




HuMENA For Human Rights and Civic Engagement
HuMENA pour les Droits de l'Homme et l'Engagement Civique
هيوميناء لحقوق الإنسان والمشاركة المدنية

MENA Diaspora

Paving Road to Justice: What Is Strategic Litigation and Why It Matters



ALBERT V. BRYAN UNITED STATES COURTHOUSE

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1. Introduction

Strategic litigation involves an organization or individual taking on a legal case as part of a strategy to achieve broader systemic change. The case may create change either through the success of the action and its impact on law, policy, or practice, or by publicly exposing injustice, raising awareness, and generating broader change. It is important that strategic litigation is used as one part of a wider campaign, rather than being conceived as an end in itself.

This guide outlines some of the advantages and disadvantages of strategic litigation, as well as some of the key considerations involved in using litigation to effect broad systemic change.

It is not enough to litigate cases that would only bring justice to individual victims: what is needed is a systemic change for all victims of the same crimes. In the MENA region where gross human rights violations are committed and impunity is the norm, the only way to durably improve the victims' situation is to use all available legal avenues, not only at the national level but also at the regional and international levels.

2. What is strategic litigation

Strategic litigation is much more than simply stating your case before a judge

Strategic litigation is the identification and pursuit of legal cases as part of a strategy to promote human rights. It focuses on an individual case in order to bring about broader social change. These cases set important legal precedents by publicly exposing injustices, raising awareness, and bringing about changes in legislation, policy, and practice. Strategic litigation can have a lasting impact on a large number of people at the national, regional, or international level.

Diaspora activists, when approaching strategic litigation, must keep individuals' needs at the core to listen to what individuals have been experiencing and try to address those issues, as many others are or could be in a similar situation. Strategic litigation can be used to:

- Amend law or policy that violates human rights either in-home countries or countries of residence
- Identify gaps between domestic legal standards and international human rights standards
- Ensure that laws are correctly applied and enforced
- Advance civil rights of immigrants and most vulnerable groups such as women, indigenous people, or other minorities

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. 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.

Benefits of strategic litigation

- Creating progressive jurisprudence by setting innovative legal precedents
- Ensuring that national laws are correctly interpreted and enforced
- Triggering reforms in national laws, policies, and practices going against human rights standards
- Strengthening and clarifying international and regional standards
- Enabling individuals to seek remedies for the harm suffered
- Achieve the desired outcome for diaspora's groups or people in home countries
- Achieve change for similarly situated people
- Induce policy change
- Provide an alternative platform for victims of violations and atrocities to speak out on an issue when the government at home country tries to silence them
- Highlight the lack of judicial independence and fairness especially in the home country

Risks of strategic litigation

- Risk diaspora members safety especially if they belong to a minority or a marginalized group
- Put a burden on victims since it is a complicated process
- Set a bad precedent
- expend valuable resources on a case that may be difficult to win

Goals of strategic litigation

Strategic litigation, sometimes also called impact litigation, involves selecting and bringing a case to the courtroom with the goal of creating broader changes in society.

People who bring strategic litigation want to use the law to leave a lasting mark beyond just winning the matter at hand. This means that strategic litigation cases are as much concerned with the effects that they will have on larger populations and governments as they are with the end result of the cases themselves.

- **Advocacy¹:** Through filing lawsuits, advocates for social justice can use the courts to bring about legal and social change. This is often a part of an overall advocacy campaign designed to raise awareness on a particular issue or promote the rights of a disadvantaged population. Many groups or individuals who bring strategic litigation also seek to convince others to join their cause, or to influence the government to change its laws.
- **Results:** When it is successfully used, strategic litigation can bring groundbreaking

1) [*Advocacy in exile*](#)



results. It can spring a government into action to provide basic care for its citizens and immigrants. There are no set limits as to what strategic litigation can accomplish.

