Strategic Litigation and International Internet Law

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Abstract The phenomenon of strategic litigation is becoming more global, inter-disciplinary and its prevalence is increasing in various areas of law. This chapter is based on the prima facie definition of strategic litigation as a method using legal means to achieve a change in the interpretation or implementation of the law beyond the scope of an individual case and to bring societal or political change. The internet has played a multidimensional role in strategic litigation activities and their influence on society, international legal scholarship and the development and interpretation of the law. Activities of legislators concerning the internet are under particular scrutiny of the digital internet community and have mobilized mass protests of the public. Internet law and digital rights have become important and ever-growing objects of strategic litigation by civil society as a resort from the political sphere to the judiciary. Based on this background, the chapter briefly analyses strategically litigating NGOs and strategic cases with transnational effects regarding international internet law and digital rights, in particular before European and US courts. NGOs and strategic litigation networks, as well as groups and individuals, have taken action against regulations and practices in the field of the internet; a well-known case is the action of Schrems against Facebook. Actors of strategic litigation are especially increasing their online public outreach activities and using the internet and its capacities for spreading information to raise public awareness. While there is much potential for strategic litigation regarding international internet law, there are also challenges and concerns requiring an examination. Nevertheless, strategic litigation enhances civil society's impact on law-making as well as the application, implementation and enforcement of international internet law. Moreover, it contributes to furthering an individual right's centred understanding of internet governance.

I. Introduction

Human rights issues today are becoming more transnational and international due to globalisation and today's interconnectedness, especially because of the internet. Simultaneously, the so-called phenomenon of strategic litigation is *prima facie* becoming more global, inter-disciplinary and professional, and it is increasingly common in the field of internet law and in the prevalence of its online public outreach activities. Strategic litigation is a method using legal means to make proclaimed injustices or rights' violations more visible and attempting to bring societal or political change as well as trying to achieve a change in the interpretation or implementati-

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on of the law beyond the scope of an individual case.[1] Although its exact definition and elements are not uniformly agreed upon, this explanation of the term serves as the basis of this chapter. The phenomenon is also known under the terms of public interest litigation, cause lawyering and impact litigation.[2]

What is remarkable and new about this form of strategic engagement is not primarily the specific usage of litigation, but its new actors and their approaches,[3] which have emerged in the last decades, and now influence how violations and individual rights are litigated. This chapter will not discuss strategic approaches in litigation by multinational corporations, like online service providers or digital communication platforms, but will rather focus on actors of civil society. It will analyse one important aspect of the professionalization of strategic litigation by civil society: Non-governmental organizations (NGOs) and strategic litigation networks. The latter can be defined as associations or alliances of civil society actors striving for contributing to a sustainable and effective implementation of human rights through legal means.[4]

The internet has also played a multidimensional role in strategic litigation activities and their influences on society, international legal scholarship and the development and interpretation of public international law itself. Regarding internet law, international, regional and national guarantees of human and fundamental rights like the right to privacy, the right to protection of personal data, and the sparsely guaranteed and still contested right to access to the internet[5] have served as an important basis to enable a strategic individual rights approach. As many individual rights guarantees were adopted decades ago, they only rarely contain explicit provisions regarding the internet or the digital sphere. Yet, courts have often developed extensive case-law regarding the internet and digital rights based on a dynamic interpretation of *de lege lata* provisions. Judicial development of individual rights has especially become necessary due to an increase in national, regional, and international law-making regarding the internet, in

1 Alexander Graser, 'Was es über Strategic Litigation zu schreiben gälte' in: Alexander Graser and Christian Helmrich (eds), *Strategic Litigation* (Baden-Baden: Nomos 2019), 9–19 (14).
2 Helen Duffy, *Strategic Human Rights Litigation* (Oxford: Hart Publishing 2018), 3.
3 Duffy (n. 2), 13–19.
4 Florian Jeßberger, 'Research Project 'Strategic Litigation',' available at: https://uni-hamburg.de/.
5 Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (Cambridge: Cambridge University Press 2014), 4.

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order to keep up with technological advances and regulate activities within cyberspace.[6]

The following contribution is not meant as a final compilation, but rather as an impulse for further research in this field. It will focus on three important aspects in this realm: Firstly, strategic litigation with the object of laws regulating the internet. Secondly, the internet as an instrument for strategic litigation. Thirdly, the interplay between these elements. In the first part of the chapter, the role of civil society in law-making regarding the internet is analysed (II.). Afterwards, strategic litigation activities in the field of (international) internet law will be examined based on cases brought forward by NGOs and individuals (III.). Thereafter a focus will be put on the strategic usage of the internet in the context of strategic litigation activities, and subsequently, the interplay between both will be explored (IV.). Finally, based on the research results so far, the potential and perils of strategic litigation in the realm of the internet will be investigated (V.), before concluding remarks are drawn (VI.).

II. Civil Society and Internet Law

In the following, developments in legislation, democratic participation by civil society and litigation with regard to internet rights are described in order to introduce the main topic of strategic litigation. The last decade saw a global surge in the number of laws governing the internet and the digital sphere. With the development and the rapid spread of the internet at the beginning of this century, legislators worldwide saw a necessity to regulate the cybersphere with specific national laws and regulations to combat a legal vacuum that could not be filled by legal regulations already in place. For example, recently, the Network Enforcement Act[7] in Germany and the law on fighting hate on the internet ('Loi Avia')[8] in France were passed, both codifying the controversial duty of online platforms to delete certain illegal content. At the same time, supranationally, the EU is working on a Digital Services Act after the General Data Protection Re-

6 Ben Wagner et al., 'Surveillance and Censorship: The Impact of Technologies on Human Rights,' 16 April 2015, available at: https://europarl.europa.eu/.

7 Netzwerkdurchsetzungsgesetz of 1 September 2017 (BGBl. I p. 3352), which was changed by Article 274 of the Decree of 19 June 2020 (BGBl. I p. 1328).

8 Assemblée nationale, proposition de loi visant à lutter contre les contenus haineux sur internet, loi n° 2020–766 de 24 juin 2020.

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gulation (GDPR) was passed and has been implemented since 2018.[9] Yet, as the world wide web and access thereto is not confined or confineable within state borders, states have also agreed on and adopted international regulations for cyberspace in the context of international organizations and transnational frameworks.

