, and in an ideal world might coincide, in the real one we need to mark the distinction between them.

3.4.2 Avoiding Sharp Distinctions Between "Strategic", "Public interest" and "Other" Litigation

Some of the controversies surrounding what constitutes SHRL, alluded to in the introduction, are linked to concerns regarding (sometimes dubious) distinctions that are drawn between 'strategic' and other forms of litigation.

The first such distinction is between victim or client-focused litigation and SHRL. In the authors view, it is impossible to fully separate the impact on victims, especially perhaps of massive violations, from the impact on the society of which they form a part. Moreover, generalisations about 'the goals of the victims' as distinct from strategic goals are almost inevitably misleading, not least as victim goals are as variable as the individuals and groups themselves. Victims of serious human rights violations in practice often seek, above all, guarantees of non-repetition – the longer-term social, political or economic change that will ensure the violations do not recur.[35] Victims' goals and broader goals are thus very often one and the same.

Indeed, given the challenges and risks facing those who take up human rights litigation, it should not be surprising perhaps that in practice it is often those victims who are personally committed to the cause at stake, determined to ameliorate the situation for other people, and sufficiently supported to do so, that are the most willing and able to front litigation and stay the course. On the other hand, it is crucial to recognize that their goals will not always be identical to the broader goals of others who may stand to be impacted by the litigation, and careful and separate consideration is due of where they converge and diverge.[36] However, it would be misleading to characterize victims' goals as necessarily distinct or

[34] Civil society involvement and support, in various forms, is likely to be critical to the impact of SHRL, as noted in Chapter 2 and as the case studies (Chapters 4-8) amply illustrate.

[35] UNESC 'The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms - Final report of the Special Rapporteur Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33' UN Doc (2000) E/CN.4/2000/62.

[36] Chapter 9, Meeting the Challenges.

somehow inherently less strategic. Assumptions about those goals and the impact of victim-centred litigation should be avoided.

Likewise, it is difficult to sustain sharp distinctions between SHRL or 'public interest litigation' on the one hand, and the public provision of 'legal aid' or 'legal services' on the other.[37] As the SERI report on litigation of legal services in South Africa noted, while there is a 'conceptual and theoretical distinction between strategic and clinical legal services … there is not always a clear practical divide.'[38] On the one hand, legal services cases can have as high an impact as proactively selected 'strategic' cases; there are many examples of this among cases recognised globally as strategically significant cases.[39] Legal services can sometimes enable a mass of litigation, or a continuum of legal cases, that may indeed further strategic goals and generate impact more effectively than any single case (as discussed in relation to developing strategy in Chapter 9), muddying the distinction a little more. Moreover, the provision of legal aid itself serves various strategic goals, of such as democratising access to justice and strengthening of the judiciary or legal system.

In the South African context in has been noted that a danger arises with the increased focus on public interest or strategic litigation, that legal services are increasingly undervalued, and with them the advancement of a broader social justice agenda.[40] This concern is particularly pronounced where differential approaches are taken to funding or supporting public interest litigation as opposed to legal services. It would be ironic if shorter-term 'strategic' goals were a basis for compromising longer-term human rights or rule of law gains.[41]

While hours of academic industry could be dedicated to definitions and classifications, it may be mostly a distraction for our purposes. It is suggested that strict categorization of litigation into strategic and others is best avoided, in favour of a flexible approach to 'SHRL' that focuses on impact and enquires into what difference litigation actually makes, and where possible tries to understand why.

3.5 Levels of Impact

The types of impact that arise from or are influenced by litigation are so diverse, complex and often situation-specific that a box-ticking approach would only be misleading. However, despite the undoubted need for caution, experience has shown that it is possible to develop a reasonably sensitive antenna for possible and actual impacts. In this section, we

[37] Such distinctions can be understandable, or indeed promoted, to facilitate organisational definition of goals and methods of work, case selection and prioritisation of resources. See eg the International Law Group's 2001 report. But as noted below they can also be problematic and should be treated cautiously.

[38] 'Public Interest Legal Services in South Africa Project Report' (2015) Socio Economic Rights Institute of South Africa 48.

[39] See Chapter 9. Many cases recognised as strategically significant started out as individual claims, for example in the Kenya torture litigation, a series of individual claims for compensation, with broad-reaching impact (see Litigating Torture in Custody report (n 12))See also'Public Interest Legal Services in South Africa Project Report' (2015) Socio Economic Rights Institute of South Africa.'

[40] Ibid, 49.

[41] This has been suggested in relation to South Africa for example, where considerable donor attention has been focused on strategic human rights litigation (see 'Public Interest Legal Services in South Africa Project Report' (n 36)). The untenability of the distinctions was borne out by litigators commenting on how the distinction plays out in several contexts as noted by eg Adam Weiss of the ERRC.

turn our attention to identifying and illustrating different types of positive impacts in diverse dimensions – beginning with the potential impacts for victim/claimants, for legal development, policy, society and culture, institutions, democracy and the rule of law – before reflecting on the negative impacts of SHRL. An assessment of potential, limitations and counter-productivity are all critical to deciding whether litigation is an appropriate tool at all, and if so to developing a strategy to enhance the positive impact while taking measures to minimise the risk of negative repercussions (as discussed further in Chapter 9).

3.5.1 Impact on Victims

Victim or client impact takes many forms, reflecting the variable goals of the particular applicants concerned.[42] It is impossible (and demeaning) to generalise about the impact on 'the victims.' However, the following are among the ways in which SHRL has had a significant impact on those most affected by the violations underpinning litigation.

Judicial Recognition and Vindication: Judgments can provide the most obvious form of validation of an individual's or group's experiences, and recognition of the wrongdoing against them. Victims, survivor groups and, perhaps especially, relatives often cite the importance of judicial decisions as a form of acknowledgment. This may be particularly powerful in circumstances where the victims have themselves been cast as wrong-doers or stigmatised as 'criminals', 'terrorists' or 'enemies', or otherwise tarnished by the suggestions that they are responsible for their own suffering.[43]

The Guantanamo and rendition cases at Chapter 6 offer potent examples of individuals who were presented to the world as 'the worst of the worst.' Their recognition as rights bearers and victims of violations, past and present (in the context of Abu Zubaydah's ongoing arbitrary detention at Guantanamo) has been an important dimension of the impact of those cases.[44] Striking examples from Argentina include the cases of sexual violence during dictatorship. Victims of rape, who were labelled as 'traitors' and accused of romantic involvement with perpetrators, have described the significance of being acknowledged through the judicial process as victims of sexual violence.[45]

The Restorative and Empowering Role of the Process*:* Long before judgment, the litigation process can itself provide victims with a voice. It can, in principle, provide a crucial opportunity for the victim to be heard, accuse and explain, and for others to acknowledge suffering, wrongs and responsibility. While the legal process can be (and often is) alienating,

[42] Usually as dsicussed in Chapter 9 human rights cases are brought by victims as applicants (though this is not always required where eg collective action is possible); this section looks at the impact on those victim applicants.

[43] See the Guatemala study (Chapter 5) and misconceptions harboured for a decade by some members of the Plan de Sanchez community as to what had brought the massacres on the communities.

[44] eg *Abu Zubaydah v Poland* (n 22) or *Sabbeh et al v Egypt* (Communication 334/06) where the victims were persons accused of terrorism.

[45] See Chapter 6, the Molina case (Molina Gregorio, Case No. 2086 Argentina Federal Court of Criminal Appeals) in the case study on disappearance in Argentina.

victims have also described it as empowering and energising, playing a role in restoring dignity.[46]

The *Hadjitou Mani v Niger* case is the clearest example, from my experience, of the positive impact of testifying on a victim as described in Chapter 4; a former slave, who was not allowed to look a free person in the eye, found her voice and stature in the course of undoubtedly difficult testimony and felt heard and respected by the ECOWAS court.[47] Of course this is often not the case, and Mani herself described the insults, threats and degrading treatment she received before national courts. Her widely recognised bravery in confronting the powerful in Niger, including her former master, has however ultimately had an important empowering and vindicating value.[48] Likewise, in Argentina, psychologists accompanying victims and witnesses have noted the psychological importance of participative processes for victims coming to terms with violations. In the *Molina* case prosecuting sexual violence during dictatorship after many years of neglect of these crimes, the victim describes her ability to speak openly about their wrongs, address the 'guilt' of her sexual violence, and confront their attackers and the past, once the cases were underway.[49]

The importance of even *lodging* claims, particularly in a context in which people are powerless, was noteworthy in relation to the Palestinian land rights cases at Chapter 8. When I interviewed the applicant in the *Jaabari* case, he proudly displayed copies of hundreds of unanswered complaints lodged in respect of intimidation by settlers, as evidence of the abuse and official unresponsiveness.[50] This accords with the description by others of the need to 'do something' in the face of their victimisation and that of their family, and of litigation as 'a form of resistance'.[51]

***Compensation**:* Perhaps the most obvious vehicle for direct impact for victims is the payment of compensation – one important aspect of the reparation to which they are entitled under international law.[52] Compensation has enabled many to re-establish themselves in society and to recover from the losses associated with their victimisation.[53] In the *Mani* case even the very small amount of damages was nonetheless critical in helping her to establish a life free from fear and want, and from her former master. Compensation assumes particular

[46] See, eg the testimony of Turkish rape survivor Nebahat Akkoç, the applicant of the *Akkoç v Turkey* case, on the importance of the EComHR's fact finding hearing in Ankara: *'No voice was heard here [in Turkey] in litigation whereas with the European Commission, despite the proceeding being a long one, you could see that someone was hearing your voice. This gives you more energy. You find power in yourself to encourage others to pursue the same way';* in Duffy, 'Litigating Torture in Custody' study (2017) (n 12), 83.
[47] Case study, *Hadijatou Mani v Niger*, Chapter 4.
[48] Chapter 4.
[49] Chapter 7.
[50] See below on record-keeping and case study OPT Land rights, Jaábari's comment being: 'even a bullet that misses makes a noise. If they do nothing, I have a record.' Interview Hebron, March 2015.
[51] See eg the moving descriptions of the motivations of the family of Aksoy, which gave rise to the first ECtHR finding of torture but led to terrible reprisals in Michael Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers University Press 2008).
[52] See, eg OHCHR Res 60/147 'UN's Basic Principles on the Right to a Remedy and Reparation, including restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition' (2005) UN Doc A/RES/60/147.
[53] See, eg comments of Nebahat Akkoç, the applicant of *Akkoç v Turkey*, ECHR 1996-VI, or the experience of Rumba Kinuthia, a Kenyan lawyer, whose compensation enabled him to return to legal practise and represent other victims of Nyayo House Torture, referred to in 'Litigating Torture in Custody' (n 12).

importance in the context of modern day slavery, where other former slaves during interview cited the lack of economic independence or of any means of sustaining themselves as among the critical factors keeping them in ongoing slavery.