- **Strategic litigation vs. Legal services:** It is, however, important to note that strategic litigation is very different from many more traditional ideas of legal services. Traditional legal service organizations offer valuable services to individual victims and work diligently to represent and advise those victims in whatever matters they may bring through the door. But because traditional legal services are victim-centered and limited by the resources of the providing organization, there is often no opportunity to look at cases in the bigger picture. Strategic litigation, on the other hand, is focused on changing policies and broader patterns of behavior. Because of this, strategic litigation is not designed to provide the best services to the largest number of people possible as traditional legal services would.



When Augusto Pinochet, the authoritarian military ruler of Chile from 1973 to 1990, was arrested in London on 16 October 1998, it was one of those rare events that set history off in a new direction. A decade on, the world is still living with the consequences of this (at the time) stunning moment. How have Pinochet's arrest, and the landmark case that followed, changed the landscape of international justice and immunity, and affected the prospects today for holding to account leaders responsible for grave abuses of human rights?

3.Planned and Unplanned Impact Litigation

Litigation can become “strategic” or “impactful” as a planned strategy that delineates the route to follow from identifying the goal to achieve and searching for the ideal victim to preparing each stage of the litigation and developing an action plan for after a decision has been issued. Planned Impact Litigation (PIL) indicates cases that have been prepared by civil society from its inception, and Unplanned Impact Litigation (UIL) indicates cases that became impact cases as the litigation unfolded. In both types of litigation, the harms suffered by the victims and their claims are real. However, the difference lies in the moment of civil society involvement in case².

2) *Impact Litigation: An Introductory Guide*



4. When does it make sense to bring strategic litigation?

Examining your options

Not all cases make sense to file as strategic litigation, and it may not always be necessary to file a case to reach your goal or further your cause. In general, litigation can be a costly and time-consuming process. In some instances, it may make sense to reserve filing lawsuits only for people or governments who have been resistant to all other forms of change. There are many factors you might consider in deciding whether or not to bring a case:

- Is there a legal issue involved that exemplifies or relates to a broader social or societal problem?
- Would a court decision be able to address that problem? Would the court decision have a widespread effect?
- Are your cause and the key issue in the case easy to understand for the media and the general public? How great is the potential for media coverage?
- Are other methods of accomplishing your goals possible? If so, how effective would they be compared with a strategic litigation approach?

5. What are legal strategies?

Legal strategies involve a strategic choice of arguments in national defense cases, appeals to higher courts, or putting forward cases before international and regional courts



Claims or cases submitted to international and regional courts



Appeals to higher courts at national level



Strategic choice of arguments in national defense cases



6. Considerations prior to litigation

Diaspora organizations should make the following considerations before moving forward with strategic litigation:

1.1. General considerations

The following are some key questions to consider before starting litigation:

- Are there other methods than litigation to achieve the victim's goal?
- Is the legal issue of achieving the victim's goals?
- Is the legal case likely to produce wider societal change beyond the individual concerned?
- Is it possible for a court decision to address the problem effectively and make a legal precedent?
- Is the victim ready to commit with the lawyers for a long period to achieve the goals?
- What are the strengths and weaknesses of the case?
- What are the legal claims and how strong are those claims on the merits, within the system, and in public opinion?
- Who else has an interest in the issue and what are those interests? Will they support the victim's position?
- How difficult will it be to prove the case? How costly will it be?
- What political repercussions will follow a win or loss in court?

1.2. Ethical considerations unique to impact litigation

some ethical critical questions must be explored, including but not limited to:

- Should the lawyer encourage the victim to continue the case despite a low likelihood of success?
- Will the victim sustain a long appeals process if necessary?
- Does the organization supporting the case have sufficient financial support?
- Can the case be presented to an international human rights body?
- If the court is likely to be adverse, is it possible to change the venue?
- What extra-legal work can be done to support the case? Will such efforts undermine the judicial process?
- Is it ethical to fail to inform the victim of an auxiliary reason for the strategy? Is there ever a justifiable reason for a victim to be kept uninformed of the strategy?

7. Advancing Litigation through other Mechanisms

The effectiveness of impact litigation does not only depend on the legal efforts but is also depending on what happens outside the court, in particular on the communication strategies developed around the case. Contacting the media, the public, and NGOs Both serve to enhance the potential of the case to make an impact and a social change.