Alongside with the passing of these laws, which are increasing in number and are becoming more detailed and comprehensive, parts of civil society and NGOs have scrutinized regulations of what they perceive to be their free and equal sphere. Due to more and more daily, social and political as well as economic and professional activities taking place digitally – especially having accelerated because of the COVID-19 pandemic – fundamental human rights like privacy rights and other digital rights essential for a liberal democracy are increasingly vulnerable and at risk of infringements. Cases of influence on politics and interference with democracy through the usage of social media platforms,[10] and increasing legislation for expansive government surveillance are only a few examples of the recent alarming developments regarding such vulnerabilities of individual rights and democracy.[11] Additionally, civil society has critically monitored the activities of transnational corporations active in cyberspace. Consequently, when perceiving activities of legislators or corporations concerning cyberspace as a violation of their rights or of other laws, the digital internet community has mobilized mass protests of the public. An example of such protest and their impact are the civil mobilization and protest against the Draft Article 13 (now Article 17) of the EU's Directive on Copyright in the Digital Single Market in 2019.[12] In the context of which civil society tried to have some of the substantive regulations chan-

9 European Commission, 'The Digital Services Act package,' available at: https://digital-strategy.ec.europa.eu/.

10 Regarding election interferences, see Michael Schmitt, 'Foreign Cyber Interference in Elections: An International Law Primer,' 16 October 2020, available at: https://ejiltalk.org.

11 Francesca Bignami, 'Schrems II: The Right to Privacy and the New Illiberalism,' 29 July 2020, available at: https://verfassungsblog.de/; Valsamis Mitsilegas, 'The Preventive Turn in European Security Policy: Towards a Rule of Law Crisis?' in: Francesca Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge: Cambridge University Press 2020), 301–318 (301, 315–317).

12 'Gegen EU-Urheberrechtsreform: 4,7 Millionen Unterschriften gegen Upload-Filter,' 18 February 2019, available at: https://tagesschau.de/; Julia Reda, 'Walking from Luxembourg to Brussels in two hours: The European Court of Justice will rule on the legality of upload filters,' 16 November 2020, available at: https://verfassungsblog.de/.

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ged, with the result of a few amendments to the original draft.[13] Another example are marches against the Anti-Counterfeiting Trade Agreement (ACTA), which was supposed to establish an international legal framework for targeting *inter alia* copyright infringement on the internet in 2012, but which has not entered into force due to a lack of ratification after mass protest and petitions.[14]

Moreover, in taking action against regulations through democratic participation, not only politically, e.g. in the form of protest and petitions regarding internet law, cracking down on laws has taken the form of legal action. Besides civil society, the affected multinational corporations also resort to speaking out and lobbying against planned law-making, and if that does not satisfy their demands, they sometimes utilize litigation in order to combat regulations of their activities.[15] When legal action goes beyond a single individual case, is supposed to have implications for a broader dimension, and litigation takes place in order to reach certain legal or socio-political aims, it can be classified as strategic litigation. The targeted resort to a specific forum with a particular selected case constellation and a predetermined approach is also a characteristic of strategic litigation. Recently, this method has become more common, especially in the field of internet law – as will be shown on the basis of the discussed cases below – simultaneously with the acceleration of law-making described above.

III. Strategic Litigation in Matters of Internet Law

Before analysing cases, NGOs and strategic litigation networks in the field of litigation regarding international internet law, it should be noted that the cases illustrated mainly focus on domestic and European regulations with an inherent transnational component. The reason behind this prevalence of cases is that there is no international court for individual rights claims regarding internet law or digital rights and only very fragmentary regulations awarding individual rights in transnational internet law. Ne-

13 Julia Reda, 'EU copyright reform: Our fight was not in vain,' 18 April 2019, available at: https://juliareda.eu/en/.

14 Quinn Norton, 'How the European Internet Rose Up Against ACTA,' 21 February 2012, available at: https://wired.com/.

15 See e.g., James Vincent, 'European Wikipedias have been turned off for the day to protest dangerous copyright laws,' 21 March 2019, available at: https://theverge.com/; ECJ, *Google LLC. v. Commission nationale de l'informatique et des libertés (CNIL)*, judgment of 24 September 2019, case no. 507/17, ECLI:EU:C:2019:772.

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vertheless, most of the largest IT service providers are active on a pan-European and global level.[16] Even though, e.g., the EU's GDPR only applies to IT operators that act within the European single market,[17] many global providers have adapted their regulations, standards and practices to implement the EU's regulations.[18] The same worldwide effect is expected for the EU's new copyright directive when implemented in the Member States.[19] This phenomenon of establishing a *de facto* high global standard through unilateral legislation by the EU is called the 'Brussels effect,'[20] named after the comparable 'California effect.'[21] This process of externalizing the EU's standards outside its Member States through single market mechanisms is also driven by numerous global providers operating subsidiaries within the EU for non-EU markets.[22] Thus, strategic litigation within the EU directly or indirectly against its regulations as well as against EU frameworks with third states or national implementation thereof is able to produce transnational and global implications and can lead to a change of legislation and practice regarding the internet worldwide.

One of the oldest NGOs active, *inter alia*, in the field of litigating digital and internet rights is the American Civil Liberties Union (ACLU). It was founded in 1920 to defend and preserve rights and liberties in the US.[23] The ACLU has been active with targeted impact litigation in many cases, including, *inter alia*, freedom of speech and distribution via the internet

16 See NOYB, 'Making Privacy a Reality. Public Project Summary,' March 2020, available at: https://noyb.eu/, 3.

17 Ibid.; Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation),' 11 June 2015, 2012/0011 (COD).

18 E.g. Julie Brill, 'Microsoft's commitment to GDPR, privacy and putting customers in control of their own data,' 21 May 2018, available at: https://blogs.microsoft.com/; Facebook, 'Complying With New Privacy Laws and Offering New Privacy Protections to Everyone, No Matter Where You Live,' 17 April 2018, available at: https://about.facebook.com/.

19 Michelle Kaminsky, 'EU's Copyright Directive Passes Despite Widespread Protests – But It's Not Law Yet,' 26 March 2020, available at: https://forbes.com/.

20 Anu Bradford, 'The Brussels Effect,' Nw. U. L. Rev. 107 (2012), 1–67 (3–5); Mark Scott and Laurens Cerulus, 'Europe's new data protection rules export privacy standards worldwide,' 31 January 2018, available at: https://politico.eu/.

21 'Three Questions: Prof. David Bach on the Reach of European Privacy Regulations,' 25 May 2018, available at: https://insights.som.yale.edu/.

