Seeking Social Change in the Courts

Tools for Strategic Advocacy

Methodology Workbook  women’s worldwide
The judiciary has the power to permit equality to grow and flourish to meet the legitimate demands and aspirations of ... the world’s population. They also have the power to deny it

Kathleen Mahoney
Chapter 1: Introduction

1.1. What Is Social Change for Justice and How Do You Achieve It
   - Changing Norms, Values, and Behaviors
   - Changing and Implementing Laws and Policies

1.2. Considering the Courts as Sites for Social Change

1.3. Women’s Link Worldwide’s Strategic Approach
   - Mapping
   - Prospective Analysis
   - Lateral Thinking

Chapter 2: Considering Litigation as an Advocacy Tool

2.1. Public Interest and Strategic Litigation

2.2. Understanding the Role of Judges

2.3. Opting for Litigation While Strengthening Democratic Institutions

2.4. Understanding the Potential Value of Judicial Processes and Decisions

Chapter 3: The Four Conditions Test

3.1. Condition One: The Rights Framework

3.2. Condition Two: Knowledgeable and Willing Judiciary

3.3. Condition Three: Legal Advocates with Capacity to Litigate

3.4. Condition Four: The Support Network

Chapter 4: Introduction to Mapping

4.1. Mapping the Legal and Judicial Contexts
   - Mapping Legal Arguments
   - Mapping the History of the Issue
   - Mapping Legal Actions and Procedures
   - Mapping Courts and Judges
   - What do We Want to Know about Judges
4.2. Mapping the Political, Social, and Cultural Contexts .................................................. 64
  Mapping Actors ................................................................................................... 65
  Mapping Public Opinion ........................................................................................ 71
  Mapping the Cultural Context ................................................................................ 74
  Mapping the Political, Social, and Cultural Calendar .................................................. 76
4.3. Using this Assessment to Determine if Litigation Is a Strategic Option............... 77

Chapter 5: When Litigation Is Not the Best Strategy .............................................. 82
5.1. Strengthening the Four Conditions ........................................................................ 83
  Monitoring ......................................................................................................... 85
  Documenting ..................................................................................................... 86
  Building Knowledge and Sensitizing ....................................................................... 88
5.2. Remembering the Courts When Advocating Elsewhere ............................................. 92
5.3. When Someone Else Takes the Issue to Court ......................................................... 92

Chapter 6: When Litigation Is a Good Strategy ....................................................... 96
6.1. Framing ............................................................................................................ 97
6.2. The Legal Strategy ............................................................................................ 102
  Legal Action ..................................................................................................... 103
  Preparing Scenarios .......................................................................................... 105
  Amicus Curiae and Public Hearings ...................................................................... 108
  Remedies ........................................................................................................ 111
6.3. The Alliance and Social Mobilization Strategy ........................................................ 112
  Core Group and Coalition .................................................................................. 114
  Leveraging Your Closest Allies .......................................................................... 114
  Targeting the Middle Ground ........................................................................... 117
  Anticipating Opposition ...................................................................................... 118
6.4. Communications Strategy .................................................................................. 120
  Audiences ........................................................................................................ 122
  Messages ......................................................................................................... 123
Spokesperson and Expert Voices ............................................................................................................. 124
Tactics and Channels .................................................................................................................................. 125
Are You Shaping the Debate? ..................................................................................................................... 127
6.5. Committing to Strategies and Tactics ................................................................................................. 129
6.6. When the Judgement Comes Down .................................................................................................... 132

Chapter 7: A Case Study: Defending Reproductive Rights in Colombia through Strategic Public Interest Litigation .......................................................................................................................... 138
7.1. The Problem ........................................................................................................................................... 139
7.2. The Four Conditions Analysis for Colombia ....................................................................................... 142
   Condition One: The Rights Framework ..................................................................................................... 142
   Condition Two: Knowledgeable and Willing Judiciary ............................................................................ 143
   Condition Three: Legal Advocates with Capacity to Litigate ................................................................. 143
   Condition Four: The Support Network .................................................................................................... 144
7.3. Designing the Litigation Strategy ......................................................................................................... 144
   Condition Two Fails .................................................................................................................................... 145
   Reframing the Strategy .............................................................................................................................. 145
7.4. Achieving Our Objective ....................................................................................................................... 147

Chapter 8: A Final Word .................................................................................................................................. 152

Boxes

Box 1: When Do You Go to the Courts? ..................................................................................................... 20
Box 2: Bias, Stereotype, Prejudice, and Discrimination ................................................................................ 33
Box 3: Effects of Judicial Decisions and Processes .................................................................................... 37
Box 4: Civil and Political Rights and Economic, Social, and Cultural Rights ............................................. 44
Box 5: Guiding Questions for Mapping Legal Arguments ........................................................................... 56
Box 6: Guiding Questions for Mapping Legal History ................................................................................ 57
Box 7: Guiding Questions for Mapping Legal Actions and Procedures ....................................................... 58
Box 8: Guiding Questions for Mapping Judges .......................................................................................... 59
Figures

Figure 1: The Role of Activists in Influencing Social Change ................................................................. 15
Figure 2: Hierarchy of Legal Norms in Constitutional Democracies ............................................................ 19
Figure 3: What Does it Mean to Think Strategically ................................................................................. 21
Figure 4: Elements of Strategic Litigation as an Advocacy Tool ................................................................. 30
Figure 5: Mapping to Design Strategies ..................................................................................................... 54
Figure 6: Mapping Tool ............................................................................................................................... 67
Figure 7: Identifying Allies, Opposition, and Middle Ground ....................................................................... 69
Figure 8: Mapping the Social, Political, and Cultural Calendar (Timeline) .............................................. 77
Figure 9: Tactics to Strengthen the Four Conditions for Social Change Litigation .................................. 84
Figure 10: Strengthening the Knowledge and Commitment of Judicial Actors ........................................... 91
Figure 11: Examples of Framings for the Abortion Debate ......................................................................... 101
Figure 12: Example of a Standard Judicial Procedure Timeline .................................................................... 107
Figure 13: Tactics for Low-Profile Allies .................................................................................................... 115
Figure 14: Tactics for the Middle Ground .................................................................................................. 117
Figure 15: Tactics for High-Profile Opposition ............................................................................................ 119
Figure 16: Tactics for Low-Profile Opposition ............................................................................................ 119
Figure 17: What Makes Traditional Communications Strategic ..................................................................... 121
Figure 18: Comparing Word Clouds .......................................................................................................... 128
Figure 19: Advocacy Tactics According to Audience and Their Interim Outcomes .................................. 129
Figure 20: Aligning Your Timelines ........................................................................................................... 131
CHAPTER 1

Introduction
This workbook is about engaging the courts to promote social change. It describes Women’s Link Worldwide’s (“Women’s Link”) approach to litigation as a platform for social change and human rights advocacy based on our understanding of judicial dynamics. It presents the methodology we have developed in order to both design our strategies and assist fellow activists in identifying whether the conditions to work with courts are sufficient to make engagement with them a useful option, and how such conditions can be strengthened.

This introduction places the courts in the context of other avenues for promoting social change. The rest of the workbook then describes how you, as a public interest lawyer or social justice activist, can strategically evaluate contexts and make decisions regarding the choices available for the legal, advocacy, and communications strategies and tactics that are necessary to effectively use litigation and legal processes as an opportunity to build upon existing human rights architecture, shape public opinion, and bolster social mobilization. At each point, it illustrates the process with examples from Women’s Link’s own experiences.

Traditionally, strategic litigation has been defined as the litigation of a public interest case that will have a broad impact on society beyond the specific interests of the parties involved. Women’s Link proposes a more comprehensive understanding of strategic public interest litigation: that which not only aims to set progressive legal standards, but also shapes public opinion and bolsters social mobilization by actively creating opportunities for activists and civil society to organize and mobilize around a case. Through this process, legal victories enable the conditions for implementation. However, even without a legal victory, the conditions to solve the problem through other democratic avenues will improve, the movement will become stronger, and the public will be better informed. These are well-recognized critical factors in civil society’s efforts to promote social change. Significantly, although a litigation loss can have benefits, it can also carry substantial risks. While litigation can be used as an advocacy strategy, it should not be used recklessly. This workbook addresses
the processes that you should undertake to maximize the benefits of litigation while minimizing the risks.

Although many of our projects eventually involve legal interventions, and all of the examples provided relate to Women’s Link’s work in the field of women’s and girls’ rights, we believe this workbook will aid both legal and non-legal activists working in all fields of social justice and human rights, as strategies and tactics can be adapted.

1.1. WHAT IS SOCIAL CHANGE FOR JUSTICE AND HOW DO YOU ACHIEVE IT

Societies face a wide range of social justice challenges. We summarize these challenges here under critical theorist Nancy Fraser’s rubric of three broad intersecting themes: lack of fair distribution of resources, lack of recognition of people’s dignity, and lack of meaningful participation and representation in decision-making.3

The lack of access to and control over resources may refer to resources as diverse as land, jobs, credit, education, healthcare, communications technologies, and information. The quality of resources must also be taken into account, as land may be polluted or health services inadequate. Addressing these shortcomings requires what Fraser refers to as “remedies of redistribution.”4

Fraser further notes that the lack of resources is related to lack of dignity, stating that “[m]arginalization in this area not only limits access to and control over resources, it limits people’s self-esteem, making them feel unwelcome in broader society, and preventing them from developing to their full potential.”5 Failure to value all people in society equally is reflected in the stigmatization of individuals or groups for reasons ranging from ethnicity to sexuality to citizenship. This stigmatization is then embedded in social norms and in some cases is also reflected in legal discrimination against specific groups.6 Again, addressing these requires what Fraser refers to as “remedies of recognition.”7
The lack of representation refers to the absence of mechanisms for free and fair elections for positions of political power. It also refers more generally to the absence of mechanisms for meaningful and substantive participation in the democratic process. Participation enables people in all their diversity to engage in public debate and influence decision-making at all levels of society. It further enables people to monitor government implementation of laws and policies and hold governments accountable for their shortcomings. This is a growing feature of contemporary democracy at the national, regional, and international levels—what Keane refers to as “monitory democracy.” As Fraser has argued, realizing the right to participation means creating conditions under which people go from being objects upon which government and others with power act, or fail to act, to becoming agents of change within political processes.

Working toward a society that values social justice therefore means promoting remedies of redistribution, recognition, representation, and participation.

As social change activists, you first identify the core problem that you wish to address. From there you can begin to think about what kinds of remedies are necessary and appropriate. Often a problem is too big to tackle in its entirety, so organizations must prioritize certain components based on contextual factors. Therefore, although here we talk about “solutions,” we recognize that these are really steps toward our ultimate goal. For example, while we may identify the first step as changing the law, and refer to this as our preferred “solution,” we are fully aware that once that is accomplished, there will be a next goal, or “solution,” which will focus on getting that law implemented. Throughout this document we will talk about “your desired solution” or “your desired social change,” but precisely because change processes are complex and multi-faceted, we are really talking about making significant progress toward achieving your desired social change, knowing that each achievement usually raises further challenges or may result in a backlash that you then have to address.
Our premise, then, is that creating social change is not a linear process. The processes of problem identification, solution development, and decision-making by those with power are not sequential or linear. Rather, they should be understood as “multiple streams” that flow independently and simultaneously.\textsuperscript{11} In each, different actors may take part. Political scientist John W. Kingdon notes that the stream of politics and political decision-making is completely separate from both problems and solutions: “political events flow along on their own schedule and according to their own rules, whether or not they are related to problems or proposals.”\textsuperscript{12} The political decision-making stream includes decision-makers such as legislators, bureaucrats (members of the executive branch) and the judiciary. It also includes service providers who implement policies and regulations, all of which influence social change.

In addition, the public—constituent groups, the electorate, the media, corporations, development agencies, and advocacy groups—can influence policymakers, bureaucrats, judges, and service providers at the local, national, regional, and international levels. These multiple streams demonstrate that there are many possible routes for achieving social justice.\textsuperscript{13} As social justice activists, you must keep in mind all relevant actors and levels as you define your target problems and envision what an ideal solution might look like.

As shown in Figure 1, when designing an advocacy strategy, activists should strive to link the separate streams. That is, you and your allies should work out how to build support among the widest possible range of groupings for the solution(s) you are proposing to a particular problem. You can build support for a particular solution by understanding the interests and dynamics of the audiences you hope to influence in order to work out the best framing of problems and solutions and the best strategies for influencing those audiences. Similarly, it is important to understand the differing interests and dynamics of those in the political stream—legislators, executive branch officials, and members of the judiciary—in order to work out how best to garner their interest in and willingness to promote the desired solution.
While achieving changes in policy, either through legislation or the courts, may be a first step toward resolving a social problem, whether a new law actually makes a difference in people’s lives depends on whether the executive branch enacts the necessary policies and regulations to ensure implementation and enforcement, creates the budget, ensures that administrative personnel understand the new requirements, and trains the people responsible for implementation. Therefore, because bureaucrats and administrators determine to what extent policies are actually imple-
mented, they are also potential targets for social change advocacy. In fact, in many cases activists must interact with more than one branch of government to fully reach the solution to any problem.

**CHANGING NORMS, VALUES, AND BEHAVIORS**

Achieving the remedies of recognition, redistribution, representation, and participation often requires shifting public norms, values, and actions away from the stigmatization of particular groups. This requires influencing people’s political priorities and hence what issues they feel motivated to take action on, to campaign for, and who and what they vote for. However, shifting people’s values, beliefs, and behaviors is not easy: providing information is seldom sufficient. Advocates must create opportunities for people to engage with an issue emotionally, to build their motivation for action, and practically, to build their skills to take action. It further requires building people’s sense of self so that they have the capacity to act. This may require not only influencing individuals directly, but also targeting their influencers, a concept borrowed from marketing that refers to those whose perspectives the decision-makers value.

There are many different theories and models of how to shift behavior, in part because perspectives and behaviors can be influenced by a diverse set of strategies and tactics. These include utilizing mass media such as a television series, local public events such as community theatre, public protests, social media campaigns, or speeches and actions by public opinion leaders or popular figures.

Public service providers can also be motivated to take action to change public perspectives on an issue as they, in focusing on meeting their constituencies’ needs, “are often stymied by the larger systems that seem to work against the people they are trying to serve.” In particular, non-governmental organizations providing services frequently serve those who are closest to the problem. Both these organizations and the people they serve may be mobilized to participate in campaigns or movements to shift public values or pressure policy-makers and implementers into action.
Changes in the law can also influence public support for an issue, either because the national debate about a legal or policy change engages the public’s imagination, or because laws themselves carry a symbolic value that influences public perspectives.

If a particular law is targeted, as an activist you can attempt to build one-on-one relationships with politicians. You can also appeal to political parties and public opinion leaders; indeed as a long-term strategy you or your allies can join political parties and build your leadership voice within these. If there are formal mechanisms for civil society participation, such as a legal requirement that parliament or city councils have public hearings before finalizing laws or policies, you can prepare organizations and individuals from different constituencies and with different skills to speak at these hearings. These strategies usually require that you utilize “insider” strategies in “invited spaces” aimed at influencing political decision-makers, including mobilizing evidence such as personal testimony of individuals experiencing the problem or research about the nature of the problem and options for addressing it.

On the other hand, sometimes you can use public campaigns and protests in an effort to put external pressure on decision-makers to change the law. Frequently this involves mobilizing public outrage and media coverage, which in turn exerts pressure on decision-makers who want support from their constituencies. These can be considered “outsider” strategies. When you manage to raise the resonance of an issue, you can “invent” spaces for example establishing platforms for dialogue or negotiation that decision-makers then feel obliged to attend.

As an advocate for social change, you may use diverse strategies to influence the development and implementation of policies and regulations. You may offer research and technical expertise to support policy development, make submissions, organize policy dialogues, offer mentorship and training to implementers, or monitor budgets and service provision. You can
also use the information gathered to hold the government accountable. In addition, you can use this information to inform outsider strategies, such as public protests, or for insider strategies such as meetings with decision-makers to share problems and identify solutions. Furthermore, you can mobilize to secure formal mechanisms for representation of diverse communities in policy dialogues on the boards of service institutions, such as hospitals or schools, or strengthen the capacity of people representing those constituencies. Thus, advocates can effectively build support for their understanding of the problem and the possible solutions they have identified.

We now turn to the importance of keeping judges on your radar, as social justice activists, in order to identify threats and opportunities as you design your strategies to achieve social justice.

1.2. CONSIDERING THE COURTS AS SITES FOR SOCIAL CHANGE

A democracy cannot be solely understood as the rule of the majority represented by those elected for office. It must also ensure the protection of the rights of all, including those who belong to minority groups and those whose interests are not represented by the legislative or executive branches, to avoid becoming a tyranny of the majority. These rights are traditionally enshrined in constitutions, and judges are in charge of protecting them. For this reason, the proper functioning of a democracy depends in large part on having a functioning judiciary.

For the most part, judges also have the duty to ensure the supremacy of the constitution, and in many cases they may decide not to apply, to overturn, or to refine laws or policies, thus limiting legislative and executive powers. This is part of the system of checks and balances between the three branches of power.

It is thus the constitution, the legal representation of the social contract, that gives judges both their legitimacy and their operational limitations. Constitutions provide the procedures, rules, and principles that judges
must use to apply, interpret, create, nullify, or modify any other norm in
the legal system.

At the same time, judges are part of society, and as such, they do not
make their decisions in a vacuum; therefore, they may feel more or less
inclined to act on an issue depending on how certain changes are per-
ceived by the legal community and general public opinion.

Figure 2: Hierarchy of Legal Norms in Constitutional Democracies

The development of international law and the adoption of constitutions
that include explicit references to international law, especially after World
War II, have altered what may be demanded of judges in many countries.
When a constitution includes a reference to international human rights
law, judges must use the constitution to determine whether such human
rights law should be understood as being part of the constitution, below the constitution but above domestic law, or equal to any other law, as shown in Figure 2. Additionally, judges must determine whether international human rights law is binding or merely guiding.\(^{30}\)

As an activist for social change, you can use constitutional references to international law or constitutional inclusions of a comprehensive rights framework to push to solve redistribution, recognition, representation, and participation problems, provided that you frame these problems as rights violations.

You can ensure that rights are interpreted consistently with the principles of the constitution and in a way that upholds human rights and democratic principles by litigating interesting cases, providing judges with helpful and rigorous information, and finding ways to hold judges accountable for the choices they make and the reasons—or lack of reasons—that they give, and their compliance with their ultimate duty: ensuring justice for all.

The impact of hard-fought battles to have human rights recognized by democratic and pluralistic constitutions may be considerably diminished if you and your social change allies do not understand the opportunities and limitations of working with judges. Judges have the power to protect our valuable rights and make them a reality in the lives of many.\(^{31}\)

**Box 1: When Do You Go to the Courts?**

Courts can provide an avenue for social change when:

- A person or group of people’s rights are violated.
- A law or policy that violates human rights or constitutional rights is enacted.
- A law requires mandatory constitutional review.
- Policymakers do not respond to a violation of rights.
- The legislature and/or policymakers address a rights violation but their solution is unclear, has gaps, or leaves certain people marginalized.
- Bringing a legal challenge would create public awareness or change the nature of debate about an issue, even if you might not get a favorable legal decision.
- Advocates wish to bring a case before an international body, and domestic remedies must be exhausted first.

Keep in mind that sometimes there is no choice. If an individual or group takes an issue to court, or criminal charges or civil disobedience claims are filed, your participation may be essential to ensure the best possible outcome to improve the conditions for your client (if applicable) and your cause. When working with clients, all of the ethical obligations (often legislated by national laws and policies) come into play and must be considered.32

1.3. WOMEN’S LINK WORLDWIDE’S STRATEGIC APPROACH

One of the defining features of Women’s Link’s work is its strategic approach to litigation and other advocacy efforts. Women’s Link’s strategic approach requires undertaking mapping exercises, applying a prospective view, and using lateral thinking when possible. Each of these components is examined separately.
MAPPING

Mapping is a qualitative methodology for analyzing the timing, actors, terrain, and means available in order to establish the most effective use of available opportunities and resources to reach an objective most efficiently in terms of material, human, political, and financial assets.

Soccer provides a useful metaphor for understanding mapping. Before a team plays a game, the head coach must evaluate her players, those of the opposing team, the referees, the state of the field, the relationship with local fans, and even the weather. A solid understanding of the rules of the game provides the backdrop to all these factors. If you plan strategies without knowing all the options available and the intricacies of the game, you leave your success to luck.

Mapping requires taking into account the legal, political, social, economic, and cultural context. This exercise may help you realize that certain
strategies are better options than others for achieving change or for preventing backsliding on existing laws, policies, or services. It is important to keep in mind that contexts change constantly, so mapping should be an ongoing exercise. Sometimes anticipating change is impossible, but other times short- and long-term context changes are obvious. For example, there might be a constitutional reform or a change in the way international human rights are accepted domestically.

