



Democratic Strategic Litigation and Defence of 'LGBTI+' Rights

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ABSTRACT

This paper is a contribution to strategic litigation studies, with most of its materials drawn from the field of 'LGBTI+' rights, i.e., issues related to sexual orientation, gender identity and expression, and sex characteristics (SOGIESC). After recalling briefly the history of strategic litigation, this paper reflects on the link between strategic litigation and democracy, by attempting to identify, among the various forms of strategic litigation those who clearly contributes to democracy and which should therefore benefit from provisions facilitating it, such as rules broadening the standing required to initiate a lawsuit or rules favoring its funding. This paper also demonstrates the legitimacy of the contribution of supreme courts to democratic regimes, as long as such courts are cautious of preserving the powers of the other bodies representing the people (mostly Parliament and Government), by making sure that judges' intervention is compensating for the flaws of democracy and or not a 'government of judges'. By comparing the process of adoption of judgments and acts of Parliament, the paper also shows the democratic merits of the judicial deliberation compared to the parliament's one. The paper, therefore, defends the idea that Strategic litigation can be a better tool than other innovative tools usually promoted to remedy the crisis of democracy, especially for marginalized groups.

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In the summer of 2022, judicial news worldwide was marked by success stories of conservative groups using strategic litigation before the US Supreme Court to reduce abortion rights (*Dobbs v. Jackson Women's Health Organization*), environmental protections (*West Virginia v. EPA*) and protections offered to victims of gun violence (*New York State Rifle & Pistol Association, Inc. v. Bruen*). Meanwhile, on the European continent, the European Court of Human Rights (ECtHR) made the headlines when delivering important decisions in 2023 and 2024 related to the inclusion of intersex women in elite sports (*Semenya v. Switzerland*) or to the fight against climate change (*Verein KlimaSeniorinnen Schweiz* and others).

These developments highlight that legal decisions delivered by various supreme courts around the world nowadays play a key role in the regulation of society, whether it be regarding issues related to oppressed communities or very sensitive economic issues in the field of digital, labour, environment or arms laws. Through the tools of fundamental and/or human rights, combined with the judicial powers of reviewing the laws and making injunctions on the governments, supreme courts have gained considerable power, but not always in the direction of a more inclusive and democratic society, as we can see in the American cases mentioned above. This has enabled supreme courts to make significant contributions in the resolution of disputed topics, thus making them key implementers of legal and social changes ([Dickson 2007](#); [Epp 1998](#); [Israel 2021](#); [Lasser 2009](#)).

It must be underlined that it took quite some time before litigation was used in a strategic way by claimants – as opposed to judges alone – in an attempt to have a meaningful impact on society and its laws. Of course, the right of the judge to challenge norms emanating from the executive power is nothing but new. For example, 14th- to 18th-century French superior courts, called 'Parliament', were recognised to have the right to delay the registration of royal ordinances, that they would have to later apply, through what was called 'resmonstrance' ([Harouel 1987](#)). This right could be used by parliamentarians finding a royal ordinance contrary to the rights of the people or to the Fundamental Laws of the French Kingdom (sort of a customary constitution). Yet, when such power was used, monarchs had the ability to bypass it by sending a letter, called 'lettre de jussion', where they would force the registration of their ordinance. The Parliament could again resist by issuing an 'iterative remonstrance', to which monarchs could also answer by reasserting their command through a second letter. If the Parliament kept resisting, monarchs could finally decide to come in person into Parliament to force the registration of their ordinance – an act known as 'lit de justice'. Such a scenario contrasts sharply with contemporary judicial review, where judges independently assess the compatibility of laws and practices with human rights standards. Also, contrary to judicial review, this right to issue remonstrance was only exercised once: when the royal ordinances were registered, their non-compliance with the rights of the people or the Fundamental Laws of the Kingdom could not be brought again before the court. Above all, unlike today's judicial review, this right of remonstrance was not in the hands of the people who could have access to Supreme Courts but instead only in the Parliament's hands, which weren't representative of the national diversity. For all these reasons, the right to issue remonstrance has limited elements in common with the various examples of strategic litigation mentioned above.

Strategic litigation also differs from judicial review, although one can hardly conceive strategic litigation if judges don't have the ability to review the law. In *Marbury v. Madison* (1803), for instance, the US Supreme Court recognised its authority to exercise judicial review over state laws to ensure their compliance with the Constitution. However, this case did not involve strategic litigation initiated by individuals or groups seeking legal and societal reform through precedent-setting decisions. The case *Marbury v. Madison* was only related to the process of appointment of a judge, although in the background existed an institutional question related to the relationship amongst the various authorities created by the US Constitution. Therefore, such litigation had nothing strategic beyond the claimant's own interests.

In strategic litigation, the claimant's objective extends beyond their personal interest in the outcome of the case (Gledhill and Ramsden 2019; Graser and Helmrich 2019; Van der Pas 2021). Such litigation can be used by civil society actors to promote social, political or legal change through targeted lawsuits (Hess 2022). This concept is an emerging element in the field of change-oriented legal practice ('lawyering for change') (Ramsden and Gledhill 2019). While it overlaps with other approaches, such as 'public interest litigation', 'movement litigation', 'cause lawyering' or 'impact litigation', strategic litigation can be distinguished by several key characteristics. Their goal is to influence public policy, change the law or ensure it is properly enforced. This approach uses the courtroom as a platform to promote a broader cause. It invites judges to recognise legal gaps or encourage legal developments beyond the individual case, not solely to enforce democracy. Therefore, in this paper, we will distinguish between strategic litigation that contributes to strengthening democracy (democratic strategic litigation [DSL]) and that which does not.