22 E.g., regarding Europe, Middle-East and Africa (EMEA) and all non-US markets, see NOYB (n. 16), 3.

23 ACLU, 'FAQs,' available at: https://aclu.org/faqs.

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in *Reno v. American Civil Liberties Union*[24] in 1997 and internet services providers' obligation to reveal private internet access information to the government in *Doe v. Holder*.[25] Important cases have also emerged in the context of government surveillance of internet activity and communication in *American Civil Liberties Union v. National Security Agency*[26] and by the Center for Constitutional Rights (CCR), another US-based legal advocacy organization, in *Center for Constitutional Rights v. Obama*.[27]

In a pending case, the ACLU and the Electronic Frontier Foundation (EFF) are seeking access to a judicial ruling reportedly finding that the US Department of Justice cannot oblige Facebook to alter its Messenger to allow for the FBI to conduct investigative wiretaps.[28] The EFF is a leading NGO, active – according to their mission – in defending civil rights and liberties in the digital sphere, predominantly in the US.[29] Strategic cases of the EFF, which they conduct under the name of impact litigation, comprise issues in the field of privacy, security and free speech in the online world.[30] While the cases mentioned so far are national US cases, due to many of the digital service providers operating from the US and digital communication as well as government surveillance not halting at domestic borders, the consequences also have a far-reaching global dimension.

The strategic turn to the courts has also led to individuals taking action against regulation in the field of the internet, even though legal action is not always taken originally in order to achieve a landmark strategic case. A well-known case is *Schrems* in the context of Facebook and EU law. In

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24 US Supreme Court, *Reno v. American Civil Liberties Union*, judgment of 26 June 1997, 521 U.S. 844; ACLU, 'Feature on Reno v. ACLU I – The battle over the CDA,' available at: https://www.aclu.org; for other internet free speech cases of the ACLU, see ACLU, 'Technology and Liberty: Internet Free Speech,' available at: https://aclu.org.

25 US District Court Southern District of New York, *Doe v. Ashcroft*, Decision of 28 October 2004, 04 Civ. 2614 (VM); the case led the court to strike down the National Security Letters provisions of the USA PATRIOT Act; ACLU, *Doe v. Holder*, judgment of 17 November 2009, available at: https://aclu.org.

26 US Court of Appeals for the Sixth Circuit, *ACLU v. NSA*, judgment of 6 July 2007, 493 F.3d 644; ACLU, 'ACLU v. NSA – Challenge to warrantless wiretapping,' September 10, 2014, available at: https://aclu.org.

27 CCR, Historic Cases, 'CCR v. Obama (formerly CCR v. Bush),' 21 October 2014, available at: https://ccrjustice.org/.

28 ACLU, 'ACLU v. US Department of Justice,' 23 January 2020, available at: https://aclu.org/.

29 EFF, 'About,' available at: https://eff.org/.

30 EFF, 'Legal Cases,' available at: https://eff.org/; EFF, 'Legal Victories,' available at: https://eff.org/.

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the *Schrems I* case, the European Court of Justice (ECJ) invalidated the European Commission's Decision 2000/5205 ('the Safe Harbour Decision') in 2015 in light of Article 7, the right to the respect for private life, Article 8, the right to the protection of personal data, and Article 47, the right to an effective remedy and to a fair trial, of the EU Charter of Fundamental Rights.[31] The Commission's Decision allowed for data transfers between the US and the EU, declaring that the US provided for adequate safeguards for data protection. This decision was based on the Safe Harbour framework, which consisted of data protection principles for US companies.

In the following *Schrems II* case, the ECJ declared the Decision 2016/1250 on the adequacy of the protection provided by the EU-US Data Protection Shield as invalid in July 2020.[32] The ECJ examined the Decision in the light of the requirements by the GDPR and the EU Charter of Fundamental Rights guaranteeing respect for private and family life, personal data protection and the right to effective judicial protection. The court decided that the limitations on the protection of personal data in US law for transferred data from the EU are not confined in a way essentially equivalent to EU law. In the court's view, the surveillance programmes based on those provisions are not proportionally limited to what is strictly necessary.[33] Additionally, the ECJ ruled that the Ombudsperson mechanism referred to in Decision 2016/1250 does not provide data subjects with any cause of action before a body which offers guarantees substantially equivalent to those required by EU law. Yet, the court found the Commission Decision 2010/87 on standard contractual clauses for the transfer of personal data to processors established in third countries to be valid.[34] This case shows that national internet law, here US law, in combination with international frameworks or conventions as well as supranational or international organizations, is not only a domestic matter but has important European and international implications and consequences.[35]

Schrems was supported by the non-profit organization NOYB – European Center for Digital Rights, which was founded in 2017. NOYB uses

31 ECJ, *Maximillian Schrems v. Data Protection Commissioner*, judgment of 6 October 2015, case no. 362/14, ECLI:EU:C:2015:650.

32 ECJ, *Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems*, judgment of 16 July 2020, case no. 311/18, ECLI:EU:C:2020:559.

33 Ibid.

34 Ibid.

35 See Christopher Kuner, 'Schrems II Re-Examined,' 25 August 2020, available at: https://verfassungsblog.de/.

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targeted and strategic litigation to enforce the right to privacy and digital rights. It predominantly works on cases against multinational corporations active in the EU.[36] Another example of its cases is the filing of complaints against Google, Instagram, WhatsApp and Facebook due to an alleged violation of the GDPR,[37] thus, illustrating the potential power of individuals and civil society associations through litigation regarding international internet law.

Besides individual approaches, social movements can also seek collective legal solutions and therefore resort to strategically litigating NGOs. In the following, European actors within this field will be examined. Similar to NOYB, the non-profit Digital Rights Ireland has litigated a strategic case regarding EU law and achieved what they call a 'landmark success'[38] when the ECJ declared the EU's Data Retention Directive[39] as invalid in 2014.[40] The Directive was set out to harmonize the retention of certain data by providers of electronic communications services or communications networks. The ECJ had to decide on the validity of the directive after being asked to determine this question by, *inter alia*, the Irish High Court, where Digital Rights Ireland had sued the Irish authorities regarding the legality of their measures.[41] The ECJ found the directive to encompass a wide-ranging and particularly serious interference with the fundamental right to respect for private life and the right to protection of personal data of the EU Charter of Fundamental Rights.[42]

In Germany, one focus of the litigation organization Society for Civil Rights (Gesellschaft für Freiheitsrechte; GFF), initially operating primarily

36 NOYB, 'Making Privacy a Reality: Public Project Summary,' available at: https://noyb.eu/, 2–3; NOYB, 'FAQs,' available at: https://noyb.eu/en/faqs.

37 NOYB, 'noyb.eu filed four complaints over 'forced consent' against Google, Instagram, WhatsApp and Facebook,' 25 May 2018, available at: https://noyb.eu/.

38 Digital Rights Ireland, 'DRI welcomes landmark data privacy judgment,' 6 October 2015, available at: https://digitalrights.ie/.

39 Directive 2006/24/EC of the European Parliament and the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending, Directive 2002/58/EC (OJ 2006 L 105, 54).

40 ECJ, *Digital Rights Ireland and Seitlinger and Others*, judgment of 8 April 2014, case nos 293/12 and 594/12, ECLI:EU:C:2014:238.

41 ECJ, Press Release No 54/14, 8 April 2014, judgment in joined cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, available at: https://curia.europa.eu/.