The methodology we use for mapping and some guiding questions are detailed in Chapter 4 (“Introduction to Mapping”).

PROSPECTIVE ANALYSIS

In order to advocate strategically, Women’s Link also prospectively analyzes the information gathered during mapping. A prospective analysis attempts to build short-, medium-, and long-term projections based on what has happened in the past, the current situation, and expected trends for the future. It is helpful to try to anticipate scenarios and identify potential risks and opportunities in order to proactively manage them.33

LATERAL THINKING

Women’s Link also utilizes lateral thinking whenever possible. Lateral thinking is a concept coined by Edward de Bono in 1967 that refers to creative thinking or “thinking outside the box.” Lateral thinking aims to avoid the immediately obvious and instead try to find alternate and ingenious solutions to a problem by approaching it from new angles.34 An example of successful lateral thinking can be found in the early work of current United States Supreme Court Justice Ruth Bader Ginsburg, who brought the first cases on gender discrimination to the country’s highest court by litigating for women’s rights through taking cases about discrimination against men. Another example of lateral thinking is understanding the benefits of losing a case in court: civil society may feel so outraged by the injustice and social mobilization may become so strong that policymakers will become motivated to solve the problem; the case may reach
higher or international courts and turn into a paradigmatic one; or academic debate and discussion on the issue may create unsuspected solutions and/or allies. This must, of course, be balanced with clients’ needs and expectations.

These analytical tools allow Women’s Link to design a strategy: actions planned in advance that align available resources and existing opportunities in order to achieve a specific goal within an uncertain environment. Women’s Link understands that in order to create social change, legal work must go hand-in-hand with communications work to shape public opinion, as well as other advocacy work to promote social mobilization. This is why all our strategies include legal, communications, and non-litigation advocacy.

This workbook explains Women’s Link’s approach to strategic legal intervention in order to create social change. The preceding sections have outlined the variety of approaches available to you as social justice activists, and the remainder of this workbook will be most helpful to those of you who have already identified problems and envisioned solutions, and are contemplating strategic litigation or similar legal processes. It will also be helpful for those of you who wish to adopt a more systematic approach to your communications and advocacy work without engaging in any legal endeavor.


4 Id. (Fraser, 1996; & Fraser, 2001).


7 Supra note 3 (Fraser, 1996; & Fraser, 2001).


10 Supra note 5 (Klugman, 2010).


14 Supra note 2 (Klugman, 2011).

15 World Health Organization (2015). *Brief Sexuality-Related Communication: Recommendations for a Public Health Approach*. Available at: http://apps.who-


20 Supra note 18 (Jepson, Harris, Plat & Tannahill, 2010).


24 Id (Askew, Matthews & Partridge, 2002). Supra note 22 (Jones, 2011).


32 For more on ethical obligations with clients, see p. 102–104.


This chapter begins with the most important considerations that you, as legal advocates and non-legal activists, must understand to fully comprehend the untapped potential of strategic public interest litigation as an advocacy tool.
To understand how litigation can promote social change, it is important to understand what can be done with public interest litigation and what judges can and cannot do, particularly in the context of constitutional democracies with separation of powers and formal recognition of human rights.

When litigating in representation of a client or clients, attorneys must first and foremost take into consideration their obligations to them, including ethical obligations. There may be a moment during the life of a case when the interests of the client and those of the “cause” are not in alignment. If possible, it is best to plan for this eventuality and have a signed agreement with the client regarding how best to resolve any issues that may come up before embarking upon litigation.¹

2.1. PUBLIC INTEREST AND STRATEGIC LITIGATION

Women’s Link proposes a comprehensive approach to strategic litigation: one that not only sets progressive legal standards, but also shapes public opinion and bolsters social mobilization by creating opportunities for activists and civil society to organize and mobilize around a case. In our view, strategic litigation creates opportunities for legal activists and judges to engage in a democratic debate around a specific case, where they can engage other branches of government, public opinion, and specific sectors of the population on how rights should be interpreted and granted, and in this way trigger social change. Through this process, legal victories create the conditions for implementation. However, even if there is not a victory, the conditions to solve the problem through other democratic avenues will improve, the movement will become stronger, and public opinion will be better informed. These are well-recognized critical factors in civil society’s work to promote social change.² Significantly, even though a loss in litigation can have benefits, it can also carry substantial risks. The fact that litigation can be used as an advocacy strategy does not mean it should always be used. This workbook addresses the processes that you, as advocates, can take to maximize the benefits of litigation while minimizing the risks.
Figure 4: Elements of Strategic Litigation as an Advocacy Tool

Figure 4 presents the different components of the definition of strategic litigation as a tool to create social change, as developed by Women’s Link. When legal advocates litigate, they give judges the opportunity to comply with their obligation to enforce the rights framework. You should also find ways—legal and non-legal—to involve civil society in the litigation process both to empower them and to create a platform to demand enforcement of rights. Similarly, if you are civil society activist leading social change processes, you might engage legal advocates when you realize that litigation is your next step. Social mobilization and strong public opinion can facilitate the decision-making of judges, as they see that the rights de-
manded by the parties in the litigation form part of a broader conversation in civil society. At the same time, a judicial decision enforcing rights will have an impact on civil society’s values, norms, and priorities.³

2.2. UNDERSTANDING THE ROLE OF JUDGES

Although there are many ways to conceptualize the role of judges, we will provide a brief summary of how Women’s Link Worldwide understands their role, as a guide for activists contemplating legal action.

Judges should administer justice without fear, favor, or prejudice, and people expect them to be fair.⁴ Often, the role of judges is described as merely “applying the law,” a technical process in which, given a set of facts, judges identify the pertinent laws and apply them, resulting in an unequivocal decision.⁵ This process has been compared to that of a slot machine or a syllogism where the major premise is the law, the minor premise is the facts, and the conclusion is the decision. As applied to the judiciary, the legal system would be the machine, the facts of the case would be the coin, and the judge would pull the lever to make the system function. Under this rubric, any judge faced with a particular set of facts would arrive at the same conclusion and any legal problem would have a predictable solution.⁶

However, things are not so simple in reality. Judges make choices throughout their reasoning process. They determine which facts are relevant, which laws are relevant, and how to apply the rules of procedure. In particular, they decide how the selected laws are interpreted and applied to the selected facts, how procedures serve the objective of the case, and ultimately what the case is all about.⁷ Judges make these decisions based on their own process of prioritization. Judges’ understanding of the law and conceptualization of their own role influences their choice of relevant facts, laws, and procedures, and thus their interpretation and application.

The nature of judging is one of the most contentious debates among judges and academics.⁸ Some judges agree that scenarios often arise
that are not explicitly foreseen by the law through code or precedent, and at the same time, that the law is constructed from language, and therefore always subject to interpretation. These judges acknowledge that an important part of their role is to make choices. Others consider the law a closed, coherent, and complete system, and tend to think their role is merely to apply the law to the facts. These judges often have a harder time seeing the different scenarios in which they can make choices.9

When judges interpret norms, either consciously or not, they use hermeneutic tools. They decide whether they will go with the most literal interpretation of the norm, the interpretation that most closely aligns with the intentions of the drafters of the law, the one that harmonizes the normative system as a whole, the one that attempts to follow the spirit of the rule, or some combination of these approaches.10

In any case, judges must be prepared both to make choices when deciding a case and to substantiate them within the relevant legal framework. The judicial obligation to provide reasoning that explains why and how they made those choices discourages abuses and facilitates accountability.11

The way judges select and interpret facts and norms is also invariably influenced by the judges’ own biases.12 Judges, like all human beings, have biases and stereotypes.13 Sometimes judges may be aware of their own prejudices, sometimes others call their attention to it, and sometimes these prejudices go undetected by all. It is essential that judges become aware of their biases in order to avoid making decisions based on stereotypes instead of the facts before him or her that could result in a discriminatory outcome.14

Not only are courts composed of human beings, but those human beings tend to have similar values and characteristics. Traditionally, judges of the highest courts have been male, of the same ethnicity, married, upper-middle class, middle-aged, and apparently heterosexual and “able-bodied.” They often attended the same schools and their children also may go to school together. They shop at the same stores and go to the movies at
the same theatres.\textsuperscript{15} That is to say, their context is similar, and as a result, their perceptions may be relatively uniform.

This uniformity of experiences reinforces judges’ ideas and expectations, and in many cases, the stereotypes they apply. At the same time, it makes the perception of differences and the consideration of alternative perspectives more challenging.\textsuperscript{16} Consequently, personal biases become systemic, and groups that have traditionally been discriminated against are likely to continue bearing the resulting burdens.\textsuperscript{17}

**Box 2: Bias, Stereotype, Prejudice, and Discrimination**

All human beings have biases, stereotypes, and prejudices. Judges are no exception. Because biases, stereotypes, and prejudices are so deeply entrenched in the human psyche, they operate unconsciously, and people tend to be unwilling to reconsider their own perceptions about a group, even dismissing rational reasoning and evidence.\textsuperscript{18}

- **Bias:** The human tendency to have a partial perspective, depending on one’s place and time in a particular society.
- **Stereotype:** Expectations and beliefs about the characteristics of the members of a group or class.
- **Prejudice:** Unfavorable affective reactions to or evaluations of groups and their members based on stereotypes and resulting in discrimination.
- **Stigma:** A negative reaction of people to an individual or group because of some assumed difference or inferiority.
- **Discrimination:** The differential treatment by individuals toward some groups and their members relative to other groups and their members. Institutional discrimination involves policies and contexts that create, enact, reify, and maintain inequality.\textsuperscript{19}
Some judges have started to admit that it is impossible to automatically subordinate existing biases, prejudices, and philosophies when appointed. However, once judges come to terms with their own human limitations and biases, they can commit to overcoming them and realize the value of deepening their understanding of the daily lives of other groups and cultures. Judges can take the initiative to continually evaluate their own prejudices by attending judicial education programs or colloquia, allowing groups that hold diverse views on an issue to share their opinions during a judicial process through amici curiae, expert testimony, or participation in public hearings (see p. 108: “Amicus Curiae and Public Hearings”), and reading publications on issues that either make them uncomfortable or are completely foreign to their own contextual reality in order to ensure their own biases are not blinding them to either the problems involved in the rights violation or its solution from the point of view of the interested communities.

When judges commit to overcoming their own biases, they are able to redefine judicial neutrality and can become powerful players in the fight for social justice. For example, in a judicial colloquium hosted by the United Nations in Vienna, judges from the highest courts around the world came together and committed to interpreting the law with a gender perspective. They recognized that applying gender-neutral laws in an environment not sensitive to gender could be discriminatory.

In sum, there is much more to the judicial role than just applying the law in a linear, logical, and univocal way. Judges are the intermediaries between the law and the reality of a case, and that mediation involves interpreting, and at times creating, legal norms. When doing so, judges always use their unique perspective, but this should not deter them from ensuring justice for all while respecting the limits imposed by the wording of the norms. In the words of the former Justice of the High Court of Australia Michael Kirby, “From this active mediation it follows that there is scope for judicial interpretation of legislation in a way that avoids unjustifiable discrimination, upholds human rights but also still gives effect to the language in question.”
This is exactly what we must demand of judges: that ultimately they make decisions that offer a fair outcome and uphold human rights.\textsuperscript{24}

\section*{2.3. OPTING FOR LITIGATION WHILE STRENGTHENING DEMOCRATIC INSTITUTIONS}

Recognizing that judges have choices when deciding a case\textsuperscript{25} does not mean that you can demand anything and everything of them. As social justice activists trying to find avenues to solve public interest problems, you have to find ways to engage judges in this endeavor, while still upholding the democratic principles of separation of powers and majority rule. Forcing the judiciary to solve a problem while disregarding the role of the other branches of government might result in the weakening of other democratic avenues that are key to the functioning of our societies. The concept of dialogical activism has been proposed by academics\textsuperscript{26} to solve the tension between the active role of judges in solving public interest problems, which some call judicial activism,\textsuperscript{27} and the democratic deficit it may entail.\textsuperscript{28}

According to dialogical activism, judges should use the legal proceedings of a case to encourage broad democratic dialogue involving the other branches of government and different constituencies from civil society, including the following features:\textsuperscript{29}

\begin{itemize}
  \item Encouraging the use of participatory means such as public hearings and \textit{amici curiae} (see p. 108: “Amicus Curiae and Public Hearings”) to deepen democratic discourse on the problem and its solution.
  \item Promoting respect for the separation of powers. Judicial action, in principle, gets relevant government bodies involved in the debate but gives these bodies the freedom to exercise their legislative or administrative duties, as long as some general guidelines are followed to ensure respect for rights. Sometimes courts set deadlines and create follow-up mechanisms that also allow for further dialogue among interested constituencies.
\end{itemize}
• Legitimizing direct judicial action when there is an institutional blockage or when public policies have manifestly failed to protect marginalized communities or accord minimal respect for human rights.

• Ultimately, regardless of the outcome of the judicial process itself, it should have the potential to improve the conditions to solve the problem through democratic avenues, whether through litigation of a different case, a new government as a result of a change of priorities in the electorate, enactment of public policy by sensitized politicians, etc.

The type of litigation that Women’s Link undertakes and wants to promote among social change activists is one inspired by dialogical activism, whether or not the judges assigned to the case understand their role and litigation in the same way. If judges agree with this vision, they will facilitate the process by using the tools they have available in procedural law to reach all of the above objectives. If not, as litigants and civil society allies, you will be challenged to think strategically and devise creative legal and non-legal tactics to reach similar objectives.

With this understanding, opting for litigation as an advocacy strategy still requires you be prepared to work with other branches of government or in alliance with groups that do.

2.4. UNDERSTANDING THE POTENTIAL VALUE OF JUDICIAL PROCESSES AND DECISIONS

When considering litigation as an avenue for social change, you must understand the potential value of judicial decisions and the potential effect of judicial processes as markers of social change. Judicial decisions usually have both practical and symbolic value. The material, or practical, value is the rights and obligations recognized or assigned to either party. The symbolic value refers to the message the decision sends to the community as to which values and principles are treasured. A judicial decision that decides a controversy between two parties thus has material value for the parties and symbolic value for the community. It may also set a precedent, binding in common law contexts and guiding in civil law systems,
so that in the future, similar cases will receive similar treatment. This precedent not only gives a judicial decision relating to human rights material and symbolic value; it also has a practical effect on right in question. For example, based on the recognition of the right to equality and non-discrimination, other individuals in similar circumstances should be entitled to the same understanding of that right.

Courts that exercise judicial review can overturn or modify laws or policies when they are not in accordance with the constitution. Judges can also interpret a law in accordance with the constitution. In these cases, the effects will be tangible for everyone in society, because the general effect of the law will be modified. This type of decision also sends messages to the legislative and executive powers that their law-making role has limitations and requirements that cannot be ignored.

The matrix in Box 3 compares the effects of judicial processes and the value of judicial decisions, providing further insight into the type of outcomes that can be achieved through the use of litigation. Judicial proceedings and decisions can be an opportunity to define the perception of a problem in terms of rights, influence the shaping of public policy, organize groups of activists around an issue, and change public policy with regard to the problem and its solutions.

**Box 3: Effects of Judicial Decisions and Processes**

<table>
<thead>
<tr>
<th>Direct</th>
<th>Indirect</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Material</strong></td>
<td></td>
</tr>
<tr>
<td>Designing public policy</td>
<td>Forming coalitions of activists to influence the issue under consideration</td>
</tr>
<tr>
<td>as ordered by the ruling</td>
<td></td>
</tr>
<tr>
<td><strong>Symbolic</strong></td>
<td></td>
</tr>
<tr>
<td>Defining and perceiving the problem as a rights violation</td>
<td>Transforming public opinion about the problem’s urgency and gravity</td>
</tr>
</tbody>
</table>
In any case, it is important to bear in mind that judicial decisions, actions, and inactions throughout the process will always either support the status quo or challenge it, thereby having legal, political, and social effects that you must take into account when designing your strategies.\textsuperscript{36}
For more on ethical obligations with clients, see p. 102–104.

Supra note 2, chapter 1 (Klugman, 2011).

Supra note 21, chapter 1 (García Villegas, 1993).


Id.

The case Artavia Murillo vs. Costa Rica of the Inter-American Court of Human Rights illustrates how judges can use hermeneutics to interpret the American Convention. When reviewing Costa Rica’s prohibition of in vitro fertilization (IVF) treatments against the American Convention on Human Right’s protection of the right to life, the Court determined that (1) Article 4.1 included a clause that stated that the right was “in general from the moment of conception,” suggesting there could be exceptions to the rule; (2) the framers of the convention had not considered IVF treatments when drafting the clause on the right to life, but they did consider that some countries allowed abortion under certain circumstances and thus included an exception; (3) systemically, the spirit of human rights conventions has not been to treat embryos and persons entitled to rights equally; and (4) the purpose of protecting prenatal life can only be achieved through the protection of the pregnant woman, making her, not the embryo, the object of protection of the right.

Supra note 5 (Kirby, 2004).


In the case of Angela Gonzalez vs. Spain, Women’s Link denounced Spain before the United Nations CEDAW Committee on the grounds that judicial authorities failed to comply with their obligation to prevent gender violence and discrimination by repeatedly disregarding Angela’s petitions for protection for herself and her daughter from her abusive former husband, who finally killed her daughter during unsupervised visitation. Angela’s petitions were not taken seriously because of gender stereotypes of women as liars and manipulators, despite the presence of ample evidence to back Angela’s claims. The CEDAW Committee held Spain responsible and ordered Spain to compensate Angela and take measures to ensure judicial personnel were educated on how to address gender stereotypes.


Supra note 18 (Ariely, 2010).


Supra note 5 (Kirby, 2004).

Women’s Link’s Gender Justice Uncovered Awards, which highlight the best and worst decisions for gender equality, are an example of how civil society can hold judges accountable for decisions that discriminate on the basis of gender disregarding their universal mandate to ensure equality and combat discrimination.


Fraser, C. (1995). *Judicial Awareness Training*. Paper at the Australian Legal Convention, September 24, 1995. Citing Abella, J.A. (1995). *On Appellate Judicial Lawmaking: Ten Realities of the Judicial Role*. Canadian Appellate Court Seminar. (“It is important to understand that there is nothing new about politicization for the courts.... We now call them activist, politicized courts because they are active in their interventions on behalf of the expansion of rights in the political process. But to show the elasticity of the labels, we should remember that we used to call courts activist when they were active in their interventions on behalf of the prevention of the expansion of rights.... If expanding rights is political, so is restricting them.”)

and the Role of Parliament.


30 Supra note 21, chapter 1 (García Villegas, 1993).

31 The case of Beauty Solomon vs. Spain, 47159/08, lodged with the European Court of Human Rights by Women’s Link, highlights these dual values. Spanish police officers physically and verbally abused Ms. Beauty Solomon, a woman of Nigerian origin residing in Spain. Her efforts to obtain justice in domestic courts not only failed; they stirred up more racist and sexist sentiments among the sitting judges. The European Court of Human Rights declared that Ms. Solomon’s right to be free from inhumane and degrading treatment and discrimination on the basis of race and gender had been violated, awarding her damages of 30,000 euros. The material effect of this decision was that Ms. Solomon received 30,000 euros and the Spanish State was forced to pay her this sum. The symbolic effect was the message that the Court sent to the two parties, other European states, and other regional systems for human rights: that discrimination on the basis of race and gender, police abuse, and judicial negligence are unacceptable, and that states can be held accountable.


33 In Women’s Link’s case C-355/06 before the Constitutional Court of Colombia, the Court stated: “when the legislature enacts criminal laws, it cannot ignore that a woman is a human being entitled to dignity and that she must be treated as such, as opposed to being treated as a reproductive instrument for the human race. The legislature must not impose the role of procreator on a woman against her will.”


CHAPTER 3

The Four Conditions Test

This chapter includes Women’s Link’s theory of change through litigation, how we evaluate whether the conditions we consider necessary for litigation to be a successful tool for sustainable social change are present, and how those conditions can be strengthened.
Achieving sustainable social change through the use of strategic litigation requires four conditions. This thesis is inspired by the theory presented by Charles R. Epp in his book *The Rights Revolution*.¹ These four conditions must be present or created before litigation, or strengthened during the litigation process:

1. An existing rights framework;
2. A knowledgeable and willing judiciary;
3. Legal advocates with the capacity to frame social problems as rights violations and litigate; and
4. A network of civil society individuals and organizations to support and leverage the opportunities presented by litigation.

### 3.1. CONDITION ONE: THE RIGHTS FRAMEWORK

Social change can only be achieved through litigation if you can identify and frame problems as rights violations. This requires a constitutional or legal framework that recognizes rights or the possibility of using international human rights law, comparative law, or another rights framework.

