



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

THE JEAN MONNET PROGRAM

J.H.H. Weiler, Director

Jean Monnet Working Paper 4/25

Kris van der Pas

Strategic litigation cases in European asylum law: a framework for assessing impact

NYU School of Law • New York, NY 10011

The Jean Monnet Working Paper Series can be found at

www.JeanMonnetProgram.org

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2161-0320 (online) Copy
Editor: Claudia Golden
© Kris van der Pas, 2025 New
York University School of Law New
York, NY 10011
USA

Publications in the Series should be cited as: AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

Strategic litigation cases in European asylum law: a framework for assessing impact

Kris van der Pas

Postdoctoral researcher,

Tilburg University/ Ludwig-Maximilians-Universität München

k.pas@lmu.de

Abstract

Litigation has become a central tool in the toolbox of European civil society organizations (CSO) active in the field of asylum. Cases that challenge European migration control policies and human rights violations against asylum seekers have led to outcry by political actors, which indicates that this ‘strategic’ litigation is striking a nerve. At the same time, there is stronger consensus in the (American) literature that CSOs too often fall victim to a ‘myth of rights’ that leads them to place excessive faith in the courts as agents for social change. Only under certain conditions can strategic litigation achieve its aims, according to these authors. This study performs an analysis of existing works on law and social change and adapts this framework to the European asylum context, creating a basis for assessing impact of progressive strategic litigation to enhance asylum seekers’ rights protection.

1. Introduction

In November 2023, Italy and Albania signed a Protocol allowing for the processing of asylum seekers intercepted at sea by Italian authorities in asylum centers on Albanian territory.¹ The purpose of this externalization (transferring asylum seekers to third states)² is to deter asylum seekers from coming to these states – despite evidence that this disincentive does not work.³ In the Italian ‘model’, specific parts of Albanian territory are assigned to and used by Italy to process asylum claims, with Italy remaining the responsible actor.⁴ Immediately after the signing and approval of the Protocol by the Albanian and Italian parliaments,⁵ civil society expressed concern about the possible consequences thereof for asylum seekers.⁶ In mid-October 2024, the two proposed centers

¹ Protocol between the Council of Ministers of the Republic of Albania and the Government of the Italian Republic of 6 November 2023 for strengthening Cooperation in the Field of Migration (6 Nov. 2023). For an English translation see: <https://odysseus-network.eu/wp-content/uploads/2023/11/Protocol-between-the-Government-of-the-Italian-Republic-and-the-Council-of-Minister-of-the-Albanian-Republic-1-1.pdf>.

² See for an extensive discussion of externalization: D. Cantor, N.F. Tan, M. Gkliati, E. Mavropoulou, K. Allinson, S. Chakrabarty, M. Grundler, L. Hillary, E. McDonnell, R. Moodley, S. Phillips, A. Pijnenburg, A. Reyhani, S. Soares, & N. Yacoub, ‘Externalisation, Access to Territorial Asylum, and International Law’, *International Journal of Refugee Law*, 34(1), 2022, p. 120-156.

³ M. Gleeson & N. Yacoub, ‘Offshore Processing’ in Australia’, *Externalizing Asylum*, 2024, available at: <https://externalizingasylum.info/offshore-processing-in-australia/>; M. Rosina, ‘Is the Rwanda Plan acting as a Deterrent? Here’s what the Evidence says about this Approach’, *The Conversation*, 29 April 2024, available at: <https://theconversation.com/is-the-rwanda-plan-acting-as-a-deterrent-heres-what-the-evidence-says-about-this-approach228836>.

⁴ This is referred to as ‘offshoring’ asylum, as opposed to ‘outsourcing’ – under which another state would be responsible for processing asylum claims, like in the UK-Rwanda Treaty. See A. Pijnenburg & K. van der Pas, ‘Litigating externalisation policies: The added value of a multi-level legal order?’, *Refugee Survey Quarterly*, 44(3), 2025, p. 345-369.

⁵ L. Semini, ‘Albanian Parliament Approves Controversial Deal to hold Migrants for Italy’, AP, 22 February 2024, available at: <https://apnews.com/article/migration-italy-albania-asylum-agreement-meloni-ramac48432ca4a1b40d19209bd96063cd752>.

⁶ C. Barry & L. Semini, ‘The EU is watching Albania’s Deal to hold Asylum Seekers for Italy: Rights Activists are Worried’, AP, 22 February 2024, available at: <https://apnews.com/article/albania-migrants-italy-deal-asylumrescue-vote1a501095a7c67e6c8910f3d938dc2938>; Amnesty International, ‘The Italy-Albania Agreement on Migration: Pushing Boundaries, Threatening Rights’, 19 January 2024, available at: <https://www.refworld.org/policy/declas/amnesty/2024/en/148458>; International Rescue Committee, ‘IRC: Proposed Italy-Albania Migration Deal is ‘Costly, Cruel and Counterproductive’’, 26 January 2024, available at: <https://www.rescue.org/eu/press-release/irc-proposed-italy-albania-migration-deal-costly-cruel-and-counterproductive>; Associazione per gli studi giuridici sull’immigrazione (ASGI), ‘L’Europa elogia il Patto Italia-Albania, ma le critica a Shengjin e Gjader sono molto chiare’, 24 July 2024, available at: <https://www.asgi.it/asilo-e-protezione-internazionale/leuropa-elogia-il-patto-italia-albania-ma-le-criticita-a-shengjin-egjader-sono-molto-chiare/>.

on Albanian territory were opened and the first asylum seekers were transferred a few days after.⁷ This was immediately followed by legal challenges, and not even a week later the Civil Court in Rome invalidated the *de facto* detention of the first group of asylum seekers that had arrived in Albania – meaning they would be sent back to Italy for the processing of their asylum claim.⁸ The battleground over the Italy-Albania Protocol remained a legal one: subsequent litigation invalidated the transfer of the second and third group of asylum seekers⁹ and a judgment of the EU Court of Justice – that was not specifically on the Protocol but did apply to it – further complicated the execution of the Protocol.¹⁰ This development is not unique to Italy: in Europe generally, there is a seeming surge of CSOs using litigation to advance asylum seekers' rights.¹¹ This use of litigation as an explicit strategy is referred to as strategic litigation: 'the (intention of) legal action through a judicial mechanism in order to secure an outcome, either by an affected party or on behalf of an affected party [...] used as a means to reach objectives which consist of creating change (e.g. legal, political, social) beyond the individual case or individual interest'.¹²

Litigation by civil society organizations (CSOs) on asylum matters in Europe has sparked significant backlash. In Germany, conservative politicians have attacked the 'anti-deportation industry' as a threat to public order, while in the Netherlands, the government

⁷ A. Amante, 'Italy Dispatches First Group of Migrants to Albania, Source Says', Reuters, available at: <https://www.reuters.com/world/europe/italy-dispatches-first-group-migrants-albania-source-says-2024-10-14/>; L. Tondo, 'Italian Migration Centres open in Albania under Controversial Deal', The Guardian, 11 October 2024, available at: <https://www.theguardian.com/world/2024/oct/11/italy-migration-centres-open-albania-controversial-deal>.

⁸ A. Lacchei and C. Scissa, 'The Italy-Albania Protocol: Curbing Migration At All Costs', RLI Blog on Refugee Law and Forced Migration, 19 November 2024, available at: <https://rli.blogs.sas.ac.uk/2024/11/19/the-italy-albania-protocol-curbing-migration-atall-costs/>.

⁹ E. Elezi, 'Has Italy's Albania Migrant Deal Completely Failed?', DW, 24 February 2025, available at: <https://www.dw.com/en/has-italys-albania-migrant-deal-completely-failed/a-71694722>.

¹⁰ A. De Leo, 'Op-ed: Does the Rome Court's Refusal to Validate the Detention Order of the First Asylum Seekers brought to Albania mark the End of the Italy-Albania Deal?', 24 October 2024, available at: <https://ecre.org/op-ed-does-the-rome-courts-refusal-to-validate-the-detention-order-of-the-first-asylum-seekers-brought-to-albania-mark-the-end-of-the-italy-albania-deal>; CJEU C-406/22, 4 October 2024 (CV v Ministerstvo vnitra České republiky, Odbor azylové a migrační politiky)

¹¹ A. Pijnenburg & K. van der Pas, 'Strategic Litigation against European Migration Control Policies: The Legal Battleground of the Central Mediterranean Migration Route', *European Journal of Migration and Law*, 24(3), 2022, p. 401-429; K. van der Pas, *The 'Strategy' in Strategic Litigation: The Why and How of Strategic Litigation by Civil Society Organizations in the Field of Asylum Law in Europe*, Europa Law Publishing, 2024.

¹² K. van der Pas, 'Conceptualising strategic litigation', *Oñati Socio-Legal Series*, 11(6(S)), 2021, p. 126-127.

attempted to defund a CSO providing legal aid to asylum seekers.¹³ Italian leaders, including PM Giorgia Meloni, have accused both national judges and the EU Court of Justice of overreach, and 27 European states recently urged the European Court of Human Rights to adopt a more deferential approach in migration cases, arguing its current stance is 'too strict'.¹⁴ While this backlash suggests litigation is effective in challenging restrictive asylum policies, it also risks undermining the legitimacy and compliance with judicial institutions.

