





**THE STRUGGLE  
FOR LAW  
AND RIGHTS:  
DEJUSTICIA'S  
FIFTEEN-PLUS YEARS  
WORKING TOWARD  
SOCIOENVIRONMENTAL  
JUSTICE AND THE  
RULE OF LAW**

**Tang Prize**  
winners 2020

Editorial **Dejusticia**

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# INTRODUCTION



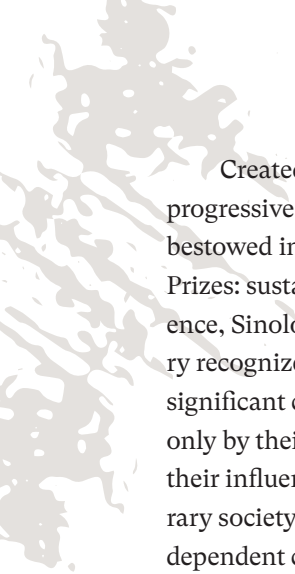
The Tang Prize logo. The design of the Chinese characters tang and jiang (“Tang” and “Prize”) was inspired by the calligraphy of the Song Dynasty artist Mi Fu. With their bold black strokes, the two characters appear as two figures walking purposefully forward.

<https://www.tang-prize.org/en/spirit.php?cat=65>

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In May 2020, in the midst of the COVID-19 lockdown, our team at Dejusticia received an email asking us to “urgently contact Dr. Jenn-Chuan Chern for important business from the Tang Prize Foundation.” The skepticism that is so common among us Colombians—which sometimes runs even deeper when working at a non-governmental organization—prompted us to first do a bit of digging on Dr. Chern and to request proof of his credentials before we agreed to hear the message that he supposedly had for our organization.

After passing muster, Dr. Chern, executive director of the Tang Prize Foundation, informed us that Dejusticia had been selected, along with two other organizations, to receive the 2020 Tang Prize. The excitement and satisfaction among our team, which had gathered together for a Friday afternoon Zoom session with beers in hand, stemmed not only from the stature of this unsought award but also from the caliber of previous laureates.



Created by Dr. Samuel Ying as a complement to the progressive public spirit of Alfred Nobel, the Tang Prize is bestowed in four areas that are not covered by the Nobel Prizes: sustainable development, biopharmaceutical science, Sinology, and the rule of law. The rule of law category recognizes individuals or institutions who have made significant contributions to the rule of law, as reflected not only by their theoretical ideas and legal practice but by their influence in furthering the rule of law in contemporary society. The selection process is conducted by an independent committee, and winners are given a medallion, a diploma, and NT\$50 million, which we shared with our two co-laureates: the Bangladesh Environmental Lawyers Association and Legal Agenda from Lebanon. Laureates from previous years whom we especially admire include Albie Sachs, former judge of the first Constitutional Court in post-apartheid South Africa; Louise Arbour, former United Nations High Commissioner for Human Rights; and Joseph Raz, Israeli legal philosopher and professor.

The chapters in this book consist of two speeches that we prepared for the prize's announcement event and the award ceremony, which took place virtually due to the pandemic. In both of these presentations, we seek to address the Tang Prize Foundation's request in terms of topic and length, drawing on our personal experience and on a review of the academic literature.

The purpose of this book is mainly to provide witness to our speeches and to preserve their original content. Thus, the two chapters contain no citations, save for a few explicit references to some of the main publications we consulted. To make up for this deficit, we have included an appendix containing a general bibliography that lists not only the sources that we consulted to write our pieces but also other academic publications that might be useful to readers. The bibliography is divided into four themes

that are covered in the speeches: notions of civil society and non-governmental organizations; participatory action research in the public interest; strategic, or public interest, litigation; and relevant jurisprudence.



A work of Japanese designer Naoto Fukasawa, the Tang Prize medal is shaped like a spiral and is meant to evoke images of double-stranded DNA, a galaxy, or a dragon. It curves in such a way as to never return to its starting point, symbolizing the infinite unravelling of history, growth and life.

<https://www.tang-prize.org/en/spirit.php?cat=65>

In the first presentation, which we prepared for a general audience consisting of all Tang Prize laureates from the four different categories, we explore Dejusticia's relationship with the rule of law. We briefly discuss the differences between Dejusticia and other civil society organizations, as well as the action-research methodology that characterizes our work and allows us to connect with the reality around us. We then turn to the role of the rule of law in contemporary society, where urgent social change is needed, and conclude with a discussion of the challenges that organizations such as Dejusticia have dealt with in the past and must tackle in the future.

The second presentation was delivered during an event in which laureates from the rule of law category discussed the rise of civil society before an audience consisting of civil society organizations from Taiwan, professors and students from the Policy and Law Center for Environ-

mental Sustainability at National Taiwan University, and law students.

This presentation explores the potential and limits of one of Dejusticia's main tools: strategic litigation, conducted in alliance with other civil society organizations, as an instrument for social and environmental justice. It offers examples of legal victories achieved by Dejusticia and our allies and offers some lessons learned during our fifteen-plus years using the law to change lives.

It is our hope that this book offers a useful tool for individuals and collectives who understand that the law should not be used to maintain the status quo, especially if that means preserving high levels of inequality, prioritizing formal justice over true justice, and ignoring the global



The Tang Prize diploma was designed by Jennifer Tsai. She decided to draw inspiration from the four elements named by Greek philosophers as the building block of our universe—water, earth, wind and fire. Rule of Law—Fire: Fire heralds the dawn of civilization. Shedding light on the logic behind law and order, it disperses the dark forces of irrationality.