Neither a written constitution, a rights-supportive culture, nor sympathetic judges is sufficient for sustained judicial attention to and support for rights. Protection of ... liberties and ... rights depend, in addition, on a support structure in civil society. Without a support structure, even the clearest constitutional rights guarantees are likely to become meaningless in the courts; but a vibrant support structure can extent and expand the feeblest of rights. Participants in constitutional democracy would do well to focus their efforts not only on framing or revising constitutional provisions, and not only on selecting the judges who interpret them, but also on shaping the support structure that defends and develops those rights in practice.

Charles R. Epp
There is no single formula for an adequate rights framework. Some national constitutions contain a bill of rights, explicitly articulating guaranteed fundamental rights. Countries may have signed regional or international treaties that ensure human rights. When states ratify international human rights treaties, these may either become directly applicable or applicable after a domestic legal process. Once a treaty becomes applicable, judges are required to take those rights into account in their judgments. When states have not ratified international human rights treaties, or when a national process of domestication of the treaties has not occurred, judges may still be able to use the treaties as guiding criteria to interpret domestic laws. In some legal systems, rights recognized in previous judicial decisions are considered binding and can be used as legal standards in subsequent cases. Most countries today have some combination of these features.

Box 4: Civil and Political Rights and Economic, Social, and Cultural Rights

International human rights law as a whole recognizes that all individuals have civil and political rights, as well as economic, social, and cultural rights. It also holds that these rights are inalienable, indivisible, interdependent, and interrelated. It means there is no hierarchical order of rights, and the improvement of one right facilitates the advancement of the others. Likewise, the deprivation of one right adversely affects the others. However, in some countries only civil and political rights are protected.

Civil and political rights usually refer to rights that protect individuals’ freedom from unwarranted infringement by governments and private organizations and ensure their ability to participate in the civil and political life of the state without discrimination or repression. Examples of these rights include speech, conscience, voting, dignity, and freedom from discrimination.
Economic, social, and cultural rights include the right to education, housing, an adequate standard of living, and health. States have a legal obligation to respect, protect, and fulfill economic, social, and cultural rights and are expected to take “progressive action” toward their fulfillment, according to their financial capacity.4

Both types of rights impose positive and negative obligations on states. For example, the right to life requires states not only to refrain from summary executions, but to take positive measures to protect vulnerable groups from life-threatening situations.

The legal system must allow for claims to be brought based on violations of rights. Some systems limit claims to actual instances of rights violations, whereas others allow for abstract review of laws or policies that are likely to lead to rights violations. It is also often possible to take action to prevent a rights violation when harm is imminent. Domestic procedural laws must be examined in conjunction with the rights framework. Who has standing to bring a case is extremely important to understanding how strategic litigation can be brought. For example, when not-for-profit organizations have standing to file a legal challenge, this will greatly influence advocacy efforts.

The easier it is for members of civil society to bring cases, the more opportunities there will be for judges to develop and strengthen human rights jurisprudence and trigger social change. For example, many Latin American constitutional systems have incorporated tutela or amparo claims to protect individual rights. These are expedited constitutional review processes that any individual can bring when a state actor is violating their human rights or when a non-state actor is doing so, and the state has knowledge, or should have knowledge, and does not prevent the violations.5
3.2. CONDITION TWO: KNOWLEDGEABLE AND WILLING JUDICIARY

No matter how powerful a rights framework is, it will never be strong enough to create social change as long as rights remain mere words on paper. Social change requires judges to enforce rights when confronted with a problem framed as a rights violation.

To apply the rights framework and endow it with meaning, the judiciary must be knowledgeable about its intricacies and willing to apply it. Even if human rights are part of the legal system, the extent to which judges promote them will be influenced by judges’ knowledge of and commitment to human rights law. While human rights law is a rather recent legal field, its development for very specific issues is quite prolific and complex, especially in a globalized context. The degree of knowledge and exposure judges have to human rights and particularly the fields that are relevant to the specific problem can vary depending on whether judges acquired such knowledge during their basic legal education, continued legal education, trainings received specifically as judges, or personal interest.

Examining the role that precedent takes in the system in which you are litigating is also important. The use of precedent was born in common law countries but is also increasingly considered relevant in civil law countries, although it may be advisory, not binding.

Applying the rights framework also requires judicial will. For a judge to be willing, judges must first be sufficiently independent from the other branches of power that they can truly provide a check on how rights are being respected, protected, and fulfilled by elected officials. Judicial independence allows judges the freedom to decide a case in accordance with their legal judgment without undue pressure from other branches of government. Factors that affect this independence include who has the power to name and remove judges and for what cause, whether or not certain skills or qualifications are required to be a judge or appointments
are merely political, the length of time judges serve, and who has the
ability to adjust budgets and salaries. It may be helpful to examine what
advocacy efforts are available to influence the selection processes of
judges. Knowing when and how judges are selected might be an impor-
tant part of your longer-term strategies. In general, when these processes
are concentrated in the hands of few individuals or there is a lack of trans-
parency, judges will enjoy less independence. If the judiciary does not
have a minimum level of independence, litigation is unlikely to be the
best strategy to advance a cause to which the state or other influential
parties are hostile.

Sometimes independent judges are not willing to apply the rights frame-
work because of a perception that doing so may harm the court. Judges
may fear that a decision perceived as an abuse of judicial power, as rad-
cially disrespectful to the authority of other branches of power, or as deeply
offensive to the morals of the community where they function may lead
to the court losing legitimacy or facing a reform that restricts its powers.
When judges have some flexibility in performing their duties, such as the
freedom to determine which cases they can decide and when, the option
to dissent publicly, or discretion in deciding the timing of the implementa-
tion of their judgements, knowledgeable and committed judges can find
ways of promoting human rights within their judicial role while neutraliz-
ing other interests at stake.

Judges who are knowledgeable about the rights framework and willing to
apply it because they understand the dynamic between the rights frame-
work and advancing social justice can play a key role in promoting social
change through the courts. These judges may facilitate the role of advoca-
tes bringing strategic litigation if they understand their responsibility as
judges to uphold human rights and democratic principles. However, social
change can also be achieved through litigation when judges simply believe
that their role is to apply the legal framework to the cases brought before
them, provided that advocates frame their desired outcome as a simple
application of existing law.
3.3. CONDITION THREE: LEGAL ADVOCATES WITH CAPACITY TO LITIGATE

Strategic litigation requires that you fully understand the role of judges and the diverse opportunities presented by litigation, as explained in the first part of this chapter. Despite how knowledgeable and committed a judge may be, he or she cannot promote rights unless presented with a case. You must be able to articulate particular problems within a rights framework, design a case, build it, and bring it to the courts, regardless of how challenging the issue at hand may be.

Today, most social problems can be framed as rights violations under existing legal frameworks. You can do this by using provisions that explicitly apply to the selected problem, or arguing that more general but recognized rights apply to the situation at hand. You can frame a problem as the violation of one or more rights. Depending on how you choose to frame the problem, the required evidence will differ. This in turn will affect the type of cases that you can develop, depending on the plaintiffs and evidence available.

Furthermore, you must be aware that judges are human beings with biases and that courts have traditionally been composed of members of the elite class (see p. 31: “Understanding the Role of Judges”). This is important to bear in mind as you shape your strategies. As strategic litigants, you should pick the most persuasive ways to build and argue a case to the particular court or judge in a given context. You should also be able to find ways to advance the objectives of the case within a legal process when faced with a judge who resents or is resistant to what he or she perceives as activism.

Additionally, as an advocate leading the litigation, you must have the capacity to collaborate with a variety of other groups in order to incorporate strategic thinking into the process and create enabling conditions that transcend courtroom walls. Enabling conditions exist when social, political, and cultural contexts allow judges to feel comfortable recognizing the
rights violations at issue in the case, despite the fact that human rights protection is often counter-majoritarian. Otherwise, judges may feel that their decision or court will lose legitimacy or relevance.

### 3.4. CONDITION FOUR: THE SUPPORT NETWORK

Social change achieved through litigation is sustainable only if there is a strong civil society support network involved. As mentioned under 3.3 ("Condition Three: Legal Advocates with Capacity to Litigate"), as a legal advocate, you must be able to involve different constituencies of this support network at different stages of the legal process. This network should include vibrant civil society individuals and organizations that can leverage the opportunities presented throughout the different stages of the judicial proceedings and the debates that occur as a consequence of litigation. Those working on an issue should be willing and able to contribute to the litigation process by providing their expertise and knowledge, understanding that depending on the issue, they may be subject to backlash and stigma.

During the course of litigation, this civil society network should raise public awareness of the issue and work to shape the debate. Effective communication involves establishing a key message about why the problem matters to the general public and what solution the litigation is proposing. This way, even if there is no legal victory, awareness of the rights at issue will have improved, and a foundation will have been laid for future advocacy through other avenues. Similarly, a favorable legal decision without a support network may have limited impact on affected constituencies and face serious obstacles during the implementation phase.

The support network should also facilitate efforts to connect with different social movements and galvanize social mobilization. People and groups, whether they consider themselves part of “the movement” or not, should be able to find different ways to support the struggle for social change inside or outside the judicial process and with varying degrees of commitment. Their actions might include disseminating information about
the case through social networks, participating in a public hearing, serving as plaintiffs, playing a role in the litigation’s communications strategy, signing a petition, making a donation to the cause, or deciding which way to cast a vote by prioritizing how the candidate stands *vis-à-vis* your selected problem and suggested solution (see p. 112: “The Alliance and Social Mobilization Strategy”).

Finally, it is very important for the support network to include committed funders who understand the complexities of strategic litigation in terms of time, the kind of activities that require funding beyond legal work, and the infrastructure needed to coordinate it all. Strategic litigation is often a lengthy process, and organizations must plan for that. Some cases begin in domestic court systems before finding their way to international tribunals, a process that can take years or even decades. You should plan to have sustainable, adequate funding.

2 In some countries this is done by the legislature alone. In others, it then requires review by a court to ensure that it is consistent with the constitution. If international human rights treaties are not legally binding in your country, you may want to consider lobbying the legislature to adopt them, as well as monitoring and participating in the judicial review process.

3 International Covenant on Civil and Political Rights (1966).


CHAPTER 4
Introduction to Mapping

This chapter provides a more in-depth exploration of the concept and process of mapping and offers guiding questions for you to assess context and gather information to help decide whether litigation is the best avenue to advance social change and, if so, which tactics might work best.
Women’s Link Worldwide defines mapping as a qualitative methodology that aims to analyze the timing, actors, terrain, and means available to advocates in order to establish the most efficient use of available opportunities and resources to reach an objective using the least material, human, political, and financial resources.

Once you have identified a problem and a proposed solution—your objective—mapping will help you understand whether the context indicates that litigation is a strategic option for achieving your desired social change. For our purposes, the main value of mapping is to assess whether the four conditions necessary in order for litigation to be able to create social change are present from the perspective of your problem, and to what degree each must be strengthened before or during the judicial process.2

If you determine that litigation is a viable option, undertaking the mapping exercise will also allow you to inquire more deeply into the problem and gather more detailed information that will inform the design of your legal, communications, and alliance strategies in order to achieve the objective you have set for your advocacy effort, as shown in Figure 5. The same process of mapping before making strategic or tactical decisions should be used throughout the process. Eventually, this approach can be integrated into project planning.

Every decision-maker who walks into a courtroom to hear a case is armed not only with relevant texts, but with a set of values, experiences and assumptions that are thoroughly embedded. The decision-making process takes place in a cultural context, and that context may require a degree of “imperturbable disinterestedness” of which not all are consistently capable.1

Justice Rosalie Abella, former Canadian Supreme Court Justice
In this chapter, we introduce the basics of mapping. Although here we separate different types of mapping for analytical clarity, it is not necessary to follow this order. They can happen in any order, or simultaneously, and they usually feed on each other and become an ongoing exercise.
It is best to have someone familiar with the context team up with an outsider to lead the mapping. An outsider could be someone from a different social context, country, movement, or field of advocacy who can approach mapping uninhibited by the biases of someone immersed in your issue; in other words, someone who can help you step back and see things you might otherwise have missed. This will ensure that the exercise will make sense of the context, but also that those too embedded in the environment will not be blinded by it.

We provide guiding questions for each type of mapping. These questions are by no means comprehensive or mandatory. Instead, they should serve as a launching point to inform your thinking and analysis.

4.1. MAPPING THE LEGAL AND JUDICIAL CONTEXTS

Attorneys often refer to legal mappings as legal research. However, the legal and judicial mapping explained here goes beyond researching the existing legal framework and jurisprudence in any one jurisdiction. Legal mapping should explore alternative arguments and where else they have worked. Furthermore, the mapping of available procedures is key, as it will allow you to think about different avenues for filing a case or raising an issue. Meanwhile, judicial mapping refers to analyzing your audience or potential audiences and using that information both to pick your forum and to craft your arguments.

Thus, researching the legal and judicial context allows you to survey the widest array of available legal options to choose from in building a case. The exercise will give you the opportunity to identify the strongest arguments both for and against your case, which in turn will allow you to pick the strongest and safest arguments, prepare your responses to counterarguments, and avoid conflict as much as possible.

Once you have mapped the judges and possible legal actions, you will have the information necessary to start designing your strategy. Legal
mapping has several components: mapping the legal framework, including relevant jurisprudence, procedural requirements, etc. (usually referred to as legal research); mapping the issue itself; and mapping relevant judicial actors (judges, clerks, registrars, judges’ secretaries, etc.). We offer some questions under each section to guide your mapping exercise.

MAPPING LEGAL ARGUMENTS

Mapping all available legal arguments by researching jurisprudence, comparative law arguments and procedural rules will allow you to determine whether the rights framework (see p. 43: “Condition One: The Rights Framework”) is strong enough to support litigation, or if strengthening the rights framework is something you need to work on before considering bringing a case.

Box 5: Guiding Questions for Mapping Legal Arguments

- Is there a domestic bill of rights in the constitution or otherwise enacted as law?
- What rights are guaranteed?
- Is there a rights language that seems especially useful to addressing the problem in an innovative way?
- Is there regional law that is binding?
- Is international human rights law binding?
- Can it be used as interpretive criteria?
- What human rights treaties has the country signed and ratified?
- Can comparative law be used as guiding or interpretive criteria?
- If so, which jurisdictions are the most commonly used?
- Is there national, international or comparative jurisprudence that recognizes rights that could be used?
- Is there soft law that is relevant to your problem or to the solution you seek?
Once you have opted for litigation, mapping will also ensure you have the widest array of possible arguments to pick from. After you gather enough information to map all relevant contexts, you will be able to determine which approach will be the most persuasive. Look for national, international, and comparative constitutions, laws, jurisprudence, dissenting opinions, regulations, doctrine, scholarship, and recommendations by treaty monitoring bodies. There may also be relevant decisions and reports from UN bodies, meetings, and Special Rapporteurs. Do not commit to framing your problem as one specific rights violation from the beginning (see p. 97: “Framing”). Focus on keeping an open mind and the list of available rights as long as possible. Looking for rights interpretations developed in other countries might help trigger your lateral thinking by inspiring different framings to the issue or problem you had not thought of before.3

MAPPING THE HISTORY OF THE ISSUE

Researching the history of your issue will facilitate a prospective analysis. In other words, the more you know about how key actors handled and reacted to relevant legal discussions in the past, the more you will be able to anticipate scenarios and identify potential risks and opportunities. You can then plan to proactively manage these as part of your strategy in the future. If the issue has not been dealt with in the legal realm, comparative research with other jurisdictions might spark ideas.

Box 6: Guiding Questions for Mapping Legal History

- How has the issue, or similar/relevant ones, been regulated?
- Have there been attempts to include this issue in the constitution? In a law? In decrees or regulations?
- What arguments have been used?
- What reaction did they cause among key constituencies?
- Who supported and who opposed perspectives compatible with yours?
Mapping the legal history will also provide information on how to identify new actors to include in the mapping of social and political contexts, and to verify the degree of agreement of those actors that are already on your radar.\footnote{4}

**MAPPING LEGAL ACTIONS AND PROCEDURES**

Mapping the types of legal actions available in a particular legal system allows you to see what options are available in pursuing your objective through litigation.

**Box 7: Guiding Questions for Mapping Legal Actions and Procedures**

- What types of legal action are available?
- What are the standing requirements for each?
- What is the procedure for each?
- Who can or must intervene in each?
- What type of evidence is required?
- What is the timeline for each?
- Must a case be filed within a certain time frame?

An important part of this mapping involves understanding and evaluating the procedural, evidentiary, and standing requirements for each type of action. The broader the rules of standing, and the lower the burden of proof or evidentiary requirements, the more flexibility you will have to design your strategy. Again, the more choices you have, the better your chances to bring the type of case that you believe will work best.

Keep in mind that politically controversial cases usually make judges more attentive to procedural issues, so they adopt a much stricter formal-
There are different types of legal action, each of which will have different requirements standing, evidence, and procedure requirements. You should consider these as part of the process of deciding on your strategy. This is a very basic description of the main case types you might want to pursue. Certain actions may or may not exist within a given domestic legal system, and each may be regulated differently, depending on the country.

**MAPPING COURTS AND JUDGES**

Mapping courts and judges is fundamental in assessing if litigation is a good strategy to advance your social change agenda. This exercise will allow you to determine whether, in this specific context, the judiciary is knowledgeable about the relevant rights framework and willing to apply it, or in other words, if 3.2 Condition Two: Knowledgeable and Willing Judiciary is present.

**Box 8: Guiding Questions for Mapping Judges**

- What skills and capacities are required to be appointed as a judge?
- Are judges educated in human rights law?
- Do judges commonly take account of human rights arguments in their decision-making?
- Are there any judges who have championed human rights issues?
- Are judges independent from the other branches of government?
- How do they conceive of their own role?
- Are judges allowed to express dissenting opinions from the majority judgment?
- Can judges determine the timing of the implementation of their judgments?
- Is the judiciary diverse?
• Is the judiciary exposed to diversity?
• What is their background/knowledge/expertise?
• What can their decisions/dissents tell us?
• Have they used stereotypes or displayed prejudices in the past?
• Have judges promoted the participation of civil society or the executive or legislative branches of government in judicial proceedings?
• Which jurisdictions do they look to when using comparative law?

Once you have decided to engage in litigation, you should strengthen your judicial mapping and learn more about the judges on the court where a case will most likely be heard, and on any likely appeals court. The perspectives of judges in the highest court may be your primary concern. Indeed, in some cases you might strategically decide that losing in lower court is best for the case so that you can appeal to the highest court, or even to a regional or international court. Regardless of whether you think a particular court is helpful or problematic for your case, you should evaluate your assumptions about the perceptions of the judges by performing a full assessment. Doing this research may make it easier to decide what type of case is possible and/or what court you want to target. For example, information indicating that some judges are more likely to issue a favorable decision may lead you to choose the court first, and then think of the legal actions that can take you to that court. When you have the option of taking your case to more than one court, the mapping of judges can help you make a strategic decision on which court to approach. Alternatively, based on the evidence available, only one legal action might be viable. In this case, your assessment of judges will be used either to tailor your arguments or to conclude that the courts are simply not a strategic option.

This workbook has discussed the role of judges and indicated that, far from being a strictly technical process, strategic litigation requires judges
to actively mediate between the law and reality. This is especially true when assessing judges from a country’s high (or highest) courts.

Gathering information about judges might sound more controversial than it actually is. Judicial scholars have defended it as “legitimate in a dynamic and multicultural democracy.” Most of the information is already public and accessible to all. You can find information about judges in different ways:

- Finding their résumés on the judiciary’s website.
- Looking for their judicial decisions and dissents, as well as scholarly analysis of these opinions.
- Looking for their academic activity (books, journals, curricula of the courses they teach, etc.).
- Looking for interviews in mainstream or specialized media.
- Looking for presentations they have given or attended at conferences and forums.
- Asking litigators, other judges, former clerks, legal scholars, students, journalists, and allies who have known them.
- Looking for reviews academics that specialize in studying the judiciary, or speaking with them directly.

WHAT DO WE WANT TO KNOW ABOUT JUDGES?

Biases, prejudices, and preferences will likely affect the way judges adjudicate. Judges can usually choose from a range of options for interpretations, arguments, decisions, and relief. Therefore, building an understanding of judges’ education, background, personal and professional circumstances, potential biases, stereotypes, prejudices, and preferences is a key step in shaping your legal strategy (see p. 102: “The Legal Strategy”).
The words of Lord Justice Scrutton, a 19th century legal scholar, offer a hint of where to start looking for information about judges’ biases and stereotypes:

... the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such nature that when you have to deal with other ideas, you do not give as sound and accurate judgements as you would wish.¹¹

In some cases, judges are not consciously aware of their own approach to their role. However, their decisions, statements, and publications will likely give hints as to where they stand. You may want to consult a scholar with expertise in legal theory to help you analyze the court to which you will be bringing your case. Furthermore, the law school that the judges attended or where they teach or taught may be a key to understanding their training and intellectual tradition. Different law schools may represent different values and legal traditions. Knowing the law school or schools with which the judges have affiliations also allows you to identify people who may be persuasive to the judges, such as their mentors or colleagues. Additionally, the associations that judges belong to, either judicial or civil, such as associations for women judges,¹² associations for judges with particular political perspectives,¹³ or religious law societies for particular religious perspectives,¹⁴ can provide insights regarding whose opinions they listen to and value. It might make sense to consider engaging these influencers as potential allies, perhaps speaking to them about filing amici curiae. This same strategy can be applied to those who support, edit, or contribute to the judge’s scholarly writings and publications (see p. 114: “Leveraging Your Closest Allies”).