The first major instance of strategic litigation emerged in the 1950s, with legal actions supported by the civil rights movement at a time when Democratic presidents had appointed more socially progressive judges to the US Supreme Court (Fraleley 2024). From that point onward, individuals and communities began using strategic litigation not to resist social reform but instead to promote systemic change. This approach was exemplified by *Brown v. Board of Education* (1954), widely regarded as the first major case of strategic litigation (Tushnet 2004), although its legacy has been debated in later scholarship (Bell 1980; Bligh 2021). Following this success, strategic litigation has expanded globally, including in non-common law countries. There, the tools used in strategic litigation may differ, due for instance to the existence of constitutional or regional courts dedicated to the protection of human rights and which use specific methods of reasoning, like the proportionality test or the margin of appreciation. As strategic litigation has proven to be effective across legal systems, both in common law and civil law countries, and domains – environmental protection, digital rights, labour law and more – it has become evident that such litigation can serve as a democratic corrective, especially in the face of the limitations of majoritarian democracy.

However, can certain forms of strategic litigation be characterised as democratic in themselves, thus justifying the concept of DSL? This paper argues that they can, focusing on the example of litigation in the field of so-called 'LGBTI+' rights (referring to the rights of lesbian, gay, bisexual, transgender, intersex and other related marginalised groups). As the core issue with understanding this concept is its claim to be democratic, we will first emphasise the contribution of some strategic litigation to democracy and therefore the merits of the term 'democratic strategic litigation' (Section 1). Having thus identified the relevance of this concept, we will then outline the legal consequences that should be drawn from it in a legal order that recognises it fully (Section 2).

I. STRATEGIC LITIGATION AND DEMOCRACY

How does strategic litigation intertwine with democracy? To answer this question, we will first show that, when it comes to minorities and marginalised groups, strategic litigation is a necessary tool to combat the current crisis of democracy. Indeed, both the usual parliamentary process and the recent innovative tools created to remedy the flaws of democracy have proven to be quite ineffective for such marginalised groups (A). However, isn't it anti-democratic for judges to respond positively to strategic litigation brought before them by such groups? As we will show with some examples from the 'LGBTI+' field, even if there is a real risk of a 'government of judges' breaking the separation of powers, some objective criteria can be used by judges to decide whether they should intervene on a disputed social issue and order the other democratic powers to enhance the rights of minorities (B).

A. THE NEED FOR STRATEGIC LITIGATION TO REMEDY THE FLAWS OF DEMOCRACY TOWARDS MINORITIES

A loss of confidence in institutions – crises of both representative regimes ([Ham et al. 2017](#)) and of representatives ([Thomassen 2014](#)), coupled with a crisis in participation ([Chevallier 2002](#)) – and a perceived elite disrespect for democratic norms ([Grimmel 2019](#); [Levitsky and Ziblatt 2019](#)) seem to divert many citizens away from decision-making processes. Since the advent of the British parliamentary system in the 18th century, parliamentary representatives have largely been drawn from specific social groups, particularly economic and social elites ([Beer 1957](#)). In most democracies, despite a gradual diversification in the sociodemographic backgrounds of representatives, power remains concentrated among narrow elite groups in which the most dominant social groups are in the majority ([Lefebvre 2019](#)). Young (2000) shows that elite dominance persists through external and internal exclusion. The former refers to structural barriers that limit political participation – for example, when economic insecurity prevents the poor from engaging. The latter arises within seemingly inclusive institutions, when political discourse rests on assumptions like the ideal of 'dispassionate' rhetoric shaped by white, middle-class male norms.

The minority position renders the pursuit of rights ineffective in modern representative democracies. This ineffectiveness is further compounded by numerous cases of decision-making processes being captured by powerful interests, particularly economic ones ([Carpenter and Moss 2014](#)). A prime example is the revolving door between financial regulators and Wall Street that contributed to regulatory failure in preventing mortgage fraud before the 2008 financial crisis. Also, numerous examples, like the legal situation of LGBTI+, show that elected political representatives are reluctant to enact substantive changes due to the political costs associated with addressing pervasive discriminatory situations. Democracy, defined as 'the rule of the many', often operates within the boundaries of dominant social norms, with elections reproducing discrimination ([Landemore 2012; 2020](#)), such as heteronormativity or patriarchy. Shouldn't it also foster a genuinely inclusive collective decision-making process? Strategic litigation varies significantly by geographic context ([Helmrich 2019](#)). Originally imported from Anglo-American law, this approach thrives in common law systems where jurisprudence more readily drives legal change. In contrast to this traditional model, India presents a unique case where public interest litigation emerged from the judiciary itself, positioning the Supreme Court as an active participant rather than merely a venue for litigation. This judicial initiation represents a

significant departure from the typical actor-driven strategic litigation seen elsewhere. As this mechanism spreads globally, it raises important questions about legal transnationalisation (Delpuech and Vassileva 2009). In civil law countries, European courts (ECtHR and the European Court of Justice [ECJ]) have become key forums where strategic litigation has adapted to the multi-level legal context, potentially leading to standardisation across European justice systems (Kelemen 2011).