The media provides the rare opportunity to gain knowledge of the violation as soon as it happens – and sometimes even while it is happening – and to follow its development domestically. It also provides a source of information as to the issues affecting society and the rule of law in each specific country and how each scene fits into the larger international arena³. Generating awareness is essential for impact litigation and it usually helps to build an enabling environment for victims to voice their opinions and to seek justice.

8. How to build an impact legislation's advocacy strategy

The following checklist is designed to help stakeholders come up with advocacy strategies to support the litigation process⁴.

1. Identify the violations of victim's rights.	<ul style="list-style-type: none">• National/regional/international context• Which specific rights under the relevant UN Conventions are violated?• Is this an issue which is relevant to other international bodies or UN projects?
2. Identify why the violation is persisting and why previous and existing forms of advocacy have failed to achieve effective remedies.	<ul style="list-style-type: none">• Different political or societal pressures• Previous advocacy efforts and why and to what extent they have failed
3. Identify what forms of legal or quasi-legal advocacy could be used to challenge the violation, what conditions need to be met before these can be used and what other obstacles there are to using these forms of advocacy, looking especially at the national constitution and legal system, and regional as well as international human rights mechanisms.	<ul style="list-style-type: none">• Relevant courts and other complaints mechanisms• National/regional/international level• Court standards and procedures, including preconditions• Legal or practical obstacles to using these forms of advocacy (lack of legal standing for NGOs in court, lack of judicial independence, negative legal precedent, etc)?• Examples of successful litigation brought against other rights violations in your country, e.g. campaigns relating to the rights of women and ethnic or religious minorities• Other avenues to challenge child rights violations (publicising efforts in the media, seeking political support, social and political campaigns, etc)

3) [Impact Litigation: An Introductory Guide](#)

4) [HOW TO BUILD A LEGAL ADVOCACY STRATEGY](#)



4. Identify the evidence that exists of the violation you have identified, how it can be gathered and how it can be used.

- How can this evidence be gathered?
- Who will need to be involved in the collection process?
- What problems might emerge?
- Are the violations taking place in closed and private settings? Is there some public method for investigation and evidence gathering?
- Are individual victims required to bring a claim, and are they willing to come forward and give evidence?
- What are the requirements for witnesses and what are the potential risks in giving evidence?
- Are there any potential limitations on victim's ability to give evidence or appear in court?

5. Identify what resources are going to be needed to mount the challenge.

- How will you acquire or attract funding and other necessary resources for your project?
- Do you have sufficient legal expertise within your organisation, or should you be looking to enlist others to advise?
- Will you need partners in other areas of the country?
- Can you spare the staff time, or should you be looking for volunteers to help keep the campaign going?
- If bringing a court case, are you or the victim(s) entitled to legal aid or will you require pro bono legal assistance?

6. Identify possible partners to work with on this issue.

- Activists, rights defenders, groups of or individual legal professionals, pro bono law firms, other NGOs, international organisations, members of political and social movements, etc
- Anyone else you need in order to fill some of the gaps you identified in the previous section on necessary resources
- Do you already have contact with these partners or will you need to approach them directly or prepare an outreach campaign?
- Are there reasons that important partners might hesitate to get involved, and what can you do to encourage them to join your efforts?



7. Develop a concrete plan to move forward with the advocacy.

- Identify the key steps you will need to take to get your legal advocacy campaign going
- What order will they need to be addressed in?
- Agree on: the overall focus and the specific objectives of the campaign (such as overturning, revising or calling for the creation of a particular law), the time scale and what resources you can put into the campaign
- Begin a preliminary division of work
- Think about specific opportunities to be taken into account (upcoming political or legal developments, appointments to public offices, national events, national days of remembrance or international awareness days, elections, referendums, legal reforms, court cases likely to be resolved in the coming months with potential of setting precedents or bringing attention to related human rights violations, etc)

8. Identify how the involved organization can help you move forward with advocacy on this issue.

- Guides, toolkits and reports
- Information sharing
- Subscription to online newsletter
- Legal database
- Hosting campaigns on the organization's website
- Providing news coverage of national advocacy efforts