Generally speaking, one of the main questions that researchers on law and social change have asked in the past is: What impact does strategic litigation have? More succinctly: is strategic litigation capable of living up to its promise and making change on the ground? Many scholars have shed their light on this question and have (empirically) assessed the impact of litigation campaigns. U.S. scholars have long debated the limits of litigation as a tool for social change. Critics like Rosenberg, Scheingold, and Handler argue that court victories often fail to translate into real-world impact due to bureaucratic resistance and resource disparities, with Galanter noting that well-resourced actors typically prevail.¹⁵ Others, such as McCann, highlight litigation's potential to build movements.¹⁶ These more pessimistic accounts stand in

¹³ T. Podolski, 'Rechts-staat heißt nicht, dass der Staat Recht hat', LTO, 7 May 2018, available at: <https://www.lto.de/recht/hintergruende/h/dobrindt-anti-abschiebe-industrie-fluechtlinge-migranten-helfer-rechtsstaat>; NOS, 'Rechter: minister Faber mag subsidie Vluchtelingenwerk niet halveren', NOS, 14 February 2025, available at: <https://nos.nl/artikel/2555815-rechter-minister-faber-mag-subsidie-vluchtelingenwerk-niet-halveren>.

¹⁴ L. Tondo, J. Henley & A. Kassam, 'Blow to Meloni's Albania deal as court orders asylum seekers' return to Italy', The Guardian, 18 October 2024, available at: <https://www.theguardian.com/world/2024/oct/18/blow-to-melonis-albania-deal-as-court-orders-asylum-seekers-return-to-italy>; F. Knapp & E. Giordano, 'Meloni fumes as EU top court makes it harder to reject asylum-seekers', Politico, 1 August 2025, available at: <https://www.politico.eu/article/eu-court-giorgia-meloni-reject-asylum-seekers-italy-albania-migration/>. See on the 'strictness' of the ECtHR in migration cases: E. Desmet, E. Sevrin & T. Spijkerboer, 'Expert report: How strict is the European Court of Human Rights in migration cases?', Strasbourg Observers, 18 February 2026, available at: <https://strasbourgobservers.com/2026/02/18/expert-report-how-strict-is-the-european-court-of-human-rights-in-migration-cases/>.

¹⁵ G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, Chicago: University of Chicago Press, 1991 (1st edition); S. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*, Ann Arbor: University of Michigan Press, 1974 (1st edition); J. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change*, New York: Academic Press, 1978; M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review*, 9(1), 1974, p. 95-160.

¹⁶ M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, University of Chicago Press, 1994.

contrast with the optimism towards and backlash against strategic litigation in European asylum law. The question that arises is: which aspects of existing research on strategic litigation and social change can be translated to the sub-field of strategic litigation in asylum law in Europe?

This paper synthesizes the current literature on litigation and social change and adapts it to the European asylum context. To this end, seminal works (such as those of Rosenberg and McCann) have been taken into account, which have been supplemented by literature found through database research and snowballing. Given the width of the field, it is not possible to discuss every study on the topic out there, but rather, this paper takes stock of the current state of play and adapts it to the asylum field. Research that has been taken on board varies in terms of ideological purpose behind litigation, field of law, type of interest, etc. Generally speaking, most studies claim to look at law in context, and thus law in action as opposed to law on the books.¹⁷ The analysis focuses on contextual factors that explain the differences between the studies in terms of social change reported. First, section 2 will survey the literature from the U.S., where this research field took shape initially. Then, section 3 will turn to the literature from outside the U.S., looking at studies from other states and inter-/supranational courts. Section 4 criticizes the literature, looking at what is missing in current understandings, and seeing what we can learn from the literature for the European asylum context. In that sense, this paper builds on an earlier working paper in this series, which sketched the field of strategic litigation in the EU.¹⁸ Unlike that working paper, this paper focuses on a specific type of strategic litigation: progressive strategic litigation, mostly by NGOs but also by individual lawyers, aimed at enhancing rights protection of asylum seekers in Europe.

2. The US experience – a mixed bag

2.1 The old US literature – critique from positivist legal liberals

This section takes a (somewhat) chronological approach to the US literature on litigation and social change, from the older literature (section 2.1) to the newer (section 2.2). In response to criticism on the counter-majoritarian nature of strategic litigation in the

¹⁷ R. Pound, 'Law in Books and Law in Action', *American Law Review*, 44(1), 1910, p. 12-36.

¹⁸ P. Cebulak, M. Morvillo & S. Salomon, 'Strategic litigation in EU law: Who does it empower?', Jean Monnet Working Paper no. 2/24, available at: <https://jeanmonnetprogram.org/papers/paper-serie/2024/>.

United States, a school of thought arose dubbed as ‘legal liberalism’ – meaning an alliance of activist courts and lawyers with a faith in law to correct the defects of a diverse democratic society.¹⁹ Critique from within this camp on the use of strategic litigation, taking flight from the 1970s onwards, led to a body of literature that explores the (dis)advantages of using strategic litigation to achieve (extra)legal aims. Research was carried out by a mix of political scientists and (socio-)legal scholars. From the political science field, litigation was seen as part of the repertoire or toolbox of CSOs from the 1950s onwards.²⁰ Litigation in that sense was used ‘beyond conventional use of the legal system’²¹ and academic attention was paid to the relativity of strategies: why one strategy would be used over another.²²

In the (socio-)legal field, Marc Galanter’s foundational work investigated why the ‘haves’ come out ahead in litigation.²³ He described how repeat-players, repetitively involved in litigation, enjoy structural advantages to shape legal outcomes beyond individual cases, due to greater resources, more experienced legal counsel, being able to play the long game, and influencing precedent.²⁴ One-shotters, on the other hand, don’t have these advantages and are limited in their ability to win cases. Importantly, Galanter also emphasized the limited ability of courts to structurally make changes in society when litigation is not paired with a push for political and institutional change.²⁵ In the same year as Galanter’s article, Scheingold produced his book in which he introduced the concept of the ‘myth of rights’, by which he meant American civil society placing excessive faith in courts and legal rights as engines of social change.²⁶ While rights discourse can inspire activism, Scheingold argued it often diverts energy away from other forms of collective action. In the 2004 second edition of the same book, he presents a somewhat

¹⁹ S. Cummings, ‘The Social Movement Turn In Law’, *Law & Social Inquiry*, 43(2), 2018, p. 360-416.

²⁰ C. Vose, ‘Litigation as a Form of Pressure Group Activity’, *The Annals of the American Academy of Political and Social Science*, 319(1), 1958, p. 20-31

²¹ *Ibid.*

²² H. Kitschelt, ‘Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies’, *British Journal of Political Science*, 16(1), 1986, p. 57–85.

²³ Galanter *supra* note 15.

²⁴ *Ibid.*

²⁵ *Ibid.*, p. 138, 149-150.

²⁶ Scheingold *supra* note 15.

more optimistic account, showing how rights claims have mattered in the past, while still warning those who replace litigation with political mobilization.²⁷

Joel Handler, a few years later, is similarly pessimistic, although he makes a useful distinction between the (immediate) effect of law reform and the (later) effect of social change.²⁸ Handler also argues for litigation grounded in broader political mobilization, whereby going to court supplements other strategies of collective political struggle.²⁹ Horowitz, similarly – though more from a court-centered perspective – questioned the ability of courts to create social change (‘policy’).³⁰ This approach is in line with one of the most influential works in this school of thought, namely that of Rosenberg. In 1991, Rosenberg published his book ‘The Hollow Hope’, in which he concluded that *Brown v. Board of Education* had not led to any ‘significant social reform’, based on empirical data about school segregation.³¹ Rosenberg presented two ideas about the US Supreme Court: the Dynamic Court (as an institution able to produce change) and the Constrained Court (as the ‘least dangerous branch’ of government and thus unable to produce social reform).³² His analysis supports the view of the Constrained Court, as US courts suffer from specific constraints: 1) the limited nature of constitutional rights (Constraint I); 2) The lack of judicial independence (Constraint II); 3) The judiciary's lack of powers of implementation (Constraint III).³³ Thus, courts are a hollow hope, however, Rosenberg also concludes that when certain conditions are present, courts can play a role. This is the case when: 1) there is ample legal precedent for change, 2) there is support for change from Congress and the executive, and 3) when there is support from some citizens or at

²⁷ S. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*, Ann Arbor: University of Michigan Press, 2004 (2nd edition).

²⁸ Handler *supra* note 15. This distinction is repeated in later important works discussed below, see for example S. Cummings, *An Equal Place: Lawyers in the Struggle for Los Angeles*, New York: Oxford University Press, 2021; S. Botero, *Courts that Matter: Activists, Judges, and the Politics of Rights Enforcement*, Cambridge: Cambridge University Press, 2023.

²⁹ Handler *supra* note 15.

³⁰ D. Horowitz, *The Courts and Social Policy*, Brookings Institution Press 1977.

³¹ Rosenberg *supra* note 15.

³² G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, Chicago: University of Chicago Press, 2008 (2nd edition), p. 2-30. This second edition adds a case study on marriage equality litigation, but the conclusions remain the same. A third edition of the book includes civil rights, abortion rights, women's rights and marriage equality, see G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, Chicago: University of Chicago Press, 2023 (3rd edition).

³³ Rosenberg *supra* note 31, p. 35.

least low levels of opposition from all citizens.³⁴ Mainly, Rosenberg argues that political and public support is required to enable courts to produce social reform.³⁵ Moreover, putting too many resources into litigation jeopardizes more useful (political) mobilization.³⁶ Rosenberg's book, which have a second and third edition including more case studies, remain highly influential in the law and social change – although his ideas have been fiercely rebutted (see section 2.2).

In a different analysis of *Brown*, Derrick Bell concludes that the litigation suffered from an accountability problem, as lawyers put their own vision and interests above those of their clients and community.³⁷ The focus on a fully desegregated system was, according to Bell, not the right strategy.³⁸ Similarly, Neier more generally critiques those litigating for making tactical errors, misreading of public opinion and being overinclusive, meaning the original aims of litigation were not achieved.³⁹ These analyses focus, less than Rosenberg, on courts as institutions, but rather on the lawyers pursuing litigation strategies. Despite this difference in subject of study, they come to the same conclusion. In a later piece, Bell even put it more strongly by saying that *Brown* was practically speaking a failure.⁴⁰ The case ended school segregation, but a 2003 study proved that schools with predominantly white children have more resources than schools with predominantly Black and Latino children – a *de facto* situation of differentiation in racialized schools.⁴¹

In sum, the literature from this time period provides a few takeaways. First, litigation is accepted and regarded as a political tool in the toolbox of civil society organizations. Second, in research on litigation and its consequences, attention is paid to

³⁴ *Ibid*, p. 36. Additionally, one of these conditions need to be present: a) Positive incentives are offered to induce compliance (Condition I); or, b) Costs are imposed to induce compliance (Condition II); or, c) Court decisions allow for market implementation (Condition III); or, d) Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind (Condition IV).