42 Ibid.

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on a national level, is data security, informational freedom and privacy.[43] In 2019, the GFF declared copyright law and freedom of communication to be a focus of their work in the context of their project 'control ©,'[44] in which they want to have individual rights issues decided by courts and critically examine the drafting and implementation of internet law, especially regarding the EU's Copyright Directive.[45] In November 2020, the NGO published a study on Article 17 of the Copyright Directive in the form of a fundamental rights assessment.[46] In their study, they find that the regulation does not include a fair balance between intellectual property rights, the freedom of expression and information of platform users, their right to protection of personal data and the freedom of platform operators to conduct a business, thus violating fundamental rights of the EU's Charter.[47] Even though the GFF is a primarily national actor, it takes into account possible international dimensions of their cases.[48] In the context of national laws implementing EU law, especially regarding the EU's copyright directive, a European dimension of the GFF's work is clearly visible. One case which the NGO calls a big success is the action against parts of the law regarding the surveillance powers of the German Federal Intelligence Service.[49] With its decision of 19 May 2020, the German Federal Constitutional Court declared the constitutional complaint, initiated and coordinated by the GFF, as successful and pronounced the German law regulating the surveillance powers of the Federal Intelligence Service in their current form regarding foreign telecommunications as violating fundamental rights of the Basic Law. Even though the case is primarily centred in German constitutional law, the litigants, as well as the court,

43 Boris Burghardt and Christian Thönnes, 'Die Gesellschaft für Freiheitsrechte' in: Graser and Helmrich (n. 1), 65–71 (69).

44 Daniela Turß, 'control ©: Urheberrecht und Kommunikationsfreiheit,' 13 April 2019, available at: https://freiheitsrechte.org; Julia Reda, 'Introducing control © – Strategic Litigation for Free Communication,' Kluwer Copyright Blog, 13 April 2020, available at: http://copyrightblog.kluweriplaw.com/.

45 See e.g. Julia Reda, 'In copyright reform, Germany wants to avoid over-blocking, not rule out upload filters,' Kluwer Copyright Blog, 9 July 2020, available at: http://copyrightblog.kluweriplaw.com.

46 Julia Reda, Joschka Selinger and Michael Servatius, 'Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment,' 16 November 2020, available at: https://freiheitsrechte.org.

47 Reda, Selinger and Servatius (n. 46), 52.

48 GFF, 'About GFF,' available at: https://freiheitsrechte.org/.

49 EDRi, 'German Constitutional Court stops mass surveillance abroad,' 27 May 2020, available at: https://edri.org/.

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also considered international law arguments in regards to the surveillance of internet communication abroad on the basis of international human rights and human rights within the scope of the European Convention on Human Rights.[50]

The GFF works in close cooperation with the above-mentioned NGO EFF.[51] Other partners of the GFF and simultaneously NGOs active in the field of national and international internet law are, inter alia, European Digital Rights (EDRi), the Humboldt Law Clinic Internetrecht (HLCI), La Quadrature du Net, Netzpolitik.org and Privacy International. These NGOs are all non-profit organizations active in the field of digital rights and civil liberties in the cybersphere. Privacy International is an NGO based in the UK, which uses strategic litigation as one of the various methods to combat violations of privacy rights.[52] In their cases regarding internet law, they have litigated before British domestic courts, the ECJ and the ECtHR against, most prominently, surveillance of the government.[53] La Quadrature du Net is a French NGO which engages strategically against the legislation as well as activities by the government and by corporations which it perceives as infringing fundamental freedoms in cyberspace.[54] An example thereof are the critical observations before the Conseil Constitutionnel in the context of the above mentioned French Loi Avia,[55] that was then declared unconstitutional by the Conseil,[56] which the NGO perceives as a success.[57] Due to similar laws or legislative plans in Europe and planned EU legislation in digital services as well as human rights

50 Constitutional Complaint of the Legal Representative working in cooperation with the GFF, available at: https://freiheitsrechte.org/bnd-gesetz-2/, 46–48; Federal Constitutional Court of Germany, judgment of 19 May 2020, 1 BvR 2835/17, paras 96–103.

51 GFF, available at: https://freiheitsrechte.org.

52 Privacy International, Strategic Areas, 'Contesting Government Data and System Exploitation,' available at: https://privacyinternational.org.

53 E.g. Privacy International, 'Tele2/Watson,' available at: https://privacyinternational.org; ECJ, *Tele2 Sverige v. Post- och telestyrelsen*, judgment of 21 December 2016, C-203/15, available at: https://privacyinternational.org; the pending case of 10 Human Rights Organisations v. United Kingdom before the ECtHR, Application No. 24960/15, available at: https://privacyinternational.org.

54 La Quadratur du Net, 'Nous,' available at: https://laquadrature.net.

55 La Quadratur du Net, 'Loi Avia, Nos Observations devant le conseil constitutionnel,' 26 May 2020, available at: https://laquadrature.net.

56 Conseil Constitutionnel, *Loi visant à lutter contre les contenus haineux sur internet*, Décision n° 2020–801 DC du 18/06/2020.

57 La Quadratur du Net, 'Loi Haine: Le Conseil Constitutionnel refuse la censure sans juge,' 18 June 2020, available at: https://laquadrature.net.

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guaranteed by the European Convention on Human Rights, these national cases have implications far beyond one state's borders. Thus, besides already pending or decided cases, the growing number of legal activities of legislators regarding the internet as well as transnational cooperation both show the possibilities and potential for strategic litigation in the future. As a dynamic between legislative processes and civil society can be observed in the form that if a certain aim cannot be achieved or a planned regulation cannot be prevented by actors of civil society, recourse from the political process to the judiciary is sought in order to reach the intended outcome for internet rights.

Over 30 privacy and digital rights non-profit organizations all over Europe involved in strategic litigation and other activities like lobbying and campaigns in the field of digital rights and internet law have joined forces in the non-profit organization European Digital Rights (EDRi) based in Brussels.[58] It is active in the fields of data protection and privacy, surveillance, copyrights and net neutrality and with campaigns, e.g., regarding the GDPR and its implementation in the EU's Member States. Therefore, it submits interventions, amicus curiae briefs and expert opinions in national, regional and international proceedings, and provides legal support to partners and clients.[59] Besides litigating non-profits, organizations working in the background with research and the gathering of information are also important aspects regarding strategic litigation of internet rights.[60]

Internet law and digital rights are also litigated in the Global South, where public interest litigation has long been established in countries like India, Pakistan and South Africa. Among others, in some states of South and Southeast Asia as well as Africa, strategic public interest litigation has been used especially in defence of the freedom of expression online and against internet bans.[61] A remarkable case that could also be classified as strategic is the one of *The Gambia v Facebook, Inc.* before the US District Court for the District of Columbia to get access to information in the

58 EDRi, 'About,' available at: https://edri.org.

59 Ibid.

60 E.g., Algorithm Watch, available at: https://algorithmwatch.org.

61 See e.g. Françoise Mukuku, 'Digital rights strategic litigation: Suing governments when online freedoms are violated,' Association for Progressive Communications, available at: https://apc.org, 13 October 2017; Software Freedom Law Center India, 'Our Statement on Delhi High Court's Dismissal of the Public Interest Litigation Challenging Internet Shutdown in Delhi,' 1 March 2020, available at: https://sflc.in; Internet Governance Forum 2016, 'Strategic Litigation: Freedom of Expression Online,' available at: https://intgovforum.org.

