Part VI: WHY would you bring strategic litigation?

Summary: Strategic litigation is a creative and powerful means of advocacy, but it may not always be the best or most appropriate option. Bringing strategic litigation can undoubtedly be an exciting adventure in and of itself, but you should think through things thoroughly before you pursue it. This last section will address what strategic litigation can do for your cause, what difficulties you are likely to encounter, and whether there would be other ways to achieve the same result.

1. What can strategic litigation do?

Rule of Law. The clearest goal of strategic litigation is to somehow alter the existing laws that govern a jurisdiction. Whether that is through enforcing laws already on the books, clarifying laws that remain untested, challenging laws you believe should be repealed, or building a body of new law, strategic litigation aims to use the power of the courts to defend and promote human rights and to change the way that laws control behavior in a society.

Enforcing laws. If there are laws in place in a jurisdiction and those laws are simply not being followed, you can bring strategic litigation to draw attention to, improve and hopefully ensure enforcement of those laws. Although people living in that jurisdiction may already be entitled to certain rights and protections, that matters little if they do not in practice receive those protections or cannot exercise those rights.

Clarifying laws. You might bring strategic litigation to clarify an existing law. Strategic litigation can help to strengthen the power of a law or a legal system overall by providing a better interpretation and understanding of how the law and system work.

Challenging laws. Probably most strategic litigation cases are brought to challenge laws or policies that violate rights or protections. Strategic litigation can prevent the enforcement of these laws, strike them from the books, and force governments or other defendants to change their policies and practices.
Building laws. Strategic litigation can reveal gaps in existing laws, and can at the same time create new laws and precedents. It can both lay the groundwork for future cases and speed up the development of new practices and policies to address violations of rights or provide other protections on the ground.

Advocacy. Strategic litigation can be an excellent tool for advocacy and advancing your cause or goal, and a single case can have a dramatic impact. Advocacy inside the courtroom is only one part of strategic litigation, and your case gives you an opportunity to send your message out to the media, the public, and the governing forces.

Awareness. Strategic litigation can bring a cause or issue into the limelight, sometimes at far less expense than an overall media campaign. This attention can raise general awareness and foster public discussion and debate. Given the open and public nature of most courtroom proceedings in many jurisdictions, it can also provide an excellent opportunity for media coverage surrounding all parties and organizations involved to gather momentum behind your cause. Changing public attitudes can be instrumental to any victories achieved being felt on the ground.

⇒ Strategic litigation also creates a record of the injustices that underlie your case for all to see. Even if you lose, you can still highlight these injustices and potentially lay a foundation for future efforts to succeed.

Education. Strategic litigation can educate the courts and legal professionals about your cause and the way that laws have brought about or failed to remedy the problem. As awareness spreads, your case may even lead to the introduction of formalized training programs both inside and outside the courthouse walls.

Reform. Strategic litigation can serve as a way for people to organize and bring pressure on a government for social change or legal reform. This pressure can come from both within and outside a jurisdiction; strategic litigation frequently becomes a matter of international discussion. Strategic lawsuits can hold governments accountable for their actions, mobilize communities, change public attitudes, and empower people whose rights have been violated to press for reform themselves.
2. What are the difficulties with strategic litigation?

**Precedent.** One of the main reasons to bring strategic litigation is to set a precedent for similar cases in the future to succeed. As discussed above, the impact your case will have varies based on the legal system in place in the jurisdiction in which you bring it. If your case will have little value for future plaintiffs, you may think twice about bringing it.

**Highest court.** In jurisdictions that rely heavily on precedent, your case may not achieve a great impact unless it is heard by the highest court available. Because of the different ways appeals work, you may not always have a chance to get a judgment from the highest court.

**Losing.** Remember that if you lose your case, you could be setting bad precedent and building roadblocks for future cases. Losing can reinforce or strengthen a harmful law or practice, only making matters worse. On the other hand, a clearly unjust loss may be helpful to your cause overall.

**Cost.** Strategic litigation can be an incredibly expensive undertaking and a costly way of launching an advocacy campaign or bringing attention to an issue. Legal fees and expenses can be difficult to predict, and may easily become prohibitive. In addition, you may also be responsible for the winning parties’ expenses if you lose your case. If you cannot find affordable counsel or volunteer lawyers to handle your case, you may be better off funneling your resources into other forms of advocacy that are less expensive or more stable and predictable.

**Control.** Strategic litigation can be very difficult to control as you are bringing in both plaintiffs and lawyers to your campaign. Understandably, plaintiffs in strategic litigation can be less than ideal clients to begin with. Some may be afraid, inconsistent in their statements, have few resources, and lack the education to fully understand the legal process. Particularly where there are many of these plaintiffs involved, it may not be easy to run and manage the case. Lawyers are another potential source of conflict, and you may find that you do not always agree with their legal advice or recommendations and prefer to maintain more direct control over your advocacy strategy.

**Lack of impartiality.** Where the courts are not truly independent from the government, it may not be worth your while to bring strategic litigation in an effort to change the way the
law works. Instead, it might make more sense to avoid the hassle of the courtroom and put your efforts toward convincing the ruling government to change its laws, policies, or practices directly.

**Impact.** As is the risk with any lawsuit, the outcome cannot be guaranteed. Even if you win in the courtroom, your case may have little impact on the ground if there is no system in place to enforce new rights, laws, practices or policies. It is also important to remember that the judgment from the court may not necessarily reflect public opinion, and you may have little support on the ground for change. If there is widespread opposition, it may even be the case that the government overturns your result by instituting or passing a new rule or law. If you fear that your case will have little impact in the community or jurisdiction in which you bring it, you may consider first trying other methods of advocacy to build support and lay a foundation for change.

**Risk of harm.** Strategic litigation can be a long, drawn out, and traumatic process, and the risk of psychological or even physical harm to plaintiffs may be great. While strategic litigation can promise broad systemic changes, you must not forget about the people who have been directly affected by your case.

⇒ Particularly if your case would involve child plaintiffs, who may be especially vulnerable, you should think twice before bringing strategic litigation where there are concerns that doing so would have a serious negative impact on their lives.

### 3. Is strategic litigation the right decision?

**Other forms of Advocacy.** Strategic litigation is but one of many strategies to advocate for your cause. When you make the decision whether to bring strategic litigation, you should look at all of the other ways you might be able to use your resources to further your goal. If you can achieve the same or similar results through awareness campaigns, lobbying efforts, community outreach programs, or other forms of advocacy without the expense and unpredictability of a trial, you may want to consider funneling your resources into non-courtroom oriented advocacy campaigns.

**Continuing the fight.** Strategic litigation can achieve truly innovative, groundbreaking victories and change the fabric of society, but it can also be a costly and unpopular
endeavor with uncertain or ineffective results. However you paint it, strategic litigation is an incredibly interesting and creative means to advocate. Whether you choose to bring strategic litigation or not, it is above all else most important to find the best ways support your cause and continue to fight for change.