Compensation awards can also have a critical symbolic value going beyond financial relief. People affected by serious violations in several states have described how compensation played a role in reinforcing the validation of the judgment in their favour - representing the crucial conversion of words into concrete action, and providing a degree of tangible accountability for the state, institutions and individuals required to pay.[54]

There are however other sides to the compensation impact story. In a very practical sense, there is the fraught question of quantum, which can influence impact. Some recent damages awards or settlements for human rights violations have involved very large sums (consider the modern slavery claim before US courts that brought the Signal corporations to its knees or the Mau Mau claims in UK courts for colonial torture).[55] Others have come up with meaningful approaches to quantifying damages that are symbolically significant.[56] But other awards are seen by those affected as negligible and disproportionate to the serious suffering to which they respond, limiting their material and symbolic significance.[57]

The real material and symbolic impact of damages awards is obviously eviscerated by non-implementation and on the national level, and compliance with damages awards varies vastly. For example, a wave of damages awards issued by Kenyan courts against the state for torture in the infamous Nyayo House detention centre played an important role in the vindication of victims and recognition of atrocities of the Moi regime, yet they have thus far not been implemented.[58] Slow processes, inconsistency and a lack of clarity in quantifying damages,[59] and what are sometimes perceived as demeaningly low awards, are widespread problems that clearly undermine impact.[60]

In turn, at the international level, as the various systems adopt different approaches to damages,[61] awards are rarely transparent or predictable. An example are the ECtHR judgments finding there have been violations but refusing to grant compensation – asserting, without explanation, that in all the circumstances the judgment is itself 'sufficient

[54] The broader impact of payments depends on who pays. It has been suggested that human rights processes involve amounts that come at 'too low a cost' for the state to have any real impact. Corporate claims have been massive, with the impact in the industry.

[55] In *Mutua and Others v Foreign Commonwealth Office* [2012] EWHC 2678 (QB) a settlement of £19.9 million was agreed which included payment to the 5,288 claimants and costs. In *David et al v Signal International LLC* No. 2:2008cv01220 five plaintiffs were awarded $14 million. Note the Mau Mau cases were a collective claim that broke down into more modest sums per applicant.

[56] In Argentina, in an important symbolic as well as practical step, victims received a sum equivalent to the maximum daily wage given to the highest-level personnel of the national government for every day of their detention. Elsewhere amounts have sometimes been described as insultingly low, disproportionate to, and undermining of, the wrongs. As noted above in some security related and other cases, no compensation is awarded.

[57] International human rights awards are not punitive and can be quite low. National systems vary greatly.

[58] See Duffy, 'Litigating Torture in Custody' study (n 12).

[59] Eg in some systems, the linkage of awards to income has adversely affected those most in need.

[60] See persistent complaints by applicants from Kenya and Turkey in Duffy, 'Litigating Torture in Custody' study (n12.) The Mau Mau claims, where a record award was made, may have been a notable exception, though given the mass of applicants this too reduced to modest sums for each one.

[61] Damages may be in respect of identifiable pecuniary loss resulting from violations or non-pecuniary, moral or non-material damages.

satisfaction'. In some cases, this is compounded by what appears to be quite unprincipled considerations being brought to bear; this was the case when the ECtHR found in favour of, but refused to award damages to, victims of unlawful killing apparently on account of their status as suspected terrorists, as in the famous *McCann and others v United Kingdom* case.[62] In a case we brought against the Russian Federation in respect of the death of former Chechen leader Maskhadov, and the refusal to return his body to his family on the basis that he was killed in a 'counter-terrorist operation,' the Court similarly refused to award damages to his family, causing confusion and frustration.[63] In other cases, such as the Abu Zubaydah torture case at Chapter 6, significant compensation was awarded by the ECtHR's standards, with important symbolic value for the victim himself, and there was quite rightly no suggestion that the allegations against him would be in any way relevant.[64]

The symbolism, empowerment and practical significance of compensation have quite often been somewhat sullied by other controversies surrounding monetary payments.[65] Media focus on awards being paid from 'taxpayers' money, rather than on underlying violations, and occasionally adverse reactions by other victims or NGOs, are among the problems the case studies illustrate.[66] The apparent discomfort on the part of some NGOs with supporting compensation can reflect ambivalence as to the value of compensation as a human rights tool and its potentially negative implications for broader strategy. As noted in the Argentina study: *'Human rights organisations feared the State was exchanging money for impunity and silence about the past.'*[67] Organisations may also have reservations about being seen to be motivated by or too closely associated with financial advantage, distracting from 'more strategic goals'.[68] All of these factors manifest in mixed messaging in respect of victims' rights to compensation, despite it being an essential part of the reparation to which they are entitled under international law.[69]

The complexities and the diversity of victim perspectives on the receipt of reparations (whether through litigation or beyond) is nothing new as reflected in analyses of German post-Second World War reparations schemes for example. Slymovic's work contrasts the feelings of her own family members, Auschwitz survivors, one of whom felt compensation

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[62] *McCann v UK* [1995] ECHR 18984/91.

[63] *Maskhadova and Others v Russia*, App No. 18071/05 6 June 2013, ECtHR. *Matthews v UK*, App No. 24833/94, 18 February 1999, ECtHR. I was co-counsel on the case with Vesselina Vandova, on behalf of Interights.

[64] Chapter 6, Litigating the War on Terror.

[65] In addition to seeing this in my own cases, interviews for 'Litigating Torture in Custody' reveal such issues arising in Kenya, Turkey and Argentina.

[66] This has arisen in eg the UK debate on ECtHR 'payouts' to terrorists; the negative reaction in Poland after the Zubaydah case was another indication noted in Chapter 6.

[67] Catalina Smulovitz, "'I can´t get no satisfaction': Accountability and Justice for Past Human Rights Violations in Argentina", in V. Popovski and M. Serrano (ed.), *Transitional Justice and Democratic Consolidation: Comparing the Effectiveness of the Accountability Mechanisms in Eastern Europe and Latin America*, United Nations University (2009) in Chapter 7.

[68] Eg Martín Abregú, Executive Director of CELS has noted that when the reparations law was passed in 1995 (following litigation and other action): 'Economic reparations were very difficult to conceive and discuss by human rights organizations.' There was opposition to supporting victims' claims 'for fear of giving the impression that our center profited from this problem'. Interview held on 1 August 2002; Maria Jose Guembe, 'Economic Reparations for Grave Human Rights Violations: The Argentinian Experience' *in* Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford OUP 2006).

[69] Eg Duffy, 'Litigating Torture in Custody' (n 12).

enabled her to 'push back,' while the other felt 'unclean' that perpetrators had assuaged guilt through monetary payments.[70] I have seen this in several contexts where compensation from wrongdoers following litigation has led to a deeply regrettable 'sense of guilt' on the part of some victims.[71] Yet for many others, it has been described as "influencing both individual and collective processes of addressing the past, and in this sense, as having a fundamental value."[72] Compensation can therefore contribute – but it can also be counter-productive – to the process of reparation.

The case studies also demonstrate how material litigation impact of this type can snowball over time, with what began as discrete compensation claims for specified applicants leading to a broader reparation scheme. This expansion of the beneficiary group was seen in the Guatemala litigation, where the reparations award of the Inter-American Court reached beyond the individuals in whose names the cases were brought. In Argentina, petitions protesting the application of statutes of limitation to preclude damages claims brought by a few individuals to the Argentine courts and IACommHR, triggered one of the largest reparation schemes on the continent benefitting many more affected persons over time.[73]

The ultimate impact of compensation for the victims concerned, and its contribution to other levels of impact, depends therefore on many things: whether compensation is paid, its nature and context of delivery, and whether, in the particular situation, compensation is treated as an important aspect of the right to reparation by victims, courts, communities and civil society. Despite broad recognition of the right – and its potential significance - a more complex picture emerges in assessing the ultimate impact of compensation.

Other concrete reparation: restitution, rectification, cessation, protection and access to services: A principle goal of human rights remedies, at least in theory, is to put victims back in the situation they would have been in but for the violation. Very often this is possible to a very limited extent, if at all. In some cases, however, human rights litigation has led directly to orders being issued and implemented, on the restitution of property, the reinstatement of judges wrongfully dismissed, [74] the transfer of land titles,[75] or release from unlawful imprisonment for example.

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[70] See eg Susan Slyomovics, *How to Accept German Reparations* (University of Pennsylvania Press 2014)

[71] See discussion in Chapter 7 on Argentina. eg Guembe (n 66) notes how amibiguous reactions were not confronted and debated: '[s]adly enough, these objections to the reparations policy did not translate into a dialogue or discussion that could have produced a collective way of addressing the issue. The debate within the human rights movement on this subject was shy, cryptic, and hampered by a strong sense of guilt by the families.' Kenya Report in Litigating Torture. See Slyomovics, ibid.

[72] Ibid.

[73] When the Supreme Court upheld the statute of limitations on civil claims in Argentina, in 1989 the IACommHR was engaged in a petition by a group of applicants. The reparation policy evolved from a dynamic back and forth among the government, applicants, the Commission and civil society, eventually covering a broader range of people; the number of victims that qualified for reparation continued to expand under subsequent governments.

[74] In *Volkov v Ukraine*. 21722/11, 9 April 2013, ECtHR, the EctHR took the unusual step of ordering that a Supreme Court Judge, Oleksandr Volkov, who had been dismissed due to an alleged breach of oath, should be reinstated. The Judge was reinstated on 2 February 2015.