Another aspect that will be important in your mapping of judges is to identify the specialty of the legal field of the judges (if this is not apparent from the jurisdiction). Judges tend to specialize in a particular type of law (civil, criminal, constitutional, labor, international, etc.). It will be helpful to know how much judges know about international or regional human rights law and instruments, which in some cases inform the way they
adjudicate. It is also useful to know which jurisdictions judges look to when they do not find an answer in their own domestic legal system. While some judges feel that using international law is part of their mandate as domestic judges, others perceive it as an imposition and prefer to use comparative law to provide relevant insights from peers in other countries. Keep in mind that the fact that human rights share a common language across borders can make comparative law arguments transferable from one country to another.

You may also want to investigate how much judges know about the problem or issue you are trying to address, and on what other related issues they are knowledgeable. If you can build your case within a framework that judges find comfortable, they will tend to understand it better and be more comfortable exploring possible arguments and solutions.

Likewise, it is also important to understand judges’ perceptions of themselves as adjudicators, especially in higher courts. If a judge likes to focus on the tensions between rights, values, and principles, take context into account, or has been identified as a judicial activist or substantialist,\textsuperscript{15} it is possible that he or she will be more open to finding ways to ensure justice and upholding the principles of the constitution and human rights. This may be the case even if the judge cannot gather the votes of the majority and you lose your case. For example, Justice Ruth Bader Ginsburg of the United States Supreme Court has on several occasions presented vehement dissents, many of them causing actual change as a consequence, either because they served as a roadmap for activists or because they persuaded politicians to engage in legal reform.\textsuperscript{16} This is a very good example of how you can create social change through litigation, even when you do not achieve a legal victory in the courts.

If the judges on the court in question are more comfortable using abstract categories or sticking to procedure, or if they self-identify as judicial passivists or formalists or prioritize restraint in their judicial role, they are more likely to adhere to the literal interpretation of the particular law without much consideration of any broader principle or context.\textsuperscript{17} These
judges will appreciate a case where the arguments are based on a “strict” interpretation of the law. Be aware that some judges who advocate for restraint may actively promote values that are inconsistent with human rights.

When mapping judges and courts, it is important to keep in mind that many judges manage their political capital in a way that ensures they maintain their legitimacy in relation to other branches of government and the citizenry. For example, after a particularly activist period, judges may restrain themselves more; and after what can be perceived as a conservative decision, judges may want to take on a progressive issue. One of the consequences of a system of checks and balances is that courts inevitably ultimately work to protect their legitimacy in part by avoiding provoking public outrage or high levels of political antagonism. It is therefore important to be mindful of these dynamics by considering the political implications of judicial decisions at specific times and in specific contexts and learning about potentially controversial upcoming cases that might compete with yours.

Finally, it is essential to try to identify the biases, stereotypes, and prejudices that your case might challenge or confront. All people have biases and stereotypes, but advocates must ensure that judges do not rely on them when making decisions, especially when these prejudices may lead to discrimination and unfairness (see p. 33: Box 2: “Bias, Stereotype, Prejudice, and Discrimination”). It is important to explore the degree to which judges have been exposed to different groups and diverse realities in order to anticipate the type of information that might be useful to present to judges in order to counter potentially harmful assumptions. A judge’s organizational affiliations may also provide insight into the judge’s biases, stereotypes, and prejudices.

4.2. MAPPING THE POLITICAL, SOCIAL, AND CULTURAL CONTEXTS

Understanding the political, social, and cultural contexts of a problem is key to determining whether litigation is a good strategy and to identifying
available opportunities and potential threats to your objective. We suggest mapping the actors who you think should have an interest in the problem and its solution. Similarly, you should map how different actors frame the problem and their desired solutions. In addition to actors, you should analyze the broader social, political, and cultural context in which the problem occurs.

**MAPPING ACTORS**

Mapping actors means finding out whether key people or organizations have sufficient knowledge about the problem and/or whether they are willing to use the tools available to them to contribute in any way to the proposed solution. It is important to gather information about everyone who has an interest in the issue in order to anticipate as much as possible how any strategy might play out. Thus, mapping actors is recommended not only when considering litigation, but as part of the process of planning the strategic litigation itself.

**Box 9: Guiding Questions for Mapping Actors**

- Who has an interest in the problem you want to address?
- What is their expertise?
- Are they knowledgeable about the issue?
- What are their opinions about the issue?
- What motivates their opinions?
- Do their values support or oppose your organization or interests on the issue?
- Are they doing anything in relation to this issue?
- Do they have influence over any decision-makers in relation to the issue, and if so, how much?
- Do they feel they have anything to lose or to gain from your position on the issue?
• What are their organizational connections?
• Who are the actors that your mapping of the legal and judicial context has indicated you need for your strategy, and where do they fall on the matrix?
• Which organizations or individuals can assess the complexities of the problem to be litigated from the perspective of the groups whose interests are at stake?
• Is there someone with the necessary legal expertise who is interested in and committed to the issue?
• Are the legal advocates open to learning from other actors and willing to take into account the political context to inform their strategic decisions?²¹
• Are there individuals or organizations that can provide data and analysis of your problem and its possible solutions?
• Are there other organizations that are interested, capable, and committed to supporting the litigation strategy?²²
• Are there sources of funding available for a litigation strategy?²³

Mapping actors involves identifying those with a potential interest in the issue, their perspectives on the issue, and their level of influence in relation both to the issue generally and to the case at hand. The aim is to look beyond the people and groups that advocates are already familiar with. It is very important to not make assumptions about the positions of individuals or groups based on their political or religious affiliation or their stance on other human rights issues; always conduct a new investigation to get accurate information about their position on this specific issue. Be mindful that not all human rights groups are comfortable with all human rights issues. Some human rights issues are controversial in certain contexts, and not all activists are willing to risk their reputations and security by showing public support for such issues.²⁴ This kind of mapping is sometimes called “force-field analysis,” “stakeholder analysis,”²⁵ or “power mapping.”²⁶ Mapping actors is an ongoing process that should be updated throughout the advocacy process. We recommend taking time to do this exercise as a group, and involving an outsider to provide a check on your assumptions.
We find it helpful to create a visual representation of the relevant actors. We suggest using a matrix for the initial mapping as indicated in Figure 6. Put people and organizations onto the matrix on the basis of their degree of agreement or disagreement with your framing of the issue and their degree of influence in relation to that issue. This matrix will be key throughout the strategy process.

Many actors should be included in your mapping. Some will be obvious supporters or opponents, but many will have perspectives that fall in between or are unknown. This list suggests categories of actors you might explore, depending on which are pertinent to your problem and proposed solution:

- Organizations mobilizing those most affected by the problem. For example: community groups such as parents’ associations, local farmers’ groups, residents’ associations, specific populations that may suffer discrimination such as women of reproductive age.
- HIV-positive people, or migrants, as well as the organizations working with these groups.  
- Individuals and groups already working on the issue, such as researchers and advocates.
• Human rights organizations, including their internal structure boards, etc., in order to clarify who makes decisions and who can veto them.
• Other social movements.
• Individual or institutional funders.
• Scientific associations.
• Academic institutions, research institutions, and think tanks.
• Religious institutions and leaders.
• Community leaders.
• Legal associations.
• Political parties.
• Legislators at all levels, including local, provincial or state, and national.
• President, ministers, executive officials, bureaucrats, and administrators at all levels.
• The judicial sector, including prosecutors, judicial associations, and higher courts.
• Service providers in the public and private sectors, as applicable to the issue.
• The professional sector pertaining to the issue.
• Media for local, national, and international audiences.
• Public opinion leaders, including those who write opinion pieces or are interviewed by the media, such as former presidents or leading intellectuals.
• Public personalities in popular culture, including art, fashion, music, film, television, etc.

Once all these actors are identified, you should research them to understand their positions on your particular social justice concern and place them on the matrix.
There are several possible sources of information on relevant actors. The first, and most reliable, is a one-on-one interview. However, bear in mind that the quality of the interview is affected by who conducts it; the interviewers must be knowledgeable and trustworthy for the information to be reliable. When this is not possible, allies who have had personal interactions with your target group or individuals are good sources of information. If neither of these options is available, the internet and other media sources can be helpful. Remember that this exercise is ongoing, so new information must be incorporated continuously.

**Figure 7: Identifying Allies, Opposition, and Middle Ground**

![Matrix Diagram]

After asking these questions about all the relevant actors, use the information you gather to place them on the matrix in order to identify potential allies, middle ground, and opposition. While you are likely already
familiar with your allies and opposition, you should focus on finding relevant actors in the middle ground, because, as allies and opposition are unlikely to change, your energy and resources should be invested in working with those in the middle ground, not wasted trying to persuade those whose views will never change. Begin with those who are easy to locate—generally those on the extreme edges—and place other actors in relation to those already plotted on the matrix.

Among your allies, you should determine whether there are legal advocates, funders, groups, organizations, or individuals who could constitute your support network in order to determine if conditions 3.3 (“Condition Three: Legal Advocates with Capacity to Litigate”) and 3.4 (“Condition Four: The Support Network”) are present or need to be strengthened. You have a long list of needs, and it is unlikely that a single organization will be able to fulfill all of them. These needs include strategic capacity, political leadership, research capacity, production of materials, lobbying skills, public relations and communications capacities, and the ability to mobilize affected and interested groups as well as their influencers. You also need funds to cover attorney fees, consultant fees, costs of coordination, consultation meetings, and other expenses linked to the overall strategy.

**Example:** In challenging Colombia’s restrictions on abortion under Act 1719, mapping actors was crucial. First of all, four organizations got together and formed a coalition to litigate the case and share responsibilities: Casa de la Mujer, DeJusticia, Corporación Humanas and Women’s Link. We were aware of the risk that allies could interpret this case as an attack on their work to pass an important act. We also realized that medical practitioners might object to the whole range of services being mandatory. Some of them argued that complying with the guidelines to report sexual violence and preserve the evidence for the justice system entailed an excess of paperwork that was useless because perpetrators were never convicted. We knew that the communications strategy should not be perceived as an attack on medical providers, because the judges of the Constitutional Court respected their opinions, and
medical professionals as a constituency would be key for implementation. We identified many victims who had become leaders in advocating for their own rights, and we involved them by asking them to write *amici curiae* and to be spokespeople. In this way, we garnered support for the case and empowered victims by connecting them with legal and advocacy organizations, thus bolstering the social movement.

**MAPPING PUBLIC OPINION**

Mapping public opinion is a qualitative and quantitative methodology that allows you to understand whether and how people communicate about your problem and suggested solution in a particular context. This is important given that one of the objectives of strategic litigation is to use judicial proceedings as a platform to shape public opinion regardless of the legal outcome of litigation. Even if you decide litigation is not a good option to advance your social change agenda, mapping public opinion will be very helpful to your advocacy planning.

**Box 10: Guiding Questions for Mapping Public Opinion**

- Who or what are the sources for journalists on all sides of the issue?
- Who are the actors the media reports on?
- How is the issue talked about?
- How is the issue referred to by sources cited in the media, public opinion leaders, reporters, and media editors?
- What are the most common frames?
- Which frames resonate most with different audiences?
- Is the problem frequently debated in the media or by public figures?
- What are the perspectives of the media outlets themselves?
• What is the dominant public opinion about human rights?

• Do different audiences know about their country’s human rights framework and the legal mechanisms individuals can use to protect their rights? Are some audiences more concerned with these issues than others?

The term “public opinion” suggests there is only one dominant public or main audience, but in many country contexts, different media capture the interest of different publics. For example, the political elite may follow certain newspapers, radio or TV stations, blogs and online sources, while young people follow others. You should assess which sections of the public care about your issues and which sections may influence national discourse and hence the climate in which your litigation and social mobilization takes place.

This mapping will let you know if your issue is part of the public agenda and provide insight into the most common framings that are used to talk about the problem you want to address. You will be able to identify the messages that are used to advocate for and against your proposed solution and assess how much these framings resonate with relevant constituencies. Agenda setting and framing will be key components of your communications strategy that will greatly affect both the level of social mobilization you will be able to trigger and the way decision-makers—including judges—will perceive the relevance and legitimacy of your efforts.

**Box 11: Framing and Agenda Setting**

• **Framing** suggests that how “reality” is presented to an audience influences how the audience processes that information and reacts to it. How a story or issue is framed conditions how the audience interprets the information it receives and creates meaning from it. Framing can be central to winning allies and triggering social mobilization when advocates actively engage in the process of producing meaning or creating collective action frames that
identify a problem, propose a solution, and create a narrative that resonates with the values of the target audience.\textsuperscript{28}

- **Agenda setting** is the ability to influence how often a topic is presented as part of the public agenda. Agenda setting implies that the press and the media do not reflect “reality” but rather filter and shape it. The more the public sees an issue discussed by the press and the media, the more important they will think it is.\textsuperscript{29}

Undertaking the exercise of mapping public opinion will also allow you to cross-check and improve the results of other mappings by offering information on actors, initiatives, and reactions that have received public attention. For example, while mapping public opinion, you may identify other actors and stakeholders in addition to those identified in your original mapping of actors. Sometimes there is a disconnect between allies’ perspective on who the actors are and the actual people or groups that receive media coverage and shape public opinion. This exercise allows you to test your assumptions and often will serve as a reality check.

Mapping public opinion begins with monitoring media sources, which requires defining search criteria and identifying sources of information, including the key websites, blogs, major newspapers, magazines, radio, and television stations. One way to monitor the media is subscribing to reports by media monitoring companies. However, if you do not have sufficient resources, you can use Google Alerts, if available in your country, to receive notifications of online mentions of an issue, or refer to popular blogs and institutional websites.

The raw information yielded by media monitoring needs to be analyzed quantitatively; for example, to find out the number of times that the issue is mentioned or a source is quoted. It must also be analyzed qualitatively to gain insights into how the issue is framed; that is, what perspectives different media carry on the issue. Where the issue is covered will also give you insights about how seriously a particular outlet takes the issue; for example, whether it appears on the front page or the editorial of a
major national newspaper or is mentioned only briefly in the inside pages of a local paper.

**Example:** We monitored the news regarding the Bill. Due to the high rate of sexual violence in the country, the issue was already on the public agenda. Through media mapping, we discovered that the main focus and framing that news agencies and non-governmental organizations chose when discussing sexual violence was access to justice. Therefore, we saw this case as an opportunity to discuss the issue publicly in the context of health services, a framing underexplored even by many allies. This also created the need for documentation of obstacles to access to health services in order to build a strong case before the Court and allies and to build the communications strategy. At the same time, it created an opportunity to meaningfully involve victims in the legal process through documentation, empowering them to claim rights for themselves.

**MAPPING THE CULTURAL CONTEXT**

Mapping the cultural and historical context of the issue will allow you to understand how the current problem is experienced in everyday life and how it is linked to the values and narratives of the affected families, neighborhoods, and communities. It will also provide insight into whether laws or regulations influence existing practices at all, and what aspect of the cultural context any intervention should take into account in order to be most effective.

**Box 12: Guiding Questions for Mapping Cultural Context**

- What are some of the most cherished values and beliefs among affected families, neighborhoods, and communities?
- How do members of affected families, neighborhoods, and communities perceive the problem? Is it ignored? Is it discussed?
• If it is not discussed, why not? Is it a taboo subject? Do individuals feel that nothing can be done to solve the problem?

• If it is discussed, how? Does it raise polarized or even violent reactions? Does it create a sense of community in trying to find a solution?

• Have legal or political interventions been effective in the past?

• What actions have been taken by the government or civil society on this issue in the past? Have they served to reinforce or address the problem?

The point of this mapping is to understand the historical and cultural nature of individuals in order to better grasp their identity and affiliations and what past processes may have influenced their ways of understanding the issue or problem. This information will be fundamental to designing strategies that are customized for the particular context and will help you avoid assuming that solutions that worked in other contexts can simply be transferred successfully. The effectiveness of the framing of the problem, proposed solution, and call for action depends on it being empirically credible to the interested parties, or perceived as real according to their conception of the world and their daily experiences, as well as culturally resonant within their communities.

**Example:** Colombian society consistently denounces the failures of the health system on social media. However, we have found that, when it comes to sexual violence, most people, even victims, non-governmental organizations working with them, and health workers, tend to overlook health needs arising from crimes of sexual violence, choosing instead to focus all their advocacy efforts on access to justice. Although many survivors have never consulted a doctor or a psychologist, they stress the importance of making access to health a priority. This points to the role of healthcare in making criminal procedures, which often re-victimize the survivor, more bearable. Years of exclusively focusing on ending pervasive impunity for sexual violence have left healthcare
in second place. Although a legal intervention is not by itself enough to significantly improve access to health services for victims of sexual violence, reinstating the mandatory provision of healthcare services provides an important advocacy tool for activists and survivors.

MAPPING THE POLITICAL, SOCIAL, AND CULTURAL CALENDAR

Conducting research about social, political, and cultural events that will be meaningful parts of the public’s calendar will easily allow you to identify potential opportunities and risks and strengthen your prospective analysis. While it is impossible to anticipate all events that will have a substantial impact on your advocacy efforts, there are some set events that are part of the life of society and are planned well in advance.

Example: In Colombia, we decided to file the case on International Day for Women’s Health to attract maximum public attention. During the preparation stages, we used the first commemoration of the National Day for the Dignity of Victims of Sexual Violence to conduct documentation workshops with survivors, in which they wrote letters to the judges demanding that reproductive services be reinstated as mandatory.

Box 13: Guiding Questions for Mapping Political, Social, and Cultural Events

- What kinds of events receive media coverage?
- What days are marked by the United Nations to commemorate your human rights and social justice issues (for example, February 20 is the World Day for Social Justice and March 8 is International Women’s Day)?
- What national holidays are coming up (Independence Day, Carnivals, Valentine’s Day, Youth Day, etc.)?
• What cultural or religious celebrations will take place (Christmas, Passover, summer break, Ramadan, etc.)?

• Are any elections coming up (presidential, legislative, constitutional assembly, referendum, etc.)?

• What is the schedule of major sporting events (Olympics, Soccer World Cup, etc.)?

• What events are your social justice allies planning?

We suggest creating a timeline of the agenda that follows the timeline you anticipate for your advocacy plan, including litigation, and marking local, national, and international events that either are clearly connected with your issue or very significant for the particular context. You can continually add to the timeline as you gather more information.

**Figure 8: Mapping the Social, Political, and Cultural Calendar (Timeline)**

- Feb  ‡ World Social Forum
- July  ‡ World Cup
- Aug  ‡ Launch of Populations Report
- Nov  ‡ Presidential Elections
- Mar  ‡ International Cinema Festival
- Abr  ‡ Universal Periodic Review at the United Nations
- July  ‡ Independendende Day

**4.3. USING THIS ASSESSMENT TO DETERMINE IF LITIGATION IS A STRATEGIC OPTION**

This chapter has outlined many categories and questions for assessing whether the legal, judicial, social, political, and cultural contexts are favorable for strategic litigation. They serve an essential function in informing strategic decisions. Since it can take several months, or even longer, to
gather the necessary information, you should set a realistic time frame for your first round of mapping and then build it in as an ongoing exercise. Consider your procedural timeline—for example, whether the case you want to litigate might expire—and the resources you have—time, expertise, and money—to determine how much mapping you can afford at this first stage of your project. When many people map together, they may be able to access much of this information quickly. What is clear is that it is indispensable to assess the terrain before you shape your strategies.

There is no set number of criteria that must be met in order to litigate as long as litigators and strategic process leaders have sufficient understanding of the relevant dynamics so that they are able to weigh the risks and opportunities of litigation. This is not a mathematical equation that will ensure a “correct” or positive result, but rather a methodology that we hope you find useful in organizing and systematizing your considerations before embarking on any strategic advocacy project, whether it includes litigation or not. Once you have completed your assessment of the legal, judicial, political, social, and cultural contexts based on a thorough and candid analysis of all information collected, you will have to consider whether, on balance, strategic litigation has a good chance of achieving your objective sustainably, according to the four conditions described in Chapter 3 (“The Four Conditions Test”).