<https://www.tang-prize.org/en/spirit.php?cat=65>

impacts of climate change. The rule of law, correctly understood and applied, and despite its limitations, offers the opportunity to remedy injustices and pave the way toward real social and environmental change. This mission guides Dejusticia and many other organizations, communities, social movements, and collectives who form an indispensable part of our work—groups who accompany us, push us to act, and teach us each day how to do our work better.

The title of this short publication is inspired by the classic and famous book by Rudolf Von Ihering, *The Struggle for Law*. Although the text by the great German scholar, based on lectures he gave in 1872, has different aims and reaches different conclusions than ours, we believe that they share a common essential vision: when a person suffers an injustice because one of their rights has been violated, we must fight against that injustice not only to protect that particular right but also to fulfill a more general duty—to defend the rule of law. That is why we believe that the struggle for rights, especially those of populations who are marginalized and discriminated against, is also a struggle for the rule of law. And by the same token, since the rule of law, to paraphrase Luigi Ferrajoli, should be understood as the law of the weakest,<sup>1</sup> then the struggle for the rule of law is also a struggle for rights, especially those of the most vulnerable and marginalized.

May this book contribute to the mission of the Tang Prize and to the realization of the law!

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1. See Luigi Ferrajoli, *Derechos y garantías: La ley del más débil* (Madrid: Trotta, 1999).

# DEJUSTICIA AS A CONTEMPORARY NGO AND THE RULE OF LAW

September 21, 2020

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Good morning.<sup>1</sup>

We would like to start by thanking the Tang Prize for co-laureating the collective effort of Dejusticia and colleagues. We are honored to receive from Taiwan a prize named after the Tang dynasty, representing a golden age of civil and academic government in Chinese history, filled with values that we share, such as flexibility, openness, tolerance, meritocracy, and knowledge-based decisions. We are also humbled to share the prize with the previous laureates that we deeply admire, some of whom are with us today because they represent a perspective on the rule of law that transcends formalisms and focuses on material justice, liberalism, and equality. Finally, we thank our Taiwanese colleagues and friends, with whom we hope to enjoy a long and lasting relationship.

To approach the subject of Dejusticia as a contemporary non-governmental organization (NGO) and the rule of law, we will divide our presentation into three parts: (1) what is an NGO and how does one such as Dejusticia differ from other civil society initiatives?;

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1. The video of the presentation can be seen at 32:00 in the following link: <https://www.youtube.com/watch?v=i7iqbQdBhTY&t=2611s>.



Louise Arbour, Albie Sachs and Joseph Raz, previous winners of the Tang Prize in the Rule of Law category. Photos: Tang Prize Foundation



Through campaigns, publications, and litigation, Dejusticia has devoted great effort to safeguarding human rights.

Photo: Dejusticia Communications Coordination

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(2) what is the vision of the rule of law in which contemporary NGOs are involved, and how does Dejusticia envisage its strategy on the rule of law as a tool of democratic change?; and (3) what are the challenges of the past and the future for NGOs such as Dejusticia?

### What is an NGO and how does one such as Dejusticia differ from other civil society initiatives?

A non-governmental organization can be defined as a not-for-profit collective entity that is independent from the government in terms of its funding, services, and function. This broad concept leads us to private collective entities. They are enormously diverse and are created for many purposes; in general, however, they either (1) advocate before the government (incidentally or indirectly) to address the specific interests of their own members or (2) are born from civil society<sup>2</sup> in order to deal with general citizen con-

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2. Civil society can be understood, as proposed by Civicus, as “the arena—beyond family, state and market—created by individual and

cerns, thereby transcending the personal interests of their members or founders. Their objectives require a permanent relationship with the government because this is the way to fulfill their mission. But at the same time, they need to be distinct and independent from the government—hence their “non-governmental” nature.

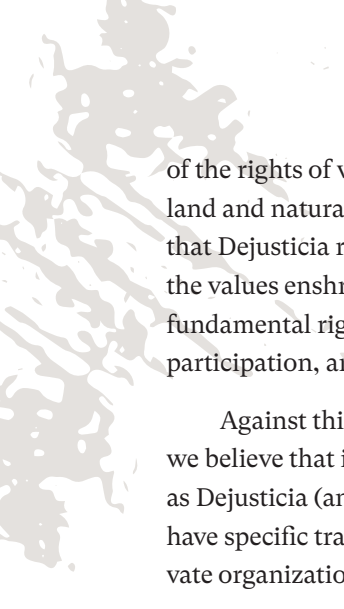
Civil society’s relationship with the government can be characterized as either following the direction established by those in power or questioning it. Many private organizations accept the status quo and provide relief—for example, by addressing poverty—without asking whether there is injustice lurking beneath the surface.



Third Global Indigenous Workshop in the territory of the Sarayaku indigenous people. Ecuador, 2018.  
Photo: Mariana Escobar Roldán

Other organizations prefer to address the roots of injustice that governments frequently ignore concerning issues such as the unequal distribution of wealth, violations

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collective actions, organizations and institutions, to advance shared interests.” Civicus, *State of Civil Society 2013: Creating an Enabling Environment*, <http://socs.civicus.org>.



of the rights of vulnerable populations, or conflicts around land and natural resources. This is the type of organization that Dejusticia represents—an organization that embraces the values enshrined in the Constitution of 1991, including fundamental rights, material justice and equality, citizen participation, and a belief in public goods.