³⁵ *Ibid*, p. 420-422.

³⁶ *Ibid*, p. 423-424.

³⁷ D. Bell Jr., 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation', *Yale Law Journal* 85(4), 1976, p. 470-516.

³⁸ This finding is all the more significant as Bell was involved in the litigation himself.

³⁹ A. Neier, *Only Judgment: The Limits Of Litigation In Social Change*, Middletown: Wesleyan University Press, 1982.

⁴⁰ D. Bell Jr., 'The Unintended Lessons In Brown V. Board Of Education', *New York Law School Law Review*, 49(4), 2005, p. 1053-1067. Bell even compared those who believe that Brown is a valuable precedent to those: "who hold that the earth is, after all, flat."

⁴¹ *Ibid*, p. 1055.

more than merely winning in court, and thus litigation is not looked at in isolation. Nevertheless, the literature presents a pessimistic view. Litigation takes away resources from other (potentially more useful) strategies, there are institutional constraints to courts, and litigation can generate backlash.⁴² A third finding is that most of the analyses focus on cases that are won and on the legal procedures themselves – not on the broader political campaign.⁴³ Finally, the abovementioned authors focus on ‘significant social reform’: incremental forms of change (i.e. smaller changes in law, policy, public opinion, etc.) are not assessed. The main purpose of academic research in this period is to show whether the underlying aim of litigation has been fully achieved.

2.2 *The new US literature: the ‘movement’ turn*

Although a clear distinction in time is difficult to make, newer US literature (from the 1990s onwards) has taken a slightly different approach to the study of strategic litigation and has emphasized effects beyond the immediate political impact of court decisions, shifting the mode of analysis to actors, such as activists, bureaucrats and/or cause lawyers. Under this new research approach, academics trace the complex process of litigation, how it shapes social meaning and how it informs individual and collective action. These authors move beyond ‘mechanistic conceptions’ of what strategic litigation can achieve, but rather focus on capacities of courts (institutional legitimacy to establish authoritative legal norms and ability to shape litigation incentives) which leads to a degree of influence over longer-term change.⁴⁴ Two authors are the most prominent voices in this shift: McCann and Epp.⁴⁵ Their analyses have a broader perception methodologically on how change occurs.⁴⁶ They rely more on qualitative data collection and analysis (through

⁴² On backlash specifically see M. Klarman, ‘How *Brown* Changed Race Relations: The Backlash Thesis’, *Journal of American History*, 81(1), 1994, p. 81-118. An overview of the literature is also provided in: S. Boutcher & H. McCammon, ‘Social Movements and Litigation’, in D. Snow, S. Soule, H. Kriesi & H. McCammon (eds.), *The Wiley Blackwell Companion to Social Movements*, New Jersey: John Wiley & Sons Ltd., 2019.

⁴³ Rosenberg even states that winning is the first step, see Rosenberg *supra* note 31, p. 31. Only Gambitta states that the possibility of losing cases could lead to ‘desired effects’, see R. Gambitta, ‘Litigation, Judicial Deference, And Policy Change’, in R. Gambitta, M. May & J. Foster (eds.), *In Governing Through Courts*, Beverly Hills: Sage Publications, 1981, p. 225-258.

⁴⁴ C. Epp, ‘Law as an Instrument of Social Reform’, in K. Whittington, R. Kelemen, and G. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, p. 595-613.

⁴⁵ McCann *supra* note 15; C. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press, 1998.

⁴⁶ See further Epp 2008 *supra* note 43.

interviews with officials, activists etc.).⁴⁷ Causal impact studies, coming from the law and economics field and relying on quantitative data, tend to agree more with Rosenberg.⁴⁸

McCann, firstly, emphasizes that litigation is to be viewed as a resource, with which he decenters litigation as the object of study and rather describes law as a ‘social practice’.⁴⁹ Compared to Rosenberg, who can be described as a positivist, McCann takes a more interpretivist approach.⁵⁰ With that approach, he looks at aspects of litigation in four parts: movement building, formal changes in official policy, policy reform implementation, and the transformative legacy of legal action.⁵¹ He then applies this framework to an extensive study on pay equity reform litigation, showing that despite limited success in the courts, movements were able to influence the political debate by invoking their rights. While acknowledging the limitations of litigation as a strategy, McCann provides a more positive account of its potential. Similarly, Epp explains that the ‘rights revolution’ in the United States – an increase in the protection of individuals (especially minorities) through strategic litigation – occurred due to the rise of a support structure for constitutional rights.⁵² These rights had always been there, but could now be effectively invoked in court due to civil society. In line with McCann, Epp focuses on lawyers and the movement behind litigation. The conditions that need to be present for this rights revolution, according to Epp, are a bill of rights, judicial leadership and docket control in the judiciary, and a culture and rights consciousness favorable to the aims pursued.⁵³

One other landmark piece of research is NeJaime’s ‘winning through losing’ argument,⁵⁴ which finds its roots in earlier work by Lobel (success without victory).⁵⁵ Speaking of indirect and direct ‘effects’ of litigation, NeJaime argues that also litigation

⁴⁷ C. Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’, *Texas Law Review*, 89, 2010, p. 1669-1698, 1679.

⁴⁸ *Ibid*, p. 1678.

⁴⁹ McCann *supra* note 15, p. 4-6.

⁵⁰ C. Hilson, ‘The Courts and Social Movements: Two Literatures and Two Methodologies’, Mobilizing Ideas, 18 February 2013, available at <https://mobilizingideas.wordpress.com/2013/02/18/the-courts-and-social-movements-two-literatures-and-two-methodologies/>.

⁵¹ McCann *supra* note 15, p. 4-6.

⁵² Epp 1998, *supra* note 43.

⁵³ *Ibid*, chapter 2.

⁵⁴ D. NeJaime, ‘Winning Through Losing’, *Iowa Law Review*, 96, 2011, p. 941-1012.

⁵⁵ J. Lobel, *Success Without Victory: Lost Legal Battles And The Long Road To Justice In America*, New York: New York University Press, 2004.

loss can have several internal effects (constructing organizational identity and mobilizing constituents, building resolve, and fundraising) and external effects (appealing to other state actors, appealing to the public).⁵⁶ For example, it can raise public consciousness, put an issue on the political agenda, and put pressure on decision-makers by highlighting the potential legal and financial risks they face if they fail to implement political solutions. NeJaime explicitly criticizes Rosenberg for taking law as an independent variable, whereas NeJaime – inspired by the ‘interpretivist’ turn – takes the law as an interdependent variable.⁵⁷ Albiston, then, responds to NeJaime and argues that next to the more ‘classic’ risks of using litigation to create social change (diverting resources from other strategies, sparking countermobilization), litigation also carries the risk to deradicalize and reshape a social movement more in line with the status quo.⁵⁸

Several criticisms (or risks of the use of litigation), therefore, remain in relation to the older literature. The legal efficacy critique remains: courts are widely regarded as lacking institutional capacity for social reform, but courts have a certain authority which can be mobilized by movements for social reform.⁵⁹ Similarly, the accountability critique, i.e. lawyers not acting in the interest of the underlying constituency, remains.⁶⁰ Even more so, NeJaime argues that individuals or separate organizations can influence the agenda of a movement by starting litigation on their own motion – whereas other initiatives such as legislative influence require cooptation and organizing.⁶¹ He refers to this as the legal mobilization dilemma.⁶² Finally, also in the ‘social movement’ turn (see below), authors point to the rise of the conservative movement – as an ‘extreme’ form of backlash – due to strategic litigation by progressive actors.⁶³

⁵⁶ NeJaime *supra* note 53, p. 959. Internal effects refer to effects within the movement itself, external effects refer to effects outside of the movement (public, state actors, etc.).

⁵⁷ *Ibid.*

⁵⁸ C. Albiston, ‘The Dark Side Of Litigation As A Social Movement Strategy’, *Iowa Law Review Bulletin*, 96, 2011, p. 61-77.

⁵⁹ Epp 1998, *supra* note 43.

⁶⁰ S. Ahlhaus, Strategic litigation as a challenge for deliberative democracy’, *American Journal of Political Science*, 2025, (Early View).

⁶¹ D. NeJaime, ‘The Legal Mobilization Dilemma’, *Emory Law Journal*, 61(4), 2012, p. 663-736.