Hereafter, we will show that there is a need for strategic litigation (1), which, as we will show, does not rely on a less-democratic process than that used in Parliament (2).

(1) In response to the ‘democratic disenchantment’ (Mény 2019), caused in particular by the weakening of representation, new foundations for the exercise of power have been sought since the 1990s. These are in line with the view that ‘the legitimate decision is not the will of all but that which results from the deliberation of all: it is the process of will formation that confers legitimacy on the results, not the wills already formed’ (Manin 1985). Among the various expedients, ‘democratic innovations’ are emerging and being legally enshrined. In specific contexts, deliberative democracy has been incorporated into public decision-making through formal legal mechanisms, and notable examples of such can be observed in various regional initiatives and practices (Trettel 2015); for example, the Aarhus Convention, signed on 25 June 1998 by 39 states, represents a major innovation in international environmental law. Aimed at promoting ‘environmental democracy’, it establishes three key principles: improving public access to environmental information held by public authorities, encouraging public participation in environmental decision-making and expanding access to justice in matters related to environmental law and information (Monédiaire 2011). Although there is a multitude of participatory practices, they share certain characteristics, notably that of reintroducing the public space into the deliberative process in order to allow a group to receive and exchange information, to critically examine an issue and to come to an agreement that will guide decision-making (Fearon 1998). In other words, these democratic innovations are ‘institutions specifically designed to increase and deepen citizen participation in the political decision-making process’ (Smith 2009). They make it possible to break free from electoral cycles and have the advantage of challenging the practices that usually guide public action. With these objectives in mind, they could provide a framework for demands that do not find an echo in traditional decision-making circles. However, democratic innovations do not allow minority groups to express themselves. This failure is primarily due to the intrinsic limitations of these mechanisms (a), which are particularly exacerbated when they involve minority groups (b).

(a) Studies that systematise these democratic innovations often take a critical view of them, particularly in that they do not fundamentally call into question the practices of public action.

First, the individuals or groups who take part in these schemes are generally not in control of the areas in which they are called upon. Sometimes imposed (particularly in urban planning and environmental matters) or suggested (Articles 6–8 of the Aarhus Convention of 25 June 1998) by the texts, the fields of public action in which participatory procedures are implemented remain largely fixed by the public authorities. These choices do not allow citizens in general, or minority groups in particular, to put their demands on the agenda in these forums. What’s more, the public authorities most often retain control over the conditions under which participation is organised (agenda, choice of interlocutors, timetable, form of participation forums,

etc.). All of these choices not only determine the conditions for participation but also predetermine the behaviour expected by the public authority, such as evacuation of power relations or collective demands (Palomars and Rabaud 2006).

Second, these various democratic innovations are generally incorporated into the standard-setting procedure under ordinary law. After deliberation, the decision must be ratified by the competent public authorities. Thus, participation in the deliberation process does not guarantee that the proposal developed in this way will subsequently be adopted by the public authorities. Such innovations do not therefore really give citizens any power in policy-making. Finally, when they are not imposed by legislation, these procedures can be used to legitimise the actions of those in power. It is not insignificant that the dynamics of participation should be favoured in the field of administrative action (Testard 2018), which by its very nature lacks democratic legitimacy. In this respect, the recourse to various democratic innovations can be explained by reasons that have nothing to do with the evolution of public policies but rather with those desired by the public authority (Gourgues and Mazeaud 2023).

(b) The intrinsic inadequacies of democratic innovations are particularly highlighted when they are geared towards the participation of minority groups. According to Laplanche-Servigne and Sa Vilas Boas (2019), the latter can be defined as ‘those who have experienced social undermining and discrimination as the common denominator of a social group’ (Wirth 1945), placed in a social relationship of ‘lesser power, of limited rights and possibilities’ in relation to a dominant group (Guillaumin 1985).

First, the choices made by the authorities when designing a participation procedure do not allow for the inclusion of minority groups and remain insufficient for the expression of their claims (Young 2000; see also Perreau 2023). This is the case when, on the one hand, the authorities determine the boundaries of the minority groups invited to participate. This categorisation of minority groups – ‘foreign’ people (Flamant 2016), ethnic groups (Lang 2021) or ‘LGBTI+’ (Bouvard 2019) – helps to exclude some of their members who do not meet the expectations of the public authorities. This categorisation does not always consider the way in which minority identities are constructed socially and politically. Thus, within them, ‘the political and social relations of domination’ (Blondiaux and Simonet 2002) persist, and minority groups find themselves assigned to positions restricted by public authority. Second, the development and internationalisation of democratic innovations contribute to a form of standardisation of participation methods, particularly through the professionalisation of the actors – often from the private sector – who design them (Mazeaud and Nonjon 2016). However, there is reason to believe that this standardisation of participatory procedures – with a view to their transposition into diverse and varied environments – does not allow the specific contexts of minority groups to be taken into account. Third, democratic innovations are, for the most part, designed and implemented at the local level (Blondiaux 2001). While this proximity encourages consultation on local issues and the re-establishment of links with local representatives, they do not offer any real prospects for challenging the factors that cause a group to be minorised.