You may decide that some of the conditions require preparatory work before you can consider litigation. (See Chapter 5, which offers ideas and advice on how to strengthen each condition. If you decide litigation is indeed a viable strategy to pursue your objectives, Chapter 6 offers guidelines on how to use the information gathered during mapping to inform and design your strategies and tactics.)
In 2014, Act 1719 was passed in Colombia to protect victims of sexual violence. However, parliamentarians who opposed reproductive rights managed to change the original version of the Act to make the provision of legal abortion optional for healthcare providers instead of mandatory. This modification allows healthcare institutions to bypass restrictions to conscientious objection imposed on them by constitutional jurisprudence. If you are considering constitutional litigation to ensure the mandatory provision of all reproductive health services for survivors of sexual violence in Colombia, you need to find out (1) if there is a rights framework that recognizes reproductive rights either explicitly or implicitly; (2) if Colombian Constitutional Court judges are knowledgeable about this rights framework and have sufficient willingness to apply it, given the strong reactions this issue usually raises; (3) if there are local attorneys who can litigate such a case; and (4) if there is a network of domestic and international civil society organizations and individuals willing and able to support this kind of litigation. Throughout this chapter, we will refer back to this case in order to illustrate the way mapping can help you form your advocacy strategy.

In 2014, when Act 1719 was passed, the Colombian Constitutional Court case law on protection of victims of sexual violence as well as case law on legal abortion was clear and unequivocal. For this reason, given that Women’s Link’s objective was to ensure the mandatory provision of abortion and other reproductive health services to survivors of sexual violence, we had a firm rights framework and a broad array of legal arguments from which to choose.

In Colombia, uncovering details about the process the Bill went through in Congress before being approved gave us information about the actors involved in the original proposal and its changes. Those behind the modification in question were the same anti-choice groups and individuals who have been trying to stop implementation of legal abortion laws since 2006. It was also clear which influential local and international individuals and human rights and women’s rights organizations supported the Bill that had been proposed by parliamentarians committed to women’s rights. In designing our communications and alliances strategies, we had to keep in mind that a challenge to the Act could be perceived as an attack on the work of those allies. For this reason, it was important to ensure that we included them all from the beginning as part of our strategies.


In Colombia, we discovered that we had two options for a constitutional review. The first option would have been to challenge the provision on the substantive ground that it violated rights of victims of sexual violence. This option, while legally strong, would also prove controversial because legal abortion was somehow involved. The second option would be challenging the provision on procedural grounds. While less controversial, this would not be as strong legally. We discussed the pros and cons of both scenarios, and decided to go for the first option, a legally strong substantive case. We made this choice because it allowed us to obtain a stronger precedent and gave us more time to involve different constituencies in the process.
of filing, as it does not have a legal deadline. In addition, it would give us the opportunity of soliciting *amicis curiae* from non-legal organizations and victims themselves, enhancing the potential of the case to bolster social mobilization.

7 *Supra* note 13, chapter 2 (Mahoney, 1996). (“Obviously, identifying both the involved in the decision-making process and their sources is legitimate in a dynamic, multicultural democracy. Moreover, this information should be made widely available. But often judges do not expressly disclose the criteria behind their decisions. Some judges merely rely on precedents, unaware of the original values embedded in them. When this happens, the judicial pronouncements are difficult to analyse or appeal and often perpetuate unstated or hidden discriminatory values.”)


9 See International Association of Women Judges. *Exclusive Interview with Justice Eusebia Munuo, President of the IAWJ* (July 31, 2013).


12 See International Association of Women Judges (IAWJ), a non-profit, non-governmental organization whose members represent all levels of the judiciary worldwide and share a commitment to equal justice and the rule of law. Available at: http://www.iawj.org.


14 See the Christian Law Society (CLS) in the United States: “CLS is a membership organization of Christian attorneys, judges, paralegals, law students, and other legal professionals dedicated to serving Jesus Christ through the practice of law, defense of religious freedom, and provision of legal aid to the needy.” More information at: http://www.clsnet.org.

15 *Supra* note 5 (Cepeda, 2004). (Arguing that this is a softer and somehow less controversial understanding of judicial activism, one that “emphasizes conflicts of values and interests but not formal powers or procedures.”)


18 *Supra* note 29, chapter 1 (Couso, 2004).

19 *Supra* note 5 (Cepeda, 2004).
In Colombia, many of the judges who produced the existing case law on abortion had finished their term on the Constitutional Court. We also knew from previous cases that some of the new judges were seeking to change case law to allow healthcare institutions to object to abortion procedures for reasons of conscience. So far, they had failed, but to avoid giving them the opportunity to open the door to conscientious objection, we chose to focus our legal and communications strategy on the right to comprehensive healthcare to victims of sexual violence based on international human rights standards, without ever mentioning abortion. From our mapping of the Constitutional Court, we knew that all the judges were sympathetic to the rights of victims of sexual violence and were keen to cite and follow international human rights law. We also sought *amici curiae* from the parliamentarians who proposed the Bill, knowing some of the new judges had great respect for congressional sovereignty. Additionally, most judges care about the opinions and stance of the Ministry of Health and medical practitioners, so we also sought and got *amici curiae* from them. Finally, the Court was going through a crisis related to allegations of corruption, so we built the case and accompanying strategies to serve as an opportunity for the Court to gain positive public regard by reaffirming its commitment to the human rights of minorities, especially those affected by armed conflict in the context of the negotiation of a peace agreement.

*Supra* note 10 (Wilson & Rasmussen, 2001).


CHAPTER 5

When Litigation Is Not the Best Strategy

This chapter outlines situations in which mappings might lead you to decide on alternate forms of strategic advocacy. This might involve symbolic tribunals, fact finding missions, and monitoring judicial appointments or case outcomes.
Of course courts matter! Of course courts influence social change. And they do so in many different ways.... I did find that courts don’t matter in the same way at all times on all issues.... And even when the conditions were not present, courts affect society in a powerful way by drawing resources to litigation and away from political mobilization.

Gerald N. Rosenberg

This workbook is about engaging the courts, civil society, and the other branches of government to create sustainable social change through litigation. However, our objective is not to convince you that litigation is always the best strategy to achieve your social justice objective. Courts should be regarded as a possibility when you plan an advocacy strategy, but engaging in litigation without a proper analysis of the conditions described in Chapter 3 (“The Four Conditions Test”) could mean squandering resources at the wrong forum. Furthermore, even if your primary expertise is not legal, there are good reasons to keep the courts on your radar, establish alliances with groups dedicated to litigation, and learn how to work with the courts.

5.1. STRENGTHENING THE FOUR CONDITIONS

If the information gathered during the first round of mapping indicates that one or more of the four conditions are nonexistent or that some need strengthening, there are still a number of tactics that can be used to strengthen one or more of the conditions. Depending on your assessment and your overall goals, these tactics can be implemented as part of other advocacy plans without being tied to litigation, as a way to prepare for future potential interactions with the courts, or as part of the litigation strategy itself. For example, you may file *amicus* briefs in cases that are being litigated by other groups that are somehow relevant to your issue or invite judges who have shown knowledge and commitment on the issue to speak at conferences or seminars.
**Figure 9: Tactics to Strengthen the Four Conditions for Social Change Litigation**

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<thead>
<tr>
<th>Tactics</th>
<th>1 Rights framework</th>
<th>2 Knowledgeable and committed judiciary</th>
<th>3 Legal advocates</th>
<th>4 Support network</th>
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<tr>
<td>Monitoring judicial appointments</td>
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<td>Monitoring judicial processes</td>
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<td>Monitoring jurisprudence</td>
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<tr>
<td>Thematic reports</td>
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<td>Fact-finding missions</td>
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<td>Producing legal memos</td>
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<td>Shadow reports</td>
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<td>Symbolic tribunals</td>
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<td><em>Amicus curiae</em></td>
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<tr>
<td>Expert witness testimony</td>
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<td>Producing manuals for judges</td>
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<tr>
<td>Capacity-building on strategic public interest litigation</td>
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<td>Capacity-building on strategic communications</td>
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MONITORING

Organizations can use different tactics to serve as “judicial watchdogs” in order to strengthen the courts as a forum for social justice and human rights advocacy. Many of these tactics will also improve the capacity of legal advocates and civil society groups to understand how and when to engage with the courts. For example, a close analysis of the procedures governing the selection or appointment of members of the judiciary could be an effective strategy to guarantee the presence of judges who understand their role is to uphold human rights and social justice, and conversely, to prevent judges without such understanding from doing so.³

Example: In 2012, opinion leaders and other organizations used the information produced by Women’s Link Worldwide to successfully prevent Ilva Myriam Hoyos from reaching the Colombian Constitutional Court. Women’s Link revealed that Ms. Hoyos led the anti-choice movement in Colombia, and as Deputy Inspector General, she disregarded constitutional mandates in order to further her anti-women’s rights agenda. See some of the articles published at the time at: http://www.semana.com/opinion/articulo/la-temible-ilva-myriam-hoyos/261178-3; http://www.elespectador.com/opinion/columna-3604-28-ilva-myriam-hoyos-y-virtudes-judiciales.

In terms of monitoring judicial procedures, experience has shown that judges act more respectfully toward victims when an advocate, researcher, or someone who provides support is observing. When someone is watching, judges tend to be more careful and thus may reduce their reliance on their own prejudices in their statements and decisions.⁴

Finally, knowledge of judicial decisions allows you to publicize those that pave the way for a solution for the violation of rights and denounce those that have a negative impact on the issue through the media, publications, events, or other means. It is also important to monitor decisions in order to be aware of new precedents and arguments that can be used in future litigation.⁵
Involving judicial actors, legal advocates, and civil society networks will allow you to strengthen all four conditions at the same time.

**DOCUMENTING**

In many cases, there is not sufficient information about a perceived problem, its causes and how it affects the lives of individuals and communities. Without this type of information, it is impossible to consider litigating a case to create social change. One approach to documentation is developing thematic reports, which result from the investigation of a particular topic in a specific context for which information is often unavailable. Thematic reports produced by international, regional, or domestic civil society organizations have been essential tools for documenting and assessing human rights violations in order to work toward creating strategies to ensure and enforce rights. These kinds of reports can get legal and non-legal activists working together to frame the problem as a violation of rights. Another type of documentation is a fact-finding mission in which an investigation is carried out in order to document specific facts and human rights violations within a particular context. This is done through the collection and comparison of information, which is then analyzed and may be included in a report. Through the fact-finding data collection process, specific human rights violations may be documented and cases may be identified for public interest litigation. Documenting also can also be helpful in gathering evidence for cases.

**Example:** Women’s Link has produced a series of fact-findings on the realities of migrant women’s rights. Some of the cases identified during these missions have been litigated.

Civil society organizations can also submit alternative reports, commonly called “shadow reports,” that document the compliance or non-compliance
of a state with specific human rights obligations. These reports supply data and statistics that provide perspective on the information submitted by states and report on states’ implementation of human rights and fulfillment of obligations under international legal instruments. These shadow reports are used by the human rights bodies in charge of monitoring states’ compliance with a certain human rights treaty, to contrast the information submitted by the state, evaluate the situation, and issue concluding observations. When the recommendations issued by treaty bodies in their concluding observations become the norm, they can be used to strengthen a rights framework (see p. 53: “Condition One: The Rights Framework”) to be used later in litigation.

A more public and pedagogical way of documenting specific cases that can illustrate your social justice problem is through symbolic tribunals. This tactic may strengthen all four conditions when traditional legal systems and avenues are unavailable due to procedural or political reasons. Symbolic tribunals allow you to have the benefits of litigation—except for a binding decision—and more, while giving you the opportunity to control all the conditions and thus ensure an optimal result.

Symbolic trials have many advantages. You can develop and test a range of legal arguments, raise public consciousness of your issue, get national and international champions to play symbolic judges, and become experts about your issue in the meantime. You can also encourage legal advocates or prestigious scholars to argue paradigmatic cases and invite national and international civil society experts and activists from different fields to present their testimony. Symbolic trials may also invite victims who have never obtained justice participate and vindicate their rights, perhaps even more strongly than they would be able to in an actual trial. As with any strategy, it is important to weigh all the factors before taking on this activity. Symbolic tribunals can also be dangerous if they work to contradict or take away from efforts to validate existing legal systems at times when this is counterproductive.
BUILDING KNOWLEDGE AND SENSITIZING

Mapping may show that legal advocates, civil society groups, or judges have varying degrees of knowledge on your problem and proposed solution, or different understandings about their own role in the struggle for social change. It is wise to dedicate enough time and resources to strengthen this knowledge and level of commitment, both to your issue and to litigation as an avenue for social change.

Building knowledge of and sensitivity to your issue greatly differs when engaging civil society and the judiciary. One of the most important skills to be strengthened among legal advocates and civil society leaders is the capacity to use a strategic approach to litigation, understanding it as a platform to bring together and give visibility to different advocacy initiatives that shape public opinion and bolster mobilization, while minimizing the risks of a legal backlash. It is crucial for legal advocates to understand that a legal victory cannot be the ultimate objective of the movement, nor does it guarantee successful social change, so litigation is more a means than an end in itself. Of course, for a client, a win in court might be a life-changing event. Advocates that have worked in public interest litigation by providing legal services to individual clients must also understand that strategic litigation presents different dynamics and thus requires a distinct set of skills.11

It is also important that leaders of civil society mobilization efforts not begrudge litigation for fear of its co-opting media attention, funds, or capacity to mobilize. Rather, litigation can be viewed as having the capacity to empower non-legal activists who rally around a case, participating as plaintiffs, in public hearings, or by filing amici curiae. The litigation creates a platform, and each person and organization can claim a role in the process. Non-legal activists should identify all opportunities offered by the judicial proceedings to bring together other efforts and leverage their potential both inside and outside the courtroom. For instance, public demonstrations have been used to draw substantial public attention to a court decision. Demonstrations may take place in public spaces, like in front of courthouses or inside courtrooms.12
Example: During the constitutional process that led to the recognition of the right to terminate a pregnancy under certain circumstances in Colombia, Women’s Link’s NGO allies held a series of monthly demonstrations in front of the Court to show support for the case. The media covered many of them. Find more information at: http://vimeo.com/14803953.

In sum, capacity building in strategic approaches to public interest litigation and in strategic communications for legal and non-legal advocates is fundamental to strengthening 3.3 (“Condition Three: Legal Advocates with Capacity to Litigate”) and 3.4 (“Condition Four: The Support Network”).

Example: Women’s Link hosted a series of mentoring programs on strategic litigation to advance reproductive rights for attorneys from Latin America and Africa. These programs included discussions around legal, communications, and mobilizing tactics. Many of the participants subsequently undertook strategic litigation in their own countries. For example, Ana Victoria Suárez from Peru represented more than 10,000 youths in the constitutional challenge led by INPPARES that achieved recognition of adolescents’ right to sexual autonomy.

Organizing meetings, seminars, and trainings on your issue or on public interest litigation can be a good way to consolidate the voices of existing experts, empower those with interest but no experience, test arguments and framings with different audiences, promote interaction among legal and non-legal activists, involve representatives from different branches of government, and sensitize decision-makers about a particular violation of rights.

In terms of building the knowledge and commitment of judges, it is important to try to understand the dynamics of different judicial communities. According to former President of the Colombian Constitutional Court Justice Manuel José Cepeda, “it is not possible for the members of the Constitutional Court to be experts on every single subject of ordinary life that
they deal with in their decisions." For this reason, understanding how to enhance judges’ knowledge about the relevant fields for the solution of your problem or the specific rights violation is crucial.

By using the information gathered during mapping you should be able to determine the level of knowledge and commitment the judicial actors you will work with have for your issue. When judges and prosecutors do not have knowledge or visible commitment, you may simply expose them to the basic concepts of your problem by presenting it as a violation of rights. If you identify some level of commitment but no knowledge, you should provide tools that offer judges the technical knowledge they can use to navigate the legal system and find a way to provide justice for your issue. When judges seem to understand the complexities of your issue but show no commitment, the engagement must go deeper. You may have to use a different approach and engage them over time in a conversation about their role as judges vis-à-vis injustices or human rights violations before considering litigation. It may also be necessary to reframe the issue or problem in a manner that generates interest, and eventually commitment. Finally, when you come across judges who are both knowledgeable and committed to your issue, see if you can recruit them as educators for other judicial actors, cite their decisions, or promote them in other ways.

Mapping should show in what areas the substantive knowledge of judges needs to be strengthened. There are many ways in which judges’ knowledge and understanding of complex social issues can be improved. For example, most groups working in the field of social justice produce publications constantly. However, it is rare that judges and clerks are included in their distribution lists. By sending publications to them or the official judicial library, advocates can ensure they will have appropriate resources for their research when a case relevant to the problem reaches their courtrooms. You can also ask experts to prepare and file amicus briefs or request permission to present expert testimony as part of existing cases so judges can benefit from their expertise.
Another tactic is to include your issue in the curricula of law schools, continuing education programs, or judicial training schools. When designing and implementing judicial colloquia, keep in mind that such events should be interesting and inviting enough to be attractive to judges, taking into account their role and intellectual authority. Judges generally value opportunities to discuss their judicial duties with peers and highly regarded academics or members of civil society in secure spaces and away from the media. These kinds of events can be done in collaboration with bar associations and judicial associations. If you opt for producing judicial manuals, these must be rigorously drafted and edited, including citations of binding domestic and international law, soft law, and doctrine.
Finally, there are more informal ways of educating and sensitizing judges. For example, where you or your allies have opportunities to participate in academic or social events that judges attend, you can use that opportunity to make a comment or ask a question that triggers reflection, or share information about a particular issue, while making sure you do not overstep the boundaries set by the judge or the country’s legal norms. Before undertaking such personal interactions, you should consider whether they might create a conflict of interest when subsequently litigating a case.

5.2. REMEMBERING THE COURTS WHEN ADVOCATING ELSEWHERE

During an advocacy process for social change, most activists interact with more than one branch of government. That means that in many occasions, even though you may not choose litigation as your primary strategy, eventually you may find yourself or your issue in court. For example, a law for which you have advocated may be challenged in court for its unconstitutionality; a regulation issued by a ministry may violate the rights of a constituency, who may seek redress in court. Courts are often the “second round” for many political debates.  

Because bringing political disputes to the courts is common, using all your resources to influence the legislative or executive branches may leave you unprepared for a judicial battle. For this reason, even when developing a non-litigation strategy in order to influence laws, policies, or regulations, you need to be mindful of the possibility that these may be taken to court. You need a basic understanding of judicial dynamics and may also need additional resources including new alliances, legal expertise, and funds at the onset of litigation.

5.3. WHEN SOMEONE ELSE TAKES THE ISSUE TO COURT

The potential of working with the courts is not a secret. It may happen that someone who does not share your views brings the issue to court. You should assess the situation to work out whether and how you need
to respond. Time will be against you and you will not have shaped the terrain in which you have to react. Nevertheless, you still need to make strategic decisions based on as solid a mapping process as you can manage within the time available. Many of the steps described in Chapter 6 to design litigation strategies and tactics will still apply.


3 *Supra* note 29, chapter 1 (Couso, 2004).

4 WATCH is an organization that trains volunteers to monitor courts. Trained WATCH volunteers monitor over 5,000 hearings each year. They also train court monitoring groups across the U. S. with manuals, site visits, and web-based training. More information at: http://www.watchmn.org.

5 Women’s Link Worldwide’s Gender Justice Observatory is an information system that contains analytical summaries and complete judicial decisions that have a significant impact on gender issues. The systemization of the cases from domestic, regional, and international courts from around the world seeks to offer a tool for advocates to foster the development of effective strategies and creative legal arguments necessary to implement human rights standards. Moreover, the Observatory offers comparative perspectives, both regional and global, to support the work of human rights activists, students, researchers, academics, and members of the judiciary and judicial branch more generally. Visit the Observatory at: http://www.womens-linkworldwide.org/en/gender-justice-observatory.


7 International Women’s Rights Action Watch. *Shadow Reporting to UN Treaty Bodies.* Available at: http://hrlibrary.umn.edu/iwraw/reports.html.

8 When filing the constitutional lawsuit against the complete ban on abortion in Colombia, Women’s Link included the recommendations issued to Colombia by several treaty monitoring bodies, including the Human Rights Committee, the Committee Against All Forms of Discrimination Against Women, and the Committee on the Rights of the Child, regarding the need to review its abortion laws and eliminate provisions making therapeutic abortion illegal. Once the Constitutional Court ruled in our favor, we presented shadow reports indicating the legal change, and Colombia received congratulatory remarks, thus making the judicial precedent politically stronger.

9 In December 2000, the Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery was convened through the efforts of non-governmental organizations throughout Asia to ensure some form of justice for the aging former “comfort women,” who were forced into sexual slavery by the Japanese Imperial Army during World War II. This massive system of enslavement had gone unpunished for more than
fifty years. One year later, the “people’s tribunal” reconvened to release the full judgment at a special ceremony which was conducted in The Hague, the Netherlands. More information at: http://www.icc-women.org/wigjdraft1/Archives/oldWCGJ/tokyo/index.htm.