[75] In *Xákmok Kásek Indigenous Community v Paraguay* (24 August 2010) the IACtHR, as a measure of restitution, ordered the State to return 10,700 hectares of land to the Community and to take "all necessary, legislative, administrative and any other measures" to ensure the right to ownership (paras. 281 – 289).

Litigation at the national or international levels will often, first and foremost, seek the cessation of ongoing wrongs and protection.[76] While international courts may have limited direct power to stop violations, examples show they may contribute to bringing an end to ongoing violations in various ways. A relatively rare direct example from Interights practice was *Assadnize v Georgia*, where a normally deferential ECtHR ordered that a prisoner be released as there was no other way to remedy the wrong. Persons wrongfully detained may also be released as an indirect result of the pressure and oversight generated by the process. While the ECOWAS case was pending in the *Hadijatou Mani* case, the applicant was released and the criminal case against her for bigamy, for daring to be free of her master, was effectively dropped. The shadow of litigation, not infrequently, provides a degree of accountability that changes the approach to victims, at least publicly. This is illustrated in the case of torture victim Abu Zubaydah, where extravagant public assertions following his capture, to the effect that he was the 'number three' in Al Qaeda, were dropped once litigation became a possibility and he had access to a lawyer.[77] Judicial oversight can serve as a deterrent to abuse.[78]

At times litigation may not bring violations to a definitive end or resolve them, but simply minimise or delay harm to individuals. In a context in which 'buying time' is described as one of the major tactics and successes of the litigation of land rights in the Occupied Palestinian Territory discussed in Chapter 8, litigation has contributed to significant delays that have slowed eviction and demolitions orders, with broader reaching implications social and political implications.[79]

The increasingly important role that litigation has played in the protection of crucial socio-economic and civil and political rights, such as ensuring access to health care and to education[80] or reducing prison overcrowding,[81] is worthy of emphasis for its crucial impact on applicants lives. When it comes to the willingness to order wide-reaching restorative socio-economic measures such as development, health and psycho-social services and education, based on the need to redress the long-term impact of egregious violations such as genocide, the Inter-American system stands out, as the *Plan de Sanchez v Guatemala* case study illustrates.[82] Access to services may also arise indirectly from the changes in the status or recognition of victims or groups; the Mau Mau litigation of colonial torture crimes in UK

[76] Protective measures from the state may be counter-productive or not desired by the victim, given the context of distrust and state responsibility or complicity.

[77] See eg *Abu Zubaydah v Lithuania and v Poland* (n 22) ECtHR <www.rightsinpractice.org>. As discussed in the Litigating the War on Terror Case Study (Chapter 6).

[78] This is reflected in IHRL, eg where judicial review of detention being treated as a safeguard inherent in the prohibition on torture itself. This recognition in law is itself a result of gains achieved through jurisprudential development by courts of international human rights law.

[79] Chapter 8, Land Rights in Palestine.

[80] Indian court case *Registrar (Judicial) of High Court of Karntaka v State of Karnataka & Ors*, which a study by Ann Skelton found to have to dramatically reduced the number of out of school children (see Ann Skelton, 'Strategic Litigation Impacts Equal Access to Quality Education' Open Society Justice Initiative (Open Society Foundations (2017) 59.

[81] See collective habeas corpus claims in Argentine courts eg *Verbitsky and Others* discussed in Duffy, 'Litigating Torture in Custody' study (n 12) 45.

[82] See Reparations Judgment and Implementation discussed in the Guatemala case study Chapter 5.

courts, contributed gradually to the ban on the group being lifted, and eventually to survivors being registered for social security and health benefits.[83]

***Accountability, Investigation and Prosecution**:* The impact of SHRL on accountability and impunity, linked to broader forms of impact, is highlighted below. It should be noted at the outset, however, that catalysing the independent, effective and thorough investigation required under international human rights law (or reopening an ineffective one) is often a key victim-focused goal, linked to both personal and collective processes of healing and reparation. The importance of seeing perpetrators held to account, even if only by being called to answer in public proceedings (not necessarily only criminal proceedings) can have an important vindicating impact.[84] Even processes that do not result in the convictions and proportionate penalties that they should can have a positive impact for some survivors, and at a minimum expose the deep-rooted impunity that may underpin and sustain the violations.[85]

Hadijatou Mani described the ongoing impunity of her former master as 'confirm[ation] that he was untouchable"' (the weakest point in an otherwise positive story of impact and implementation).[86] This is not an unusual tale, as human rights judgments have poor records of implementation with regards orders for investigation and accountability.[87] In practice the accountability goal may be particularly difficult to satisfy, at least in the short to medium term.[88]

***Symbolic Reparation of Victims**:* The Plan de Sanchez Reparations Judgment (2004), illustrates the sort of multi-faceted and significant reparations that can emerge from human rights litigation in the Inter-American system. These included 'guarantees of non-repetition by providing for collective memory' – discussed below for their broader social and cultural impact – which can be of huge importance of the survivors. Individual victims have spoken to the importance of their dead being honoured through, for example, the museums and monuments established, with individual names carved in stone.[89]

The declaratory role of judgements in acknowledging human suffering and wrongs has been noted, but litigation may also prompt government or institutional recognition of responsibility. Often such recognition and apology only emerges from litigation when there has also been a political transition, such that states 'apologise' on behalf of *previous* administrations, thereby sidestepping genuine *mea culpa*. It can nonetheless involve grappling with institutional responsibility of importance for victims and prevention in the future.

Recognition and apology deserve particular attention in this context, as forms of victim reparation increasingly sought, and awarded, in international law and practice. In the *Plan de Sanchez* case, the state's moves towards acknowledgement and apology were

[83] See Duffy 'Litigating Torture in Custody' study (n 12).
[84] In Duffy, 'Litigating Torture in Custody' (n 12) there are numerous examples of survivors speaking of the importance of seeing wrongdoers being made 'uncomfortable' (eg *Akkoç* case from Turkey and others from Argentina) even if not ultimately held directly accountable.
[85] ibid, Turkey testimonies on the importance of the processes notwithstanding impunity.
[86] Interview in Niger 2016.
[87] See Chapter 2, reports on Implementation.
[88] See eg enormous strides forward, eventually, in Argentina in Chapter 7.
[89] See Chapter 5 Genocide in Guatemala.

incremental; the state first withdrew its preliminary objections in writing before the hearing; it accepted responsibility publicly during the first public hearing; and, while the Reparations Judgement was pending, it issued an apology. Another striking example of litigation prompting 'sincere regret' decades after violations was the settlement following cases against the UK government in English courts for torture during the colonial regime in Kenya.[90]

By contrast, as noted in chapter 6, securing recognition has been an enormous struggle in CIA-led rendition and torture cases. States are chillingly reluctant to recognise victims and apologise for their role in their torture and rendition, perhaps suggesting an unprincipled approach to victimhood that compounds the original wrongs. The Maher Arar and Khadr cases were notable exceptions where the Canadian government issued public apologies, in the latter case after years of litigation.[91] However, in other cases, apology has increasingly featured as a priority remedy sought through litigation, but to no avail.[92] One recent rendition case in the UK has used to good effect to expose the refusal to acknowledge responsibility and apologise: the victims in the Belhaj case refused to accept the offer of handsome settlements, insisting instead on only £3 (one for each man, woman and child rendered to Libya) coupled with an apology. No agreement on this basis could be reached.[93] The broader political context is never far from the surface in these cases. In addition to the benefits for victims, the acknowledgment of responsibility and expression of regret can have an important role in institutional learning from mistakes made - often in short supply in the counter-terrorism context.

The Journey From Victim to Survivor to Complainant to Activist: The potential influence of litigation on the mobilisation of civil society is noted below for its far-reaching social and political impact. However, experience also points to the transformative impact that litigation can have on individual clients themselves. I have seen several examples where applicants become more organised in order to facilitate the litigation, with more wide-reaching positive benefits (eg the associations formed in Guatemala to bring the genocide cases). Another dimension is seen in remarkable examples of victims who later became activists or supporters of other victims to enable them to assert their rights. Among numerous other examples[94] is the *Mani* case, where a woman who was among the most marginalized in society now engages with anti-slavery groups and reaches out to women in slavery.[95]

As noted above, for many survivors, an important part of their motivation in pursuing litigation is to ensure that the crimes do not occur again, that others do not suffer and that lessons are learned. The impact on them is therefore closely linked to the other levels of impact explored below.

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[90] See the Mau Mau litigation in the UK as discussed in Duffy, 'Litigating Torture in Custody' study (n 12).
[91] Chapter 6.
[92] *Abu Zubaydah v Lithuania* (n 22) seeks remedy and apology.
[93] See www.reprieve.org.uk/press/2013_03_04_belhaj_apology_secret_courts. The *Belhaj* claim for damages has been allowed to proceed (Supreme Court 2017), and is pending at July 2017.
[94] The well-known *Akkoç* torture case against Turkey, where the victim became an activist in the course of the litigation processes, and the mobilisation of families of detainees in Argentina (see also Mobilization & Empowerment below).
[95] Chapter 4.

3.5.2 Legal Impact

One of the clearest and causally most straightforward ways in which human rights litigation has an impact is in the development of legal standards. It does so directly, by shaping jurisprudence and procedures, and indirectly, by exposing problems with national laws and prompting processes of reform.

Changing National Legislation: In some systems, laws may be declared unconstitutional, or even struck down by the courts, when incompatible with fundamental rights. There are also many examples of reform following promptly and directly on the heels of judgments against the state at the international level, or laws being changed *while* a matter was being litigated. In the post-9/11 context, where rights-restrictive laws swept the globe, courts have often made clear that legislation falls foul of international obligations and national frameworks. As chapter 6 illustrates, in the European context such cases have proliferated, and states have frequently modified laws and practices in response to ECtHR decisions.

However, while legislative changes may flow directly from a court order, more often legal reform may require a much longer and more multi-faceted process. The *Grootboom* housing rights case (South African Constitutional court) set in train a long process of reform leading to public housing legislation seven years later.[96] Litigation's shorter-term impact may be a greater awareness of the legal inadequacies that have been exposed by the case, playing into a broader advocacy drive for legislative or even constitutional reform.