These limits to the expression and recognition of grievances within the various democratic innovations implemented are obviously not without impacts on minority groups. Indeed, some studies point to the politicisation of inequalities experienced by minority groups within participatory mechanisms. This is the case of the surveys carried out at the women’s conferences in Recife (Sa Vilas Boas 2015) and community

organising groups in the USA (Talpin 2016). In this way, the various democratic innovations make it possible to raise awareness of inequalities without offering any prospects for resolving them. Further, recourse to the courts would allow minority groups to make their demands within the framework of a deliberative process of a different nature, one that has the advantage of being integrated into the rule of law and one of its corollaries, the principle of the separation of powers. The struggles of minority groups would find here a space for expressing their demands without liberal political institutions being sidelined (Mouffe 2018).

(2) As soon as a debate is directed by the government and partisan, logic prevails over the individual sensitivities of the representatives (Bentham [1791] 1999) and the assemblies cannot function as a satisfactory deliberative space. In this context, when the executive and legislative powers show major institutional blockages to any significant progress in terms of equal rights, two possible modes of action can be combined, such as grassroots pressure and the response of the courts (Vanhala 2009). This analysis focuses on the latter approach – strategic litigation – as a means to advance legal and social change. Some traits that fall within the ‘deliberative’ paradigm of democratic thought since the 1980s (Girard 2011; 2013) can be found on the side of the judicial institution. Deliberative democracy places public deliberation at the heart of democratic life, considering it a central source of political legitimacy. According to this tradition of thought, the exercise of power involves the public exchange of opinions, information and arguments among equal citizens, with the aim of making decisions. Strategic litigation reflects this by making the stimulation of public debate one of its core objectives. This would offer many advantages to marginalised groups, compared to the political decision of parliamentary origin, by offering an institutional outlet for their claims.

Thus, several elements support the idea that the adversarial process before the court and its contribution to deliberation enable the formulation of a democratic decision. First, the norms created by judges in the context of strategic litigation are often the result of deliberation. Also, the judgment – at least in the tradition of civil law that dominates today at the European Courts, where strategic litigation is brought forth (ECtHR and ECJ) – is based on real reasoning, unlike parliamentary deliberation where, in practice, the various opinions are more juxtaposed than coherently articulated and where it is much more often the political party with the most deputies who triumphs in the bill, rather than the one with the best arguments.

Second, the exchanges between different actors – the parties and the Public Rapporteur or the Advocate General – are not so much aimed at reaching a consensual decision but rather at winning the conviction of the judges who arbitrate (Manin 2021). On the contrary, the decision adopted in Parliament results from a vote among the actors: it is not a question of winning the conviction of an impartial third party but rather of maintaining a pre-existing majority. While parliamentarians from the majority do not have to take seriously or counter-argue the points raised by the oppositions – the rules governing the amendment procedure are, in this respect, enlightening – it is different from the exchanges between the parties to the trial. From this point of view, jurisdictional space is the one that allows the confrontation of opposing positions to be the most fruitful in order to feed the deliberation (Manin 2017; Ordovery and Weitzman 1977). Especially since the exchanges are organised by judges in respect of procedural rules. While the closure of the judicial investigation is ordered once they consider they have all the necessary information for the debate, which will continue during the oral phase, the legislative time devoted to discussion is constrained by the majority

according to other concerns than those drawn from the fullness and completeness of exchanges (avoid parliamentary obstruction, programmed legislative time, etc.).

Finally, the conditions under which the debates take place also show the democratic aspects of the judicial decision-making process. In the political decision of a parliamentary nature, a political majority submits its public policy proposal to discussion, has extensive powers in the organisation of exchanges and participates in the vote. Under these conditions, marginalised groups cannot hope for the agenda of their claims. On the contrary, as far as the political decision of a jurisdictional nature is concerned, marginalised groups can provoke the trial, determine their claims and the means that support them, enabling them to have theoretically a wider impact.

However, in practice, judges will not very often rally the activists or will demand a high level of evidence or public understanding of the disputed matter since judges tend to be very cautious when deciding on their own on contested issues, mostly because they may doubt their legitimacy to intervene and are attentive to the reactions of Parliament and the government. A good example of that attitude of self-restraint can be found in the case law of the ECtHR, which grants member states a very wide margin of appreciation on disputed social issues (*S.A.S. v. France* 2014, §154) and which considers that separation of powers is a good reason for national judges not to step into disputed social issues (*Y v. France* 2023, §89). Another good example can be found in the case law of the French Constitutional Court which, on contested issues like same-sex marriage (*Mme Corinne C. et autre* 2011), will often employ self-restraint and explain that its power is of a ‘different nature’ than the one held by the Parliament ([Altwegg-Boussac 2021](#)), thus bringing to light the problems of legitimacy that strategic litigation poses to judges in their relationships with other powers.

B. STRATEGIC LITIGATION AND THE MANAGEMENT OF THE DEMOCRATIC LEGITIMACY OF OTHER POWERS

When a marginalised group decides to initiate a strategic litigation, it must know that the answer of the courts will depend to a large extent on how the judges perceive the role of their court: a self-restrained court or an activist court, especially in the cases where flaws of democracy can be found. The answers of the court also depend on whether the issue addressed by the court has already been addressed by the judges in the past or not. Having developed these two criteria of judicial intervention (1), we will then be able to conclude on the cautiousness of the Court regarding the democratic legitimacy of the other powers (2).