⁶² *Ibid.*

⁶³ S. Teles, *The Rise Of The Conservative Legal Movement*, New Jersey: Princeton University Press, 2008. Some argue that it is difficult to draw precise causal links between backlash and a countermovement, see L. Greenhouse & R. Siegel, ‘Before (And After) Roe V. Wade: New Questions About Backlash’, *The Yale Law Journal*, 120(8), 2011, p. 2028-2087. Keck, therefore, argues that backlash can be oversimplified as an immediate response to strategic litigation, and that it is to be assessed more intricately; see T. Keck, ‘Beyond

In the current state of play, many works have been written by Cummings. He co-authored a synthesizing article in 2009 with Rhode, in which they use the literature above to develop an important point of departure for how litigation can be used to create long-lasting social reform: court victories are merely symbolic, and they need political mobilization, administrative enforcement, and cultural change to have meaningful impact.⁶⁴ Firstly, litigation needs to be included in broader advocacy efforts, including collaboration with community groups (in order to circumvent the accountability critique of Bell), legislative and administrative strategies, and grassroots organizing.⁶⁵ They add to this that financial resources can both form and important opportunity or constraint, meaning that it is vital to assess this when studying strategic litigation.⁶⁶ Moreover, they allege that strategic litigation differs per topic area, with migration (and specifically undocumented migrants in the US) posing a great challenge due to political saliency and negative discourse.⁶⁷ Together with the aforementioned author NeJaime, Cummings wrote on marriage equality and how backlash against this movement did not stem only from their litigation efforts – but can also be attributed to other factors.⁶⁸

In more recent works, Cummings has described how the study of strategic litigation/legal mobilization has taken a ‘social movement turn’, a move away from legal liberalism (which centered courts and litigation as drivers of reform), to movement liberalism, with law and litigation embedded in a broader toolkit of movements.⁶⁹ He stresses the importance of contextual factors, making a link with the (political science) literature on the reasons why organizations, movements or individuals go to court, as this research focuses on political and legal opportunities as well as organizational resources that shape the (movement and) litigation context.⁷⁰ In another work, Cummings stresses

Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights’, *Law & Society Review*, 43(1), 2009, p. 151-186.

⁶⁴ S. Cummings & D. Rhode, ‘Public Interest Litigation: Insights From Theory and Practice’, *Fordham Urban Law Journal* 36(4), 2009, p. 603-651.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ S. Cummings & D. NeJaime, ‘Lawyering for Marriage Equality’, *UCLA Law Review* 57, 2010, p. 1235-1331.

⁶⁹ Cummings *supra* note 19.

⁷⁰ *Ibid.* For an overview of this literature, see van der Pas *supra* note 11, chapter 3. Important works include E. Andersen, *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights*

the possibility of backlash and countermobilization when strategic litigation is pursued.⁷¹ In his 2021 book, Cummings carries out an extensive study of strategic litigation in the Los Angeles context, bringing most of the aforementioned points of departure in practice using an impressive amount of empirical data.⁷² In this book, he formulates several foundational aspects for research on strategic litigation. First, the analysis should look at integrated political and legal strategies – as opposed to litigation in isolation. Second, research should move beyond the law versus politics divide: looking at outcomes (law on the books) as well as impact (law in action). Third, Cummings deploys a comparative institutional analysis, meaning a differentiation between strategies and how these influence outcomes and impact.⁷³

A central lesson of the book is that the challenge of accountable leadership cuts across legal, political, and movement-based forms of representation; lawyers are neither uniquely deficient nor uniquely effective in meeting this challenge (and thus the accountability critique applies more generally to elites). The book also reframes the legal liberal critique of efficacy by showing that enforcement failures, resistance, and cooptation are not unique to litigation but are inherent to all tools aimed at redistributive social change.⁷⁴ While litigation can be effective in some contexts, it regularly fails (similar to legislation, regulation and contracts) at the implementation stage due to complex systems

Litigation, Ann Arbor: University of Michigan Press 2006; L. Vanhala, *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*, Cambridge: Cambridge University Press 2011; G. De Fazio, 'Legal Opportunity Structure and Social Movement Strategy in Northern Ireland and Southern United States', *International Journal of Comparative Sociology*, 53(1), 2012, p. 3-22; A. Lejeune & J. Ringelheim, 'Workers With Disabilities Between Legal Changes and Persisting Exclusion: How Contradictory Rights Shape Legal Mobilization', *Law and Society Review*, 53(4), 2019, p. 983-1015; A. Lejeune & J. Ringelheim, 'The Differential Use of Litigation by NGOs: A Case Study on Antidiscrimination Legal Mobilization in Belgium', *Law & Social Inquiry*, 48(4), 2023, p. 1365-1398; L. Vanhala, 'Is Legal Mobilization for the Birds? Legal Opportunity Structures and Environmental Nongovernmental Organizations in the United Kingdom, France, Finland, and Italy', *Comparative Political Studies*, 51(3), 2018, p. 380-412; G. Fuchs, 'Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries', *Canadian Journal of Law & Society*, 28(2), 2013, p. 189-208; B. Wilson & J. Rodríguez Cordero, 'Legal Opportunity Structures and Social Movements', *Comparative Political Studies*, 39(3), 2006, p. 325-351; C. Hilson, 'New Social Movements: The Role of Legal Opportunity', *Journal of European Public Policy*, 9(2), 2002, p. 238-255; H. Kitschelt, 'Political Opportunity Structures and Political Protest: Anti-Nuclear Movements in Four Democracies', *British Journal of Political Science*, 16(1), 1986, p. 57-85.

⁷¹ S. Cummings, 'Law and Social Movements: Reimagining the Progressive Canon', *Wisconsin Law Review*, 2018, p. 441-501.

⁷² Cummings *supra* note 28.

⁷³ Ibid, p. 5-8.

⁷⁴ As already articulated by Lobel in 2007, see O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', *Harvard Law Review* 120(4), 2007, p. 937-988.

and powerful opposition, making enforcement gaps the norm rather than the exception. For strategic litigants, litigation is therefore treated as a tactical component, deliberately integrated with organizing, public pressure, and other advocacy strategies rather than pursued as a standalone solution.⁷⁵

In sum, the ‘movement’ turn in academic research has led to a new perspective taken on strategic litigation: as opposed to looking at litigation and social reform in isolation, a broader, holistic perspective is taken, referred to as the legal mobilization approach.⁷⁶ This approach is process-based (iterative), takes a bottom-up (movement) perspective, looks at litigation in the broader context of strategies, and acknowledges the unequal power dimension between lawyers and the movement.⁷⁷ Certain key takeaways from this literature are: litigation is a political tool that, when used strategically, can complement other efforts; whether litigation is effective is relative to other tools available; and it is necessary to examine the political, economic, cultural, and organizational conditions within which a lawsuit operates in order to identify change.⁷⁸ If used correctly, litigation can positively affect movement constituencies, by leveraging power from opponents, raising expectations among movement constituents, legitimating a movement’s goals through publicity, building organizational resources, and mobilizing constituents.⁷⁹

3. Evidence from other jurisdictions – including inter- and supranational contexts

3.1 National and international courts

The aforementioned literature focuses on U.S. courts and that national context. There is now also a growing body on the potential of strategic litigation before courts in other

⁷⁵ Cummings *supra* note 28, ch. 7.

⁷⁶ M. McCann (2008) ‘Litigation and Legal Mobilization’, in K. Whittington, R. Kelemen, and G. Caldeira (eds.), *The Oxford Handbook of Law and Politics*, Oxford: Oxford University Press, 2008, p. 522-540.

⁷⁷ *Ibid*, see also M. McCann, ‘Legal Mobilization And Social Reform Movements: Notes On Theory And Its Applications’, in M. McCann (ed.), *Law And Social Movements*, Oxon: Routledge, 2016, p. 3-32.

⁷⁸ L. Vanhala & J. Kinghan, Literature Review on the Use and Impact of Litigation, Public Law Project research paper, 2018, available at: <https://e9a680wtza6.exactdn.com/wp-content/uploads/2018/05/Public-Law-Project-Literature-review-on-the-use-and-impact-of-litigation.pdf>

⁷⁹ Boutcher & McCammon *supra* note 41.

jurisdictions and supra-/international courts.⁸⁰ This also includes research on the use of strategic litigation in countries in Europe,⁸¹ in ‘U.S.-like’ states,⁸² in authoritarian contexts/illiberal democracies,⁸³ and new(er) democracies/developing countries.⁸⁴ First, this section addresses research on strategic litigation before national courts and international courts (section 3.1), after which works on the European courts are discussed (section 3.2). General relevant contextual factors that arise from the literature are the system of government and procedural/substantive law, the independence of the judiciary, and public attitudes towards law.⁸⁵ A first comprehensive work is Brickhill’s study on strategic litigation in South Africa.⁸⁶ He identifies several concrete factors that contributed to the occurrence of social change after strategic litigation.⁸⁷ Among others he argues one of these is South Africa’s constitutional framework, which allowed courts to enforce existing rights and order more structural remedies.⁸⁸ Additionally, Brickhill identified the well-resourced public interest organizations (including skilled lawyers) and certain socio-economic and socio-political factors (such as favorable public opinion) as

⁸⁰ See for a different overview (also on the notion of lawfare): T. Matthews, ‘Interrogating the Debates Around Lawfare and Legal Mobilization: A Literature Review’, *Journal of Human Rights Practice*, 15(1), 2023, p. 24-45. Gloppen provides a more general framework for researching litigation as a strategy in the context of the right to health, see S. Gloppen, ‘Litigation as a strategy to hold governments accountable for implementing the right to health’, *Health and Human Rights: An International Journal*, 10(2), 2008, p. 21-36. I have not taken into account implementation studies per se, such as C. Gianella-Malca, S. Gloppen & E. Fosse, ‘Giving Effect to Children’s Right to Health in Colombia? Analysing the Implementation of Court Decisions Ordering Health System Reform’, *Journal of Human Rights Practice*, 5(1), 2013, p. 153-176.

⁸¹ P. Cebulak, M. Morvillo & S. Salomon, ‘Strategic Litigation in EU Law: Who does it Empower?’, *German Law Journal*, 25(6), 2024, p. 800-821.

⁸² E. Birchall (ed.), *Strategic Human Rights Litigation in Australia*, Alexandria, New South Wales: The Federation Press 2025.

⁸³ L. Chua, ‘Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore’, *Law & Society Review*, 46(4), 2012, p. 713-748.

⁸⁴ J. Brickhill, *Strategic litigation in South Africa: Understanding and evaluating impact*, Dphil Thesis, University of Oxford, available at: <https://ora.ox.ac.uk/objects/uuid:e7be10e6-c511-40b1-8126-df3b3b229b5b>; A. Bhuwania, ‘Courting the People: The Rise of Public Interest Litigation in Post-Emergency India’, *Comparative Studies of South Asia Africa and the Middle East*, 34(2), 2014, p. 314-335; Varun Gauri and Daniel Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge, Cambridge University Press 2008.