10 *Supra* note 29, chapter 2 (Rodríguez Garavito & Rodríguez Franco, 2010).

11 *Supra* note 24, chapter 4 (Geary, 2008).

12 *Supra* note 7, chapter 2 (Jaramillo & Alfonso Sierra, 2008).


14 During her presentation at the Global Safe Abortion Conference in 2007, Mónica Roa asked an audience of more than 800 reproductive rights advocates and services providers who among them produced publications with data and research about abortion. Almost everyone raised his or her hand. Then she asked how many had judges on their distribution lists. Only a few raised their hands. This illustrated how advocates were not thinking of judges as important players, even in a context in which abortion debates were reaching the courts all over the world.

15 Women’s Link obtained permission to present the expert testimony of Patricia Sellers, expert on gender-based violence in the context of conflict, and María Eugenia Saldarriaga, expert on sexual violence against indigenous women in Guatemala. Both testimonies were admitted in the case investigating the Guatemalan genocide at the Audiencia Nacional in Spain. As a result, the investigating judge issued a decision stating that acts of sexual violence must be investigated as part of the investigation of acts constituting genocide.

16 Women’s Link, in collaboration with FIDA Uganda and the Judicial Service Commission, organized a judicial colloquium in February 2013 for Ugandan judges, at which reproductive rights were discussed for the first time among judges in the country. Presenters included judges from India, South Africa, and the Inter-American Court for Human Rights.


18 *Id.* p. 666.
CHAPTER 6
When Litigation Is a Good Strategy

This chapter outlines how to design an interactive litigation strategy that includes mobilizing, communications, and legal tactics, showing how the different mappings from Chapter 4 come together to inform a unified strategy for social change using the courts.
If the results of your mapping indicate that the conditions discussed in Chapter 3 (“The Four Conditions Test”) are strong enough or can be easily strengthened, litigation may be a good option for achieving your advocacy objective. If so, use the information gathered during mapping to design your interactive legal, communications, alliance, and social mobilization strategies, while continuing to dig deeper into your mapping analysis as you go along. The objective is to use these strategies to turn the litigation into a platform where different advocacy efforts can come together and rally to build conditions to push for the solution to your problem, whether a specific legal victory is obtained or not.

A litigation strategy should have at least three components: the legal strategy itself, the alliance and social mobilization strategy, and the communications strategy. In this chapter, start by describing each component separately, but they should be brought together in your planning process so that you will actually be carrying them out simultaneously. For example, although we begin with the legal strategy, in the component on alliances, we consider how to constitute the core group that will undertake this strategy. Also, even though framing could be a subsection of the communications strategy, we understand it broadly and discuss it first because it will be relevant to all the tactics and inform all the strategies. How you frame a problem will affect how you approach the problem, its solutions, and your overall strategy so it is important to dedicate thought to the power and politics of framing.

### 6.1. FRAMING

Frames provide us with a reference to see things in a particular way and attribute a certain meaning to how facts are depicted. Creating frames proactively is part of the “politics of signification,” and therefore one of the most important aspects of any advocacy strategy. Framing requires activists to be agents in the production of mobilizing and counter mobilizing ideas and meanings. When you frame an issue, the resulting “collective action frames” serve two objectives: (1) they offer you and your allies a narrative, built on beliefs and values, that lends legitimacy to your actions
and the social mobilization you want to foster, and (2) they offer individu-
als the reference you want them to use to process and label life occur-
rences within their world.²

**Example:** Feminists introduced the concept of “femicide” to describe the killing of a woman or girl, by a man, on account of her gender because she is a woman. This helps to reframe violence against women as a structural problem of violence against women and point to its need for special treat-
ment, as opposed to, for example, those killings being random acts of vio-
lence, treated as isolated homicides.

You start making framing decisions, sometimes without even noticing, when you pick a way to think about a social justice problem you want to address and propose a solution; the moment you deliberate with your colleagues and consider ways to convene other allies; persuade bystanders and demobilize opposition; when you discuss the meaning of litigation with a client; when you pick the legal narrative and arguments to be presented to the judges; and when you decide on your messages to engage public opinion.

**Example:** In Colombia, in November 2015, the Constitutional Court ruled in favor of same-sex adoption. A university professor filed a claim of unconstitu-
tionality where the main argument was not the right of same-sex couple to not be discriminated, but the right of homeless children to family life. This new framing of the rights of the children to have a family was successful, be-
cause it allowed for a new and innovative way of approaching the rights of same-sex couples to adopt children.

Collective action frames usually include three parts: diagnostic framing, or how we understand the problem and its causes; prognostic framing, or what solution we propose; and motivational framing, or why this is a mat-
ter that deserves our attention and action. These frames are generally not constructed at the same time or with the same degree of agreement, but rather through a negotiated and contentious process among activists, as discussed in Chapter 1 (Introduction), which recognizes that problems and solutions operate in separate streams with motivated activists making links between the two. The most important part is diagnostic framing, which refers to the identification and common understanding of the problem. The challenge is to find a diagnostic frame that is clear and persuasive to those that have been identified as being in the middle ground on an issue (not in total agreement and not in total disagreement) and present the problem in a way that even your opposition can agree. Prognostic framing is about the proposed solution, which in turn marks, or at least limits, the type of strategy that should be used.

Finally, motivational framing is the rationale that invites your allies and supporters to engage in collective action. Among allies, different factions may disagree about the problem or the solution. However, they can still interact and recognize the value of the other’s approach. Opposition will certainly criticize your frame and push for a counter-frame, which in turn will provide the rationale for their diagnostic and suggested remedies. This is why using the information you collected during mapping to anticipate the opposition’s counter-framing can help you refine your framing process.

For example, you can propose to liberalize abortion laws because illegal abortion results in high levels of maternal mortality and morbidity. Some of your allies may disagree with your diagnosis and insist that the real problem is that women are not being allowed to make decisions about their own bodies. Other allies may agree with your diagnosis but disagree with your proposed solution and suggest dedicating efforts to increasing women’s use of contraception or to making abortion safe, without making changes to the criminal code. Those in opposition could agree that the deaths of women due to unsafe abortion is a problem, but they might argue for higher penalties or prosecution of abortion providers, as their desired solution is to eliminate unsafe abortion, not to legalize abortion.
To make sure your frames are effective and have the capacity to mobilize civil society, you need to take into account the information gathered during the mapping process. You want your frame both to align with the values of your target audience and be as culturally resonant as possible within the context where you are working. People should feel that the way you are presenting the problem and solution is consistent, credible, and congruent with their everyday experiences. Frames should also be open and elastic to increase their mobilization capacity. Concise frames are effective for specific audiences, but broader frames can appeal to a larger number of social groups, which means increasing mobilization capacity. Both interacting with grassroots organizations that serve the populations and establishing a dialogue with the affected communities will also enrich your ability to frame the issue.

Social media networks like Facebook and Twitter are excellent laboratories to test different frames and identify those that resonate with most people for free, because they show the number of likes or re-tweets each post gets. For the abortion example, a frame that is exclusively relevant for women who self-identify as feminists has less mobilization potential than one that makes it relevant for all women or for communities as a whole. Talking about the reproductive choices of women including having children, opting for adoption, using contraceptives, accessing reproductive technologies, or having an abortion as equally legitimate choices will appeal to a wider audience than would a frame limited to abortion.

The information gathered during the mapping of the different audiences and public opinion should give you an idea of where you are in the debate. If this is the first time a debate is introduced, you can set the tone and frame the debate. If the debate is ongoing, you have to evaluate whether you need to counter-frame a debate that has been monopolized by the opposition, or reframe the issue. You can use the results of mapping to identify what has worked and what has not in the past, and inform your decisions accordingly.
Figure 11: Examples of Framings for the Abortion Debate

The abortion debate should be about:

- A pregnant women's right not to lose her rights
- An ethical mandate for health care providers
- A compassionate moral principle
- A development opportunity
- A human rights obligation
- A reproductive rights component
- A social justice problem
- A gender equality issue
- A feminist demand
- A moral health component
- An ineffective use of the criminal justice system
- A rights obligation
- An ethical mandate for society
- A human rights issue
- A development opportunity
It is crucial that you have the capacity to be self-critical and recognize when a frame is winning or losing a debate with a specific audience. If the frame is successful, you should strengthen it to amplify its impact. If it is not proving to be successful, you will have to consider reframing. Changing the frame is difficult because you are emotionally and financially invested in the previous frame, but doing it will allow you to open space for new conversations and have another attempt at reaching your objective.\(^4\)

Framing will be present constantly throughout the design and execution of your strategies, and you should be consciously reflecting on it and strengthening it at each stage of the project.

**6.2. THE LEGAL STRATEGY**

Your litigation strategy should be informed by a wide variety of variables identified during your mapping and analysis. The most important question for your legal strategy is what the most persuasive case you can build is, given the available choices, for the specific court that will decide it. Again, the answer to this question begins with using the information you have gathered to determine what framing will resonate the most with the judges.

It is important to keep in mind that if you have clients, you must make sure that your clients understand that they are participating in strategic litigation, and a check-in should occur to make sure that the objectives of the client and yours align. We suggest that a letter of engagement or other form of document be prepared and used to explain the relationship to the client.

**Box 14: Basic Decisions to Design Your Legal Strategy**

- What is the most strategic case that you can build with what you, your client (if any), and your allies have (evidence, time, resources)?
- What are the most persuasive arguments you can use to make your case before this particular court?
• What is the right time to file? Are there other cases competing for political attention?

• Given what you know, what conditions would enable judges to be more comfortable making the desired decision? Public opinion? Amici by key people? International attention? Grassroots outcry? Further education on an issue?

• What is the worst-case scenario and what are your plans B, C, and D?

• What can you do to use this case to encourage a democratic debate by involving as many actors as possible from other branches of government and civil society to be part of the dialogue during the legal process?

• What kind of orders and reparations do you want to ask the judge for?

LEGAL ACTION

By contrasting the rules of standing—that is, the requirements to bring a lawsuit in your jurisdiction—and the evidence required to win each available legal action with the resources you might be able to access, you can narrow down the options for a type of case you can bring in a realistic way. After a thorough review of the available laws and literature and in-depth exchanges with experts in the field, you should have a clear understanding of what evidence exists for building your case.

Most legal actions require one person or a group of people who have evidence that a violation of their rights has occurred and are willing to denounce it. As noted above, the attorney who is litigating has ethical obligations to represent the best interests of his or her clients and is required to respect their wishes regarding the case. The best interests of the client may not always be in line with the advocacy objective you have set in advance, so it is important to be honest and disclose your agenda to the potential clients, so you can jointly determine whether strategic public interest litigation would serve all the interests at stake. It is key to find a frame that both makes the litigation meaningful to the client and inspires allies and those you want to influence. Sometimes the needs of the client
may be addressed more efficiently outside of the judicial system or outside of a particular public interest litigation approach. For example, the client may be stigmatized or endangered, want to settle for monetary compensation, or get tired of the process and decide that enough has been achieved before the ultimate strategic objective has been reached.⁵ In such cases, advocates must remember that the desire of the client trumps everything else, even when you disagree with the decision.⁶

This is one of the reasons why legal advocates should consider, where possible, the option of litigating without a client (or having the client not be the person that is directly affected by the violation of rights) and be mindful of the difference between designing a case and finding a case. When the institutional design is sufficiently flexible, legal advocates can design cases in which they control most of the variables. Litigation against a legal norm in the abstract—because it could violate rights, but without having to prove harm has already been caused to a particular individual—is a good example, but not the only scenario. Sometimes the way rights violations are framed allows legal advocates to easily find people who fit the desired profile of a client and are willing to be plaintiffs as part of their commitment to supporting the cause. Also keep in mind that the more plaintiffs you can find for one case, the more opportunity you create for social mobilization and empowerment for those involved, and the less opportunity your opponents have to stigmatize individual victims.⁷

Advocates working in countries where abstract litigation is not contemplated under procedural rules, *amici* are not accepted, organizations do not have standing, etc., may wish to explore mechanisms to seek to change procedural rules. This is particularly important in contexts where strategic litigation is not utilized as a way to seek social change.

If your mapping has allowed you to conceptualize what an ideal case would look like, you can undertake what is known as “fishing litigation”—you litigate many cases in lower courts (or partner with others who do) until you find the profile of client and case that is best suited to take to the higher courts. This is a common practice in countries with federal sys-
tems where cases could potentially be litigated in many states, but only one will reach the Supreme Court, with the potential for setting a national standard. You can also find a case through a fact-finding mission or by using your mapping to identify actors who are positioned to detect potential cases, such as service providers or community organizers. It is important not confuse this scenario with letting a case catch you off guard. Often people needing legal services seek out public interest litigators. If a client whose situation is not the ideal test case as identified in your mapping approaches your team, you should be wary of taking on the case, because doing so may undermine the right of that individual to zealous individual representation. On the other hand, sometimes someone’s rights are violated and the case receives media attention, alerting you to a potential client whose case could be paradigmatic of the issue. Even though your timeframe to follow the strategic process described in this workbook would be much shorter, you should consider whether, on balance, intervening in some way will help you reach your objectives and is thus worth taking on.

The regulations of the type of legal action you choose will have implications on many fronts. For example, the deadline to file the case (statute of limitations), the expected length of the process, and its monetary costs, other resources that will be used, including the time and energy of your core team and allies, will differ between various forms of legal action. Precautionary measures or preliminary injunctions are an example of expedited legal actions that not only might save time and money, but may also place judges in a position in which they feel compelled to resolve a problem immediately in order to prevent further irreparable damage.8 In some systems, these measures are tied to the filing of a proper case after the measures are granted; in others, these can be filed independently as stand-alone cases.

PREPARING SCENARIOS

Your analysis of the findings of the mapping from Chapter 4 (“Introduction to Mapping”) will allow you to prepare scenarios for winning, losing, or just testing the waters to contribute to your desired solution. For example,
if you are aiming at creating a human rights regional legal standard by litigating in a regional court, you may want to avoid spending all your human and financial resources during national litigation while you exhaust domestic remedies. You can either push for the exhaustion of domestic remedies to be over quickly or, if possible, argue some exception that allows you to skip that requirement.

If you are confident that your arguments will be persuasive to the judges, you may want the case to have the highest possible profile and involve as many constituencies as possible to facilitate implementation. If you are not certain of the outcome, you can either use the process to gain momentum for the movement or postpone the communications work until after a victory is secured. Whatever your prediction, your job is to know that nothing guarantees a good outcome, and that winning the case is not indispensable to the achievement of your objective. While overturning a bad precedent could take years or even decades, depending on the court and the context, losing might not be the worst-case scenario. In the event of a defeat, you should consider tactics to leverage the feeling of outrage of the public, and capitalize on the allies and public opinion gained throughout the process to find a solution through alternative democratic avenues like adopting public policy, enacting legislation, or litigating another case.

You should also aim to anticipate as many opposing arguments as possible, then develop your point in a way that preempts as many as possible, either by responding with a stronger argument or by framing the debate in a way that makes the others weaker. Your job as the strategic legal thinker is to consider the foreseeable argumentative scenarios and design a plan addressing each of them. Then you select the scenario that best serves your objective and develop a plan to create the conditions to make it happen. For example, when challenging the unconstitutionality of the complete ban on abortion in Colombia, we knew that arguments focusing on the right to life of the fetus would form a major part of the opposition’s
case. For that reason, we prioritized the framing the problem as a matter relating to the right to life of women, citing high rates of maternal mortality that result from abortion being completely banned in the country. We also knew that the Catholic Church was going to play a key role in opposing our case, so we decided to take the constitutional separation between church and state for granted, therefore diminishing the Church’s influence in the debate. Instead, we acknowledged from the beginning that theirs was only one more legitimate voice expressing their disagreement, but clarified that we were not asking the church to change their stand on abortion.

When planning the strategy, it is necessary to have a contingency plan for every eventuality you are able to imagine, including your worst-case scenario. There may also be times when unanticipated or unforeseeable events affect your litigation strategy. This can be effectively handled by ensuring that your core team is aware of the possibility of the element of surprise and that a plan is in place for such eventualities. For example, ensure that there is an agreed secure location to meet and discuss any unforeseen developments before reacting publicly. Your alliance and communications strategies can also help manage the different scenarios.

It is useful to draw a timeline of the process so that at each point you are clear on the timeframe, opportunities, and costs of the steps ahead. When drawing a timeline, keep in mind the different possible scenarios that arise in relation to each decision within the process.

**Figure 12: Example of a Standard Judicial Procedure Timeline**

- 6 months
- 1 month
- 3 months
- 1 month
- 6 months
- 2 weeks

- Prep work
- Filing
- Admission (preview scenarios)
- Amici
- Public hearing
- Admission (preview scenarios)
- Appeal
AMICUS CURIAE AND PUBLIC HEARINGS

*Amici curiae* (Latin for friends of the court) are third-party or citizen interventions. Persons or organizations that are not a party to the judicial process may intervene by submitting information on a particular issue (legal or non-legal) relevant to the case that may assist the judge or court in the consideration and resolution of the case.9

Once you have clarity about whether the court is open to receiving *amici curiae* or whether there will be a public hearing, the mapping of actors should indicate which individuals, organizations, and institutions you should approach to invite to take part. Remember that one of the most important objectives of this type of litigation is to use the judicial process to strengthen the democratic debate and offer a platform to create greater visibility for your issue and leverage the impact of a variety of advocacy efforts. The key is not to allow the legal aspects of litigation to drain all the attention and political capital away from your broader goals. Finally, you should anticipate who are the key players for implementation in the event of a victory and find a way to get them involved throughout the process. This will greatly facilitate the more complex process of implementation.

Depending on the legal system, *amici curiae* are regulated in different ways. In some countries they are expressly prohibited, in others expressly authorized, and in others unregulated. Some courts require the permission of the judge; others require the permission of the parties involved. *Amici curiae* may be used strategically to create an educational or persuasive effect, test new arguments, or empower civil society actors and promote a democratic and participatory debate.

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**Example:** In Uruguay, the *amicus curiae* is not regulated under domestic law. However, Mujer Ahora, a feminist organization in Uruguay, along with Women’s Link Worldwide filed an *amicus curiae* in 201410 at the Supreme Court in
a case of sexual exploitation of a fifteen-year-old girl. The Supreme Court accepted the *amicus curiae*, creating a precedent of use of this type of intervention in the future.

Because judges are often legal generalists, they may have limited knowledge of specific issues. *Amici curiae*, therefore, are an effective mechanism to highlight key legal issues outside their area of expertise, in areas of international or comparative law, or in non-legal issues relevant to the case in question. In this way, *amici curiae* may enrich the debate by offering perspectives, arguments, facts, or interpretations that have not been presented by the parties involved. When the goal sought is educational, recognized authorities on the topic should author the interventions.

**Example:** On issues related to sexual and reproductive rights, the World Health Organization, the International Federation of Gynecology and Obstetrics, and their regional peers can provide a public health perspective. Human Rights Watch, the Center for Reproductive Rights, or the Reproductive Rights Program of the University of Toronto can illustrate the link between sexual and reproductive rights and human rights. When the goal is to validate the issue in terms of precedents in countries with similar contexts—particularly where the issue is vulnerable to accusations of having been imported from the global north—legal experts from other southern countries can share their jurisprudence on the issue. Women’s organizations may offer the perspective of reproductive rights as an issue of gender equality. Other disciplines like medicine, nutrition, psychology, psychiatry, sociology, demography, anthropology, or statistics may offer views that enrich the debate and the perspective of the judges making the decision.

*Amici curiae* are also a way of putting the issue before the court within a context or frame. For example, in the case of an abstract judicial review case, the personal stories of people who are affected by the legal norm at
issue can lend a human dimension to the problem. *Amici curiae* presented by persons or institutions that judges are likely to give significant weight to, such as the educated opinion of other judges, prestigious academic institutions, professional associations, etc., may have a highly persuasive effect. *Amici* may show that the issue in question has a much broader reach than the particular interests of the parties involved and prove the salience of the problem being debated. In cases before international or regional courts, *amici* may also help judges see an international or regional consensus on an issue or the opportunity to set important precedent.

A safe way to test innovative arguments is by presenting them to the court in the form of an *amicus*. It is safe because judges are not obliged to take those arguments into account and can dismiss them if they turn out to be unpersuasive without affecting the case overall. This is a way of offering judges alternative legal framings to the case.

**Example:** In October 2017, in a case about abortion in Kenya, Women’s Link filed an *amicus* presenting the interpretation of the right to life from conception set by the Inter-American Court for Human Rights. Kenya is not part of the Inter-American System for Human Rights, but its Constitution includes similar language protecting the right to life from conception. If the Kenyan court does not consider the interpretation of the Inter-American Court relevant, no harm is done. But knowing there is an interpretation of a similar provision in another context where human rights are also guiding principles could inspire judges to follow the same path and use that precedent to set their own interpretation and decide the local case.