(1) The case *Y v. France* delivered in January 2023 by the ECtHR, concerning the recognition of ‘sex markers’ being different between males and females, can help to illustrate the importance of judges’ self-perceived role. In this case, which was built from the beginning as strategic litigation, while six of the seven European judges believed that, when it comes to debated issues, the ECtHR should restrain itself from making any strong statement and should rather leave these issues to Parliament (which led them to reject the claim that Article 8 of the European Convention of Human Rights requires States to allow intersex people to have another ‘sex marker’ than male or female). The Czech judge Kateřina Šimáčková, in her lone dissent, expresses the opposite opinion, based on her self-perceived role of the ECtHR in such a situation. After acknowledging that the ‘argument based on the duty of reserve of an international court, which reflects the means of domestic law based on the separation of powers, is also very powerful’, she added that, to assess the argument

‘that it is not up to the Court but to the legislator to regulate the rights of intersex people’, the Court ‘should [...] take into account the fact that the issue that is raised is rare and does not concern a group of people of such importance as it would have political relevance’, meaning that such a group cannot by itself push its interests in the political agenda (Baumgartner and Jones 2009) and ensure that their interest be effectively protected. Then, considering this limited ability of intersex people to obtain from the Parliament a change of the law, she concludes that France should have recognised the claimant’s right to be recognised with a neutral ‘sex marker’.

Another situation where a supreme court dares intervene on debated social issues where the Parliament hasn’t done anything about it is when the Supreme Court has already delivered a similar opinion on this topic but nothing has subsequently changed in the member States. To illustrate the role of previous decisions delivered by the ECtHR, we can make a comparison between, on one side, the case *Y v. France*, already mentioned, and, on the other side, the cases *Goodwin v. United Kingdom* (2002) and *Oliari v. Italy* (2015), two strategic litigations brought before the ECtHR regarding respectively gendered and sexual minorities. In *Y v. France*, after explaining why the Court is going to reject the request of the claimant to have ‘neutral’ registered as a ‘sex marker’, the ECtHR, however, recalls (§91), as a hand outstretched to the intersex community, what was said in *Rees v. United-Kingdom*, a case where it had rejected the claim of transgender person requiring the state to change their legal gender marker. In *Rees*, after also explaining why it would reject the claim, the ECtHR said that ‘The Convention has always to be interpreted and applied in the light of current circumstances [...]. The need for appropriate legal measures should therefore be kept under review, having regard particularly to scientific and societal developments’. And, indeed, that’s what the court did: when 10 years later, in *Goodwin v. United Kingdom*, a similar question came again before the Court, with the authorities of the UK having done nothing for the transgender communities, the ECtHR decided that it was time to overturn what it had decided in *Rees v. United Kingdom* and to impose to the UK (and therefore to all member states) a duty to enable the change of gender marker for transgender people living as their preferred gender after undergoing gender-affirming treatments. Therefore, one can see the reference to *Rees* made in *Y v. France* as a promise that the ECtHR will overturn its refusal to recognise ‘neutral’ as a ‘sex marker’ if France doesn’t do anything about it in the coming years. From these cases, one can therefore conclude that, when the ECtHR decides to leave States a wide margin of appreciation on disputed issues, there is no guarantee that such a broad margin will be kept in the future and that member States should therefore reconsider their decision in the future if they don’t want to risk that, in the next case looked up by the Court, it concludes that the margin is now too strict, which leads it to conclude a violation of the State obligation to protect human rights.

The *Oliari* case, mentioned above, is also interesting in this perspective since it shows us that the ECtHR can also use the case law of national judges to force a State to change its legislation related to sexual minorities. In that case, the European Court of Human Rights built its decision condemning Italy for not offering same-sex couples legal protection of their union, based on the fact that such a condemnation had already been made by the national court and that the Parliament hadn’t implemented it. It should be mentioned that this attention to previous decisions is very common among Supreme Courts dealing with strategic litigation on debated issues. For instance, the development of a specific form of regulation of strategic litigation in India, in the late 1980s, relies on the same process where the Supreme Court first pinpointed a problem

and then, after five years of the Federal State doing nothing about it, finally decided to create on its own a praetorian rule to offer a much broader standing to a claimant initiating ‘public interest litigation’ (Moron-Puech 2023).

(2) To conclude, one can see that, when supreme courts judges are willing to grant sexual, sexed and gendered minorities the rights they failed to obtain in their national order from the executive or legislative power often perceived as embodying democracy, such judges often make sure first that there was a failure in the democratic majoritarian process, due to its inability to make a place for the voices of these minorities to be heard. Sometimes, these judges are willing to make this move by the sole proof of the lack of means of expression of this group, as the Czech judge Kateřina Šimáčková did in *Y v. France*. Other times, they only want to do this after they or other courts have already brought to the attention of States the difficult situation of this minority regarding their human rights in a first decision. In any case, supreme courts are here compensating for the flaws of democracy and are ensuring that the legitimacy of their actions should not be so much questioned. The same can be said of the contribution of such strategic litigation – and its supporters – to democracy of which they help to compensate for the insufficiencies. This is why we find it appropriate to use the expression ‘democratic strategic litigation’. This is doubly true: not only in terms of the legislative changes introduced but also in terms of the judicial debates that are part of the public debate (see Urbinati 2014, 228 for a definition of democracy as a diarchic system governed by the principle of voting but also by the principle of unhindered opinion-forming and on the fundamental importance of opinion and the public forum). This resonance for public debate applies to DSL, as well as to the use of strategic litigation by politicised conservatives, which then raises the following question: Can all strategic litigations be said to have such a democratic function? This a question that needs to be addressed by showing the diversity of strategic litigation in the field of issues related to sexual orientation, gender identity and expression and sex characteristics (SOGIESCs).

