

RESENHA

Assessing Strategic Litigation Impact on Human Rights

DUFFY, Helen. Strategic Human Rights Litigation: Understanding and Maximising Impact. Oxford: HART PUBLISHING, 2018.

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Judgment day, verdict is given. Victory! Justice! “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’” (DUFFY, 2018). In *Strategic Human Rights Litigation*, released in 2018, Hellen Duffy argues against the *cliché* of legal victory, and the illusion that winning in court is the ultimate solution to solve human rights violations. Taking advantage of her international professional experience as a practitioner on issues ranging from modern slavery to transitional justice and the war on terror, the author analyzes the field of strategic human rights litigation by exposing its limitations and potential, focusing on developing a framework to better plan and assess impact.

In order to do that, Duffy replaces the binary “victory x defeat”¹ as the main possible outcome of a case by suggesting that “modern lenses” should be used to analyze and broaden the understanding of impact: high definition lenses to identify multiple levels of impact, from victim’s reparation to legal impact and extensive societal changes; wide-angle lenses to understand context and the magnitude of clusters of similar cases; a time-lapser to perceive impact over the years; and, finally, the need to consider multiple perspectives from different actors in the litigation process, such as victims, lawyers and NGOs.

Duffy acknowledges that each case has its own characteristics and avoids to fully standardize and oversimplify the framework for impact assessment. In an area in which the debate between differences in justiciability of civil and political rights and economic, social and cultural rights is still vivid, the author gives less attention to the type of right being litigated to focus on dissecting each situation by analyzing specific contexts, goals and outcomes. Perhaps, by adapting the framework to each situation and avoiding the use of a rigid pattern of identified levels of impact, the author might limit the replication of the framework by others, frustrating those more eager to find in the book a preconceived formula to effective litigation.

¹ Duffy defines Strategic human rights litigation as what is in some systems called public interest litigation, test litigation, simply impact litigation, a growing area of practice globally that involves the increased use of the courts (national and supranational) by lawyers and civil society groups around the world, to advance human rights goals that go beyond the interests of just the applicants in the case. It reflects also the need to be strategic in the way litigation is done, to ensure that the process, both inside and outside of the courtroom, contributes to real success, beyond legal victory. (DUFFY, 2017: 1).



However, the great variety in the facts and rights of the cases allows the author to make analogies, to find common ground between different situations and to underline strategies that can be used in more than one occasion. For instance, the importance of reframing violations to strengthen impact is identified in most of the case studies, such as the development of enforced disappearance in Argentina, the recognition of apartheid in systematic violations against the Palestinians and framing egregious violations against indigenous and rural communities in Guatemala as genocide.

After presenting her framework for assessing the complexities of impact, Duffy identifies its multiple levels, from victim and legal impact, to impact on mobilization and empowerment. The author instigates the reader by placing these guidelines before the case studies in the book, allowing anyone with a minimum acquaintance with human rights issues to engage in her impact assessment of specific cases. Readers from Latin America are contemplated with two cases regarding their region, which turns the reading even more interesting for lawyers and activists that wish to understand better the characteristics of the Inter-American System, such as: the holistic approach of their decisions; its position regarding the right to truth and genocide; and its important role to fostering a discourse on constitutional rights shared across the region's courts (HUNEEUS; MADSEN, 2018).

As a Brazilian reader, it was inevitable to draw comparisons between the chapter on litigation of crimes committed during the Argentinian military dictatorship and transitional justice in Brazil. While the book exposes the impacts of this process in Argentina, such as the strong anti-impunity message sent by the conviction of more than 600 defendants and the relation between truth trials and the reopening of criminal cases, it becomes clear that these proceedings also influenced and had impact in the struggle for accountability in Brazil², although backlash can also be identified. In the last