Triggering the Enforcement of National Law: In certain situations, adequate laws do exist, but they may not be applied or enforced. Litigation is, in key part, about ensuring that laws are given effect in practice. Cases may expose related underlying issues which need to be addressed, such as a judicial lack of knowledge or understanding of their own laws, or practices and cultures that constrain the application of that law. An example from the case studies is how the *Hadijatou Mani v Niger* case before the ECOWAS court, revealed that exemplary legal provisions on slavery were either unknown or ignored in practice, overshadowed by customary laws. I have also seen litigation expose the refusal of sectors of the state or the public to abide by or give effect to rights they know are enshrined in law, as in the *Tysiac v Poland* case before the ECtHR.[97] In that case, reproductive rights were enshrined in Polish law, but ignored in practice by the medical profession and inadequately supported by the state, such that legal rights had little meaningful effect. International mechanisms may be invoked either to challenge or enforce national law.

Developing Legal Standards through National or International Jurisprudence: In practice, international human rights law, set out in skeletal treaties, is given form and content through its interpretation and application by human rights courts and bodies. Bringing cases and securing strong jurisprudence is one way in which the law is strengthened and clarified. SHRL has therefore been used to good effect for decades by 'norm entrepreneurs',[98] with a transformative impact on the dynamic development of international law.

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[96] Public Housing Act 2008, and the Government of the *Republic of South Africa & Ors v Grootboom* above, on the right to adequate housing. As noted above, Ms Grootboom was dead by the time of the legal reform.

[97] *Tysiac v Poland* Application no. 5410/03 ECtHR (2007)

[98] eg Harold Koh 'How Is International Human Rights Law Enforced?' (2009) 74 Indiana Law Journal 1.

As noted in Chapter 2, while decisions from one system do not strictly speaking apply in another, in practice the increase in judicial cross fertilisation between systems means that legal developments in one arena increasingly translate into another.[99] Thus litigation at the regional and international levels can have a multiplier effect, rolling out jurisprudential gains across states and ultimately regions.

This global normative impact is illustrated across human rights practice. Take the fundamental doctrine of 'positive obligations' that underpins international human rights law for example.[100] An early set of cases, spearheaded by the seminal *Velasquez Rodriquez v Honduras* case, interpreted the obligation to 'ensure' the rights in general human rights conventions as enshrining a duty to prevent, investigate, prosecute and provide reparation in international law. As such, they set down what have become the defining norms on the scope and content of IHRL, accepted across international and regional human rights systems. In turn, these normative gains provided the basis for another series of cases that challenged the lawfulness of amnesty laws and related impediments to prosecution in several states, including *Barrios Altos v Peru*, which has been cited around the globe.[101] These cases have in turn triggered legislative and constitutional changes at the national level, and been applied directly in national proceedings (as the Argentina and Guatemala case studies show). They have changed standards internationally and nationally, by providing the basis for courts and bodies around the world to address accountability norms consistently.

Likewise, the emergence of 'new rights' – or rather new interpretations of existing obligations – such as the recognition of a 'right to truth', was born of litigation in the Inter-American system, discussed above, and eventually recognised decades later by the ECtHR in the rendition cases in Chapter 6.[102] In another example of this transnational jurisprudential journey reflected in Chapter 4, the ECOWAS court sitting in Niger relied on the elements of slavery set down by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Hague, which were then picked up by the Inter-American Court and further consolidated in a case concerning modern day slavery in Brazil.[103] In this way, different systems collectively contribute to improving and strengthening global human rights standards in a vibrant and multidimensional jurisprudential dynamic.[104]

Development of Remedies and Procedures*:* The impact of SHRL is influenced by the remedies available, which vary among systems.[105] But SHRL itself influences the development of those remedies in sometimes quite remarkable ways. In Argentina during the

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[99] See http://assembly.coe.int/nw/xml/News/News-View-En.asp?newsid=5968&lang=2 referring to developments in Dutch law.

[100] This entails states obligations not only to refrain from violating rights but to ensure their protection, through prevention and response.

[101] See eg *Barrios Altos v Peru*, Merits, Judgment, Inter-AmCtHR (ser. C) No. 75, cited in international and national courts around the globe, including in the Argentinian decisions that led to the amnesty laws being set aside.

[102] *Abu Zubaydah v Poland* above. Discussed in the detention and rendition case study.

[103] *Fazenda Brazil v Brazil* (Case no 12.066, 20 October, 2016 IACtHR).

[104] There are today innumerable examples of the judicial borrowing; in addition to the case studies, examples from cases I was involved with Interights include *Opuz v Turkey* on domestic violence, or *MC v Bulgaria* on prosecuting sexual violence, where the ECtHR relied on CEDAW and other standards as a result of strategic interventions, with this as a goal.

[105] See eg Chapter 2 comparing limited forms of reparation in the European system to the Interamerican counterpart.

last decade, innovative legal action sought to use long-standing 'habeas corpus' provisions on behalf of all detainees in the system who were subject to dismal conditions of detention, overcrowding and institutional violence, exposing them to serious risks.[106] The action was, perhaps somewhat surprisingly, accepted by the Federal Supreme Court and a new remedy of 'collective habeas corpus' was born; as such, it has been described as truly 'trailblazing' litigation that broke judicial inertia, established collective habeas corpus as a tool, and influenced subsequent litigation practice addressing structural human rights problems in a range of contexts.[107]

The rapid growth in acceptance of third-party (or amicus curiae) interventions in national and international procedures – which open up systems and enlighten judicial processes – has also been prompted by litigation. Originally a child of the common process, litigants have ventured to use amicus interventions increasingly, across legal systems, and through acceptance of such interventions on a case-by-case basis, they have come to be constitute standard procedure in many systems. In some, this constructive litigation opportunism has led to rules on interventions being subsequently formally enshrined in the procedures of the relevant court or body. An international example is found in the African Commission, before which there were originally no formal procedures for third-party interveners, but a broad reference to the Commission being able to 'hear from … any … person capable of enlightening it'.[108] The first couple of third-party interventions were presented to in Interights' cases by partner international organisations CEJIL (in respect of poverty as a ground for waiving the exhaustion requirement, in the case of *John K Modise* in 1994) and the Open Society Justice Initiative (in the case of *Kenneth Good*, on permissible distinctions between citizens and non-citizens). The briefs were accepted, and the rules of procedure later came to reflect and regularise this practice, enabling the adoption of measures for protecting third parties, including witnesses, experts and NGOs.

There are several similar examples before national courts. Although alien to Argentine procedure at that time, requests were made by international NGOs to present amicus curiae briefs in 'truth trials' concerning forced disappearance and torture discussed in Chapter 7. These were accepted, paving the way for such interventions in many later cases and opening up an active role for national and international NGOs in bringing comparative human rights arguments to bear on a broad range of issues. [109]

In this and many other ways, national court procedures have been shaped, and subsequent litigation opportunities created, through the practice of litigation with potentially positive, longer-term human rights repercussions.

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[106] eg Supreme Court of Argentina, Verbitsky *and Ors* (V.856.XXXVIII.) Judgment of 3 May 2005. The Federal Supreme Court's decision is wide reaching and ground breaking in various ways.

[107] Filippini 2007, in Duffy 'Litigating Torture in Custody' (n 12). The Supreme Court's recognition of the right to lodge collective habeas corpus action provided a much-needed remedy in cases requiring structural reform, where individual remedies had proved ineffective.

[108] African Charter on Human and Peoples' Rights (Art 46).

[109] During litigation on the right to truth in Argentina, international NGOs tried this to good effect *(Monica Maria Candelaria Mignone v Argentina,* Case no. 2209, 1977 IAComHR*);* it is has since become a common feature of practice in that state and others in the region. Chapter 7, case study on Enforced Disappearance in Argentina.

3.5.3. Impact on Policy and Practice

Changing or Challenging Policy: The most obvious way in which human rights litigation seeks to bring about change is by challenging policies and practices that violate human rights. States may directly cease an activity and revoke policies as a result of litigation, as happened in the case of the security detention of non-nationals in the UK post-9/11, which ceased due to *A & Ors v UK* in Chapter 6. This kind of detention was replaced by control orders, which were subsequently also challenged, in an ongoing trialogue among the executive, legislature and judiciary.[110]

Achieving change in practices and policies is rarely an overnight event, however compelling the judgment. Certain 'mega-judgments' or 'structural litigation' referred to in Chapter 2, which have involved courts monitoring responses to structural human rights problems on an ongoing basis, epitomise this.[111] Rather than indicating specific policy measures that the authorities must adopt, the courts established a participative and deliberative framework for the development of policies to address the problem, and a degree of accountability through judicial supervision. One example is the approach of the Colombian Constitutional court in displacement cases which spanned six years, during which the courts engaged the authorities at multiple stages, with wide-reaching policy ramifications.[112] Another is the litigation of structural issues relating to conditions of detention in Argentina noted above,[113] where the court imposed specific requirements that the government and legislature: amend criminal legislation; submit detailed reports of conditions of confinement (tellingly so that the judiciary could weigh the 'justification for continuing detention' and whether 'alternatives' were required); convene a dialogue panel, to which amicus curiae, prisoners and other sectors of civil society should be invited; and report to the Federal Court on progress every sixty days.[114] As such, the courts remained engaged over a period of years, supervising implementation, forcing policy statements and commitments to be made, and ensuring that issues that the government might prefer to de-prioritise remained on the political agenda.[115]

These structural cases, like friendly settlement procedures internationally, have at times required the establishment of 'platforms for dialogue' on the development of appropriate policy responses. This is an example of how litigation can help create political space, and draw a broader range of actors (including victims and civil society) into policy discussions, providing a crucial step towards identifying longer term solutions that could never be provided by the litigation itself.[116]

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[110] Chapter 6 Litigating the War on Terror ; for more detail see Chapter 11, Duffy, *War on Terror* (n 101).
[111] Case T 105, CC, 2005, in Garavito and Franco (n 3).
[112] ibid. There were 84 follow-up decisions and 14 hearings.
[113] *Verbitsky and Ors* cases (n 103) in Duffy 'Litigating Torture in Custody' (n 12).
[114] The Supreme Court of Argentina ordered specific and broad-ranging measures from all branches of government, which provided a road map for policy reform, with a tight timetable and political pressure.
[115] ibid, *Verbitsky and Ors* cases (n 103) in Duffy 'Litigating Torture in Custody' (n 12).
[116] This is linked to the mobilization and empowerment impact, below. See eg Inter-American Commission on Human Rights (IACHR) Precautionary Measures, No. 923-04, *Penitentiaries of Mendoza*, August 3, 2004 available at: *http://www.derechos.org/nizkor/arg/doc/carcjul4.html* Salinas, Pablo 2010, "*La aplicación de la tortura en Argentina. Realidad social y regulación jurídica"* Editores del Puerto, Buenos Aires.