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context of the ongoing case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* before the International Court of Justice.[62]

After the examination of these NGOs' and individuals' activities regarding internet law, a short insight will be given into how NGOs finance these activities in order to examine which actors enable strategic litigation financially and what motives might be behind certain activities. Besides donations and supporting memberships, grants are an important source of revenue for non-profit organizations.[63] The Digital Freedom Fund (DFF) is an NGO which also awards financial grants to strategic litigators for cases in all Council of Europe Member States and engages in skill building and networking.[64] The NGO is based in the Netherlands and sees its mission in supporting strategic litigation to advance digital rights in Europe. DFF works in the field of digital rights, which they define broadly as human rights applicable in the digital sphere and encompassing rights and freedoms concerning the internet.[65] NGOs the DFF has supported in their case work are, for example, the GFF and epicenter.works regarding a lawsuit against the EU's Passenger Name Records Directive 2016/681, which requires airlines to automatically transfer passengers' data to government centres.[66] The NGO epicenter.works is an Austrian non-profit advocating for fundamental rights in the digital age as well as equal rights regarding the internet and a self-determined usage thereof.[67] In this context, they also use strategic proceedings before national and European courts to achieve their goals.[68] Another case, which the DFF has financially supported, is litigation against the government's use of an automated surveillance system, named System Risk Indication (SyRI), in the Netherlands by, *inter alia*, the Dutch non-profits Public Interest Litigation Network and Privacy

62 Priya Pillai, 'The Republic of The Gambia v Facebook, Inc.: Domestic Proceedings, International Implications,' OpinioJuris, 8 August 2020, available at: https://opiniojuris.org.

63 Jason M. M. Wilson, 'Litigation Finance in the Public Interest,' Am. U.L. Rev. 64 (2014), 385–455 (390, 400–401).

64 Digital Freedom Fund, 'About,' available at: https://digitalfreedomfund.org.

65 Digital Freedom Fund, 'Grants,' available at: https://digitalfreedomfund.org.

66 Digital Freedom Fund, 'De Capitani and others v. Federal Republic of Germany and others, Criminal Police Office of Austria and others,' available at: https://digitalfreedomfund.org; No PNR, 'We are taking legal action against the mass processing of passenger data!,' available at: https://nopnr.eu.

67 Epicenter.works, 'Vision,' available at: https://en.epicenter.works.

68 Epicenter.works, 'History,' available at: https://en.epicenter.works.

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First.[69] In this case, The Hague District Court found that the law enabling SyRI violates international human rights guarantees, namely Article 8 of the European Convention on Human Rights, which protects the right to respect for private life.[70] In the Netherlands, strategic litigation on the basis of international law is possible through domestic regulations.[71]

Thus, a certain independence of strategic litigation networks, as well as their activities and strategies, can be observed, while they at the same time have to rely on donations, supporting memberships and grants awarded for action in special areas with certain legal, political or social narratives and goals. Additionally, financial transparency is an important aspect of many strategic litigation networks.

To conclude, laws regulating the internet have globally become an important and ever-growing object of scrutiny through strategic litigation, especially when lobbying and protest by civil society and internet platforms during the process of law-making are unsuccessful. Strategic litigation has therefore led to a professional legal engagement of civil society monitoring the making, application, implementation and enforcement of national and international internet law. Transnational connectedness of actors leads to the forming of new cooperation and support in cases or campaigns, multiplier effects and an exchange of important learning experiences. Nevertheless, strategic cases do not only focus on internet law and digital rights, but on many different fields of the law, most often based on individual rights. In these cases, the internet plays an important role, not necessarily as an object for strategic litigation, but as an instrument in strategic litigation activities. The latter will be closely examined in the next chapter.

IV. Usage of the Internet for Strategic Litigation

Strategic litigation activities of individuals, NGOs or strategic litigation networks rely on the usage of different instruments. Besides legal and procedural means within proceedings before a court, lawsuits and other

69 Digital Freedom Fund, 'NCJM et al. vs. The State of The Netherlands – SyRI Verdict,' available at: https://digitalfreedomfund.org; The Public Interest Litigation Project, 'Profiling and SyRI,' available at: https://pilpnjcm.nl.

70 The Hague District Court, judgment of 5 February 2020, C/09/550982 / HA ZA 18–388.

71 Otto Spijkers, 'Public Interest Litigation Before Domestic Courts in The Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code,' EJIL:Talk! Blogpost, 6 March 2020, available at: https://ejiltalk.org.

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complaints, an important instrument consists of public outreach activities via the internet. In this kind of public relations work, especially the internet and its capacities for spreading information are utilized to raise public awareness. In this context, individuals and NGOs use their web presence and engagement in social media to raise awareness of the cases at hand, their work, ongoing legal proceedings and their demands on how courts should rule, what the legislator needs to change about existing laws or what the authorities need to do differently in their application of legal regulations. Apart from awareness-raising and education, the strategy is built on the multiplier effect and public pressure through the conscious and targeted usage of the cybersphere. The internet is also essential in strategic litigation for communicating with clients, lawyers, legal representatives, partner organizations and building networks. Information technology has thus helped in overcoming a major communication barrier,[72] especially in international and transnational strategic litigation. Consequently, it is contributing to the growth and spread of strategic litigation.[73]

Simultaneously, democratic participation nowadays is becoming more and more digitalized, especially during the current COVID-19 pandemic. New technology has provided faster and more effective ways to communicate, seek like-minded individuals, express one's opinion, opposition or support and protest online. Even civil disobedience has taken up new forms in the digital world.[74] Thus, digitalization offers new platforms for strategic litigants to spread information and to point out perceived injustices. This form of changing public opinion through case-based activities and publications is one important aspect of strategic litigation. An example of the usage of the internet as an instrument in strategic litigation are the outreach activities of the European Center for Constitutional and Human Rights (ECCHR) during the trial against two suspected members of the Syrian regime. Besides a trial monitoring on its website, different online publications and participation in different virtual formats, it uses

72 Daniel Joyce, 'Internet Freedom and Human Rights,' EJIL 26 (2015), 493–514 (494–495).

73 See Christian Helmrich, 'Strategic Litigation rund um die Welt' in: Graser and Helmrich (n. 1), 115; Christian Boulanger and David Krebs, 'Strategische Prozessführung,' Zeitschrift für Rechtssoziologie 39 (2019), 1–4 (1).