⁸⁵ H. Hershkoff & A. McCutcheon, ‘Public Interest Litigation: An International Perspective’, in M. McClymont & S. Golub (eds.), *Many Roads To Justice: The Law Related Work Of Ford Foundation Grantees Around The World*, The United States Of America: The Ford Foundation, 2000, p. 89-126.

⁸⁶ Brickhill *supra* note 81. See also by Brickhill on strategic litigation in South Africa more generally: J. Brickhill, ‘Public Interest Litigation in South Africa’, *Advocate*, 2018, available at: <https://www.gcbsa.co.za/law-journals/2018/december/2018-december-vol031-no3-pp36-43.pdf>

⁸⁷ Brickhill *supra* note 83.

⁸⁸ *Ibid.*

vital why strategic litigation, as part of this context, achieved its aims.⁸⁹ In Colombia, then, Roa and Klugman similarly identify four main factors as vital to the success of strategic litigation: (1) an existing rights framework; (2) an independent and knowledgeable judiciary; (3) civil society organizations with the capacity to frame social problems as rights violations and to litigate; and (4) a network able to support and leverage the opportunities presented by litigation.⁹⁰ Duffy, in her well-known book on strategic human rights litigation, identifies a range of possible (positive) impacts (based on her first-hand experience): victim impact, legal impact, impact on policy & practice, institutional impact, information & truth, social & cultural, mobilization and empowerment, democracy and rule of law.⁹¹

Scholarship in individual countries in Europe has also evolved so as to look at this topic,⁹² with authors concluding that some of the critiques from the U.S. literature are taken on board by NGOs active in Europe – by assessing the relative (dis)advantages of litigation compared to other strategies, for example.⁹³ Findings are at times similar: litigation does not need to be successful on the merits, but can also be a way of signaling a topic or participating in a formal institutional arena.⁹⁴ Donald and Mottershaw, in their article, argue to cast the net wide when studying strategic litigation and look at both process and outcome, policy and implementation, and experiences of constituencies.⁹⁵ Their study on 10 cases, which was repeated in a more extensive single case study by

⁸⁹ *Ibid.*

⁹⁰ M. Roa & B. Klugman, 'Considering Strategic Litigation As An Advocacy Tool: A Case Study Of The Defence Of Reproductive Rights In Colombia', *Reproductive Health Matters*, 22(44), 2014, p. 31-41.

⁹¹ H. Duffy, *Strategic Human Rights Litigation. Understanding And Maximising Impact*, Oxford: Hart Publishing, 2018.

⁹² Starting already in 1992, see C. Harlow & R. Rawlings, *Pressure Through Law*, London: Routledge, 1992. See further L. Israël, 'Legalise It! The rising place of law in French sociology', *International Journal of Law in Context*, 9(2), 2013, p. 262-278; J. Handmaker & S. Taekema, 'O lungo Drom: Legal Mobilization as Counterpower', *Journal of Human Rights Practice*, 15(1), 2023, p. 6-23; D. Fjellborg, 'Banging on Closed Doors or Beating the Drum? Social Movements' Interpretations of Opportunities in Legal Appeal Processes', *Social Movement Studies*, 24(1), 2025, p. 95-112; G. Fuchs, 'Using Strategic Litigation For Women's Rights: Political Restrictions In Poland And Achievements Of The Women's Movement', *European Journal Of Women's Studies*, 20(1), 2013, p. 21-43.

⁹³ Handmaker & Taekema *supra* note 91, p. 7.

⁹⁴ Fjellborg *supra* note 91.

⁹⁵ A. Donald & E. Mottershaw, 'Evaluating The Impact Of Human Rights Litigation On Policy And Practice: A Case Study Of The UK', *Journal Of Human Rights Practice*, 1(3), 2009, p. 339-361.

Vanhala, Lambe & Knowles, again paints a positive picture of winning in court, empowerment, and changing public opinion.⁹⁶

These authors all paint a somewhat ‘rosy’ picture of the potential of strategic litigation in these respective contexts, however, other authors show that successful outcomes are not necessarily always the case. In India, the Supreme Court has the ability to issue far-reaching structural remedies and can continue its jurisdiction (mandamus) over cases, but this contextual factor does not ensure guaranteed social reform.⁹⁷ In the edited volume of Guari & Brinks, strategic litigation on social and economic rights in the developing world is assessed.⁹⁸ Providing a nuanced analysis, the book’s key findings distinguish between different models of judicial intervention (individualized versus structural), while also identifying different contextual factors that make strategic litigation more effective: supportive political environments, dialogic remedies by courts (rather than rigid commands), and courts complementing policy-making – as opposed to replacing it.⁹⁹

In their analysis of the potential of strategic litigation before international courts, Caserta and Rask Madsen conclude that for litigation to have impact, there is the need for institutional opportunities (new judicial avenues or laws), coordinated legal strategies, plus societal momentum or at least the absence of political contestation.¹⁰⁰ Alter, on top of that, finds that litigation before international courts can provide legal, symbolic, and leverageable resources that shift the political balance in favor of domestic and international actors who prefer policies that are more consistent with international law.¹⁰¹ Civil society can thus use case law from international courts to put pressure on compliance partners – similar to Epp’s argument of the support structure.¹⁰²

⁹⁶ L. Vanhala, S. Lambe, and R. Knowles, ‘Let Us Learn’: Legal Mobilization for the Rights of Young Migrants to Access Student Loans in the UK’, *Journal of Human Rights Practice*, 10(3), 2018, p. 439-460

⁹⁷ Bhuwania *supra* note 83.

⁹⁸ Gauri & Brinks *supra* note 83.

⁹⁹ *Ibid.* Dialogic remedies are also stressed by Rodríguez-Garavito, see Rodríguez-Garavito *supra* note 46.

¹⁰⁰ S. Caserta & M. Rask Madsen, ‘When the Sun, the Moon and the Stars Align: Litigating LGBTQIA+ Rights and the Death Penalty in East Africa and the Caribbean’, *European Journal of International Law*, 35(3), 2024, p. 727-749.

¹⁰¹ K. Alter, *The New Terrain Of International Law: Courts, Politics, Rights*, New Jersey: Princeton University Press, 2014.

¹⁰² *Ibid.*

A comprehensive recent study has been conducted by Botero, looking at socio-economic rights in the global south (Colombia, Argentina and India).¹⁰³ She makes a distinction between immediate effects and outcomes, i.e. a temporal difference.¹⁰⁴ Immediate effects consist of ideas and discourse, formal norms, organizational changes, and resources. Outcomes relate to the effect on the underlying constituency, rights realization.¹⁰⁵ Importantly, Botero combines the concept of compliance (with which she refers to Rosenberg) and the symbolic/ideational effects of litigation in her conceptualization of impact (more in line with McCann).¹⁰⁶ She criticizes the existing literature for focusing on one of three elements: a court's agency, the role of litigants, or electoral incentives of elites (i.e. political support).¹⁰⁷ She combines the three in her work, concluding that court monitoring mechanisms, whereby civil society is involved (public collaborative oversight arena), is an important factor in realizing impact with strategic litigation.¹⁰⁸ Additionally, she argues that legal density of social movement organizations, i.e. to what extent these organizations can collectively mobilize (because of how active they are, their networks, and their funding), plays an important role in creating change after the litigation procedure has ended.¹⁰⁹ However, if the legal density of the social movement is too diverse, their aims and approaches do not always align and this can negatively affect impact.¹¹⁰ The mapping of civil society organizations is, in this regard, vital.¹¹¹

More subjectively, several comprehensive reports produced by civil society organizations themselves are available now as well. These tend to be rather optimistic, stressing how planning and strategy around litigation are vital, how litigation should be combined with other advocacy forms, etcetera.¹¹² Open Society Foundations, and specifically their Open Society Justice Initiative, are one of the main organizations

¹⁰³ Botero *supra* note 28.

¹⁰⁴ *Ibid*, p. 13.

¹⁰⁵ *Ibid*, p. 15.

¹⁰⁶ *Ibid*, p. 17-18.

¹⁰⁷ *Ibid*, p. 20-22.

¹⁰⁸ *Ibid*, p. 172. She concludes there are certain caveats to her initial theory, as powerful state actors can take over the role of civil society.

¹⁰⁹ *Ibid*, p. 26.

¹¹⁰ *Ibid*, p. 178.

¹¹¹ *Ibid*.

¹¹² S. Budlender, G. Marcus & N. Ferreira, *Public Interest Litigation And Social Change In South Africa: Strategies, Tactics And Lessons*, Bermuda: The Atlantic Philanthropies, 2014, available at: <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf>.

involved in strategic litigation around the world, either as funder of others or litigant themselves.¹¹³ In this regard, they have produced several reports measuring and evaluating impact of their strategic litigation.¹¹⁴ These generally paint a more positive picture (most likely related also to their necessity to attract funders), focusing mainly on benefits (raising awareness, strengthening rule of law, etc.) and less on limitations and risks.¹¹⁵ Their most comprehensive report looks at litigation in different contexts around the world, identifying many positive impacts, but also flagging that every case is highly contextual.¹¹⁶ Especially implementation was in their 2018 report considered a problematic aspect, leading to a separate report on implementation and follow-up.¹¹⁷ While these reports are a useful resource for (empirical) evidence on strategic litigation, as Barber rightly points out, human rights organizations suffer from the problem that assessing success is done in post-hoc evaluations, as opposed to based on goals identified at the outset.¹¹⁸

In sum, this literature is slightly more optimistic (generally speaking) than its U.S. counterpart and more focus is placed on contextual factors that are beneficial for achieving aims with strategic litigation. An important contribution made is the focus on the importance of incremental change, as opposed to more sweeping forms of reform – internalizing to some extent the new approach of the U.S. literature.¹¹⁹ Nevertheless,

¹¹³ See <https://www.justiceinitiative.org/>

¹¹⁴ Open Society Foundations, *Advancing Public Health Through Strategic Litigation: Lessons From Five Countries*, 2016, available at: <https://www.opensocietyfoundations.org/uploads/c60a09ac-8877-43d4-a875-6ad3ede223a2/advancing-public-health-through-strategic-litigation-20160622.pdf>; Open Society Foundations, *Strategic Litigation Impacts. Insights From Global Experience*, 2018, available at: <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf>; Open Society Foundations, *Implementing Human Rights Decisions: Reflections, Successes, And New Directions*, 2021, available at: <https://www.justiceinitiative.org/uploads/3e398a5e-0b10-4fa4-ba28-275bc909a8f8/implementing-human-rights-decisions-20210721.pdf>.