² In Brazil, a Truth Commission was established in 2011 to investigate crimes committed during the dictatorship. Some efforts were (and still are) made to trial some of the perpetrators as it happened in Argentina, without success, since the Brazilian Supreme Court (Supremo Tribunal Federal) has never revised the amnesty law in the country. The Inter-American Court of Human Rights condemned Brazil for its negligence in investigating, prosecuting, and punishing gross human rights violations twice: in the 2010 Araguaia guerrilla case and in a recent case about the assassination and torture of journalist Vladimir Herzog in 1975. The Court argues the impossibility of justifying the non-investigation of a gross crime by using amnesty laws. For more information about the differences between transitional justice in Brazil and Argentina, see the article by Andrés del Río, "Supreme Court, Institutional Change and Authoritarian Regimes: Argentina and Brazil (1964-1985)".



years, a growing dictatorship-praising rhetoric took over the country, led by a former captain and congressmen that gathered support by conservative sectors of Brazilian society by opposing any type of efforts in supporting advocacy and litigation aiming to hold individuals accountable for their gross crimes during the military dictatorship (FIORATTI,2018) – today he is the Brazilian president.

Strategic Human Rights Litigation also contains examples of how to plan strategy and impact in situations in which instability and the political atmosphere makes it difficult even to guarantee access to justice or to an independent judge. The lack of jurisdiction or independence of the courts portrayed in cases such as the “War on Terror” litigations, and the Argentinian dictatorship are fruitful for current strategic litigation in countries in which the independency of the Judiciary is not guaranteed, such as Hungary and Poland (KOSAR; SIPULOVÁ, 2018). Moreover, the chapter focusing on litigation in the Palestinian Occupied Territories exposes the contempt of the Israeli judiciary towards international human rights authority and can be useful for reader’s in countries in which the current political discourse attacks the authority of human rights and treats activists and NGOs with disdain, such as Bolsonaro’s Brazil and Erdogan’s Turkey (Allen, 2018). In the Palestinian case, Duffy explains how activists have been documenting violations through unsuccessful litigation and buying time by frustrating harmful policies for decades in order to achieve change in the long-term.

Readers from all over the world can benefit from the author’s focus on institutional analysis and legal impact, specially in describing particularities of international and regional human rights bodies and courts. The approach produces an interesting blueprint for a worldwide human rights system already in place, since most cases analyzed by Duffy were formed by a usually uncoordinated cluster of national and international litigation. This allows the author to explore institutional dialogues, new fora for human rights litigation, such as the ECOWAS court in West Africa, and creative aspects to strategically choosing a court or international body to litigate. In the case of the war of terror, Duffy describes how the rights of non-US citizens arrested in Guantánamo ended up in the European Court of Human Rights. And in the chapter about forced disappearances during the Argentinian dictatorship, the author exposes how a mix of pressure from the Inter-American System, the creation of the International Criminal Court and litigation in foreign states based on universal jurisdiction and passive personality influenced national policies and trials, dismantling the logic of unconditional



amnesty. On the other hand, the author also comments the defiance of some states towards the authority of the international human rights mechanisms and the lack of effective regional courts in Asia and the Middle East, as obstacles that limit international justice.³

This pattern of exposing positive impact while pointing out obstacles, limits and dangers for strategic litigation, is another important feature of the book, that debates risk assessment, negative impact and backlash of taking human rights cases to court. During the chapter about the “War on Terror”, Duffy even identifies negative and positive impacts created through the same aspect of a decision: the high reparation awarded to the victim of torture Abu Zubaydah by the European Court of Human Rights was firstly seen as a having a positive symbolic importance, which later backlashed as the media and the general public questioned the payment of ‘terrorists’.

These nuances in strategic human rights litigation presented by the book, together with the multiple areas affected by impact, from changing policies to changing a whole culture, also demand multiple skills for those involved in litigation, including extra-legal ones. In human rights it is not possible to adequately address international wrongdoing without a holistic understanding of the problem, that is part of a political, historical, economic, social and cultural context that needs to be understood to produce the desired results (CARVELHO; BAKER, 2014). Hence, the coordination with advocacy, social movements, international monitoring mechanisms⁴, the media and societal mobilization is seen as a major factor in the success of litigation by Duffy, who considers that litigation should be perceived as a tool to change the landscape of human rights, and not a panacea for all human rights violations.