Against this backdrop, and based on our experience, we believe that in contemporary civil society, NGOs such as Dejusticia (and probably BELA and Legal Agenda) must have specific traits in order to stand apart from other private organizations. In short, these NGOs must:

1. be the result of a free decision by a collective of citizens
2. not earn a profit
3. be independent from the government
4. promote collective interests in the public domain, such as universal human rights, inclusive democracy, sustainable development, or the environment
5. be guided by a perspective based on social justice or social/political transformation
6. be led by a human rights-based approach
7. work with or for grassroots organizations, vulnerable minorities, or historically marginalized groups, while also having a proper voice of their own
8. view the rule of law as a tool for social change<sup>3</sup>

With this in mind, we will now focus on the last condition, which refers to the relationship between the NGO and the rule of law.

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3. Some of these characteristics are based on a document by Eduardo Cáceres on the role of NGOs in Latin America. See [https://ccong.org.co/files/496\\_at\\_ROL-ONG-Latinoamerica.pdf](https://ccong.org.co/files/496_at_ROL-ONG-Latinoamerica.pdf)

The Tang Prize's 2020 award ceremony, held virtually on November 20, 2021, against the backdrop of a global pandemic, had a special significance, as every laureate helped ease this health crisis in their own way. The ceremony is available at <https://www.youtube.com/watch?v=56GwDm3ELOg>





## Dejusticia's vision of the rule of law and the relationship between academia and social activism in favor of social justice

Dejusticia was created with the aim of strengthening the gaps that exist between the academic world and social activism in order to advance social justice.

Academia and social activism are distinct fields with their own logics. The academic world is centered on the search for truth and knowledge, usually at a slow speed. For scholars, a relative distance from passion and from daily social and political struggles is important to guarantee freedom of research, without which knowledge and critical thinking cannot flourish. Meanwhile, social activism requires a passionate involvement in these daily struggles, as the goal is to contribute to the transformation of structures that perpetuate discrimination and oppression.

A certain distance between academia and social activism is healthy, but it cannot become a rigid separation. If scholars were to refrain entirely from involvement in public discussions, then politics and social activism would not benefit from the new knowledge and the critical thinking associated with academic research. Thus, we strongly believe that democracy improves when some scholars accept the challenge of becoming involved in public discussions and social activism.

At Dejusticia, we have assumed this challenge. Our goal has been to incorporate some of the ethics, methods, and knowledge of the academic field into public democratic discussions and into the struggles on behalf of the rights of the most discriminated and marginalized groups.


We did not invent this idea, which has been embraced in the past by other institutions and scholars, such as Colombian sociologist Orlando Fals Borda, with his notion of “participatory action research,” and Michael Burawoy,

who uses civil society as a starting point for his public sociology. One of our sons has even argued that this idea is as old as philosophy itself, since Plato's creation of his academy in ancient Greece had a similar purpose, although within an aristocratic conception.

But we do claim some merit in having been able to materialize this vision in a very difficult environment: in the global South, in Colombia, one of the most violent and challenging countries for human rights activism. Here in Colombia, we have managed to create and sustain an institution that is a mixture of an interdisciplinary think-tank on law and society and a passionate NGO involved in concrete struggles for social justice. This vision explains the tools we use in our daily work: socio-legal research to produce new knowledge relevant for social justice; policy proposals and participation in public debates based on this research; strategic and public interest litigation promoting the rule of law and social justice; communications aimed at the wider public, and informal education for grassroots organizations and human rights activists. In all of these activities, we emphasize the importance of working with other civil society organizations and grassroots groups, especially in a South-South manner. Under this perspective, we challenge North-South power relations and try to center our reflections and methodology from below—that is, by using the voices, ideas, and considerations of those who are usually in the margins, out of the reach of the Global North.

This commitment, which tries to defend certain causes by using the social sciences, also resonates in our vision of the rule of law and its relation to social justice.

We agree partly with the notion formulated by prominent scholars, such as Joseph Raz, a previous recipient of the Tang Prize, that the rule of law implies the existence of



clear legal norms that are predictable and non-retroactive and that must be respected not only by individuals but also by authorities in order to avoid arbitrary government actions and to protect individual freedoms. Thus, the rule of law implies a separation of powers, and especially the existence of an independent judiciary with the capacity to control governmental abuses. However, in our daily work, we endorse a more robust and ambitious notion of the rule of law, associated with respect for all human rights, not just civil and political rights. Living in a society such as Colombia, which is characterized by acute discrimination, deep social inequalities, and widespread poverty, we have to merge the struggle for a liberal notion of the rule of law with the struggle for social justice and against discrimination and inequalities, including socioeconomic and cultural ones. For us, the rule of law is deeply rooted as a means for transforming needs into freedoms, a challenge that can be summarized in the eloquent words of the preamble of the Universal Human Rights Declaration: “a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want.”

## Challenges that NGOs like Dejusticia have dealt with in the past and must face in the future to materialize the rule of law

### *Challenges in the past*

To combat democratic deficit and implement the principles of the rule of law, we have acted in the past based on the strategy of bringing academic ideas to the courts, to the public at large, and to other NGOs and grassroots organizations. We will share three examples of this practice:

First, Dejusticia engaged in litigation seeking the protection of ethnic rights and equality of opportunities in Colombian society. For eight years, Dejusticia guided and



Community Council of Black Communities of the Community Unit of Rural Government of the Rosario Islands - Caserío de Orika.  
Photo: Tina Neumann

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supported petitioners in their legal quest for the recognition of their collective property. This strategy resulted in the first judicial decision in Colombia reaffirming the importance of Afro communities in two islands of the Caribbean and their struggle to access collective territory since slavery, maintaining the culture and bond within hundreds of families.