II. THE REGULATION OF DSL

Given the contribution of strategic litigation to democracy, it would be quite logical to regulate DSL in order to improve it. However, unlike Strategic Litigation Against Public Participation, very recently regulated by the European Union Directive 2024/1069 (Moron-Puech 2023), nothing similar has been thought of for DSL, mainly because of political difficulties related to the lack of awareness of the contributions of strategic litigation to democracy and the low interest of States in empowering activists and consequently reducing the power of parliamentary and governmental bodies. Before going into some of the key provisions of such a regulation (B), we should first determine its precise scope (A).

A. THE SCOPE OF THE REGULATION

Strategic lawsuits against public participation (SLAPPs) restrict freedom of expression through legal threats. These abusive actions, deployed by powerful entities to intimidate and stop stakeholders in civil society – such as journalists, non-governmental organisations (NGOs) and political activists – impose financial and emotional burdens that effectively discourage public participation and undermine democracy (Hess 2022). Examples include TotalEnergie’s action against Greenpeace

(Moron-Puech 2023). While the distinction between the anti-democratic use of strategic litigation to prevent public debate through SLAPPs (Canan and Pring 1988; Hess 2022; Sheldrick 2014) and the corrective use of strategic litigation to publicise debate about situations of inequality and advance SOGIESC rights appears straightforward (Moron-Puech 2017), this binary categorisation is insufficient to fully conceptualise democratic strategic litigation. This difficulty should help us narrow our interest specifically to democratic strategic litigation, defined by its democratic aims (1), regardless of its outcomes (2).

(1) To gain a better view of what can be a democratic aim, let's consider the use of Strategic Litigation by the US-based NGO Alliance Defending Freedom or the French-based NGO Juristes pour l'enfance. Both of these organisations have indeed taken the freedom of speech and/or belief to dismantle or to refrain, through some strategic litigation, the advancement of the human rights of sexual, sexed and gendered minorities. Although it can be said that such litigation contributes to fuelling debates of general interest by enabling a regulated confrontation of opposite opinions, this doesn't seem enough to qualify them as democratic. Democracy doesn't lie in the possibility of debating properly important issues; democracy is also about dealing properly with such issues. If the group that initiated the strategic litigation already had a lot of support to their views and an ability to access media and political institutions, especially Parliament, there haven't been any flaws in the democratic process that judges need to correct in a strategic litigation. This group was able to defend its view fairly in Parliament and simply lost the battle. There is no flaw of majoritarian democracy to correct and the strategic litigation can therefore not be qualified as democratic.

If we go back to the strategic litigation initiated by Alliance Defending Freedom and Juristes pour l'enfance, it's noteworthy that, while the first obtained some successes before the US federal courts in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018) or *Brush & Nib Studio, LC v. City of Phoenix* (2019), the second one failed to convince the French Conseil d'Etat (the Supreme Court for administrative justice) that teachers' freedom of belief was endangered by the obligation made to them by the State to call their pupils with their preferred first name, respectful of their gender identity, and not with their first name assigned at birth (*SOS Éducation et Juristes pour l'enfance* 2023). Whereas the French administrative judges appeared in this case to have been quite cautious, as they also usually do for DSL aiming at improving the rights of sexed, sexual and gendered minorities (Berthier 2002 – refusing single-parent adoption by a homosexual; *Mousse et al.* 2017 – upholding the exclusion of homosexuals from blood donation; *GISS et Fourtic* 2019 – declining to extend the equality principle to inclusive language, thereby perpetuating the marginalisation of women and non-binary people; *Mme C... D...* 2024 – holding that the rectification of personal data does not apply retroactively following a legal gender change), the US judges were, on the contrary, quite audacious in their interpretation and in the result they reached (Dick 2021; Leonard 2018), which seems the opposite of what should be a proper regulation of strategic litigation. Below, we will further examine this phenomenon, i.e. avoiding backlash resulting from strategic litigation pushed by well-represented groups but enabling progress resulting from strategic litigation pushed by underrepresented groups.

One might think that it's not always easy to distinguish between groups that are well represented and those that are under-represented. Although we think that there is an objective way of doing this, through looking, for instance, at their budget, their

appearance in the media or their ability to meet with politicians or to be heard by ministers, we must admit that such well-represented groups often pretend to be part of an oppressed minority. Consider, for example, political conservatives' use of Christian persecution rhetoric or arguments about the vulnerability of cisgender women or heterosexuality under attack (Dick 2021; Nash and Brown 2020; Perreau 2023). Politicised conservatives use similar arguments to obstruct social and cultural shifts perceived as aligning with the majority, posing a fundamental normative question regarding minority claims for democratic legitimacy. It should be the role of the judge to identify which group can be qualified as representing a minority – ideally with a qualitative approach based on the marginalised position of a group and not the sole number of its members (Perreau 2023 or Moron-Puech 2024) – and benefit from advantages such as a regulation supporting their strategic litigation and which group cannot.