74 See e.g., Vaclav Jirovsky, 'Anonymous, a new Civil Disobedience Phenomenon' in: Helmut Reimer, Norbert Pohlmann and Wolfgang Schneider (eds), *ISSE 2012 Securing Electronic Business Processes* (Wiesbaden: Springer 2012).

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different social media platforms to promote its case work.[75] Another example are the internet activities by the NGO Earthjustice in the context of the complaint before the Committee on the Rights of the Child on climate change.[76] The German-based GFF also uses its website, social media and professional platforms to showcase its activities. The same applies to many other NGOs active in strategic litigation. Generally, public outreach campaigns and PR before, during and after strategic litigation have become an important element of case work. These activities are oftentimes not carried out by NGOs or litigating representatives themselves, but instead, professionals or professional NGOs specialized in press communication are hired. The impact of these PR activities, especially through the internet, can be remarkable.

Yet, it is to be noted that this kind of usage of the internet does not reach all areas of society, given that a reception of such information requires access to the internet and being a user or reader of the respective (social) media platforms. Thus, the recipients of this strategic engagement are especially the generations with a certain cyber literacy and an openness to social media. Internet and computer accessibility can also have many barriers, especially in cases of disability or impairment[77] and in cases of internet censorship. Besides that, a socio-financial aspect through the necessary infrastructure of an internet connection and the necessary devices is to be taken into account, which leads to some sectors of society being excluded from this information, especially in countries of the Global South or through surveillance and internet restrictions[78]. This phenomenon of unequal access and usage of internet communication technologies is called the digital divide.[79] It also has a gender aspect which has to be taken into

75 ECCHR, 'Trial Updates: First Trial Worldwide on Torture in Syria in the context of the criminal complaint in the criminal trial before the OLG Koblenz for crimes against humanity in Syria,' available at: https://ecchr.eu.

76 Earthjustice, '16 Young People File UN Human Rights Complaint on Climate Change,' 23 September 2019, available at: https://earthjustice.org.

77 Lainey Feingold, 'Digital Accessibility and the Quest for Online Equality,' Journal of Internet Law 21 (2017), 3–12 (3–4).

78 See e.g., Anita R. Gohdes, 'Repression Technology: Internet Accessibility and State Violence,' AJPS 64 (2020), 488–503.

79 Bridgette Wessels, 'The Reproduction and Reconfiguration of Inequality. Differentiation and Class, Status and Power in the Dynamics of Digital Divides' in: Massimo Ragnedda (ed.), *The Digital Divide: The Internet and Social Inequality in International Perspective* (Florence: Taylor and Francis 2013), 17–28 (17–19).

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account.[80] Causes for such gender-based discrepancies are obstacles to access, socio-economic reasons, and lack of technological and digital literacy, gaps in education, inherent biases as well as socio-cultural norms.[81] Consequently, existing inequalities are reflected in a digital divide, transposing offline divides into the digital space.[82] In order to combat some of these issues, there are also projects in a place like 'Decolonising Digital Rights' by the DFF.[83] Another important barrier is the language and complexity of legal matters. Besides the digital divide, another key factor is knowledge about one's own rights in the sphere of the internet. Here (online) education campaigns set out by NGOs active in the field to inform internet users play an important role.[84]

Additionally, it is to be pointed out that strategic litigation is not only used in the public interest, but also in the context of strategic lawsuits *against* public participation (SLAPPs).[85] This phenomenon often recurs in the context of online activities by NGOs and so-called internet speech. These lawsuits took place, e.g., regarding activism in cases of Amnesty International and Greenpeace.[86] Thus, the usage of the internet for public interest litigation or political campaigns has itself become a target of strategic litigation. Recently, campaigns and litigation against these national and transnational SLAPPs by affected NGOs and allies have grown.[87] Legislative measures and judicial procedure reforms are being demanded for

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80 Nani Jansen Reventlow, 'The Gender Divide in Digital Rights,' 3 March 2020, Digital Freedom Fund Blog, available at: https://digitalfreedomfund.org.

81 Report of the Organisation for Economic Co-operation and Development, 'Bridging the Digital Gender Divide Include, Upskill, Innovate,' 2018, available at: https://oecd.org, 22.

82 OHCHR, 'Ways to bridge the gender digital divide from a human rights perspective,' Submission by the Human Rights, Big Data and Technology Project of the University of Essex, available at: https://ohchr.org, 1.

83 DFF, 'Decolonising Digital Rights,' available at: https://digitalfreedomfund.org; Aurum Linh, 'What Decolonising Digital Rights Looks Like,' DFF Blog, 6 April 2020, available at: https://digitalfreedomfund.org.

84 See e.g., the campaign #SaveYourInternet by EDRi, available at: https://saveyourinternet.eu.

85 Penelope Canan and George W. Pring, 'Strategic Lawsuits against Public Participation,' Social Problems 35 (1988), 506–519 (506).

86 Annalisa Ciampi, UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, 'Info Note – SLAPPs and FoAA rights,' available at: https://ohchr.org; Business and Human Rights Resource Centre, 'Silencing the Critics – How big polluters try to paralyse environmental and human rights advocacy through the courts,' available at: https://business-humanrights.org.

87 See e.g., the NGO Protect the Protest, available at: https://protecttheprotest.org.

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a containment of the increasing phenomenon in order to change this practice which supposedly endangers public interest in the name of economic interests.[88]

Besides civil society as a whole, it is to be examined more closely what influence the strategic engagement through the usage of the internet has on international legal scholarship. Particularly noteworthy in this context are the ways in which strategic litigants seek connection to international legal scholarship and what influence this can have or already has on legal positions within international legal scholarship. NGOs active in strategic litigation cite as an aspect of their activities the engagement in legal scholarship.[89] Such activities often consist of publications in relevant journals, books or blog contributions. The latter is an important instrument for giving impulse, raising awareness and stating one's opinions. In the long term, this engagement in international legal scholarship can lead to changing legal opinions and positions, e.g., in the interpretation of legal regulations in public international law or regarding accountability for human rights' violations which might then influence law-making and the judiciary. One example is the online symposium by Verfassungsblog.de on international supply chains as well as responsibility and liability therein, while the German government is working on a draft of a law regulating supply chains.[90] Additionally, members of NGOs often participate in real life or online discussions or give interviews to influential newspapers on the relevant topics, which can also influence international legal scholarship and bring attention to certain issues. Furthermore, strategic litigators are oftentimes legal scholars themselves participating in establishing chains of argument in cases, writing lawsuits and appearing in court.