Finally, encouraging individuals and organizations to file *amici curiae* in a judicial process may lead to truly democratic and participatory debates. Non-legal advocates will feel that their take on the problem is being considered at a court of justice, which will allow them to take ownership of the process, thus promoting even greater mobilization.
Example: In 2015, in Colombia, in a case that challenged the optional provision of health services to victims of rape, many survivors were invited to file amici explaining their experiences with the health system to the court. The court not only admitted these amici, but took the survivors’ experiences into account and quoted their interventions as part of the rationale for its decision to make the provision of these services mandatory. Survivors were empowered and gained a sense of agency in the vindication of their own rights.11

The same objectives can be achieved through participation in a public hearing, or in some cases, through the use of expert testimony as part of the evidence of the case. If the judicial process does not allow for the participation of third or interested parties in the discussion, you can design mechanisms to bolster public debate and social mobilization outside the courtroom. Ultimately, the objective is to use the tools offered by the judicial process and traditional advocacy forums as opportunities to create the conditions that make judges comfortable making a decision that upholds human rights and social justice, even if such a holding is unpopular or controversial.

REMEDIES

In deciding what remedy to seek, you must be creative and mindful of the options available. Most fundamentally, remedies must be in line with the objectives of your client and project. For example, if you want to challenge the illegality of abortion or denounce barriers to access to the service, holding doctors individually responsible is not enough and may endanger the possibility of creating an alliance with the medical community. You need to pick a legal action and remedy that allows you to ensure individual redress, prevent further violations, and address the structural problem. You should examine whether the possibility exists of seeking structural remedies. Once again, you need to carefully consider how you frame the request so it becomes part of your overall advocacy strategy.
Example: In a landmark 2008 decision, the Constitutional Court of Colombia issued *Auto 092*\(^1\) on women and displacement. In that ruling, the Court noted that displaced women are in a state of higher vulnerability and at particular risk of sexual violence. The remedies and recommendations to tackle this issue were groundbreaking and innovative. The Court called on the Attorney General’s Office to investigate 183 cases related to sex crimes. It issued individual protection orders for 600 displaced women. The Court also ordered the Government to develop specific protection programs to address the multiple risks and gender issues related to the armed conflict and displacement, with sensitivity to differences of ethnicity, age, and disability within the affected group.

If allowed by your country’s judicial rules on the separation of powers between different branches of government, you can ask judges to issue guidelines for parliament or members of the government so they can enact, change, or adapt laws or policies in accordance with human rights and constitutional principles, or to do it themselves. In the first scenario, it is important for the court to include a timeframe and a follow-up procedure to monitor compliance. You can also ask the court to order symbolic actions like a public apology or naming a street after a person or a community, which can be a powerful way of sending a message to society and vindicating the rights of affected groups. Finally, judges can order awareness or educational trainings for public officials to address structural discriminatory practices entrenched in the system.\(^2\)

### 6.3. THE ALLIANCE AND SOCIAL MOBILIZATION STRATEGY

The purpose of your alliance and social mobilization strategy is to identify the people and groups with whom you are going to work, mobilize your existing allies and increase their level of commitment, anticipate, and when possible, neutralize your opposition and win the support of those in the middle ground. It is important to think about this strategy as it
relates to the judicial process itself, and beyond the legal process, use it as a platform where different advocacy efforts can complement and support each other.

**Box 15: Basic Decisions to Design the Alliance and Mobilization Strategy**

- Who will you work with?
- Who will be part of the core group?
- Who will be part of the coalition?
- How do you coordinate and move forward without consensus?
- Which allies are going to do what and when?
- Who else do you need as allies and how can you or your allies reach out to them?
- How can you reach key players or their influencers?
- How do you raise the profile of key allies?
- How do you involve affected communities/constituencies to empower them throughout the process?
- Which government body has duties related to the issue? How can you involve them?
- How will your allies need to change if you take your case to a regional or international tribunal?
- Which constituencies will be involved in implementation, in the event of a legal victory? How can you involve them? What is the most strategic time to do it?
- What are the most successful existing advocacy efforts around your issue? How can you leverage each other’s potential?
CORE GROUP AND COALITION

The very first step is to decide with whom you are going to work, recognizing that this decision may change as your strategy evolves. To get started, use the results of the mapping of actors to identify allies who are committed to the issue, have a similar understanding of the problem, and agree with your proposed solution. You should create a core group where a small group of people with different skills and a shared theory of change come together as often as necessary to make strategic and tactical decisions in a timely fashion. It is important that there is a high level of trust among the members so the core group can discuss confidential and contentious issues and feel comfortable working with one another.

You should also identify other individuals, groups, and organizations that have contributions to make and invite them to form a broader coalition that can meet on a regular basis to share information and identify opportunities to collaborate. This coalition should not require members to approve every tactic, but simply aim for a basic agreement about the overall goals. As discussed in Chapter 1 (“Introduction”), in every process of social change, there are multiple approaches and varying views about what solutions are most desirable or viable at a particular moment in time; yours is just one among many. It is important to build a culture among coalition members that welcomes discussion and openness and does not push too strongly to create consensus. Such an environment recognizes diverse positions and expertise. At the same time, you should try to find a way for as wide a range of people as possible to feel they have a role to play. When inviting people to come on board, there is a balance to be struck between respecting their positions, making the best use of their expertise, and enabling them to find their way to embrace and contribute to your strategy.

LEVERAGING YOUR CLOSEST ALLIES

It is not necessary to spend time persuading this group; they already agree with you. This may sound obvious, but there are many examples
of organizations using their limited resources “preaching to the choir.” The objective with your allies is to increase their capacity to influence the debate and their commitment to take action in a way that serves your objective. To increase your allies’ influence, you can, for example, provide communications training or facilitate their exposure to the media and academic forums.

Figure 13: Tactics for Low-Profile Allies

From your mapping of actors as described in Chapter 4, you will know what your allies are doing and what roles they play in relation to your issue. This facilitates an ongoing conversation about how to develop mutually supportive tactics. You should ask your allies to engage in activities that they can actually do without too much difficulty and that are in line with their lifestyle or work style. Your challenge is to transform allies’ agreement into action to support the overall goal, respecting each ally’s stand and expertise, whether inside or outside of the judicial process.
Allies can play a variety of roles:

- **Support the alliance strategy by:**
  - Participating in the core strategy group.
  - Participating in the broader coalition.
  - Helping with parts of the mapping process.
  - Raising money.
  - Creating entry-points for the core strategy group to meet influencers or decision-makers.

- **Support the social mobilization strategy by:**
  - Building support within specific constituencies.
  - Promoting debate among diverse constituencies, such as through academic conferences or film forums.
  - Organizing public demonstrations and campaigns.
  - Engaging the public directly, such as through street theatre.

- **Support the legal strategy by:**
  - Helping to identify potential parties to a case or becoming parties themselves.
  - Filing *amici.*
  - Being expert witnesses in the case.
  - Participating in public hearings.
  - Monitoring and advocating for the appointment of judges who are educated on the issue and committed to human rights.
  - Engaging in educating judges by organizing specialized conferences for them, or advocating for the inclusion of the issue in judicial curricula.
  - Engaging the legislative and executive branches.

- **Support the media strategy by:**
  - Being an expert voice.
  - Sensitizing editors and journalists.
  - Writing public opinion pieces.
  - Appearing in radio and TV talk shows.
  - Writing blogs.
  - Using social media.
TARGETING THE MIDDLE GROUND

Your aim is to build up support over time, moving the “on-the-fence” audience along the agreement continuum of your map, as shown in Figure 14, below. This middle ground is the area where you can have the most impact and make the most efficient use of resources by persuading people of the relevance of the problem and the validity of your proposed solution. Your energy should go into finding a way to engage the middle ground so that audience feels more comfortable agreeing than disagreeing. This may mean aiming to shift perspectives slightly toward agreement rather than to the fringes of the spectrum. You can achieve this by finding a frame that makes the problem clear, reasonable, and relevant to everyone in that audience. Increasing the number of people and organizations who identify with your definition of the problem is a key marker of progress in any social change initiative.

Figure 14: Tactics for the Middle Ground
For example, in the abortion debate, you cannot expect people who have misgivings about supporting your framing of the issue to support abortion on demand overnight. You work to find common ground, foster mutual respect, and make them comfortable expressing their views in order to facilitate dialogue. For instance, you may seek to validate their beliefs while asking them to not to impose their views on society. Then you can design part of your communications strategy for this audience to facilitate their understanding of the problem and allow them to form their own opinion. With time and respect for their values, you can also build their support and commitment along the agreement continuum. In the future, when they talk to someone on the fence, they will articulate the message that resonated with them and opened their mind. If you close the door and dismiss those that do not agree with all aspects of your view, it will be impossible to mobilize them. But if you find the way to start a genuine conversation, you may be creating an excellent advocate for your cause who will know exactly what to say to mobilize those in the middle ground.

ANTICIPATING OPPOSITION

To be very clear, you are not going to change the position of those who are in total opposition to your perspective on the issue. It is unwise to waste time and resources trying to do so. However, you need to take into account what your opposition is doing as you develop your legal and communications strategy. Always bear in mind whether your opposition is comfortable intervening in legal processes and plan accordingly. Anticipating their messages is also key to informing your initial framing, as is constantly monitoring their messages in order to detect when counterframing is necessary. You could identify strategies to reduce their influence on decision-makers or public debate by demonstrating poor quality of evidence or internal inconsistencies in their arguments and behavior and by providing evidence that raises questions about their assumptions or their proposed solutions.
Be aware that focusing energy on extreme opposition often only increases their visibility and saps resources that you could otherwise employ more efficiently. You have to learn when to engage and when not to, when it is necessary to respond, and how to ignore provocation. Your communications strategy will ensure that you anticipate such dynamics and are prepared to respond in ways that support your overall strategy.
Those in opposition who have little influence should seldom be your focus; however, they may be targeted by those with power in the opposition. Sometimes the strategy becomes highly personalized. For example, when you are representing a client in a court case, the opposition may mobilize the client’s relatives and the community against him or her. This can be traumatic and even dangerous for the person involved. This means you have to keep this group on your radar. You may have to help individuals and their family members cope with backlash against them.

6.4. COMMUNICATIONS STRATEGY

Communications is central to any strategic advocacy plan. A communications strategy is not only a media strategy that can be designed once the legal or any other tactic has been decided and is about to be put into motion; it is about choosing the most effective way to communicate to your relevant audiences and targets for mobilization in order to reach your objectives and goals. You should take control of your communications work from the very beginning of the project, carry it out consciously throughout to leverage all its potential, and refine your own understanding of what you want to accomplish at each step of the process. As shown in Figure 17, the logic of strategic communications forces you to think strategically, that is to identify the audiences you need in order to effect the desired change, and consider what they need to hear and how they need to hear it in order to act in a way that helps you move the strategy forward and reach your objective.

Box 16: Basic Decisions for Your Communications Strategy

- What is the “framing” of the case? What are you talking about? What is this case about? What is the meaning of this process?
- Make agenda-setting decisions: yes/no/when.
- Who are your audiences?
• What are the key messages for each audience?
• What are the tactics for each audience?
• Who will be spokespeople and experts?
• Training for spokespeople and experts.
• Sensitizing media editors and opinion leaders.
• Preparing a press kit with background information in a format that is useful for journalists.
• Preparing social media campaigns (#hashtags, memes, tweets, etc.).
• Who will issue press releases and react to relevant news in a timely fashion?
• What are the moments the judicial process offers to use as an opportunity to shape public opinion?

Figure 17: What Makes Traditional Communications Strategic

LOGIC OF TRADITIONAL COMMUNICATIONS

Source ———> Message ———> Channel ———> Receiver

LOGIC OF STRATEGIC COMMUNICATIONS

Objective ———> Audience ———> Message ———> Spokesperson ———> Tactic
As we have stated throughout this workbook, litigation provides an opportunity to shape public opinion by placing an issue on the public’s radar, changing the way people think and talk about the problem, and incorporating new arguments and actors into the debate. Assuming you do win the case, the public’s knowledge of their newly-won rights will foster implementation. However, regardless of the outcome of the case, you must always strive to win in the court of public opinion.\(^{17}\)

While we will present a brief discussion of the main aspects of a communications strategy below, we encourage core teams to involve professional communications staff and experts to support this part of the strategy.

**AUDIENCES**

The individuals and groups that your strategy targets are your audiences. It is helpful to divide your audiences between decision-makers, those that can influence decision-makers (influencers), and more general segments of the public.\(^{18}\) Since we are discussing an advocacy strategy around litigation, your decision-makers will be judges. Depending on the specific case, influencers may include renowned judges and jurists, academics, public opinion leaders, members of the other branches of government, community leaders, legal or political advisors, thought leaders, highly-regarded experts in different fields, certain advocacy organizations, etc. “The public” should be understood as the specific segment of the public you are trying to mobilize. Remember that the media is not an audience but a channel. Audiences can also be national, regional, or international, if necessary to reach your objective or ultimate goal. Each identified audience requires its own strategy.

The mapping of actors and judges, as described in Chapter 4, will have provided you with a sense of what approaches to framing and messaging will resonate best with each audience. Knowing and respecting your audience is key to designing an effective communications strategy. One of the most important lessons on strategic communications as a key component to an advocacy strategy is to understand that is not about what
you want to say, but what your audiences need to hear in order to act in a way that serves your objective. For this reason, you should design your communications strategy in a way that links the values of your audience to the needs of your objective, while remaining authentic and true to your principles.

MESSAGES

You have to choose the most persuasive frame to use with your audiences, and then develop your key messages. Developing a message must begin with identifying whether your target audience needs to understand the problem, commit to its solution, or step up their actions in support of that solution. In other words, you must determine whether you need to share knowledge, build will, or reinforce action. To share knowledge, you can provide information about the problem without overwhelming the audience, and help them develop a personal connection to it. To build will, you can show your audience the benefits of taking action and the possibility of creating a positive change, while respecting their comfort zone. To reinforce action, you can acknowledge and reward each step taken by your audience and give them credit for every victory, showing that they did the right thing and their contribution is significant to the process of social change.

Messages are not set sentences or sound bites, but ideas that can be used to answer any question and be expressed in different ways. They should include both the rational (evidence, facts, actions, statistics) and the emotional (feelings, values, stories, aesthetics) dimensions of the problem. You should tailor the main message according to the insights provided by the mapping in relation to the concerns of different actors. Some will want to hear about the human impact, such as through personal stories; others will want data on the scope of the problem or the costs of addressing it; still others will want to understand the legal basis of the argument.

Messages to judges will be quite different from the messages to allies or the public. Judges must understand the problem as a violation of rights
and a legal problem they can fix using the legal tools available. Allies need to hear why it is important that they take action, and how they can do it. The public needs a message that articulates a problem and moves them to demand a solution. Remember that you want to create conditions to solve the problem, whether you win in court or not.

You and your allies must understand that every time you have an opportunity to communicate, whether through media or at a conference or with a policy-maker, it is an opportunity to share your message. You should always begin your response to any question with your basic message, and if you are given more time you can elaborate according to the audience. You should never waste that precious time giving voice to the perspectives of the opposition.

**SPOKESPERSON AND EXPERT VOICES**

The messenger is just as important as the message to be delivered, and should also be decided according to what the audience values. Your spokesperson is the official face and voice of the project for each audience. The audience must perceive him or her as credible, knowledgeable, or recognized as having status in the community. Spokespeople must be able to establish an emotional connection to the audience and become a touchstone in society. The person must be trained, readily available, well prepared in managing the key messages, and able to communicate with diverse kinds of individuals and the media. This person is the direct contact journalists have with the original source of information about your efforts.

Expert voices are those allies you have identified in your mapping of actors who are willing and able to communicate key information or stories in support of your message. They must also be trained and available to talk to the media or at events if possible.

The communications strategy should aim to turn your spokesperson and expert voices into the go-to sources journalists approach for information
or commentary on your issue, thus increasing their ability to influence the debate. This requires training and relationships-building based on an understanding of journalists’ professional context. This means that as a source, you must produce information in a format that journalists can easily understand, and do so in a timely and rigorous manner.

Box 17: Tips on Effective Messaging When Interviewed

- Define the objective of the interview, pick the most relevant key messages for that audience, and manage them.
- Every question is an opportunity to deliver your message. Do not create openings for your opposition.
- You have the information, so you control it. Stay and look calm. You should not pick a fight or be aggressive, even if provoked.
- You must believe in what you are saying!
- You must be well prepared, especially to answer the most difficult questions.
- Your language and tone should be accessible to the layperson, rather than experts in your field.
- You must be aware of and control your appearance and body language so that you appear professional, confident, and comfortable and your look does not undermine or distract your message (i.e., noisy earrings).
- Transform negative takes on the issue into positive messages.
- Practice in front of a camera to deliver your message in less than thirty seconds, and watch the video to see how you did!
- There is no such thing as an “off-the-record” conversation.

TACTICS AND CHANNELS

Tactics refer to how you will deliver your message to the target audience. You can deliver your messages through many different channels, either
directly or indirectly. Direct communication involves meeting with influencers or talking to allies in project meetings or to larger audiences at conferences. Indirect communication involves using channels such as the media, websites, newsletters, social networks, posters, or flyers. Direct communication is preferable whenever possible. Every tactic should be in line with the objective and be chosen according to the audience. For example, you should not use Twitter to communicate with judges, and you should not issue official press releases when you are trying to engage young people. The main tactics for delivering the message to judges are legal briefs and other communications inside the courtroom. However, keep in mind judges are members of society and will also receive messages delivered as part of the public debate.

Traditional media is likely going to be one of your main tactics, so it is important to understand its logic and dynamics. Media outlets are companies in the business of information. The editorial policies and coverage of most media companies are driven by the need for profit. In addition, some have strong editorial perspectives. If your issue becomes topical, the media will always want to cover it and find sources. Therefore, you need to find ways to become a source and get coverage in a broad range of different media outlets; otherwise, someone else will be given the opportunity to shape what should be your debate. Journalists are professionals who work under pressure and with time and space constraints. They need to get information from the experts (like you!) in a way that is easy to process. A copy of the full brief and of all the *amici* filed in court is not the way to give journalists all the relevant information. You and your core team must plan time to process this information and offer key points in one-pagers or bullet points journalists can easily manage. Time is of the essence, so if a journalist needs an interview, you must respond as quickly as possible. Along the same lines, if you and your allies want to react to an event, you must have a system in place to agree, draft, and issue a press release as soon as possible before it becomes old news and your opinion is no longer relevant.

You can provide the media information by issuing press releases; contacting columnists; arranging for interviews; holding press conferences; send-
ing letters to the editor; placing phone calls to journalists; publishing press kits, photographs, and graphics; disseminating investigative pieces; and even through gossip. A good communications strategist knows what tactic to use when.

There may be times when your strategy is “media silence.” For example, if you are not sure your case is going to be admitted by the court, you may want to delay media attention; if the issue is strongly rejected by the public but you have a good chance of winning, you may not want the media to mobilize negative public sentiment. Your communications strategy should nevertheless be prepared to address issues should they get into the media. This is called agenda-setting. Remember that not all media attention is good. It is not about seeing your name in the press or getting as much coverage as possible. It is about getting the type of coverage you need in line with your strategy at specific moments in time.

Your communications strategy should also take advantage of social media to expand your base of allies and stay connected with them through e-lists, social networking websites, blogging, tweeting, text messaging, and other online or app-based messaging. You can also use social media to test frames and messages. For example, you can talk about the issue in different ways and see which ones elicit good reactions. Social media is also useful for distributing and receiving relevant information.

ARE YOU SHAPING THE DEBATE?

A communications strategy is not static. By repeating the mapping over time, you can see whether the debate is shifting and whether your communications strategy is contributing to that shift. Are groups you are working with being heard in the debate? Are journalists you have been briefing presenting your perspectives? Word clouds repeated over time can be an illustrative way to monitor the outcomes of your communications strategy.21 If you are not making progress, you may need to rethink your communications strategy.
For example, Women’s Link monitored the language used in abortion related press articles in Uganda during 2010 and 2011 to evaluate the impact of the communications training we offered local activists. There are remarkable changes in the word cloud created in 2010 compared to 2011, as shown in Figure 18.

Words like “contraception,” “care,” “access,” “education,” and “safe” have become more relevant, replacing others like “children,” “life,” “blood,” and “family.” This shift suggests a context in which abortion is perceived less
as a sin or a crime, and more as a public health and human rights issue, and indeed, our deeper review of the content affirmed this to be the case.