¹¹⁵ Open Society Foundations 2016, *supra* note 113.

¹¹⁶ Open Society Foundations 2018, *supra* note 113.

¹¹⁷ Open Society Foundations 2021, *supra* note 113.

¹¹⁸ C. Barber, 'Tackling The Evaluation Challenge In Human Rights: Assessing The Impact Of Strategic Litigation Organisations', *The International Journal of Human Rights*, 16(3), 2012, p. 411-435.

¹¹⁹ T. Ezer & P. Patil, 'Strategic Litigation To Advance Public Health', *Health And Human Rights Journal*, 20(2), 2018, p. 149-160; M. Baumgärtel, *Demanding Rights: Europe's Supranational Courts and the Dilemma of Migrant Vulnerability*, Cambridge: Cambridge University Press, 2019; V. Passalacqua, 'Legal Mobilization via Preliminary reference: Insights from the Case of Migrant Rights', *Common Market Law Review*, 58(3), 2021, p. 751-776.

several works in the international context lack empirical evidence with authors employing a legal-doctrinal/document analysis.¹²⁰

3.2 The European context

Literature on Europe is particularly relevant to the adaptation of existing works on the potential of strategic litigation in the European asylum context – despite these works being scarce. Europe has had its own ‘rights revolution’¹²¹ due to the creation of supranational courts (the multi-level system) and fundamental rights at European and international level (alongside national-level bills of rights).¹²² More specifically, the EU has brought in a new level of opportunity structures.¹²³ If EU law has a comparative advantage over national law, it can be effectively mobilized to change national laws and policies.¹²⁴ Surveying the field of EU law litigation, Hermansen and Pavone conclude that most studies on social change (which they refer to as ‘downstream effects’) focus on direct effects, i.e. compliance and policy change, whereas research on indirect effects (public opinion, media attention) is lacking.¹²⁵ This finding is echoed by Cebulak, Morvillo &

¹²⁰ J. Goldston, ‘Public Interest Litigation In Central And Eastern Europe: Roots, Prospects, And Challenges’, *Human Rights Quarterly*, 28(2), 2006, p. 492-527; M. Heywood, ‘South Africa’s Treatment Action Campaign: Combining Law And Social Mobilization To Realize The Right To Health’, *Journal Of Human Rights Practice*, 1(1), 2009, p. 14-36; Roa & Klugman *supra* note 87; J. Hernandez & A. Levesque, ‘Movement Lawyering and the Caring Society Litigation’, *Journal of Human Rights Practice*, 15(2), 2023, p. 395-413; M. Ramsden, ‘Strategic Litigation Before The International Court Of Justice: Evaluating Impact In The Campaign For Rohingya Rights’, *European Journal Of International Law*, 20(2), 2022, p. 441-472

¹²¹ D. Anagnostou, ‘Law and Rights’ Claiming on behalf of Minorities in the Multi-level European System’, in Dia Anagnostou (ed.), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System*, Oxford and Portland Oregon: Hart Publishing, 2014, p. 1-24; M. Land, K. Libal & J. Chambers (eds.) (2021), *Beyond Borders: The Human Rights of Non-Citizens at Home and Abroad*, Cambridge: Cambridge University Press.

¹²² Anagnostou *supra* note 118, p. 4. See also on the international level B. Simmons, *Mobilizing for human rights: international law in domestic politics*, Cambridge: Cambridge University Press, 2012.

¹²³ L. Conant, A. Hofmann, D. Soennecken & L. Vanhala, ‘Mobilizing European law’, *Journal of European Public Policy*, 25(9), 2018, p. 1376-1389; R. Evans Case & T. Givens, ‘Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive’, *Journal of Common Market Studies*, 48(2), 2010, p. 221-241. See also on the European Court of Human Rights: R. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Cambridge: Cambridge University Press, 2007.

¹²⁴ Passalacqua *supra* note 116. EU law does not always provide this advantage due to procedural obstacles or the fact that EU Member States ‘hide’ behind EU law, see C. Eckes, ‘Strategic Climate Litigation before National Courts: Can European Union Law be used as a Shield?’, *German Law Journal*, 25(6), 2024, p. 1022-1042.

¹²⁵ S. Lyder Hermansen & T. Pavone, ‘EU Law Litigation: Who litigates, who influences judges, what downstream effects?’, in D. Naurin, U. Sadl, & J. Zgliniski (eds.), *Empirical Legal Studies of EU Law*, Cambridge: Cambridge University Press (forthcoming).

Salomon.¹²⁶ Many existing works use document analysis or remain focused on legal/policy change. For example, studies on compliance exist (looking at ‘judicial Europeanization’), which investigate the effects of European Court of Justice (ECJ) rulings at the domestic level.¹²⁷ One study points to NGOs as decentralized enforcers of EU law, however, these authors themselves point out that there is a significant gap in the literature on whether NGOs are successful at this.¹²⁸ There is some (limited) quantitative data on strategy choice of CSOs in Europe. Hofmann and Naurin show that litigation is not as prominent of a strategy of European groups – they go to court less than their US counterparts.¹²⁹ Moreover, they find that groups who are politically active and more resourceful also go to court more often.¹³⁰ In relation to the ECtHR, Cichowski shows 3 relevant factors that shape the impact of strategic litigation before this court: standing rules and rights, the Court’s review power, and interest and advocacy group expertise and resources.¹³¹ Also for the ECtHR, authors have stressed how judgments can have indirect (radiating) effects, but this is not based on qualitative interview/survey data.¹³²

One of the exceptions to this lack of qualitative empirical studies on strategic litigation in Europe is Pavone’s 2022 book, in which he indicated that certain types of change, such as a rise in legal consciousness and backlash in public opinion, can occur when European law is mobilized.¹³³ Moreover, Pavone argues that lawyers within national contexts have actually driven the process of European integration, as these ‘Euro-lawyers’ act as political actors between national politics and supranational law/courts.¹³⁴ Passalacqua, similarly, stresses the role of specific Euro-expertise in order to successfully

¹²⁶ P. Cebulak, M. Morvillo & S. Salomon, ‘Strategic Litigation in EU Law: Who does it Empower?’, *German Law Journal*, 25(6), 2024, p. 800-821.

¹²⁷ D. Seikel, ‘Class Struggle in the Shadow of Luxembourg: The Domestic Impact of the European Court of Justice’s Case Law on the Regulation of Working Conditions’, *Journal of European Public Policy*, 22(8), 2015, p. 1166-1185; M. Blauberger, ‘With Luxembourg in Mind ... the Remaking of National Policies in the Face of ECJ Jurisprudence’, *Journal of European Public Policy*, 19(1), 2012, p. 109-26.

¹²⁸ K. Reiners & E. Versluis, ‘NGOs as new Guardians of the Treaties? Analysing the effectiveness of NGOs as decentralised enforcers of EU law’, *Journal of European Public Policy*, 30(8), 2023, p. 1518-1536.

¹²⁹ A. Hofmann & D. Naurin, ‘Explaining interest group litigation in Europe: Evidence from the comparative interest group survey’, *Governance*, 34(4), 2021, p. 1235-1253.

¹³⁰ *Ibid.*

¹³¹ R. Cichowski, ‘The European Court of Human Rights, Amicus Curiae, and Violence against Women’, *Law & Society Review*, 50(4), 2016, p. 890-919.

¹³² E. Fokas & D. Anagnostou, ‘The “Radiating Effects” Of The ECtHR On Social Mobilizations Around Religion And Education In Europe: An Analytical Frame’, *Politics And Religion*, 12, 2019, p. 9-30.

¹³³ T. Pavone, *The Ghostwriters: Lawyers and the Politics behind the Judicial Construction of Europe*, Cambridge: Cambridge University Press, 2022.

¹³⁴ *Ibid.*

engage in strategic litigation at EU level.¹³⁵ These authors, thus, emphasize the importance of resources in order to achieve aims with strategic litigation in Europe. Hoevenaars' study showed the other side of the coin to this: due to a high level of Euro-expertise, individuals can be left behind, which raises accountability issues.¹³⁶ One specific socio-legal study looked at the effectiveness European courts in the migration field.¹³⁷ Baumgärtel, in his book, deploys a top-down approach, assessing law development effectiveness, case-specific effectiveness, and strategic effectiveness.¹³⁸ He comes to the conclusion that strategic litigation can be successful if deployed for incremental forms of change and consolidation of rights, as opposed to going for sweeping impact.¹³⁹ Synthesizing most of the works above, Cebulak and others provide a framework for future research on strategic litigation in the EU. They suggest to distinguish between three ideal types of actors (the loner, the organization, and the corporation), three types of structures/arguments (procedural, substantive, and constitutional principles) and three types of effects.¹⁴⁰ These effects can take place in the courtroom (legal effects), the square (socio-economic effects), and the palace (political effects).¹⁴¹

4. Criticism and adaptation to the European asylum context – law as a sword or shield?

4.1 Criticism on the literature: concepts and methodologies

Based on the literature above, I have several points of critique. These are elaborated on in this section (4.1). Afterwards, in 4.2, an adaptation of the literature to the European asylum context is made. Hershkoff, in a 2010 overview article, concludes that three aspects are overlooked in the literature on law and social change as of then: differences in judicial capacity, a non-linear approach to change, and the methodology used (including

¹³⁵ V. Passalacqua, 'Legal Mobilization via Preliminary reference: Insights from the Case of Migrant Rights', *Common Market Law Review* 2021, 58, p. 751-776.