Another new digital method for strategic litigation is legal enforcement through legal tech. A massive surge of lawsuits through digital automatization can also act as a strategy in trying to enforce certain rights and in attempting to accomplish a broader change in administrative or business behaviour or policy.[91] Access to legal tech instruments for (potential)

88 See e.g. the Open Letter 'Ending gag Lawsuits in Europe – Protecting Democracy and Fundamental rights,' available at: https://edri.org.

89 See Burghardt and Thönnes (n. 43), 67; Arite Keller and Karina Theurer, 'Menschenrechte mit rechtlichen Mitteln durchsetzen: Die Arbeit des ECCHR' in: Graser and Helmrich (n. 1), 62.

90 Verfassungsblog, 'Lieferkettengesetz Made in Germany,' available at: https://verfassungsblog.de.

91 Britta Rehder and Katharina van Elten, 'Legal Tech & Dieselgate. Digitale Rechtsdienstleister als Akteure der strategischen Prozessführung. Legal Tech & Dieselga-

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clients often takes place through the internet by online forms enabling quick legal reviews of claims. Legal tech platforms additionally oftentimes inform digitally and publicly about the rights and legal possibilities one has in certain situations, mostly within the realm of the specialization of a legal tech business. Thereby, obstacles to access to justice are easier to overcome.[92] Digitalization has thus enabled the emergence and rapid growth of legal tech mechanisms. Yet, the economic motives and dynamics for achieving this form of legal mobilization need to be considered.

After having examined the internet as an instrument of strategic litigation networks' activities and the internet's legal regulation regime as an object of strategic litigation separately, a significant mobilization takes place in cases where an interaction of the two aspects occurs. Namely, in cases whose object of strategic litigation consists of (international) internet law and the method of mobilizing the public through intensive digital activities in cyberspace is applied. The cases of *Schrems* are a prominent example of this effect. Oftentimes NGOs attempt to make use of PR and media campaigns and activities to vocalize their demands or bring attention to issues of present internet regulations or lack of data protection before turning to the courts. If this is done to no avail, NGOs active in strategic litigation often use the internet during their court cases in order to spread further awareness and create pressure not only on the judges who seem less likely to be influenced by media attention due to their independent role, but more so on government, parliament and large corporations to change legislation or practice. The benefits of this kind of mobilization, as well as dangers arising thereof, will be discussed in the next chapter.

V. Potential and Perils of Strategic Litigation regarding Internet Law

When looking at the legal outcome and the impact of strategic litigation regarding internet law, the possible effects on affected individuals and their rights as well as on the law must be stressed. Strategic litigation can lead to legal mobilization whereby an unlawful or unconstitutional application, interpretation or implementation of legal regulations or laws regarding cybersphere can be changed or a change enforced.[93] Besides

te – How digital providers of legal services foster strategic litigation,' Zeitschrift für Rechtssoziologie 39 (2019), 64–86 (82–83).

92 Ibid., 67–71.

93 NOYB, 'Making Privacy a Reality, Public Project Summary,' available at: https://noyb.eu, 16–17; Duffy (n. 2), 59–60.

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achieving that laws, governmental or corporate practices are declared (partly) unconstitutional, unlawful or in violation of European or international law, another advantage consists in the participation of individuals and NGOs in the development of the law.[94] Additionally, litigants can force the legislative to reform the law, the government to change policy and companies to change their practice.[95] Thus, as the above-mentioned cases and judgments illustrate, participation mechanisms and networking capacities – through the format of strategic litigation – enhance society's impact on law-making, application and implementation of internet law. In the case of internet law, strategic litigation is thus able to contribute to a liberal, individual right's centred understanding of internet governance.

Nevertheless, a success through the strategic engagement of the courts is not always guaranteed. While dismissals by lower courts are not as far-reaching and often act as an enabler of legal action before higher courts, dismissive decisions by higher or the highest competent courts can lead, in the worst case, to a deterioration of individual rights or at least prevent future legal action in similar cases. In many cases, national courts, European and other regional courts have rejected lawsuits regarding internet law and not found a violation of fundamental or human rights. For example, a lawsuit against the German Network Enforcement Act was found inadmissible for procedural reasons, thus upholding the alleged 'privatization of censorship.'[96] In the cases of the ACLU and the CCR against government surveillance, the courts also dismissed the lawsuits, yet they can be seen as part of a wider social and political transnational movement against executive surveillance of digital communication.

However, legal change can also be accomplished without success before court, as it might be brought about through the legislator or authorities. Moreover, losing in court does not always mean that no positive impact has been made by litigating.[97] Through a court case concerning internet regulations, awareness of the media and the public can be raised, especially if this litigation is accompanied by a campaign addressing the general public

94 Duffy (n. 2), 61–62.
95 Duffy (n. 2), 63–65.
96 VG Köln, 'Netzwerkdurchsetzungsgesetz: FDP-Bundestagsabgeordnete scheitern mit vorbeugender Feststellungsklage,' 14 February 2019, available at: https://vg-koeln.nrw.de.
97 See Jules Lobel, *Success Without Victory: Lost Legal Battle and the Long Road to Justice in America* (New York: New York University Press 2003), 264–269; Ben Depoorter, 'The Upside of Losing,' Columbia Law Review 113 (2013), 831–833.

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or the affected internet community.[98] Additionally, the accountability of the government or of multinational digital corporations for their practices and policies, as well as the results thereof, can be enhanced. Thus, a loss can be an impetus for long-term change.[99] Besides this outcome, a certain influence on future law-making through public and political pressure is not to be underestimated. Additionally, court proceedings can also serve as an important step towards getting access to information, which has previously been confidential, as a learning experience for the involved litigating actors and as a necessary precondition to submitting the case before higher, supreme or regional courts as an exhaustion of (domestic) remedies.[100] Still, a major difficulty for strategic litigation regarding international internet law is the overwhelming lack of international courts or bodies with competences for individual complaints regarding regulations of international conventions as well as regarding international lawsuits against non-state actors like multinational companies.[101]

Beyond the direct legal and regulatory outcomes, strategic litigation can sometimes change policies and practices by holding those in charge accountable. Moreover, through campaigns before, during and after strategic litigation, public awareness is raised and influenced through public debate.[102] Besides the general public and oftentimes the respective affected internet community, a potential impact on international legal scholarship is to be acknowledged, especially regarding academic involvement with publications and cooperation with universities and law clinics. Digitalization in this regard has a certain influence as especially law blogs and social media activities of academic institutions, chairs, professors and legal scholars have increased, thus enabling a digital interaction and discourse on the regulation of the internet.