(2) One last clarification should be made regarding the results of strategic litigation. In our view, such results should not be considered when deciding whether a strategic litigation can be called democratic. One of the reasons for that is because it can sometimes be very complex to decide whether a case had a positive result for democracy. Also, even when cases can be seen at first as victorious, they may have dark sides. For instance, in *A.P., Garçon et Nicot v. France* (2017) or *Goodwin v. United Kingdom* (2002), the ECtHR improved significantly the rights of the transgender people willing to change their gender marker. However, the first decision led to 15 years of sterilisation and the second to the certification of trans psychiatrisation. Finally, if one wants to adapt the procedural rules applicable to DSL, the democratic qualification must be known in advance, independently of the results of such litigation. Therefore, the result cannot be a criterion to define DSL. The only valuable criterion is the aim of the claimant. This aim is twofold: first, there is the aim of changing society through a litigation whose scope is beyond the personal interest at stake in the case; second, there is the aim of putting at the top of the political agenda a question that was not raised or properly dealt with before in the various public institutions due to the capture of democracy by the majoritarian group. Both criteria enable judges to make a clear distinction between regular strategic litigation, including sometimes SLAPPs, and DSL. Only the latter should benefit from the provisions that could be adopted to facilitate DSL.

B. THE KEY PROVISION OF SUCH REGULATION

Two levers could be mobilised to promote DSL, especially those related to SOGIESC issues: adaptation of the rules on standing (1) or those on funding (2). Of course, other changes in the law could be made, such as the recognition of punitive damages or the creation or extension of class actions, to always cover strategic litigation. However, from our own experience, standing (or, more generally, the legal ability to access courts) and funding can be major obstacles to DSL, at least for groups willing to go to court (Vanhala 2009), and therefore the priority issue to work on. It should be noted, reciprocally, that in the recent European Union Directive 2024/1069 on the regulation of SLAPPs, these were also the tools used not to promote but to discourage this anti-democratic form of strategic litigation.

(1) In order to facilitate DSL, it would be necessary to determine the scope of persons who could have the standing to act. This question raises the same issues as the one raised for all forms of *actio popularis* (Voeffray 2004): should the right to file a DSL

be given an *erga omnes* scope or should it be restricted to individuals representing the sectoral interests of SOGIESCs (Brennecke 2017; Eliantonio et al. 2012)? After presenting this alternative in general, we will apply it to DSL related to SOGIESC issues.

The first approach would allow anyone to file a lawsuit to defend the interest of SOGIESC minorities (individuals, associations, companies, states, NGOs, European institutions, etc.), including the judge, who could have the power of self-referral. The advantage of this option lies in its ability to broadly open access to the DSL, without the need to demonstrate a direct and personal interest, as is currently seen in the case before the ECJ, according to Article 263 of the Treaty on the Functioning of the European Union, or to have the status of a victim required by Article 34 of the European Convention on Human Rights (ECHR). Mechanically, it would therefore increase its chances of legislative intervention and, ultimately, the extension of SOGIESC rights. However, as any *actio popularis*, it presents two major potential drawbacks: the well-known possibility of jurisdictional congestion caused by the filing of abusive requests – although overestimated according to some authors (Voeffray 2004) – and the risk of politicisation of the action. In this regard, it cannot be excluded that some political parties or populist regimes try to have their own strategic litigation related to SOGIESC matters qualified as DSL (Barberá et al. 2024; Hameleers 2022). Similarly, it could also be imagined that some opponents to these rights resort to astroturfing, by forming a DSL under the appearance of spontaneous citizen movements to present frivolous requests (Cheung 2022), subsequently discrediting genuine activist actions in the eyes of public opinion. Yet, if strict criteria are adopted to define DSL, like the one above-mentioned and based on the specific aims of the claimant, this risk should be widely avoided.

The second approach would limit the standing only to individuals or groups having a specific interest in defending SOGIESC rights, an interest that could not only be characterised by its statutory purpose. This option would imply choosing between formal/legal criteria, such as prior authorisation conferred by national or supranational administrations, or material criteria, such as representativeness – that is, the ability to represent the sectoral interests of groups of individuals wishing for the recognition of SOGIESC rights. Formal criteria could effectively target the most representative organisations, but they could also prove to be totally biased in the event of institutional capture (Carpenter and Moss 2014; Dávid-Barrett 2023), if indeed such authorisations are issued by entities captured by majority interests opposed to one of the groups minorised because of their SOGIESCs. In these conditions, the risks of manipulation and blackmail should not be overlooked, particularly when organisations are reliant upon public or private funding sources, which may compromise their capacity for critical discourse or subject them to political influence (Dunlop 2024). The case of Stonewall, the United Kingdom's leading 'LGBTI+' advocacy organisation, is illustrative: the national media regulator Ofcom terminated its partnership with the NGO, citing perceived bias, despite Stonewall's continued criticism of governmental inaction on conversion practices and opposition to the blocking of transgender rights legislation in Scotland. Regarding material criteria, the difficulty would lie in their definition: if we take the example of an NGO, should the ability to mobilise a minimum threshold of people and seniority of existence be retained? Here, again, this criterion is debatable because, if a movement struggles to mobilise or forms in reaction to a social dynamic, it will be excluded, even though its claims could be legitimate. Thus, the question of the standing constitutes a major issue of legislative and judicial policy for DSL.