¹³⁶ J. Hoevenaars, *A People's Court? A Bottom-Up Approach to Litigation before the European Court of Justice*, The Hague: Eleven Publishing, 2018.

¹³⁷ Baumgärtel *supra* note 118.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Cebulak, Morvillo & Salomon *supra* note 125.

¹⁴¹ *Ibid.*

a discussion of complex relations).¹⁴² Based on sections 2 and 3, I come to different criticisms (which include aspects of Hershkoff's), which are further detailed below. The first criticism is conceptual: many authors lack a clear definition of their object of study (strategic litigation/legal mobilization) and a clear conceptualization of change/impact/effects. The second criticism pertains to methods used, as many works lack original empirical data. The third and final criticism is methodological, since the issue of drawing causal connections between litigation and change is not always addressed.

Firstly, it is striking that a range of studies fail to incorporate conceptualization and explanation of two main concepts: strategic litigation (as object of study) and change (or impact/effects). Strategic litigation, or legal mobilization, can and has not only been defined in different ways, it also has different features depending on the legal system (civil, administrative, national, European, etc.) and the area of law. The 'input' of strategic litigation (or the *ex ante* situation) is, therefore, not always addressed. Moreover, as the newer U.S. literature has shown, a more comprehensive approach (the legal mobilization approach) is more useful in assessing the change on the ground created by litigation procedures as it takes a broader view on causality, but this approach is not consistently adopted in the (inter)national field – which ties into the second criticism explained below. The concept of (social) change, interchangeably used with 'impact(s)' or 'effect(s)' is often kept vague and broad, with different typologies deployed. Duffy's book, for example, using a wide range of impacts, whereas Brickhill and others distinguish only three.¹⁴³ Others make temporal distinctions, looking at more immediate outcomes and later reforms. This lack of consistency is not necessarily a problem, but conceptualizations often fail to take into account the specificities of legal system and the status quo in that specific area of the law

The second point of critique is that very often, both in the U.S. and other literature, there is a lack of original empirical data included in research, leading to a rehashing of similar (dis)advantages of strategic litigation found in earlier work. Claims made in these works are not tested empirically. Evidence presented is often focused on legal change &

¹⁴² H. Hershkoff, 'Public Law Litigation: Lessons and Questions', *Human Rights Review*, 10(2), 2010, p. 157-181.

¹⁴³ Duffy *supra* note 90; Rodríguez-Garavito *supra* note 46; Brickhill *supra* note 83. Brickhill also includes 'material' impacts, but these are irrelevant in some fields of law.

wins,¹⁴⁴ with the mentioned caveat that change on the ground is different from a win in court. Thus, many ‘reflections’ on strategic litigation focus rather on litigation procedures and their immediate legal (and perhaps policy) impact, without the use of a broader – legal mobilization – perspective on litigation and social change.¹⁴⁵ A noteworthy example is the article of Ramsden, who looks at the impact of strategic litigation before the International Court of Justice. While explaining the extra-legal aims of this type of litigation, he does not include empirical evidence in his analysis.¹⁴⁶ On a related note, some studies focus narrowly on cause lawyers (or political lawyers), without looking at the movements within which – or outside of which – they are operating, making the broader picture unclear.¹⁴⁷

Third, it is noteworthy that many studies pay very little attention to causality.¹⁴⁸ As the discussion on positivism versus interpretivism shows, the way in which causality (and the conceptualization of ‘change’ for that matter) is approached significantly influences the type of analysis carried out. Nevertheless, a large number of the works cited above remain silent on the ‘problem’ of causality, leaving the following question unanswered: how do you prove that the occurrence of change can be linked to strategic litigation? Some studies do address this problem, such as the report of the Open Society Justice Initiative,

¹⁴⁴ In the field of asylum specifically, there was a special issue of the *German Law Journal* in 2020 focusing on (among other aspects) strategic litigation, but the analyses were mainly doctrinal. See C. Costello & I. Mann, ‘Border Justice: Migration and Accountability for Human Rights Violations’, *German Law Journal*, 21(3), 2020, p. 311-334; C. Ferstman, ‘Human Rights Due Diligence Policies Applied to Extraterritorial Cooperation to Prevent “Irregular” Migration: European Union and United Kingdom Support to Libya’, *German Law Journal*, 21(3), 2020, p. 459-486; I. Kalpouzos, ‘International Criminal Law and the Violence against Migrants’, *German Law Journal* 21(3), 2020, p. 571-597; V. Moreno-Lax, ‘The Architecture of Functional Jurisdiction: Unpacking Contactless Control-On Public Powers, S.S. and Others v. Italy, and the “Operational Model”’, *German Law Journal*, 21(3), 2020, p. 385-416; N. Tan & T. Gammeltoft-Hansen, ‘A Topographical Approach to Accountability for Human Rights Violations in Migration Control’, *German Law Journal*, 21(3), 2020, p. 335-354. Some of these authors have been involved in strategic litigation themselves.

¹⁴⁵ Examples include: T. Stoddard, ‘Bleeding Heart: Reflections On Using The Law To Make Social Change’, *New York University Law Review*, 72(5), 1997, p. 967-991; R. Goldstone & B. Ray, ‘The International Legacy Of Brown V. Board Of Education’, *McGeorge Law Review*, 35, 2004, p. 105-120.

¹⁴⁶ Ramsden *supra* note 119.

¹⁴⁷ A. Sarat & S. Scheingold (eds.), *Something to Believe in: Politics, Professionalism, and Cause Lawyering*, Redwood City, California: Stanford University Press, 2004; A. Sarat & S. Scheingold (eds.), *Cause Lawyers and Social Movements*, Redwood City, California: Stanford University Press 2006; K. Loewy, ‘Lawyering For Social Change’, *Fordham Urban Law Journal*, 27(6), 2000, p. 1869-1901; D. Katz & L. Bernabei, ‘Practicing Public Interest Law In A Private Public Interest Law Firm: The Ideal Setting To Challenge The Power’, *West Virginia Law Review*, 96(2), 1994, p. 293-316.

¹⁴⁸ Examples are: A. Hatano, ‘Can Strategic Human Rights Litigation Complement Social Movements: A Case Study of the Movement against Racism and Hate Speech in Japan’, *University of Pennsylvania Asian Law Review* 14(2), 2019, p. 228-274; Hernandez & Levesque *supra* note 117.

but then fail to explicate how the problem of showing causality has been overcome.¹⁴⁹ Causality and/or correlation are rarely addressed, the net is ‘cast wide’,¹⁵⁰ without discussing what implications such an approach has – or how operationalization takes place. Moreover, many studies use only anecdotal evidence, making it unclear how findings can be translated to a broader context.¹⁵¹ Newer studies, such as Cummings’ 2023 book, show the complexity of litigation within a broader social movement and in relation to other (political) strategies. This approach provides a clearer picture as to what kind of social change has occurred – without attributing it to litigation or another strategy per se, but more to the myriad of strategies deployed.

In sum, several aspects of existing works can be criticized as they do not (or cannot) show the full picture of what strategic litigation has achieved in relation to social change. It is noteworthy that a 2017 study by Tankard & Paluck presented the first experimental evidence on how court judgments change public opinion in the U.S. – as changing public opinion is always mentioned as a possible effect of strategic litigation.¹⁵² If the object of study (strategic litigation/legal mobilization) and change/impact are conceptualized correctly, the notions are to be operationalized and assessed through a range of methods. While the field has developed and expanded globally, these methodological issues remain. This can be explained in part as some literatures do not speak to one other, as rightly pointed out by Botero. Some literature focuses on compliance and the capacities of courts, whereas others (as most of the studies addressed above) want to highlight effectiveness of court judgments, looking at the role of civil society.¹⁵³ Moreover, the literature on judges’ ability to act (focusing on judicial independence, rules and procedure, public opinion on courts (legitimacy)) does not speak to the more ‘subjective’ literature deploying the legal mobilization approach.¹⁵⁴ A holistic perspective, including specification to the area of law,

¹⁴⁹ Open Society Foundations 2018, *supra* note 113, p. 28.

¹⁵⁰ Donald & Mottershaw *supra* note 94, p. 341, reiterated by Vanhala, Lambe & Knowles *supra* note 95.

¹⁵¹ Barber *supra* note 117.

¹⁵² M. Tankard & E. Paluck, ‘The Effect Of A Supreme Court Decision Regarding Gay Marriage On Social Norms And Personal Attitudes’, *Psychological Science*, 28(9), 2017, p. 1334–1344.

¹⁵³ C. Hillbrecht, ‘Compliance with Judicial Decisions’, in L. Epstein, G. Grendstad, U. Sadl & K. Weinshall (eds.), *Oxford Handbook of Comparative Judicial Behaviour*, New York: Oxford University Press, 2023, p. 849–868.

¹⁵⁴ G. Rosenberg, ‘Courts as Agents of Change’, in L. Epstein, G. Grendstad, U. Sadl & K. Weinshall (eds.), *Oxford Handbook of Comparative Judicial Behaviour*, New York: Oxford University Press, 2023, p. 869–892.

what strategic litigation/legal mobilizations consists of there, and looking both at (inter)national/European/national level opportunities (structures) and outcomes, as well as internal aspects, is warranted.