In addition to creating guidelines towards the improvement of the use of strategic litigation in human rights, the biggest triumph of the book is the fact that it contains a lot of information only made possible by the impressive author’s career as a human right activist all around the globe. These experiences allowed Duffy to add very personal inputs throughout the text, from subjective perceptions to the depiction of informal exchanges with colleagues, as well as on exclusive interviews made with

³ For more information about regional human rights courts and the debate about a World Court of Human Rights, see the article by Phillip Alston, “Against a World Court for Human Rights”.

⁴ The most usual ones are the reporting procedures of the UN Human Rights Treaty Bodies, mandatory to state parties of each treaty, and the Universal Periodic Review of the Human Rights Council of the UN, mandatory to all UN countries.



victims, judges, lawyers and government officials. In the case study *Mani vs. Niger*, Duffy narrates her return to Niger eight years after the victory in the courtroom in order to analyze the strength of multiple impacts of the proceedings in the widespread practice of slavery in the African country. The journey is revealing and emotional, and the author describes different improvements, such as the empowerment of local activists and former victims, social and cultural changes in Niger and neighboring countries, and some shortcomings, such as the correlation between insufficient accountability efforts by the government and persisting impunity.

Overall, the case studies in the book had more positive than negative impacts, and a clearer example of a mostly frustrated litigation could have been detailed. Yet, the fact that backlash and lack of implementation are easily identified even in successful lawsuits confirms the importance to better assess litigation impacts, which is the main purpose of the book.

The massive bibliography, original content and multiple references to many landmark cases from different national and international fora present in *Strategic Human Rights Litigation* gives the publication aspects of both an ontology and a manual for the growing contemporary practice of human rights law. It is a book that should be read by anyone who wishes to be introduced to this field, but also by experienced lawyers and activists, since it contains abundant, exclusive and updated information that can inspire anyone intending to take a significant human rights case to court.

References

ALLEN, Kate. **Turkey's huge crackdown is destroying civil society**. The Guardian, 2018. Available at: <<https://www.theguardian.com/commentisfree/2018/jan/30/amnesty-workers-terrorists-repressive-new-turkey-ngo-draconian-government>>. Accessed on 23/12/2018.

ALSTON, Philip. Against a World Court for Human Rights. **Ethics and International Affairs** v. 28, p. 197-212, 2014.

CARVALHO, Sandra; BAKER, Eduardo. Strategic Litigation Experiences in the Inter-American Human Rights System, **SUR - International Journal On Human Rights**, v. 11 n. 20, p. 449-460, 2014.

DEL RÍO, Andrés. Supreme Court, Institutional Change and Authoritarian Regimes: Argentina and Brazil (1964-1985). **Razón crítica**, v. 1, p. 22-44, 2018.



DUFFY, Helen. **Strategic Human Rights Litigation: ‘Bursting the Bubble on the Champagne Moment’**. Inaugural Lecture Grotius Centre for International Legal Studies, 2017. Available at: <<https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/grotius-centre/oratie-helen-duffy-spreekversie.pdf>>. Accessed on 29/12/2018.

DUFFY, Helen. **The ‘War on Terror’ and the Framework of International Law**. Cambridge: Cambridge University Press, 2015.

FIORATTI, Gustavo. **Bolsonaro inflou antipetismo ao se opor à Comissão Nacional da Verdade**. Folha de São Paulo, 2018. Available at: <<https://www1.folha.uol.com.br/poder/2018/10/bolsonaro-inflou-antipetismo-ao-se-opor-a-comissao-nacional-da-verdade.shtml>>. Accessed on 20/12/2018.

HUNEEUS, Alexandra; MADSEN, Mikael Radsen. Between Universalism and Regional Law and Politics: A Comparative History of the American, European, and African Human Rights Systems. **International Journal of Constitutional Law**, 16 (1), p. 136–160, 2018.

KOSAR, David; ŠIPULOVÁ, Katarína. The Strasbourg Court Meets Abusive Constitutionalism: Baka V. Hungary and the Rule of Law. **Hague Journal on the Rule of Law**, v. 10 (1), p. 83–110, 2018.

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