Particular policy changes may also arise unexpectedly *during* the litigation, as governments articulate and adjust their positions for the purpose of litigation. The *Al Skeine v UK* case, on the applicability of the ECHR to British troops in Iraq, is illustrative. Under pressure to be consistent with its own litigation position adopted in previous cases, the government shifted its approach to focus on whether and to what extent its human rights obligations applied abroad – that is, from arguing non-applicability to a more nuanced position (which Strasbourg ultimately rejected) that its obligations applied in detention centres but not on the streets it patrolled.[117]

Frustrating Policies: In some contexts, policy change is impossible, either because the courts are unwilling or unable to engage, or the political arms are unwilling to comply. It may be that the best to hope for is that policies are frustrated or impeded, rather than shaped, by the courts. This has been noted in relation to South Africa under apartheid, where anti-apartheid lawyers brought cases with the aim of 'delaying and perhaps frustrating an executive bent upon change'.[118] It resonates also in the land rights cases in Palestine, where 'buying time' is described as one of the major tactics and modest successes. While cases are rarely won, delays have put off hundreds of eviction and demolition orders temporarily, often for prolonged periods of time. While this at first sounds distinctly underwhelming as a goal or achievement, the delay is significant for the individuals involved, and politically. Given the strategic, political, economic, cultural and religious significance of Jerusalem for a Palestinian future state, holding off on the removal of Palestinians from East Jerusalem, and the creation of the 'buffer zone' around Israeli controlled areas, has broader potential impact. The delays in settlement expansion or in the removal of Palestinians from East Jerusalem do not provide solutions in themselves, or achieve the broader social goals they pursue, but they may create time and space for other solutions, from wherever they might emerge.

Breaking down Impunity: In a great deal of SHRL, one of the goals for victims and others is the pursuit of individual accountability. Accountability is often seen as a crucial form of reparation for survivors, and greatly valued for its potential contribution to non-repetition in the future and to broader rule of law goals. Human rights litigation can, and as the examples show does, impact impunity at different levels.

Cases denouncing inadequate investigations in light of the obligations to investigate, prosecute and punish proportionately are the staple work of human rights courts and tribunals, and have led to changes in policy guidelines and practice in the way particular types of investigation are conducted. In two ECtHR cases in which Interights was an intervener – *MC v Bulgaria* on sexual violence, and *Opuz v Turkey* on domestic violence – the states issued directives on the adequate investigation of crimes, with the real potential to influence the practice and behaviour on the ground.[119]

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[117] *Al-Skeini and Others v The United Kingdom* App no 55721/07, 1 July 2007, ECtHR. See also Chapter 11, Duffy, *War on Terror* (n 101).

[118] Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (CUP 2001) 518.

[119] A directive on the effective investigation and prosecution of crimes of sexual violence was issued following *MC v Bulgaria*, App No 39272/98, 4 December 2003, ECtHR which rejected the domestic requirements of evidence of physical force for a rape charge, or the Victims Rights Directive following the failure to investigate domestic violence due to lack of victim complaint, in *Opuz v Turkey*, 33401/02, (9 June 2009, ECtHR.

International proceedings, including implementation proceedings, often provide a forum and context for oversight of domestic accountability processes, and a framework to monitor the genuineness and effectiveness of investigations. These processes often serve at a minimum to force reluctant states to commit publicly to justice and justify delays or obstructions, and on occasion do push defunct investigations forward. This can provide some type of counterweight (albeit often insufficient) to the 'enormous pressure'[120] on authorities *not* to open or advance investigations of powerful perpetrators, as epitomised by the CIA rendition cases.[121] Even as litigation has a relatively weak track record in counteracting impunity, it can considerably alter state discourse around accountability.

The investigation of those responsible may be specifically ordered as a component of the remedies awarded in supranational cases. In the Guatemala cases, the Inter-American Commission and Court specifically require the state investigate and prosecute massacres of the late seventies and early eighties.[122] However, while implementation is a broader problem, it is in relation to accountability that compliance rates are generally poorest. As the Guatemala and Argentina cases demonstrate, such an order is only ever likely to be one small step towards accountability – a tool among others to pressure a reluctant state slowly to edge towards justice.[123] But both cases also show how litigation has been used at many stages to progress along the road towards justice, resulting in numerous prosecutions and convictions in practice. The Guatemalan example reveals multiple prosecutions of, as yet, low level perpetrators of the *Plan de Sanchez* case. [124]

Likewise, in Argentina, there has been a slow and multi-staged journey towards justice for disappearances during dictatorship. An impressive range of forms of litigation used incrementally, in conjunction with other processes, inched the country towards accountability, and eventually to the unprecedented degree of individual criminal accountability currently underway.[125] Some clarified the duty to investigate and the right to truth; some prompted a reparations process that kept the judiciary involved in the broader discussion; the Inter-American and other foreign courts increased pressure for justice at home. Eventually, the *Simon* judgment found amnesty laws unconstitutional, and criminal trials got underway in earnest. The role of litigation evolved before getting to this point: By exposing the facts, opening debate, and generating pressure on judges by foreign processes, it cumulatively influenced the political, legal and social landscape in which impunity could

[120] See Litigating the War on Terror (Chapter 6): Rhe COE commissioner refers to such pressure being exerted by Washington on other states not to investigate the war on terror crimes.

[121] See Chapter 6 on the US pressure on Eastern European states complicit in the rendition programme; states such as Poland Lithuania and Romania are now being called upon to investigate and open or are reopening domestic proceedings by supranational courts and bodies.

[122] *Plan de Sánchez Massacre v Guatemala*, Judgment of 19 November 2004, IACHR: '95. More than 22 years after the massacre and 10 after the corresponding investigations were opened, the State has not investigated the facts or identified, prosecuted and punished those responsible. This constitutes a situation of impunity, which contravenes the State's aforementioned obligation, harms the victims, and encourages the chronic repetition of the human rights violations in question … and this obligation must be complied with seriously and not as a mere formality.'

[123] See Implementation above.

[124] In Guatemala these have been mostly low level despite ongoing efforts, and some impact, as regards the intellectual authors such as Rios Montt; see the case study.

[125] 1609 criminal cases were reopened after the amnesty laws were set aside; to date there have been 692 convictions. See Chapter 7 and Duffy, Litigating Torture in Custody, n12.

exist. Litigation was no magic solution, but an instrument put to good use in diverse ways to combat impunity over a long period of time.

3.5.4. Institutional Impact, Including Judicial Strengthening

Litigation may serve to strengthen institutions, nationally or internationally. There are many examples of human rights institutions being created, or strengthened, to combat a problem exposed – at least in part – through litigation.[126] Whether those institutions can be made to be effective, or are a chimera to obscure the lack of real change, will of course determine their ultimate impact.

A key role of national and international human rights litigation lies specifically in the strengthening of national judiciaries. International human rights courts are not (as is popularly understood) courts of appeal or 'courts of fourth instance',[127] but are duly deferential to their national counterparts, provided they work broadly within the flexible framework of human rights law. The subsidiary system of international human rights litigation provides an opportunity, and incentive, for states to avoid the need for international jurisdiction by discharging their primary role as protectors of human rights and the rule of law, while providing a check on them where they do not.[128] This can bolster the hand of national judges who are friendly to the rule of law. Indeed, the impact of international litigation in supporting national judges, including by protecting judicial independence, is significant.

Where there are national attacks on judicial independence, these may themselves be the subject of international litigation in various forms. Examples from my practice include the *Garzon v Spain* case before the Human Rights Committee, where a judge who was prosecuted for his own judicial decisions could challenge this internationally, or the *Taba* bombings case before the African Commission, where the lack of judicial independence in Egyptian state security courts was robustly criticised.[129] The crucial importance of judicial independence to the rule of law is clear;[130]-SHRL can ensure that where judiciaries succumb, the state can be held accountable internationally, which may provide a small measure of protection or at least strengthen judges resolve.

International litigation has provided national judges with human rights tools, and may influence national judges' decisions when the issues next come before their courts. In many systems, examples of strategic human rights litigation has helped open systems up to international and comparative standards, and to considering issues through 'the world's eye'.

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[126] In very concrete ways, new institutions have been created to given effect to human judgments and to address a particular problem exposed or criticised through litigation: see numerous examples in Duffy 'Litigating Torture in Custody' (n 12).

[127] The ECtHR reiterates this in these terms repeatedly.

[128] This is reflected in the primordial right to a remedy across international law, eg the ILC Articles on State Responsibility 2001 and all human rights treaties), and in the subsidiarity of international human rights courts and the exhaustion of domestic remedies rule.

[129] I am counsel in these cases. In the latter, the ACHPR called the state to account for lack independence of state security courts specifically, which appears to have contributed to some cases being reheard and the process of reform. Many international human rights cases criticise military courts.

[130] Chapter 2.

The growing 'trans-judicial dialogue', evident across several case studies, has encouraged compliance with international rule of law standards domestically.

One of the functions of litigation may be to test and strengthen the human rights machinery itself. The procedures and processes of regional and *international* institutions themselves have been refined and strengthened through practice and by the way that advocates conduct litigation, which may contribute to maintaining or raising standards in courts or bodies themselves. Particularly in the early days of a human rights body's life, an important objective is to ensure there is a suitable flow of cases to develop a functioning and effective body. This was one of a number of objectives that Interights pursued, with some effect, in the early days on the African human rights system. The Mani case has been attributed with enhancing the standing of the ECOWAS court, and gave rise to a line of human rights cases in a previously underutilised forum.