Nonetheless, strategic litigation is criticized for causing issues in regards to the democratic legitimacy of court decisions and the separation of powers due to the recourse to the judiciary in order to influence laws and policies originally in the constitutional competence of the legislative

98 See e.g., NOYB, 'Making Privacy a Reality, Public Project Summary,' available at: https://noyb.eu, 21.

99 Susan Hansen, 'Atlantic Insights. Strategic Litigation,' The Atlantic Philanthropies, 2018, 13–15, available at: https://atlanticphilanthropies.org.

100 Duffy (n. 2), 69–72.

101 Duffy (n. 2), 27.

102 Lobel (n. 97), 4.

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as well as raising problems for national sovereignty.[103] However, seeking recourse to the courts through fundamental or human rights for review of laws and practices is also part of constitutional procedural rights and often guaranteed by regional human rights instruments.[104] Criticism is to be set aside in most cases where only an interpretation or clarification of laws is sought, which is the constitutional competence of courts. Attempts to overturn democratically passed laws or achieve law-making in certain areas for political reasons need to be further researched following the constitutional issues it raises. Nevertheless, it has to be examined carefully whether a claim or application is deemed to pose questions of democratic legitimacy and resulting court decisions are seen as overstepping the separation of powers.

Using legal instruments for strategic litigation can also perpetuate existing hegemonic structures[105] by its recourse to the law, which also might enshrine certain inequalities and uphold them through the usage of the internet and access thereto. In court proceedings, the procedural legal regulations must be respected, and the claimed rights and matters have to be proven with sufficient evidence. Furthermore, one must pay attention to NGO activities. Often NGOs primarily from the Global North represent claimants from the Global South, especially in cases with a high level of public attention in the online sphere.[106] In the following, these activities are examined in order to point out the socio-legal impacts this dynamic can have and already has. One element in the approach of strategic litigation consists of NGOs or other associations actively looking for or selecting possible plaintiffs they can then represent or for whom

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103 See e.g. Bernhard W. Wegener, 'Urgenda – Weltrettung per Gerichtsbeschluss? Klimaklagen testen die Grenzen des Rechtsschutzes,' Zeitschrift für Umweltrecht 1 (2019), 3–13 (10–13).

104 See e.g. Alexander Graser, 'Vermeintliche Fesseln der Demokratie: Warum die Klimaklagen ein vielversprechender Weg sind,' Zeitschrift für Umweltrecht 1 (2019), 271–278.

105 See generally Alejandra Ancheita and Carolijn Terwindt, 'Auf dem Weg zu einer funktionierenden transnationalen Zusammenarbeit auf Augenhöhe,' Forschungsjournal Soziale Bewegungen 28 (2015), 56–65; and for a detailed analysis Karina Theurer and Wolfgang Kaleck, *Dekoloniale Rechtskritik und Rechtspraxis* (Baden-Baden: Nomos 2020).

106 E.g. US District Court Southern District of New York, *Shell v. Wiwa* and *Lliuya v. RWE*; Ken Wiwa against Royal Dutch Petroleum Co (Shell) and Brian Anderson, Case 1:96-cv-08386-KMW-HBP; CCR, Wiwa et al v. Royal Dutch Petroleum et al., available at: https://ccrjustice.org; OLG Hamm, *Lliuya against RWE AG*, Az. 5 U 15/17; Germanwatch, 'Saúl versus RWE – The Huaraz Case,' available at: https://germanwatch.org.

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they can use their developed legal strategy and legal arguments in court or before authorities. Thus, the claimants and their rights have a certain predetermined role; they act as the enabler of strategic litigation. This can lead to issues like a collision of interests, especially regarding settlements, completely different starting positions, an instrumentalization of individuals and their rights for political or legal motives far beyond the respective case, a disproportionate psychological toll, excessive demands and disappointed hopes. Therefore, it is important to have a common understanding and mutual respect as well as a clearly defined mandate. Yet, it seems as if most NGOs have a proficient understanding of the power dynamics of the law and its institutions as well as social power structures of which they are a part of and in which they operate.[107] These power structures and power dynamics are also present in cyberspace and NGOs' activities operating therein. Additionally, NGOs display a careful operation in their field and behaviour, attentively listening to people's stories and seeking cooperation with NGOs' and activists on the ground, not acting like the 'saviours' from the Global North for 'victims' in the Global South. Yet, they cannot overcome the power dynamics and requirements national and international law set out.

Nevertheless, besides the dangers of strategic litigation, there is also potential which should not be neglected. Increasingly, funding strategic litigation by donors and foundations has not only become an altruistic and philanthropic investment joined by initiatives and non-profits awarding grants with large sums,[108] but it is also increasingly motivated by the will to achieve certain results according to a determined vision of the content of law and policy. This has also led to a demand for detailed evaluation and impact assessment of the recipient NGOs' activities. Non-profits like the DFF have made attempts in developing a framework to methodically monitor and measure the impact of strategic litigation in the field of digital rights.[109] Yet, independent socio-legal research is necessary for an extensive impact evaluation in this and other fields of strategic litigation in

107 See as one example ECCHR, 'New Perspectives on the Law: Decolonial Legal Critique and Practice,' available at: https://ecchr.eu.

108 See e.g. the Digital Freedom Fund, 'Grants,' available at: https://digitalfreedomfund.org; regarding digital rights and more generally the Open Society Foundations, available at: https://opensocietyfoundations.org and in the past the Atlantic Philanthropies, available at: https://atlanticphilanthropies.org.

109 DFF, 'Measuring the Impact of Strategic Litigation in Digital Rights. Developing a Tool for the Field,' 2019, available at: https://digitalfreedomfund.org.

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order to enable the judging of consequences this form of engagement of civil society has on the law and beyond.

VI. Conclusion

This chapter has focused on strategic litigation regarding global dimensions of internet law and its implications. It has provided an overview of different strategic litigation networks, NGOs and individuals as well as their strategic cases, activities and outcomes. Strategic litigation has, in a few cases, been effective in the regard that it has pushed towards taking human rights aspects more holistically into account in areas of international and national internet law. Even in cases where litigation was not successful in the sense of an intended judicial outcome, public attention was drawn to digital rights aspects. However, this mobilization was not always enough to lead to a change in practice, policy or legal regulations. A broader and more detailed analysis of and research on the specific impacts of strategic litigation on public international law would be necessary, but would reach beyond the scope of this contribution. While strategic human rights litigation and public interest litigation in other fields have increasingly become a topic for in-depth research, strategic litigation regarding internet law and digital rights has been largely academically unexplored, leaving room for future research. An analysis in this sense could build on studies and research in the field of the internet and society. As the development of the internet and its capacities are ever-evolving, so is the dynamic field and potential for strategic litigation and research therein.

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