4.2 Adaptation to the European asylum context

In line with the conclusions drawn in section 4.1, this section will comment on and adapt the literature from sections 2 and 3 to the specific context of asylum law in Europe. On a macro-level, firstly, despite concerns of rule of law backsliding (and acknowledging different situations per state), European states form Western liberal democracies.¹⁵⁵ Court judgments are generally complied with and the judiciary is independent. As opposed to several courts in the developing world, European national courts do not have the power to issue structural injunctions – which in theory interfere more with social processes than declarations of law/individual injunctions/awarding damages.¹⁵⁶ On top of that, there is also no dialogic remedial phase, meaning that stakeholders (such as civil society organizations) can rarely engage with courts over remedies and implementation. Implementation is often left to political actors. Finally, the European system is unique as it has two supranational courts (CJEU and ECtHR) that are available avenues for strategic litigation.¹⁵⁷

For asylum specifically, it is relevant that the asylum policy of individual European states has been harmonized through EU law. Additionally, through the jurisprudence of the European courts, a true Europeanization of Europe's asylum policy has taken place.¹⁵⁸ This provides for interesting leverage for civil society organizations, as section 3.2 has described that when EU law has a comparative advantage over national law, it can be mobilized effectively. At the same time, there is not a lot of literature on the effectiveness of asylum litigation in the EU context.¹⁵⁹ Protopapa has argued, based on document

¹⁵⁵ This changes the playing field significantly, according to Chua *supra* note 80.

¹⁵⁶ Epp 2008 *supra* note 43.

¹⁵⁷ EU law is also notably mobilized by powerful corporate actors, see A. Hofmann, 'The Legal Mobilization of EU Market Freedoms: Strategic Action or Random Noise?', *West European Politics*, 48(2), 2025, p. 423-448.

¹⁵⁸ E. Guild, 'The Europeanisation of Europe's Asylum Policy', *International Journal of Refugee Law*, 18(3-4), 2006, p. 630-651.

¹⁵⁹ See exceptionally V. Protopapa, 'From Legal Mobilization to Effective Migrants' Rights: The Italian Case', *European Public Law*, 26(2), 2020, p. 477-507. Protopapa does not use original qualitative data in her analysis.

analysis, that a larger support structure has led to an effectuation of EU right for migrants in Italy.¹⁶⁰ This support Conant's earlier finding (on EU migrants specifically), that a lack of organizational capacity, among other variables, has limited the impact of litigation to enhance their rights.¹⁶¹ Hoevenaars also concludes that this support structure and Euro-expertise, in addition to framing many issues through a legal lens, has been present in several mobilization campaigns for migrant rights.¹⁶² This means that civil society organizations working on European asylum matters defy the typology of the loner, organization and corporation advanced by Cebulak and others.¹⁶³ Finally, Pijnenburg and van der Pas conclude that NGOs, lawyers and activists collaborate and integrate their legal strategies in order to fight rights violations due to European migration control policies.¹⁶⁴ However, they also conclude that states tend to change the law when confronted with case law they do not agree with.¹⁶⁵

As Ogg rightly points out, there is a lack of studies into strategic litigation on asylum matters – not only in Europe.¹⁶⁶ Kavar is one of the few providing an extensive analysis of what she refers to as 'legal activism' (or cause lawyering) and its impact on asylum (immigration) policy.¹⁶⁷ She deploys a different type of approach than most of the aforementioned writers, but more in line with the constructivist approach, she looks at how contestation of immigration policy in court (as a culturally productive activity) has generated 'radiating effects'.¹⁶⁸ She argues, in this regard, that litigation has shaped legal

¹⁶⁰ *Ibid.*

¹⁶¹ L. Conant, *Justice Contained: Law and Politics in the European Union*, Ithaca, New York: Cornell University Press, 2002.

¹⁶² Hoevenaars *supra* note 135, p. 206-207.

¹⁶³ Cebulak, Morvillo & Salomon *supra* note 125.

¹⁶⁴ Pijnenburg & van der Pas *supra* note 11.

¹⁶⁵ I. Mann, 'Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993-2013', *Harvard International Law Journal*, 54(2), 2013, p. 315-391; Pijnenburg & van der Pas *supra* note 4; Hoevenaars *supra* note 133; M. Baumgärtel, 'Part of the Game', in T. Aalberts and T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law*, Cambridge: Cambridge University Press, 2018, p. 103-128.

¹⁶⁶ K. Ogg, 'Fighting for Refugee Rights in Courts, Parliaments and Beyond: The Need for a Different Approach to Identifying and Analysing Strategic Litigation', in E. Birchall (ed.), *Strategic Human Rights Litigation in Australia*, p. 153-175. Ogg refers to 'refugee rights', which is the more common term in common law jurisdictions.

¹⁶⁷ L. Kavar, *Contesting Immigration Policy in Court: Legal Activism and its Radiating Effects in the United States and France*, Cambridge: Cambridge University Press, 2015.

¹⁶⁸ *Ibid.*, p. 2 (referring to M. Galanter, 'The Radiating Effects of Courts', in K. Boyum & L. Mather (eds.), *Empirical Theories about Courts*, New York, Longmans, 1983, p. 117-142.

frames and narratives in order to construct identities and meanings – despite perhaps limited doctrinal success for the strategic litigants.¹⁶⁹ Ogg, at the same time, problematizes much of the aforementioned literature on strategic litigation and its applicability to the field of asylum law, for two main reasons. First, litigation is often not conducted in one single case and there are multiple actors and litigations surrounding a specific problem – which can be explained by the individual nature of asylum rights.¹⁷⁰ Second, social change in asylum litigation is often not sought from the outset, but litigation is more ad hoc and defensive, hence the strategic aspect often comes only at a later stage.¹⁷¹ In addition to these points, asylum seekers are a specific constituency, who significantly face obstacles to access justice.¹⁷² Generally speaking, this means that lawyers take a prominent role in strategic litigation, as opposed to lawyering on behalf of a movement.¹⁷³ Effects on ‘movements’ are often assessed and reported in the existing literature, such as raising consciousness, form a collective identity, increase bargaining power, make allies (which all have a negative counterpart, i.e. mobilizing opponents, demobilize litigants if litigation is unsuccessful, etc.).¹⁷⁴ Such a social movement does not appear to be there in asylum. This creates an unequal power dimension between the constituency and the lawyers, whereby a model of movement lawyering (acknowledging litigation as one piece of the puzzle)¹⁷⁵ and a legal mobilization approach in research might be difficult to carry out.

5. Conclusion

This paper set out to answer the question how existing research on law/litigation and social change holds up in relation to the specific sub-field of European asylum law. This conclusion summarizes the most important findings and translates these into a more

¹⁶⁹ *Ibid*, p. 153, 158.

¹⁷⁰ Ogg *supra* note 164.

¹⁷¹ *Ibid*.

¹⁷² K. van der Pas, ‘Bridging the gap? Using strategic litigation to increase access to justice of asylum seekers in Europe’, *e-legal*, 9, 2025.

¹⁷³ Van der Pas *supra* note 11.

¹⁷⁴ Albiston *supra* note 57; Hatano *supra* note 146.

¹⁷⁵ Hernandez & Levesque *supra* note 119.

concrete framework that can be used and implied in future research. Through a survey of the wide-ranging U.S. literature and the literature from other jurisdictions plus the supra-/international level, several red threads have been found that signify this type of research. Firstly, distinctive approaches have been found between the court-centered and movement-centered researches: whereas the former look for strict causal connections between law and social change (that often lead them to find little to no evidence thereof), the latter regard law as a social practice and look for correlation between strategic litigation and social change. Second, in the new literature the legal mobilization approach has been adopted by contemporary authors: they map all integrated political and legal strategies deployed by actors on a specific topic – as opposed to focusing on litigation only. This entails forms of political mobilization, grassroots organizing, public/media campaigns, etc., with litigation and law remaining the central object of study.

Nevertheless, this paper has also cast critique on some of the literature. Despite the legal mobilization approach, many authors tend to deploy limited empirical strategies to find evidence of social change through litigation. Methodological and conceptual problems remain as well: what is strategic litigation? What is social change? And how to establish causation or correlation between them? Finally, in an attempt to adapt the literature to the European asylum context, problems can be observed in light of the ‘movement-perspective’ deployed by many researchers. It is unclear whether such a movement exists in European asylum law, and/or whether elite lawyers take grassroots voices into account. The lack of studies into the asylum field does not help here either. Asylum litigation is often individualized, defensive and *ad hoc*, as opposed to preconceived and on behalf of a larger group.

In order to provide a useful tool for future research, the table below provides an overview of the different effects that are to be addressed when researching strategic litigation and social change in the European asylum context. These have been distinguished as ‘input’, meaning the situation *ex ante*, and ‘output’, entailing the situation after strategic litigation has been conducted. One has to devote specific attention to the operationalization of these different effects and how they are to be assessed through empirical research – including discussion of tracing causal connections. Only then can this field of research fully develop to maturity.

Table 1. Framework for researching social change through strategic litigation in European asylum law

	Input (before legal mobilization)	Output (social change)
External aspects	Nature of rights/substantive rights (EU, constitutional)	Precedent, new legislation
	Procedural law	Widening or diminishing of access to justice
	Policy framework	Policy change
	Judicial independence	Backlash on the judiciary
	Implementation processes	Policy implementation
	Political support/political climate	Changes in political discourse, political support (backlash)
	Public support	Public consciousness/awareness
Internal aspects	Resources CSO (financial, Euro-expertise)	Fundraising, increase in knowledge
	Legal consciousness of the constituency	Change in rights awareness
	Relation of the elites to the constituency	Accountability
	Relations within the movement (density, network analysis)	Movement-building or diminishing (legal mobilization dilemma)
	Relations of movement to outsiders	Countermobilization
	Discourse and narratives	Changes in discourse within the movement