Second, a careful litigation strategy with an NGO that works for LGBT rights (Colombia Diversa) contributed to securing legal equality for same-sex couples in Colombia, who now have the right to marry, adopt children, and enjoy social protection in the same way that heterosexual couples do. This legal effort also helped change the way that Colombian society at large views this historically marginalized group of people.

Third, Dejusticia engaged in a variety of efforts in support of the country's peace process, which culminated in



the signing of a peace agreement in 2016 that put an end to more than 50 years of internal conflict between the government and the oldest left-wing guerrilla group. Through research, technical assistance to peace negotiators, intervention in public discussions, op-eds in national and regional news outlets, litigation, communication pieces, capacity-building exercises, and “ideas for peacebuilding,” Dejusticia helped pave Colombia’s long and winding road toward peace, which the country is still navigating to this day.

### *Challenges for the future*

Like many NGOs, Dejusticia faces significant challenges for the future, such as how to attain financial sustainability without losing independence, how to resist threats and attacks in a difficult political environment such as Colombia, and so on. However, instead of describing a laundry list of challenges, we prefer to concentrate on two interrelated risks for the contemporary rule of law: increased polarization and increased social inequality.

In recent years, corrosive polarization has increased. Hate and a lack of common sense can be seen in the killing and threatening of human rights defenders, in the stigmatization of NGOs, and in the closing of borders for migrants. There is a lack of social spaces where reasonable and evidence-based arguments can be shared in order to nourish a balanced decision-making process. At the same time, economic inequality has increased significantly almost everywhere, with negative impacts on social cohesion and the enjoyment of rights by the most marginalized.

Both phenomena are intertwined: the increase in inequality feeds the emergence of authoritarian populist movements and social polarization.

The most pressing problem for human rights organizations such as Dejusticia is that our traditional tools—such

as naming and shaming and strategic litigation—no longer seem entirely appropriate for facing these sorts of challenges. For instance, how are we supposed to use these tools to reduce polarization, division, and radicalization, as well as to promote democratic deliberation among those who hold different views? What other strategies can we use to reduce economic inequalities?

There are no easy answers to these difficult questions, which have become even more complex because of the COVID-19 pandemic. However, we strongly believe that the methodological approach adopted by Dejusticia and other NGOs continues to be relevant in this new COVID-19 era, still surrounded by uncertainty. It is through a creative combination of academic research and social activism that organizations such as Dejusticia can contribute to resolving these challenges to the rule of law. Today more than ever, we feel deeply committed to our mission and to our approach.



Tutela writ for the Covid-19 relief for national and migrant women, 2020. Photo: Dejusticia Communications Coordination

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# **STRATEGIC LITIGATION, DEMOCRACY, AND SOCIAL JUSTICE**

## **A PERSPECTIVE FROM DEJUSTICIA AND THE GLOBAL SOUTH**

November 20, 2021

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Good morning<sup>1</sup>.

Once again, we start by thanking the Tang Prize for co-laureating Dejusticia together with Legal Agenda and BELA in the rule of law category.

In this short talk, we want to discuss one of the main tools of our work: strategic, or public interest, litigation as an instrument of democratic transformation and social and environmental justice. We think that this discussion not only is of academic interest for those scholars present in the room—as it raises a classical but still relevant question about the capacity of law and litigation to achieve progressive change in a period in which public interest litigation has become a global phenomenon—but also has a practical interest for the civil society organizations present, as it shows both the potential and the limits of this instrument for their work. For that purpose, we have divided our presentation into four parts: (1) Dejusticia’s perspective on public interest litigation; (2) evidence of our own work that shows how strategic litigation can be a powerful instrument for democratization and social and environmental justice; (3) the limits and risks of such litigation; and (4) the lessons learned from our public interest litigation.

### **The Concept: Strategic Litigation, Social Justice, and Democratization**

Throughout Dejusticia’s existence, we have assumed the challenge of being scholars while simultaneously being involved in social activism on human rights and the rule of law. We try to bridge these roles by merging the rigorous search of truth and knowledge with the passion for finding concrete and practical solutions to social injustice. While

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1. For a video of the original presentation, see <https://www.youtube.com/watch?v=0bS7Xgja9I4>



Litigation Course in Cartagena, Colombia, 2023.  
Photo: Dejusticia Communications Coordination

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our activism around rights takes place in different settings, such as those related to capacity building, advocacy on public policy, and influencing public opinion through campaigns and the media, an important part of this work takes place in the courts through strategic litigation, impact litigation, or public interest litigation, which we take to be synonymous expressions.

In a nutshell, we understand strategic litigation as the presentation of a case or an intervention before a judge, a court, or a semi-judicial body (such as an international human rights treaty body) with the purpose of using the law in order to achieve broader changes in society. From our perspective, these changes should take place in support of social and environmental justice, democracy, and human rights, especially as they concern the most disadvantaged populations. Our goal is therefore not limited to obtaining a favorable judicial ruling in a particular case. Instead, we aim to instigate broader social effects, such as raising the voice of marginalized groups, placing victims of injustice in the center of the discussion, changing attitudes, and fos-

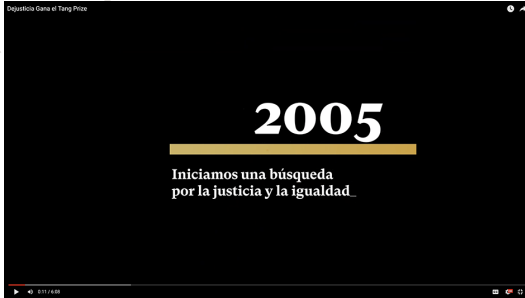
tering democratic reform. In this regard, we are referring to a specific form of democratic strategic litigation—or strategic human rights litigation, as some call it—to emphasize that it pursues democratic and social justice goals,<sup>2</sup> while other actors, such as corporations, also develop their own forms of strategic litigation but in order to defend privileges. Thus, it is a contested—or at least varied—field.