Litigation may seek to expand particular procedures within systems, enhancing the relevance and effectiveness of those judicial functions. A good example is the gradual expansion, case-by-case of 'interim' or 'precautionary' measures applied by supranational human rights bodies as an expression of their protective mandate. Finally, SHRL has a role to play in the *education* of judges and other officials. In the *Mani* slavery case, one of the problems that the case exposed was judicial ignorance of rights and the law. By contrast, interviews for this study made clear that, as a result of that case, knowledge of at least the prohibition on slavery has become widespread among judges at different levels. In addition, capacity building of the judiciary, police, prosecution service and other officials has occasionally been reflected directly in reparations orders, or negotiated as part of a friendly settlement.[131] More commonly (as in the *Mani* case), capacity building may result indirectly, as other states, organisations or NGOs step up in light of the institutional need exposed by the case. In turn, as a result of unfavourable litigation, the state in question may be keen to appear to be addressing the problem and more open to capacity building initiatives.[132] As the *Mani* case illustrates, a piece of litigation may expose the need for training among both national judges and their supranational counterparts (in that case, the ECOWAS court).[133]

Emerging work in comparative politics suggests that the growth of human rights litigation, and in particular the role of NGOs in it, has benefitted the courts themselves. One study describes the relationship between the courts and NGOs to be 'reciprocal,' whereby the court 'is perceived as an instrument to advance NGO claims' while in turn 'NGO participation provides the court with services or enhanced legitimacy.'[134] While caution is

[131] See eg the impact of litigation on legislative reform on torture and ill-treatment in Turkey in Duffy 'Litigating Torture in Custody' (n 12). In 1982 France, Norway, Denmark, Sweden and the Netherlands brought proceedings against Turkey for violations of the ECHR. Parties agreed to a friendly settlement, and negotiations provided a basis for commitment to reform. Turkey agreed to accede to the European Convention for the Prevention of Torture and the UN Convention Against Torture, agreed to report to the Commission on implementation activities, and also shortened maximum periods of pretrial detention.

[132] See eg widespread trainings in Turkey as part of the implementation programme of ECHR cases- in Duffy 'Litigating Torture in Custody' (n 12) - or trainings following the Mani judgment, in Chapter 4.

[133] See very poor judgment on discrimination (though strong on slavery), and the Danish Institute training programmes that followed.

[134] From Heidi Nicholls Haddad, 'Judicial Institutional Builders: NGOs and International Human Rights Courts' (2012) 11 Journal of Human Rights 126. It notes also 'civil society provides the court with services, including monitoring, initiating litigation, and documenting violations'.

clearly due to protect judicial independence and impartiality, and the perception of the same,[135] the judicial role can itself be supported and enhanced through the development of strong SHRL and the dedication of professionalism and resources to the enterprise.

3.4.5. Information Gathering, Truth Telling and Historical Record

Information may be a goal, or more often a valuable by-product, of litigation. Litigation may directly pursue information through 'Freedom of Information Act' litigation in domestic systems, for example.[136] Human rights courts may also, occasionally, exercise a fact-finding function.[137] Less directly and more commonly, litigation processes may prise open facts and contribute more subtly to revealing the truth about the nature of violations and responsibility for them, through submissions by the parties and the dialogue between them and external experts, interveners and courts. Litigation is of course only one way to do this, and not necessarily the most efficient. But its potential to illuminate facts, enhance the understanding of those directly affected, as well as society more broadly, and provide tools for further action, should not be underestimated.

Overreaching approaches to national security and state secrecy, particularly in the counter-terrorism context, make access to information particularly challenging, and important. Even in these cases, governments have revealed information to defend their position, respond to judicial prompting, or appear cooperative. In this way, they have placed documents in the public domain which they had previously withheld.[138] Sometimes information may seep out in the litigation process, such as the remarkable revelations on the CIA's rendition programme, which emerged from civil litigation between companies in US courts which had not been subject to the same clampdown on state secrecy grounds as human rights claims as they had fallen under the government's radar.[139]

Information obtained through litigation can contribute incrementally to greater gains, as it is employed as evidence in future cases, or feeds other action and advocacy. Even information derived from quite unsuccessful litigation during the dictatorship in Argentina proved invaluable evidence in the junta trials after democracy, just as the 'truth trials' (when criminal trials were precluded by amnesty) informed and re-energised civil society claims for accountability by a broader range of actors. As the series of criminal cases continue to unfold,

[135] This is revisited in Chapter 9.
[136] See eg Chapters 7 and 8.
[137] See eg Article 38 of the European Convention of Human Rights ("The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties shall furnish all necessary facilities"). Similarly, Article 48 of the American Convention on Human Rights provides "the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the States concerned shall furnish to it, all necessary facilities."
[138] See Chapter 6 and the Lithuanian decision to allow documents on the investigation in CIA crimes to be released, announced in the course of the hearing in June 2016.
[139] See eg Claire Algar, 'US court documents reveal inner workings of CIA renditions,' *The Guardian* (London, 31 August 2011) available at: www.theguardian.com/commentisfree/2011/aug/31/documents-reveal-renditions-programme-business.

a broader range of individuals responsible are prosecuted, and to some degree a broader understanding of the wrongs of dictatorship is achieved.[140]

Courts may also call out the authorities on the lack of transparency and the *refusal* to share information in domestic processes, or for overreaching approaches to state secrecy or national security.[141] Litigation may reveal the overreaching nature of secrecy, with its own contribution to the debate on openness and democracy.[142]

Despite its potential to do so, there is certainly no guarantee that litigation will prove to be an effective context for revealing truth. If it comes truth will be slow, and partial. In Turkey it has been suggested that, on occasion, 'false accounts' presented to the judiciary, and to the public through litigation, that went inadequately challenged, consolidated official misinformation.[143] As one interviewee noted, according to the state, detainees were dying through suicide or sickness, or disappeared persons had left the country or joined the PKK; however, over time, the multiple cases on torture revealed a pattern that ignited public consciousness of the lies being advanced by the state as to the nature and the number of these 'terrorists' who were being tortured in the name of security.[144] The public was thus gradually informed, through litigation, not only of the wrongs, but the terrible extent of the lies and misinformation proffered by the state.[145]

Supranational litigation has been seen to provide a complementary 'truth-telling' process, which may be particularly important in situations like that in Turkey where there have been no truth commissions or similar processes despite massive violations.[146] In practice, however, while litigation can expose facts and failures and shine a light in dark corners, its role in uncovering a fuller 'truth' has been questioned.[147] Litigation is likely to provide at best one small component of a much bigger process to gain understanding and acknowledgement of, and address, the past.[148]

Closely related to the information gathering and truth telling function is the role of litigation in documenting official abuse, destroying the perceived legality of government action, and helping lay the foundation for the future protection of human rights. By exposing

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[140] Chapter 7.

[141] See eg Mohammed Serdar case in the UK courts (culminating in *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2.

[142] See among others the Guatemala Genocide Study (Chapter 5) on the refusal to share military plans alleged to have been destroyed, but which later emerged. Or the Litigating the War on Terror Study (Chapter 6), where the extreme refusal of the US to allow Abu Zubaydah to provide information or communication with the ECtHR, even an affidavit, which was noted by the Court.

[143] Duffy 'Litigating Torture in Custody' (n 12).

[144] Ibid: 'In the beginning when police said that a terrorist organisation was found, the press believed that...because there was a great counterpropaganda... After a while even the most insensitive came to a point to say "it cannot be that much"'.'

[145] Ibid, see cases such as Bedii Tan. Metin Goktepe and Siddik Bilgin which gradually revealed these fallacies as to the nature of victims of torture.

[146] See recognition of the truth-telling value of those processes in SezginTanrikulu, 'ECHR as a Truth Telling Commission' in '50 Years of the ECtHR Failure or Success' Ankara Bar Association. In Turkey, there has been no truth-telling process, transition or reckoning with the past.

[147] See however the view that it has revealed only a much narrower 'fact-finding' function, not a deeper process of truth, in Basak Cali, 'The Logics of Supranational Human Rights Litigation, Official Acknowledgment, and Human Rights Reform: The Southeast Turkey Cases before the European Court of Human Rights, 1996–2006' (2010) 2 *Law and Social Inquiry* 311.

[148] Interview with Kerem Altıparmak, academic, Ankara University (12 November 2015), Litigating Torture in Custody' (2017).

and condemning human rights violations, and providing some indication of the reasons for them, it may contribute to the historical record of official practices. This can enable a coming to terms with the past and help build towards non-repetition in the longer term.

The role of the courts in helping, directly and indirectly, to write history and shape narratives comes across in all of the case studies. In Palestine, where so few cases are successful, it is reflected in individual applicants who continue with legal action which had no obvious outcome on the basis that 'Even the bullet that misses makes a noise; if they do nothing I have a record,' in the description of litigation as 'holding a mirror to the problems in Palestine,' or of judicial archives as 'the great library of the occupation'. [149] The series of land rights cases considered together provide a prism through which the nature of the unjust policies, denial of justice, and their impact on particular individuals, families and communities, can be seen.

The Guatemala case study emphasises how the research and preparation of a case can have a critical function, alongside the revelations through the judicial process itself, in debunking insidious myths, including as to the responsibility of victims for their own misfortune.[150] By informing collective historical narratives it can play a role in breaking down the states of denial that tend to pervade in the face of widespread violations and crimes, and enhance collective learning.[151] As such, the search for information and truth through litigation is closely linked to the question of its social and cultural impact.

3.4.6. Social or Cultural Impact

César Rodríguez-Garavito describes litigation as having a role in 'chang[ing] ideas, perceptions and collective social constructs relating to the litigation's subject matter … in sociological terms, they imply cultural or ideological alterations with respect to the problem posed by the case.'[152] There are many dimensions to this role, closely associated with other forms of impact, some of which are illustrated below.