In our view, in the context of DSL, this question on the standing should be settled by examining the very object of the action. Indeed, referring to the definition of DSL

mentioned above, the justification of the standing should be subordinated to the meeting of two cumulative requirements, one being more objective than the other: the existence of a legal loophole in terms of SOGIESC rights, and the impossibility of access to the democratic process to correct it.

By legal loophole, we mean here cases where national and/or European law does not provide a provision able to properly regulate a given case or a particular situation (Astolfi 2017; Katz 2010; Kostruba et al. 2023). In other words, it is the hypothesis that current legislation on SOGIESC rights is insufficient, ambiguous or non-existent (European Parliamentary Research Service 2022) – particularly in domains such as the legal recognition of family ties for same-sex or non-heteronormative parents or the effective prohibition of conversion therapies. The objective of such criteria would be to push the judge, in the absence of alternative legal frameworks or regimes, to adopt new norms or modify existing laws or even to provide a new creative interpretation of the law. Such a demonstration would require mobilising a high level of legal expertise, especially if it is required to carry out an impact study demonstrating the shortcomings of the current legislation and the feasible solutions. Regarding the impossibility of access to the democratic process, it is certain that this condition would give rise to a more subjective assessment, to the extent that it would be necessary to use a set of indicators to show that the current political configuration (which could be inspired by LDL 2012), whether at the national or European level, offers no democratic avenue allowing SOGIESC minorities to be recognised with new rights. Among these indicators, one could, for example, consider the limited number of governmental and parliamentary representatives likely to advocate for their interests, the rarity of consultations of representative bodies by institutions, or the low volume of bill proposals filed in favour of the rights being requested.

Given these conditions related to the standing, these questions could therefore be solved by choosing the first approach above-mentioned. Indeed, as previously demonstrated, this would guarantee a particularly broad scope of application *ratione personae*, which is likely to include all concerned minorities, thus aligning with democratic principles. But it would also overcome the aforementioned drawbacks, by representing a cost of entry too high for laypeople who would try to introduce abusive requests, whether in the context of a political manoeuvre or to discredit activist efforts. Nevertheless, beyond the admissibility conditions of a DSL, it is also necessary, for anyone willing to facilitate DSL, to work on the question of its funding.

(2) First, regarding funding, it must be recalled that, in the European context, access to justice is presented as a fundamental pillar of human rights, framed both by Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union. However, this promise of equity and justice often clashes with a pragmatic reality: the cost of judicial procedures. Indeed, without the necessary financial resources, the theoretical right to a fair trial is likely to remain a dead letter for many citizens (CoE 2000), including SOGIESC minorities. For the time being, if some institutions, such as the European Commission, fund organisations that promote ‘LGBTI+’ rights,¹ they have only recently become aware of the benefits that private funding can bring in facilitating access to justice (European Parliament 2022; European Parliamentary Research Service 2021).

1 https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combating-discrimination/lesbian-gay-bi-trans-and-intersex-equality/eu-funding-lgbtq-equality_en.

Moreover, several funding models for DSL could be considered (see, notably, [FRA and CoE 2016](#)): support by non-profit organisations or NGOs, which are dedicated to various causes and are often financed by donations; crowdfunding, leveraging the collection of funds from the general public via online platforms to gather resources; private funds specifically oriented to support DSL; pro bono support from law firms, which provide their services for free or at a reduced rate; third-party sponsorship, where entities finance the DSL, from a marketing and communicational perspective; and, of course, public aid and subsidies like the one offered to fund a whole procedure by the Canadian Court Challenges Program existing since 1978 ([Brodie 2001](#); [Cardinal 2000](#); [Karwacki 1994](#)) or the more limited French public fund on class action created by the Act of Parliament no 2025–391, or even the indirect support that the French Ombudsman would like to offer to parties involved in discrimination cases that would require testing and that the Ombudsman would like to organise ([DDD 2023](#) and [2024](#); [Kolbe-André and Moron-Puech 2023](#)). It should also not be forgotten that partnerships and coalitions between different organisations potentially interested in the request allow for sharing costs and that such partnership can be facilitated through procedural rules like a rule on class action or joint representation. These models are not exclusive and can be combined in practice to meet the specific needs of each DSL in terms of SOGIESC rights.

CONCLUSION

This paper has examined the relationship between strategic litigation and democracy, particularly in the context of marginalised groups, such as those affected by SOGIESC-related discrimination. We have argued that strategic litigation is not only compatible with democracy but can also serve as a necessary corrective to its shortcomings – especially where representative institutions fail to protect minority rights. While concerns about judicial overreach are valid, we have shown that courts can rely on objective criteria – such as the existence of a legal gap and the inaccessibility of the democratic process – to assess whether intervention is justified.

To further support what we call *democratic strategic litigation*, two key levers must be addressed: standing and funding. We proposed an inclusive model of standing that aligns with democratic values while filtering out abusive or manipulative claims and outlined diverse and practical funding mechanisms to ensure that access to justice is not conditioned on financial capacity.

COMPETING INTERESTS

The authors have no competing interests to declare.

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