Dejusticia is also an academic research center. The ideas developed and the evidence found in our research nourish and feed the arguments we present to judges in our strategic litigation. Why? Because very often, the realization of rights is hindered by a lack of persuasive arguments and evidence from civil society; because more often than not, government accountability does not work automatically but requires judicial decisions; and because the rule of law may and must act as part of a transformation tool. Hence, the need for this bridge between academic theory and real justice.

Finally, it is not a coincidence that public interest litigation is also known as strategic litigation, because we need a clear strategy if we want to have successful impact litigation—that is, a lawsuit that is able to obtain judicial decisions that spur large-scale social changes and advance and strengthen human rights, particularly for vulnerable or marginalized groups whose voices would otherwise not be heard. This strategy, in order to be effective, requires some important legal and political considerations: we need to select suitable cases, analyze potential legal arguments and choose the most persuasive ones, explore the problems that might be encountered during the implementation of a successful ruling, evaluate possible backlashes, and assess the risks facing affected populations, among other things.

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2. See, for instance, Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Oxford: Hart Publishing, 2018).

In 2020, Dejusticia won the Tang Prize in the rule of law category, a distinction that, in the world of lawyers and human rights defenders, is equivalent to a Nobel. A video featuring Dejusticia's 15-plus years of milestones can be seen at <https://www.youtube.com/watch?v=ST9Fb4QaN0M>



However, producing legal arguments and sharing them in courts is not sufficient in public interest lawyering. Since we are moved by the aim of social transformation, we try to protect the situation of vulnerable or marginalized groups, whose voices are not strong enough to be heard or considered by certain sectors of society, sectors that might not even be interested in hearing the margins. So we make special efforts to craft a collective voice from below in order to disseminate arguments that will influence judges, policy makers, and public opinion. We try to reach this last constituency by publishing our ideas in op-eds, producing communication pieces, and in general structuring campaigns that convey the message required to achieve social change.

In our experience, this strategic thinking for public interest litigation involves ten steps, as described in a manual that Dejusticia published in tandem with Legal Agenda in 2020:

1) identifying the injustice to be remedied, 2) envisioning the goal, 3) developing a legal strategy, 4) identifying the parties, 5) assessing risks and resources, 6) collecting evidence, 7) developing legal arguments, 8) building an outreach strategy, 9) ensuring that a win is effective or investing in a loss, and 10) learning and retooling.<sup>3</sup>

## The Possibilities: Examples of Successful Strategic Litigation

Strategic litigation can have positive impacts for social justice and democracy in some fields and contexts. These impacts are of very different natures; they can range from the material benefits obtained directly by petitioners or

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3. See Adriana Eslava, Lama Karamé, Mariluz Barragán, and Mauricio Albarracín, *Strategic Litigation Manual: From Theory to Practice, Lessons from Colombia and Lebanon* (Bogotá: Dejusticia and Legal Agenda, 2020).



Laura Santacoloma in one of the sessions of the Litigation Course in Cartagena, 2023. Photo: Dejusticia Communications Coordination

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by the members of certain groups, to the symbolic and emotional impacts of the litigation in society, to the changing of society's views in relation to a particular actor or issue. Public interest litigation can also produce changes in law, jurisprudence, public policies, or public institutions' designs or practices.<sup>4</sup>

Here, we will describe some of the impacts obtained by Dejusticia in our strategic litigation efforts, which we usually conduct in collaboration with other human rights or grassroots organizations.

Until 2005, same-sex marriages in Colombia were not legally recognized, and same-sex couples suffered deep discrimination. Not only could these couples not marry or adopt, but they were also excluded from social welfare ben-

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4. For a discussion of the impacts of strategic litigation based on a large comparative analysis, see Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (Budapest: Open Society Foundations, 2018).


efits as couples. Dejusticia, in alliance with other organizations, especially Colombia Diversa, developed a careful litigation strategy over the course of several years to dismantle this discrimination. We obtained several victories before the Constitutional Court that established legal equality for same-sex couples. As a result, these couples can now marry, adopt, and enjoy social protection measures exactly as heterosexual couples can. This conquest of legal equality for same-sex couples is in itself important in the fight against discrimination; but even more than that, it has contributed to changing the hearts and minds of Colombians.

In 2010, supporters of President Uribe raised the possibility of a national referendum in order to modify Colombian law to remove the two-term limit for presidents. Since Uribe was very popular, he probably would have been reelected if he had had the chance to run for a third term. Moreover, since he was a very authoritarian leader, a third term would have seriously undermined the system of checks and balances that had already been weakened and in general the rule of law in Colombia. Many civil society organizations, Dejusticia among them, filed strategic



Vivian Newman in a public hearing at Colombia's Constitutional Court in 2019. Photo: EFE

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interventions before the Constitutional Court to prevent presidents from serving more than two terms, arguing that such a reform would have a deeply negative impact on democracy, the separation of powers, and human rights. This collective litigation was successful, and Uribe was unable to run again. The rule of law was preserved.