Reframing Issues, Catalysing Debate and Shaping Perspectives? Litigation can provide a catalyst for debate on issues that are overlooked or taboo. This is very clearly seen in the case study on slavery, where an entirely new debate emerged around an established, widespread practice protected by a conspiracy of silence. Discussion of the case reverberated around the country, not only in the political echelons, but homes, marketplaces and judicial corridors. Litigation can make a remarkable contribution simply by placing – or keeping – in the public eye unwelcome issues that affect the least powerful and threaten the status quo.[153] The role of litigation in generating awareness of violations, causes and contributors – closely

[149] See Chapter 8.

[150] See legal philosopher Jaime Molamud Goti on the importance of clarifying that victims are 'not responsible for their own disgrace'. An example of an international judgement of this type is *El Masri v Macedonia*, App no. 9630/09, 13 December 2012, ECtHR where the Court, in a judgment on rendition, recognised the wrongs and victimisation, and awarded compensation to the individual.

[151] Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Polity 2000).

[152] César Rodríguez-Garavito, 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2011) 89 Texas Law Review 1669, 1680.

[153] See cases studies in Chapters 4-8. Slavery, conditions of detention, rendition, inequality and high-level impunity for torture were all issues that not only the authorities but also some sectors of the public sought to keep behind closed doors. Litigation made this at least more difficult.

linked to its function in unlocking information and revealing the truth noted above – is an important perequisite to pressuring for change and learning from the past.

The *terms* of the debate may also be influenced by litigation. Proceedings in court inherently reframe issues in legal rather than purely political terms. The legal paradigm may influence the context, tone, content and quality of the discussion. This can be particularly important in the context of vitriolic debates on issues such as terrorism and security, though as experience shows legal action cannot be guaranteed a positive presentation in the media.[154] The reframing in court proceedings can add weight, influencing the seriousness with which issues are taken. In Guatemala, litigation played an important role, alongside other processes, in awakening an appreciation of the massacres as 'genocide.'

The *Hadijatou v Mani* slavery case is one example where several sources attest to attitudes (in judicial halls and the marketplace) having been directly shaped by litigation and ensuing coverage and debate. Similarly, litigation against torture in detention has been described as contributing to public awareness, and over time a greater degree of public condemnation of the phenomenon (although much still depends on who tortures whom).[155] In various contexts, survivors who dared to expose and litigate such violations have challenged the notion that such practices are ordinary, and at a minimum 'denormalised' them.[156] It may nonetheless prove among its most significant contributions, not only for the individuals but in shaping public attitudes that ultimately bear upon repetition.

The Humanising Power of the Litigation Narrative: Court cases can serve to tell real people's stories, individualising and providing an often graphic illustration of what human rights violations mean in practice. This can help move public debate laws, policies and practices beyond the level of abstract, political questions. In respect of at least some applicants, litigation can expose and challenge assumptions and prejudices-towards groups or individuals that often underpin violations. Judicial determinations can themselves carry weight in public perception, reframing demonised individuals as applicants, victims and rights-bearing human beings.[157]

In the face of egregious violations to human dignity, the 'humanising' goal of litigation may be central. It cannot be taken for granted though, and is particularly challenging in contexts such as counter-terrorism and others where prejudice vis-a-vis individual applicants can be prevalent and stubborn.

Recognition, Reconciliation and Restoration of Culture: Undoubtedly, litigation can be divisive just as it can be restorative, but what emerges from much discussion on the impact of litigation is that it can, and sometimes does, facilitate healing processes. To the extent that, as noted above, it has clarified truth, provoked apologies, and consolidated

[154] See Rendition case study noting negative press associated with legal action in this field, as well as more positive presentations.
[155] See interviews in Duffy 'Litigating Torture in Custody' (n 12): interview in Istanbul with Şebnem Korur Fincancı, academic and medical practitioner.
[156] ibid.
[157] It is in the face of tense politicalized debate, as has characterised the political debate around terrorism in many states, that the discipline of dispassionate legal and principled arguments, and judicial responses, is most needed, but where shaping public perceptions appears most challenging. This will be explored in the case studies of the UK counter-terrorism cases Chapter 6. See also controversies regarding 'sympathetic victims' in Chapter 9.

'collective memory' in particular contexts, litigation has also been associated with 'individual and collective processes of coming to terms with the past.'[158]

The opening of museums, monuments that bear the names of the dead, and commemorative events that honour them, as reflected in Chapters 5 and 7, may be important manifestations of this impact. Their significance is reflected in the inscription on the chapel which was built in Plan de Sanchez Guatemala as part of the reparation associated with the massacre at the same site: 'Memory, truth, justice and reparations form the fundamental base of the restitution of the social fabric and an authentic reconciliation.'

The litigation of colonial crimes provides another telling example of processes that have been described by litigants as beginning to heal very old wounds.[159] The Mau Mau torture case brought to British courts, and the associated settlement, was described as 'the beginning of reconciliation between the Mau Mau freedom fighters of Kenya and the British government'.[160] The reconciliatory impact cannot be dissociated from the other more concrete consequences of the legal action, which included financial compensation, a memorial, welfare for Mau Mau veterans and a lifting of the ban on the organisation.

Given the cultural impact of certain violations, the corresponding need for reparation that restores culture is emphasised in litigation on issues such as genocide in Guatemala and indigenous rights more broadly. [161] In the former, the desecration of Mayan culture was inherently linked to the genocide by the state, and strongly reflected in the reparations judgment. Though implementation has been incomplete, specific and concrete measures have been taken to 'promote' the Mayan culture and language. Likewise, the documentation and presentation in court of the 'historical, cultural, social and religious precepts' of indigenous groups, in famous cases such as Enderois litigation before the African Commission, has been described as 'an important vehicle to capture … cultural heritage', regenerating the 'cultural pride of the communities'. [162]

3.4.7. Mobilisation and Empowerment

Many international studies identify politically aware, mobilised and organised groups as factors that are often key (albeit not essential) to the longer-term strategic success of litigation initiatives.[163] In turn, it can equally be said that litigation is a 'political and politicising process' that itself, empowers and enables.[164]

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[158] See in particular the Guatemala and Argentina studies (Chapters 5 and 7).

[159] Duffy 'Litigating Torture in Custody' (n 12).citing members of the Mau Mau movement, in relation to the Mau Mau case concerning UK colonial crimes in Kenya.

[160] Mau Mau representative Gitu Kahengeri, cited in Duffy 'Litigating Torture in Custody' (n 12).. The settlement agreement included a payment in respect of 5,228 claimants, as well as a substantial sum in costs, to the total value of £19.9 million. But it also led to the construction of a memorial in Nairobi and welfare for Mau Mau War Veterans.

[161] Jérémie Gilbert, 'Indigenous People Land Rights' (2017) OSJI, 59, 60 <www.opensocietyfoundations.org/sites/default/files/slip-land-rights-20170424.pdf>

[162] Gilbert, ibid.

[163] Steven Budlender, Gilbert Marcus SC and Nick Ferreira, 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (The Atlantic Philanthropies, 2014); Gilbert Marcus and Nick Ferreira, 'A strategic evaluation of public interest litigation South Africa' (The Atlantic Philanthropies, 2008). See eg study on why litigation on human rights issues in US and India reaped differential results, and the Atlantic Philanthropies report analysis of the factors contributing to impact in eg the well known *Grootboom*

This is particularly important where cases bring to public attention issues that affect marginalised social groups or persons subject to prejudice and discrimination, as is so often the case with the full range of human rights violations. Strategic litigation can contribute to giving a public voice to that group, as well as highlighting that issue. In so doing it may enhance the confidence and standing of the group, or their representatives,[165] and in turn their leverage and capacity to defend themselves and represent others in the future. It may influence the resources at their disposal, as illustrated in some of the case studies.

Litigation processes can contribute to the creation or strengthening of social structures within affected groups, that enhances the effectiveness of other, non-litigation strategies.[166] In Palestine, litigation by groups such as the Sheikh Jarrah communities of East Jerusalem vitalised a strong community voice. In Guatemala, an association of victims that came together principally for the purpose of preparing litigation–has endured as a collective and enhanced the ability of the survivors to assert their rights. This was described by one interviewee as perhaps the most significant contribution of the massacre cases in the longer term.[167] In Argentina, it has been suggested that the largely shared priority of the struggle against impunity through litigation contributed to the cohesion of the whole human rights movement in that state. The need for regional and international coordination has contributed in turn to international networks which have enhanced other human rights advocacy work.[168]

Litigation can have a crucial mobilising effect on other victims of the same impugned practices that give rise to legal action. Indeed, victims can themselves become human rights defenders as seen above in the *Mani* case in Niger, where Mani (who took on the challenge of litigation and later became an advocate for those still enslaved) and many others.[169] In Niger, the research and interviews brought to light remarkable evidence of how news of the litigation swept into many dark corners of the country, and inspired other victims to come forward and to seek help.[170]

It has been observed by Dugard and Langford in the South African context that an increasingly common critique of litigation is that 'rights-based approaches have traditionally neglected the dimension of power – that is to say that rights discourse has over-emphasised the agency of actors and under-emphasised the structures of dominating power [whether

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housing case in South Africa, which includes social mobilization as a key factor. My analysis of Guatemala reaches similar conclusions, to the effect that one of the most important outcomes of the litigation processes was the longer term social organisation and mobilisation. See also Maria Jose Guembe's analysis of dictatorship-related litigation in Argentina, Chapter 7.

[164] Dugard and Langford, 'Art or Science?', n 8.

[165] Interview Maitre Chaibou, co-counsel in Mani case in Niger, noting that cases from his office, or involving Timidria the antislavery NGO are now taken seriously and cannot be ignored.

[166] See Chapters 5 and 8 on Guatemala and Palestine. As noted, several analyses of public interest cases have noted the significance of mobilization for litigation. Beyond that, the formation litigation support groups can itself have other broader benefits for the community, as noted in eg the study on Guatemala.

[167] Interview with Paul Se.

[168] Shared objectives in relation to the criminal prosecutions of previous regimes in Latin American and beyond has lead to complex networks and partnerships between human rights organizations, and sometimes state actors.

[169] Duffy 'Litigating Torture in Custody' (n 12) revealed examples from Turkey and Argentina and Kenya on this. See above 'Victim impact'. In the case of *Akkoç v Turkey* two women suffering extreme vulnerability and abuse as slaves -regained their role in society and became advocates–for others in similar positions of vulnerability.