Finally, we must recall that campesinos in Colombia face high levels of poverty, largely due to extreme land concentration and a lack of appropriate public policies. This problem was aggravated—until recently—by the state’s failure to collect accurate statistics on their specific situation. In 2016, the most important campesino organizations in Colombia asked Dejusticia to support them in their struggle to obtain official statistics that would allow for improved rural policies. In collaboration with these organizations, we filed a lawsuit with the motto “if we want campesinos to count, they should be counted.” The Supreme Court ruled in our favor and asked the National Administrative Department of Statistics to collect specific data on campesinos. Thanks to that ruling, today we have information that confirms the dire social situation of campesinos, a critical first step to improving public policies vis-à-vis the rural population and to reducing rural inequality, one of the most pressing problems facing Colombian democracy.

### **The Limits: Preconditions, Difficulties, and Risks of Strategic Litigation**

The aforementioned examples show that strategic litigation can be a powerful tool for fundamental issues, including (1) protecting vulnerable minorities, such as the LGBT population, (2) defending democracy against authoritarian tendencies, and (3) combatting economic inequality. However, there is also important academic evidence showing that, in many aspects, strategic litigation

does not work properly or, even worse, can be counterproductive for social justice and democracy. Thus, a balanced view of strategic litigation needs to take account of several important limits and risks.

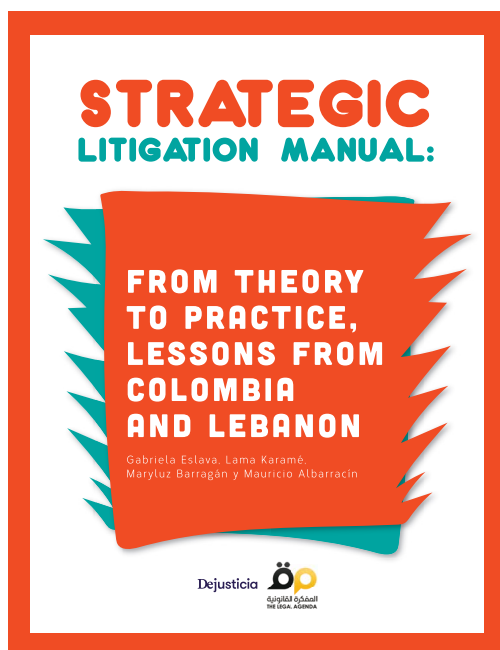
First, strategic litigation presupposes an enabling legal and political environment. At least three elements are crucial in this regard: (1) the rule of law must be present, as successful litigation requires clear legal norms that are respected not only by individuals but also by authorities, as well as the separation of powers and independent and impartial judges who rule according to the law and proven facts; (2) courts should be accessible and should be willing to invoke human rights when appropriate, including both civil and political rights and economic, social, and cultural rights, as well as willing to use their legal powers to remedy structural injustice; and (3) civil society and grassroots organizations must be robust and unified, ready to argue in favor of a common cause neglected by those in power. Without these elements, strategic litigation might be impossible, or at least very difficult.

However, these factors are dynamic and have a complex relation with strategic litigation, because sometimes we can use strategic litigation precisely to create or strengthen the preconditions that make it possible and successful, even if that sounds paradoxical. Indeed, litigation can and should be used to defend and improve the rule of law, as shown with the litigation developed against a third presidential term for Uribe. Further, in some contexts, one of the main aims of strategic litigation is to transform judicial culture in order to strengthen judges' commitment to human rights. For instance, several non-governmental organizations in Latin America have employed creative public interest litigation to induce national courts to apply international human rights law, which is in some areas much more progressive than national law.

Second, even when the preconditions for public interest litigation are met and we develop a strategy that sounds reasonable, success is never guaranteed. Litigation can fail, as courts can reject the claims; in other cases, even if we think we can achieve a favorable ruling, litigation might be too costly or take too much time compared to other strategies, such as direct advocacy before the legislative or executive branches; and in yet other cases, the implementation of a favorable ruling might be difficult or even impossible.

Third, in some cases, the situation might be even worse: a failed lawsuit can reinforce a structural injustice because the rejection of the claim by the courts might provide a certain amount of legitimacy to the injustice, making it even more difficult to combat, at least for a time. A classic example is the 1896 case *Plessy v. Ferguson* before the US Supreme Court, which legitimized racial segregation in the United States for half a century under the infamous doctrine of “separate but equal” that was defeated

“Strategic Litigation Manual: From Theory to Practice, Lessons from Colombia and Lebanon” seeks to address each step of the strategic litigation process, including how to select a case and its components, practical perspectives on litigation, and the post-failure phase. The manual contains ten key steps for a human rights litigation strategy. [https://www.dejusticia.org/wp-content/uploads/2022/02/Strategic\\_Litigation\\_Web.pdf](https://www.dejusticia.org/wp-content/uploads/2022/02/Strategic_Litigation_Web.pdf)




only in 1953 in the well-known decision of *Brown v. Board of Education*.

However, decisions in which courts reject our arguments—which are in principle a failure—are not always entirely negative, because they can have other positive effects if we take advantage of the situation. Such lawsuits can stimulate a public discussion on a given issue or trigger a political response by the government.