[170] Interviews Niger. Affirmed in Special Rapporteur on Slavery's Report of 2015 (UN Doc A/HRC/30/35).

these are social, political or economic]'.[171] To the extent that litigation can, in effect, target this underlying reality, its positive impact should not be underestimated. More broadly, it has been suggested that the human rights litigation process is fundamentally about the transfer of power from the executive to individuals, so far as it reviews executive action against the benchmark of human rights.[172] This is linked to empowerment, but also strengthening democracy, the last level of impact highlighted in this report.

3.4.8. Democracy and Rule of Law Impact

An essential ingredient of democratic legitimacy is the willingness to govern within the law. Judicial oversight and accountability are inherent to that enterprise. While strategic litigation may therefore seek to be instrumental in myriad forms of change, its intrinsic value as an instrument of the rule of law should not be underestimated. It can reinforce the importance of law, seek to give it real effect, and contribute to the stabilisation of a legal system.

Through litigation, states are called to account - at least to some extent: to explain, clarify or change their positions. This can arise throughout the legal process, questions to parties and the broader debate, as well as through the ultimate judicial decision. As the unfolding litigation stories in Latin America may attest, the existence of robust judiciaries, and the willingness of government to be criticised and challenged within the framework of law, is itself a test of democratic maturity. Following transitions to democracy, SHRL can therefore play a particularly important role. Analysis of the role of litigation in post-totalitarian countries of Central and Eastern Europe suggests that strategic litigation has proved to be a useful tool in developing human rights protection.[173] In the Palestinian context some have suggested that resort to the courts is about investing in and building that democracy for the future.[174] This reflects discussion in Argentina on the extent to which the swath of accountability litigation has, over time, contributed to the reassertion of the significance of the judiciary, thereby 'consolidating the transition to democracy'.[175]

3.5. Litigation's Dark Side: Negative Impact

Despite its potential, human rights litigation is not an outcome-neutral enterprise. The real negative impact that strategic (and especially 'unstrategic') litigation can have

[171] Dugard and Langford n 8.

[172] Then Dame Mary Arden stated in a 2005 case that 'the decision in the A case should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual.' (2005) 121 L.Q.R. at paras 623–624 in. T. H. Smith 'Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation' (2007) 13 Eur J Crim Policy Res73.

[173] See, for example, *Assenov v Bulgaria* App no. 90/1997/874/1086, 28 October 1998, ECtHR, and examples in 'Access to Justice in Central and Eastern Europe'(Public Interest Law Initiative, 2003).

[174] Interviews for land rights case study.

[175] See eg L. Fillipini on criminal processes as consolidating democracy in Chapter 7, Argentina Case Study. For a recent questioning of the extent to which the focus on criminal law has gone far enough to build social cohesion and democratic foundations, see Malamud Goti "Crímines de Estado, Dilemas de la Justicia" (Hammurabi, 2016).

underscores the importance of ensuring that litigation is done carefully and selectively. There are many ways in which litigation can be – and has in practice been – counter-productive or damaging, many of which are flagged already and explored in the case studies that now follow. Indeed, most dimensions of positive impact, have a potential flip side; litigation can have (and, as case studies show, have had) detrimental effects on victims, the legal framework, policies and practices, on public attitudes and social movements.

The abundant and shocking examples around the world today of the negative consequences that flow from bringing legal action for applicants and those associated with them cannot be neglected in any responsible discussion on SHRL impact.[176] The stories behind the cases reveal brutal reprisals, as epitomised by the ground-breaking *Aksoy v Turkey* case, which is known for its jurisprudential impact on 'torture' standards, but which led to the applicant being re-tortured and ultimately killed, and his father repeatedly tortured and castrated, for refusing to cede to threats to withdraw complaints.[177] Some of the case studies explored here, such as the Argentinian dictatorship cases, have similarly involved the disappearance and torture of complainants and witnesses.[178] In Palestine, individuals have been arrested for lodging complaints. Many other applicants elsewhere report similar consequences, or public vilification for 'betraying their country' through complaining to a foreign court.[179] The growing practice of brining criminal complaints against lawyers and others for supporting 'terrorist' applicants is one of the many sinister implications that SHRL has in the world today.[180] This reality underscores the often multiple vulnerabilities of those applicants subject to ongoing violations, who most need the protection of SHRL but often cannot secure it.[181]

The litigation process can also be traumatising, as noted above, in more and less insidious ways. Victims may feel marginalized or disrespected within elitist judicial or 'lawyer-led' processes. Beyond the direct treatment of victims throughout the processes is the simple fact of unfulfilled expectations, and a sense of being, once again, the victim of injustice when litigation 'fails.'[182] Given the range of negative consequences, unsurprisingly, in many cases, victims withdraw their claims, and the potential of litigation for them and

[176] See Michel Forst, Report of the Special Rapporteur on the Situation of Human Rights Defenders, 29 December 2014 (A/HRC/28/63).

[177] See the excellent book *A Peoples History of the European Court of Human rights* Goldhaber (RUP 2007) one of relatively few studies that seek to tell the human stories behind ECtHR cases and their real consequences.

[178] eg dictatorship witness Jorge Julio López in Argentina provides an example, or see more recently cases on torture in detention today where reprisals have arisen in Argentina, Litigating torture report.

[179] This has arisen recurrently in Turkey; see Duffy 'Litigating Torture in Custody' (n 12). interview Ayse Bingol and Nebahat Akkoç, the applicant in the *Akkoç v Turkey* case.

[180] Interview with Tahir Elçi for Duffy 'Litigating Torture in Custody' (n 12), whose case *Tahir Elci and others v Turkey* App no. 23145/93 and 25091/94 13 November 2003, ECtHR focused specifically on torture and intimidation of lawyers. Elci was tragically executed shortly after this interview in November 2015.

[181] Eg those in continuing detention, or ongoing enslavement, who seek to litigate assume great risks. The death of the *Opuz* (n 116) applicants, after complaints had been made, show the challenges arising from ineffectiveness of complaints procedures to secure protection.

[182] Unjust outcomes may involve not only losing the case, for example the victim may win on some points but be denied basic compensation on dubious grounds. This arose in the *Maskhadova and Others v Russia* App No 18071/05 6 June 2013, ECtHR, case where I represented the family members with Interights colleagues.

others is never realised.[183] Perhaps more remarkable is the determination that so many show, despite all odds, to pursue justice before the courts.

Other broader negative consequences include the consolidation of poor jurisprudence or the adoption of clarifying legislation that further restricts rights.[184] Negative results may reaffirm an unfavourable law or practice and make it more resistant (or impossible) to challenge in subsequent cases, depending on the legal system,[185] thereby entrenching the problem. Undermining of the judicial role by government, press or others, where litigation does support 'unpopular' causes, is often a risk. Litigation may occasionally reframe debate in less helpful ways, or close debate down while it is subject to litigation, with potentially chilling effect on other strategies for change.[186] Meanwhile, push-back in popular opinion may worsen the discrimination that so often underpins violations, and compound underlying problems.

Finally, litigation risks providing a veneer of legitimacy around practices, policies or indeed the legal system as a whole. A finding against applicants can be misunderstood or manipulated to undermine causes and social movements. Acquittals or adverse rulings can, and often have, been portrayed as proving that allegations were 'fabricated' or baseless.[187] A court's rejection or even refusal to exercise jurisdiction can be seen as a determination that the claim was unmeritorious (whatever the basis for the court's ruling which may be quite different).[188] More broadly, as explored in the case studies, deep concerns can emerge as to the long-term impact of the 'legitimising' role of litigation. Intractable debates and profound concerns have arisen in Palestinian context as to the role of legal challenges in 'beautifying' the occupation in Palestine – creating an impression at home and abroad that there is a fair and functioning legal system wherein justice can be served while, for certain rights issues at least, this is highly questionable.[189] There are shadows of these debates and concerns around some of the war on terror litigation, notably the dysfunctional Guantanamo habeas hearings.[190] One lawyer who practiced during apartheid described the feeling of 'being tarnished by the need to speak in terms of laws they despise'.[191] While litigation may seek to

[183] See Chapter 2 above. I have had strong claims dropped by women in Guatemala, in the war on terror context, and in womens' rights cases across systems and in Turkey. See also Interview with Öztürk Türkdoğan, president of the Human Rights Association and Ayse Bingol, 11 Dec. 2015, Duffy 'Litigating Torture in Custody' (n 12).
[184] See Chapter 6 and Chapter 8.
[185] A direct and curious example is Article 26 of the Irish Constitution, under which the President may refer a proposed bill of doubtful constitutionality to the Supreme Court prior to its enactment into law; however, if the bill is found to be constitutional by the Court, the subsequent statute is immune from constitutional challenge.
[186] Reporting while litigation is pending may be limited, or governments may refuse to answer questions on the basis that issues are 'sub judice', pending judicial resolution.
[187] There are numerous examples of this from turkey, see Duffy 'Litigating Torture in Custody' (n 12).
[188] In my experience this is most problematic where opaque admissibility procedures (as before the ECtHR for example - see chapter 2) mean cases can be thrown out without reasons.
[189] See case study on Palestine for structural issue, courts responses, associated debate; see discussion on the proposals of a boycott of the Israeli courts that were ultimately rejected; see M. Sfard, the Wall and the Gate, (forthcoming 2018).
[190] Chapter 6 Litigating the War on Terror. Since 2010 Guantanamo habeas proceedings have ground to an effective halt, leading to questions as to whether they merely create an illusion of judicial oversight.
[191] He described the dilemma as follows: 'A specter is haunting lawyers working against injustice – the specter of legitimation. Those who seek to challenge unjust states by using the law of those states against them are very likely to feel tarnished by the need to speak in terms of laws they despise. This sense of personal taint is bad enough, and sometimes may simply be intolerable.' Stephen Ellmann, 'Struggle and Legitimation' (1995) 20 Law & Soc. Inquiry 339.

improve the legal and political landscape it is also constrained by it, posing unenviable dilemmas for those considering SHRL.

It should also be recalled, however, that impact, whether negative or positive, is complex, often a matter of perspective, and rarely linear. Today's setback may be a stepping stone towards tomorrow's progress, and vice versa.