For instance, in the midst of the COVID-19 pandemic, we undertook strategic litigation on behalf of a group of vulnerable women who were excluded from a cash transfer program created to alleviate the impact of the pandemic. The government's reasons for excluding them were not transparent or clear. The purpose of our litigation was not only to protect these women but also to make this important social program more accountable and transparent. The lawsuit failed in the first instance thus leaving most of these women's fundamental rights unattended. However the litigation and the publicity we made of it triggered a fruitful technical conversation with those responsible for the program. As a result, the transparency of the program improved, and some of the women we represented were included as beneficiaries, either directly or indirectly. The failure thus ended in a certain kind of victory which was later confirmed by the Constitutional Court of Colombia

Finally, strategic litigation carries at least two important political risks on account of the fact that it relies on courts and judges. First, such litigation aims for the courts, which are not elected bodies, to adopt decisions with a potentially huge impact on society; thus, according to some critics, this leads to a sort of “judicialization of politics” to the extent that crucial aspects of society are decided by the courts instead of being left to deliberation by elected bodies, as should be the case in a democracy. According to these



critics, this judicialization of politics not only impoverishes democracy but creates the risk of backlash because it can trigger attacks against court rulings and even the courts themselves. Second, and relatedly, strategic litigation might affect the legitimacy and independence of the judicial system, both because of the aforementioned attacks against the courts and also because political actors see that courts are becoming a crucial actor in the political system and try to control them. This politicization of the judicial system is not healthy for the rule of law.

### Some Final Remarks on Strategic Litigation

We have shown with concrete examples that public interest litigation can be a crucial tool for upholding human rights and combatting structural injustice. However, we have also shown that strategic litigation not only has its limits but might be counterproductive for democracy and the rule of law under certain circumstances. Thus, the challenge for organizations interested in using strategic litigation as an instrument for social and environmental justice is to maximize its democratic impact while simultaneously minimizing its risks.

There are no easy ways to achieve this; but our reflections, based on our own experience and on academic discussion on the subject, offer a number of insights.

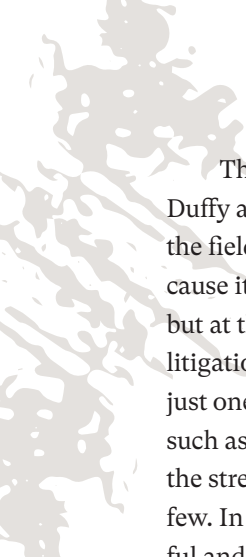
The first of these relates to the importance of the continuous defense of judicial independence and of judges' adherence to human rights principles, as the judiciary is under constant pressure from a range of public and private actors. This is presently the case with a legal complaint in Colombia challenging the confidentiality of the government's COVID-19 vaccine procurement contracts with pharmaceutical companies, arguing that such secrecy impairs the rule of law and the public's right to access



*A week in the heart of the world: In 2022, a group of Colombian indigenous youth traveled to the Kankuamo community of Chemesquemena to learn, along with Dejusticia, about the right to prior consultation. Photo: Santiago Ardila Sierra*

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information. In response to the complaint—to which Dejusticia contributed—the judges held that publishing the details of the government’s procurement contracts would not disclose any trade secrets and that the Colombian state has a responsibility to apply the principle of access to information so that the public can debate ideas and ensure accountability. The administration responded to the ruling with weak arguments and argued that the judiciary would be responsible for any economic consequence on public health that the disclosure of the contracts might produce. In addition, a handful of pharmaceutical companies filed a claim before a superior court demanding the reopening of the proceedings in order to protect the confidentiality of the contracts—a reopening that fortunately never took place. In cases such as these, civil society must foresee and counterbalance public and private strategies that put pressure on judges based on a false dichotomy between health and transparency.



The second insight has been aptly described by Helen Duffy and is shared by almost all the best practitioners in the field: we should “appreciate” strategic litigation because it is a powerful tool in the struggle for social justice; but at the same time, we must “demythologize” it because litigation is not a panacea. Indeed, it carries risks and is just one among several instruments from which to choose, such as direct advocacy before political bodies, protests in the streets, or participation in public debates, to name a few. In many cases, these other tools might be more powerful and less costly and risky than strategic litigation.

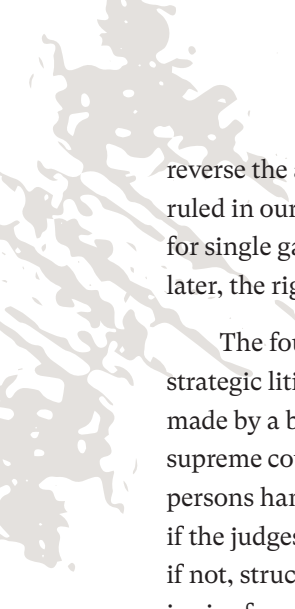
The third insight concerns the importance of *ex ante* strategic planning prior to any litigation effort and *ex post* monitoring of the implementation of court decisions. With regard to planning, we need to evaluate not only the possibilities of success of a specific lawsuit but also the costs and risks involved. In such an evaluation, it is crucial to compare strategic litigation with other tools that could be used to realize human rights and strengthen democracy. In our experience, this analysis has led us to decide against filing a lawsuit. By the same token, when monitoring implementation, we need to ensure that decisions transcend formal justice and contribute effectively to material justice. This is an important step because sometimes the final decision is not complied with by the authorities—or even worse, is complied with formally but causes collateral damage in the process.

The fourth lesson seems contradictory to the previous one but is not: we should not overemphasize the role of *ex ante* strategic planning because we do not have control over the evolution of the context or the legal actions developed by other actors. Thus, we have to remain flexible and be prepared to revise our decisions if the context changes; consequently, our strategic evaluation, as a permanent process, also changes.

Let us illustrate with an example: in 2010, Dejusticia decided to postpone litigation in the contentious subject of adoption by same-sex couples. We thought that such a lawsuit would be difficult to win and might trigger a backlash. However, the following year, an American journalist adopted two Colombian brothers. When he was about to return to the United States with his children, the ICBF (the Colombian agency in charge of adoptions) revoked the adoption after the journalist informed them that he was gay. He decided to present a legal complaint against the reversal of the adoption and came to us for assistance. In spite of our previous decision, we took the case because we knew that the lawsuit would be filed regardless of our involvement and that it offered a good opportunity to combat social prejudice against adoption by gay people. We accompanied our litigation with an extensive media campaign, supported by several LGBT organizations, to show how inhuman and discriminatory it would be to



Diana Esther Guzmán (right), Rodrigo Uprimny and one of the guests at the Litigation Course in Cartagena, 2023.  
Photo: Dejusticia Communications Coordination



reverse the adoption. Ultimately, the Constitutional Court ruled in our favor, holding that adoption was not forbidden for single gay persons, a first step toward obtaining, years later, the right to adoption by same-sex couples.

The four previous insights lead us to a fifth lesson: strategic litigation is not about an astute legal argument made by a brilliant lawyer in a single hearing before a supreme court, with the fate of millions of disadvantaged persons hanging on the line. According to such a scenario, if the judges accept the argument, society is transformed; if not, structural injustice prevails. While this type of scene is nice for a Hollywood movie, the reality is more complex. Strategic litigation is, as many scholars stress, usually more of a process involving several cases than a single case. Moreover, it consists of other tools beyond legal ones, such as mobilizing grassroots organizations, developing media campaigns, and securing support from powerful actors (or at least taking action to reduce their opposition). And the impact of litigation goes beyond the legal realm, as we saw with the case of the cash transfer program. Thus, we agree with Justice Initiative that we should go beyond an approach that sees the impact of strategic litigation as a binary “win or lose” result in a single case. This vision is too restrictive because it cannot analyze “what advances can be achieved, both inside and outside the courtroom, as a direct and indirect result of litigation.”<sup>5</sup> That is why strategic human rights litigation should be seen as “multi-dimensional, multi-disciplinary, multi-stakeholder, iterative, and composed of several stages.”<sup>6</sup>

Finally, the previous considerations lead us to a crucial sixth lesson: strategic litigation requires lawyers and

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5. Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (Budapest: Open Society Foundations, 2018).

6. *Ibid.*, p. 18.



Thank you gifts to the Tang Prize team, which include the hammock, backpack and loom made by hand by the Mampuján Women Weavers, in which some milestones in the history of Dejusticia are recounted.

Photography: Santiago Ardila Sierra

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legal expertise. However, it should not be an isolated activity carried out solely by law firms and legal activists. If we want to increase its transformative and democratic potential, strategic litigation needs to involve grassroots organizations, especially those whose constituents might be affected by the decision. The appropriation of a judicial decision by its beneficiaries is crucial for its effectiveness on the ground.

In summary, using the words attributed to Clemenceau—that war is too serious a matter to entrust only to military men—we think that human rights strategic litigation is too serious a matter to entrust only to lawyers and judges. Strategic litigation should be seen as part of a broader collective effort to achieve social and environmental justice. It needs citizens and grassroots involvement as well.



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The two presentations featured in this book were prepared for two sessions related to the 2020 Tang Prize—the announcement event and the award ceremony—both of which were virtual due to the COVID-19 pandemic. Both texts are based on our firsthand experience and on a review of the academic literature, and they were written to conform to the topic and length determined by the Tang Prize Foundation.

Given that the purpose of this book is mainly to provide witness to the two oral presentations and to preserve their original content, the two chapters contain no citations, save for a few explicit references to some of the main publications that were consulted. To make up for this deficit, this appendix includes a general supporting bibliography that lists not only the sources that were consulted in the writing of the speeches but also other works that may be valuable for anyone reading this book. The bibliography below is divided into four themes that are covered in the speeches: notions of civil society and non-governmental organizations; participatory action research in the public interest; strategic, or public interest, litigation; and relevant jurisprudence.

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*This case represents a fight for equality in COVID-19 relief*

*policies, arguing that female domestic workers and migrants should be awarded the supplemental COVID-19 support funding that the government gave to citizens during the pandemic. The lawsuit is pending.*

Constitutional Court of Colombia. Sentence T-159. June 9, 2023 <https://www.corteconstitucional.gov.co/Relatoria/2023/T-159-23.htm>.

*The Constitutional Court urged the Colombian State to create a public policy taking into consideration the situation of women domestic workers and care workers.*

Administrative Tribunal of Cundinamarca. Sentence 2021-09-178-RI. September 30, 2021. <https://www.dejusticia.org/wp-content/uploads/2022/06/08.-Sentencia-TAC-1.pdf>

*This decision ordered the National Unit for Disaster Risk Management to share the confidentiality clauses of Colombia's COVID-19 vaccine contracts.*

Administrative Tribunal of Cundinamarca. Interlocutory Injunction. 2022-05-225 AT. May 16, 2022. <https://www.dejusticia.org/wp-content/uploads/2022/06/2021-514-RI-Auto-resuelve-recurso-de-reposicio%CC%81n-auto-que-niega-nulidad-1.pdf>

*This ruling, which upholds the previous sentence, gave Dejusticia and its partner (Alianza Más Información Más Derechos) access to the confidentiality clauses of the COVID-19 vaccine contracts.*

Alianza Más Información Más Derechos. Request for compliance with the 2022 sentence. (2022). <https://www.dejusticia.org/wp-content/uploads/2022/06/Cumplimiento-sentencia-TAC-cla%CC%81usulas1.pdf>

### ***Other Cases Cited in the Presentations***

*Plessy v. Ferguson*, 163 U.S. 537 (1896).

*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).