6.5. COMMITTING TO STRATEGIES AND TACTICS

Experts in advocacy strategies list litigation as only one tactic among many. However, when you have reached the point of identifying litigation as your strategy, it should provide a platform that brings together other advocacy tactics. This can enable you to achieve a range of interim outcomes among different audiences through that litigation, either directly or indirectly.22

Figure 19: Advocacy Tactics According to Audience and Their Interim Outcomes23
You can use Figure 19 to spark your creativity and find a role for each of your allies as you bring together your legal, mobilization, and communications strategies and work out what specific tactics to pursue in each.

Once you have considered your options and made informed bets on what the most persuasive tactics will be for your different audiences, both inside and outside the courtroom, it is time to pull your strategies together. Use the judicial process timeline as a starting point and start creating timelines for the communications, alliance, and social mobilization strategies. Finally, insert below the social, political, and cultural events you can anticipate in order to identify potential threats or opportunities.
Figure 20: Aligning Your Timelines

LITIGATION TIMELINE

- Prep work
- Filing
- Admission (preview scenarios)
- Amici
- Public hearing
- Admission (preview scenarios)
- Appeal

COMMUNICATIONS TIMELINE

- Training the spokesperson
- Press release announcing filing
- Interviewing authors of key *amici*
- Social network campaign to promote participation in public hearing
- Media coverage
- Press release reacting
- Press release announcing next step

SOCIAL MOBILIZATION TIMELINE

- Convening a coalition
- Looking for plaintiffs with grassroots organizations
- Asking diverse groups to participate in hearing
- Diverse forums to discuss problems and solutions
- Public demonstration reacting to decision

AGENDA TIMELINE

- World Social Forum
- Presidential Elections
- Launch of Populations Report
- International Cinema Festival
- World Cup
- Universal Periodic Review at the United Nations
- Independende Day
The structure of the judicial process should help you identify opportunities to act within your communications and mobilization strategy. For example, you can decide whether you will issue a press release informing the public about the case when you file, or when the case is officially admitted. You need to start asking people and organizations to file *amicus* well in advance and use those filings as opportunities to get the media to interview them so they can explain their contribution to the debate. If there is going to be a public hearing, you should train and prepare participants to make sure their interventions are clear and strike the right tone. Also, before the decision comes down, you should have discussed with your core group the possible scenarios and have a press release ready for each of them, according to the overall strategy.

Ongoing mapping of the social, political, and cultural context will allow you to identify opportunities to connect public events with the issue being debated by the court. These can be directly linked to the problem or proposed solution, or present you with a creative challenge to find a way to connect them. For example, during the 2014 Soccer World Cup in Brazil, the group IPAS created a social media campaign that compared the abortion laws of the two countries playing each game. If there are elections coming up, and you have positioned your issue well, you should push for it to become one of the hot issues where candidates are expected to take a stand. You can also anticipate threats, such as the announcement of a referendum to overturn the victory achieved in court if there is one, and either preempt that initiative or plan an appropriate response.

You can be flexible and adapt your tactics if you see that they are not achieving the desired results. However, the overall strategy should not change in principle. The key is to analyze whether you are making progress toward your objective and shift tactics as needed.

**6.6. WHEN THE JUDGEMENT COMES DOWN**

A successful process of social change does not end when a judgment is handed down. A legal victory in the short term can be ignored or eroded,
while a legal defeat can be an empowering experience for the affected communities. Whatever the outcome, you must design a new strategy following the steps all over again in order to continue moving forward toward your goal.

Winning a court case might be the end of your strategy, but it is just one step toward achieving the change you want to see. While a judicial decision may give specific orders to the legislature or the executive branch and send an important message to the public, its practical impact will depend on effective implementation. You need to be aware that winning a case only requires persuading a majority of judges sitting on the court, while a process of implementation may require building commitment among those responsible for implementation, beginning with the allocation of the necessary budgets, and building the understanding of those responsible as to their new obligations and how to plan for and implement them.

You should make sure to use the mapping process described in Chapter 4 to identify actors who are in a position to lead the strategy for implementation, and that you involve them in the process in a way that allows them to anticipate and prepare for the work that will be required in order to realize the benefits of a victory, ultimately making the movement stronger and the achievements sustainable. Different civil society groups are likely to be positioned to play different roles, with some building capacity of service providers, others undertaking ongoing monitoring to see whether those responsible for implementation are taking the necessary steps toward implementation, and still others building knowledge of potential beneficiaries as to how they can claim their newly won right and the actions they can take if denied. Experiences in Colombia and South Africa indicate that there needs to be a group with capacity to provide legal aid—not necessarily litigation—to people who want to exercise their newly-acknowledged rights.

Keep in mind that victories also mobilize the opposition. Just as you may mobilize when a case against your issue is won, so your opposition is likely to mobilize in an effort to overturn the finding or undermine imple-
mentation efforts when you win. To overturn a judicial decision, the opposition may file an appeal, take other cases to court, or attempt to pass a new law or constitutional reform. To undermine implementation efforts, the opposition has a wide range of tactics available to it, from passing laws or policies that create blockages to mobilizing those responsible for implementation and the public against the finding. When shaping your strategy, you need to include as much preparation and as many resources as possible for such eventualities.

2 *Id.*

3 *Id.* p. 615–617.

4 Spitfire Strategies, *The Smart Chart 3.0*. Available at: http://smartchart.org/content/smart_chart_3_0.pdf.

5 *Supra* note 27, chapter 4 (Farrell 2010).

6 Women’s Link, in collaboration with IPAS Nicaragua and CEJIL Central America, filed for precautionary measures on behalf of Amalia, a woman from Nicaragua who was denied an abortion, even though she was diagnosed with cancer and needed chemotherapy. The Inter-American Commission for Human Rights granted the measures stating Nicaragua had to provide the medical treatment necessary to save Amalia’s life, in accordance with her rights as a patient. Nicaraguan officials convinced her they were going to provide a type of chemotherapy that was so “advanced” it would not harm the fetus. We confirmed with our allies in the medical community that such thing did not exist. However, in the context of a poor health system, she feared losing the “privileged health treatment” she was receiving, and asked her attorneys not to pursue any further action against the state. We had to respect her decision, even though it meant her life was at stake. Sadly, a few months later, she had a miscarriage and died. More information at: http://www.oas.org/en/iachr/women/protection/precautionary.asp.

7 Women’s Link provided technical assistance to INNPARES in Peru to design a litigation strategy against the criminalization of voluntary sexual intercourse between teens from 14 to 18. Instead of finding an individual to bring a case, which could potentially have exposed the teen to stigma and lack of privacy regarding their sexual activity, INNPARES gathered more than 10,000 youth to collectively challenge the Criminal Code.


10 The *amicus* is available in Spanish at: http://www.womenslinkworldwide.org/files/72f4b920aea8fbe1b9db6d3f9ba4b789.pdf.


12 A summary and the complete judicial decision from the Constitutional Court may be viewed at:
In the case of *Angela Gonzalez vs. Spain*, litigated by Women’s Link, the CEDAW Committee recommended training on gender stereotypes for all public servants and members of the judiciary to ensure the appropriate implementation of the law to prevent and punish violence against women. In this case, administrative and judicial actors in charge of protecting women from domestic violence had disregarded Angela’s repeated allegations for the safety of her daughter when left alone with her abusive ex-husband, based on stereotypes about women as liars and manipulative. The lack of protection resulted in Angela’s ex-husband murdering her daughter during unsupervised visitation.


Mónica Roa wishes to acknowledge that her experience in strategic communications owes much to the expertise of Women’s Link Worldwide’s consultants, Brújula Comunicaciones, Bogotá. To contact Brújula Comunicaciones, visit: http://www.brujula.com.co.


19 *Supra* note 14 (Grimm, 2006).


21 A word cloud is a random arrangement of the words of one or many documents, where the most important ones appear bigger. You can make your own word clouds here: http://worditout.com. You can paste as many of the articles that have appeared on your issues in the press or social media as you want into the system, then see which words are largest to give you a sense of whether your key words are being used. For a more systematic approach, code the entire media outlet according to the main messages to get a more accurate assessment. However, as a day-to-day activity, you can just monitor a broad range of media coverage and reflect on what you read or hear.

22 *Supra* note 18, chapter 6 (Beer & Coffman, 2015).

23 *Id.*

24 The role of La Mesa por la Vida y Salud de las Mujeres was key in the process of implementation of decision C-355/06, which recognized therapeutic abortion as a right in Colombia. La Mesa provided legal support to women who encountered obstacles when requesting a legal abortion. Their work also allowed documentation, systematization, and analysis of the main roadblocks.

CHAPTER 7
A Case Study: Defending Reproductive Rights in Colombia through Strategic Public Interest Litigation

This chapter presents a case study developed and litigated by Women’s Link Worldwide, illustrating how we put into practice the processes described in this workbook.
In this chapter we present two examples from Women’s Link’s own work in Colombia in 2011 and 2012. First, we explore the context in the country in the years following the recognition of therapeutic abortion as a right, and how the analysis of the four conditions informed our litigation strategy. Our key challenge was confronting the views of the Procurador General de la Nación, who is opposed to reproductive rights and uses his position to limit them. Women’s Link adopted two litigation strategies. First, Women’s Link brought a disciplinary complaint against the Procurador, which was not successful in the courts. However, the case allowed us to introduce our message, put his position in the spotlight, educate the public, and build support among civil society. Women’s Link then filed a second case, changing the framing and using the right to information as the necessary premise to enjoy reproductive rights. Building on our momentum, Women’s Link won a legal victory and, importantly, a symbolic one as well.

7.1. THE PROBLEM

To understand the context in which these cases occurred, it is necessary to understand the position of the Procurador, which is unique to Colombia. The Procurador is elected by the Senate from the three candidates submitted by the President, for a four-year term, eligible for reelection once.¹ The Procurador’s role is to monitor compliance with the Constitution, laws, and judicial decisions, protect human rights, and monitor the conduct of public officials.² In theory, the Procurador is Colombia’s top defender of human rights. In pursuit of these goals, the Constitution grants the Procurador substantial power. In fact, with the exception of the President and judges, the Procurador has virtually unlimited discretion to discipline and remove any public official.³

The breadth of this authority makes challenging the Procurador complicated, as the people in a position to amend the scope of the Procurador’s power are the same individuals subject to his disciplinary control. The potential for the Procurador to abuse this power became clear during the two terms of Procurador Alejandro Ordóñez, who was elected in 2009 and re-elected in 2013, to serve until December 2016.
Before taking office, Ordóñez published several books, one asserting that public officials should have the right to disobey laws if they believe they violate divine law, and another detailing his concerns with human rights advocacy. In this second book, Ordóñez writes:

The objective of the cultural revolution today is to undo the principles and values that are the basis of a Christian family; its heterosexual, monogamous, unbreakable, and fertile nature; these are the obstacles that they want to remove at all costs by allowing for divorce, the use of contraception, abortion, and homosexual marriage, a first phase that is almost complete.4

In 2006, shortly before Ordóñez wrote the above, the Colombian Constitutional Court had issued Judgment C-355/06, declaring abortion legal under certain circumstances.5 The case, brought by Women’s Link, recognized abortion as a right of women and girls under three circumstances: (1) when the pregnancy poses a risk to the health or life of the pregnant woman; (2) when the fetus suffers serious malformations that make life outside of the womb impossible; and (3) when the pregnancy is a result of rape or incest. Ordóñez would thus become responsible for enforcing a key judicial decision he believed posed a threat to religious family values, as he understands them.

On June 5, 2008, the Colombian Council of State struck down an attempt by anti-choice groups to ban emergency contraception, stating that emergency contraception was indeed a contraceptive method, not a form of abortion, and thereby finding its use in accordance with the Colombian Constitution.6

Upon assuming the office of Procurador, Ordóñez chose to prioritize his personal beliefs over the constitutionally mandated duty to abide by the Constitution and protect human rights, including reproductive rights. On May 10, 2009, Ordóñez issued a memorandum requiring public officials to take measures to “protect the rights of unborn children.”7 Judgment C-355/06 explicitly declared that unborn children do not have legally
enforceable rights. On October 21, 2009, he issued a press release in response to a judicial decision requiring educational campaigns on sexual and reproductive rights, declaring he would contest such a “massive campaign promoting abortion.” Further, on December 7, 2009 the Office of the Procurador issued a press release describing emergency contraception as a form of abortion, and declared that emergency contraception pills would therefore be prohibited, despite medical and judicial conclusions to the contrary.

Furthermore, Ordóñez appointed Ilva Myriam Hoyos, the founder of an anti-abortion coalition, as the Deputy Procuradora for Children, Adolescents, and Family. After the issuance of Judgment C-355/06, as the leader of the anti-choice movement, she publicly declared that she would do everything in her power to overturn the decision, meaning recriminalizing all grounds for abortion. Her duties included ensuring women’s constitutional access to abortion and enforcing the decision.

On March 2, 2010, Hoyos wrote a letter to the Head of the National Health Department in response to a memorandum he had issued to public health system personnel regarding their need to comply with Judgment C-355/06. The National Health Department supervises all healthcare providers in Colombia. In her letter, Hoyos argued that abortion was not considered a right, contrary to clear constitutional jurisprudence stating otherwise. She went on to say that the Health Department was not required to ensure the public health system was providing abortions in accordance with Judgment C-355/06, arguing that abortion did not fall under the healthcare mandate of the Department.

Additionally, in 2011, the mayor of Medellín announced plans to open a women’s health clinic to provide a range of services for women, including reproductive health services. In response, Procurador Ordóñez announced an investigation of the mayor under his disciplinary powers and Deputy Procuradora Hoyos formed a special working group to investigate the clinic specifically. The actions of these top government officials responsible for defending human rights illustrated that they were not only
personally opposed to human rights, but willing to leverage their positions of power to fight against reproductive health and rights.

Finally, also in 2011, another official in the Procurador’s office began challenging the proposed inclusion of misoprostol as an essential medicine under the national health system. Procuradora María Eugenia Carreño wrote to the Ministry of Social Protection, declaring that the Colombian drug regulatory authorities had not approved misoprostol and that the World Health Organization had expressed doubts about its safety. In fact, the World Health Organization approved misoprostol as a medication for several obstetric uses, including abortion, and included it on their list of essential medicines.16

With this complicated background, Women’s Link evaluated the four conditions for litigation and designed an advocacy strategy to protect and advance reproductive rights and health.

7.2. THE FOUR CONDITIONS ANALYSIS FOR COLOMBIA

CONDITION ONE: THE RIGHTS FRAMEWORK

Colombia has a broad rights framework. The 1991 Colombian Constitution protects social, economic, and cultural rights.17 Article 49 assigns the state the duty to establish and run a health system, providing a minimum level of care for free.18 The Constitutional Court also explicitly recognized the right to free abortion services in Judgment C-355/06. Lastly, the Colombian Constitution also directly incorporates international human rights treaties into the domestic legal framework.19 This means judges can apply international human rights norms directly in their decisions.

The Colombian Constitution of 1991 also established the right to *tutela* (writ of protection),20 which is designed to protect constitutionally guaranteed rights in a time-sensitive manner. Every citizen has the right to file a *tutela* when his or her fundamental rights have been threatened or violated, and a judge must respond within ten days. The *tutela* has been
used frequently since 1991 to enforce a broad variety of rights.\textsuperscript{21} Citizens are familiar with the process, and it is part of popular rights awareness. The *tutela* has also been used specifically to demand enforcement of Judgment C-355/06.\textsuperscript{22}

**CONDITION TWO: KNOWLEDGEABLE AND WILLING JUDICIARY**

The Colombian Constitution declares that the judiciary is independent\textsuperscript{23} and includes an institutional design that supports its independence. The Supreme Court of Justice is the highest court for civil and criminal matters. The Constitutional Court was created as the final arbiter of constitutional interpretation. The judges on the Supreme Court of Justice are selected from lists created by the Superior Council of the Judicature.\textsuperscript{24} The Senate elects members of the Constitutional Court.\textsuperscript{25} Judges must be lawyers and have at least ten years of experience.\textsuperscript{26} Additionally, judges are subject to disciplinary control by the Superior Council of the Judicature and are not subject to the disciplinary powers of the Procurador.\textsuperscript{27}

However, in practice, it is possible for the courts to become politicized through the appointment process. Additionally, judges on these high courts serve eight-year terms\textsuperscript{28} and may be subject to influences arising from their concerns regarding their subsequent employment options. At the time when Women’s Link was considering litigation, after evaluating the judges on the Supreme Court of Justice and the Constitutional Court, we believed there was still a high level of judicial independence. The Supreme Court of Justice, for example, was publicly fighting the executive branch after they discovered that members of the executive branch had been illegally tapping judges’ telephones.\textsuperscript{29} Women’s Link thus considered the second condition to be met.

**CONDITION THREE: LEGAL ADVOCATES WITH CAPACITY TO LITIGATE**

Women’s Link already had substantial experience working in public interest litigation. We rejected the possibility of filing a criminal complaint. Instead, because our staff has expertise in both constitutional and adminis-
trative law, we believed we had the technical legal skills necessary to bring either a disciplinary complaint or a constitutional case. Had we been considering another type of legal action, this may not have been the case.

**CONDITION FOUR: THE SUPPORT NETWORK**

Women’s Link determined that there was a strong support structure at the time. A number of civil society organizations were mobilizing against the Procurador. Some of these organizations were framing their advocacy in terms of rights violations, but nobody was litigating. There was not an explicit coalition against the Procurador’s actions among these organizations, but Women’s Link sensed a shared consciousness that action needed to be taken. Therefore, Women’s Link determined that this condition could be strengthened sufficiently to support strategic litigation.

After reviewing these four conditions, Women’s Link concluded that strategic litigation was viable. We next moved on to designing specific legal strategies that would take our analysis of the four conditions into account in this hostile context.

**7.3. DESIGNING THE LITIGATION STRATEGY**

We first chose to submit a disciplinary complaint against the Procurador. We selected this strategy because we believed we could articulate the ways in which the Procurador was not complying with his constitutional duties. In addition, the Supreme Court of Justice is responsible for hearing disciplinary complaints against the Procurador, and Women’s Link had concluded there was a high degree of judicial independence and commitment to human rights on the Court.

We also felt we could develop a strong communications and alliance strategy to engage the public and other civil society organizations. This strategy framed the Procurador’s record of imposing his understanding of religious values on public officials as incompatible with his role in enforcing a lay constitution. The day the complaint was filed, Women’s
Link worked with allied organizations to hold low-cost candlelight vigils in four major cities against the Procurador to draw attention to the filing. We used social media to publicize the events, and worked with newspaper columnists, other women’s rights groups, LGBTI groups, and Catholics for Choice to raise awareness. At the events, we distributed boxes of matches with the photograph of the Procurador to send the message that a religious extremist represented a danger to our constitutional rights. The title of the campaign was “No More Darkness”.

**CONDITION TWO FAILS**

Unfortunately, the second condition, regarding the independence of the judiciary, changed over the course of this litigation. The Supreme Court of Justice took six months to officially begin the investigation of the complaint. During this period, there were several changes in the Court’s composition. The terms ended for several judges who were considered independent and committed to rights. The Chief Justice, also considered a strong independent voice on the bench, resigned for personal reasons following a family illness.

New judges, therefore, arrived on the Court. Many of these judges had family or personal relationships with people working for the Procurador. At this point, Women’s Link realized that the composition of the Court was no longer sufficiently independent. Even though the Court finally opened the investigative proceedings, Women’s Link no longer believed the litigation was viable. However, we continued with the legal process during the next eighteen months to continue raising public awareness about the Procurador’s abuse of power. The court ultimately dismissed the case in November 2012.

**REFRAMING THE STRATEGY**

In these new circumstances, we reevaluated the four conditions. This time, we looked to the Constitutional Court as the only judicial body that was issuing decisions critical of the Procurador. For example, the Court
had already instructed the Procurador to comply with orders regarding the failure to implement educational campaigns on sexual and reproductive rights.\textsuperscript{31} They specifically found that institutions cannot be conscientious objectors and that a healthcare provider’s conscientious objection cannot override women’s rights, notwithstanding the provider’s own personal misgivings.

Next, we needed to design a legal strategy appropriate for this court. Even though we strongly suspected the Procurador’s actions were dissuading other authorities from ensuring reproductive rights, we did not have the evidence to prove causality between his actions, the actions of other officials, and the violation of reproductive rights. Furthermore, it had been our experience that most women who face obstacles accessing a legal abortion do not want to engage in litigation. The few women who had litigated were usually stigmatized and paid a high price for lending their case to the cause.\textsuperscript{32} Therefore, we took it upon ourselves to design a case that would not depend on an individual woman’s story.

We built a case using the evidence we had gathered by monitoring the actions of the Procuraduría related to reproductive rights. We knew the Procurador and his deputies had distributed misleading and unreliable information publicly and to officials under his disciplinary control. We used evidence of this to reframe our strategy and filed a \textit{tutela}, based on a threatened or violated fundamental right and grounded in the right to information. The right to information is protected under Article 20 of the Colombian Constitution\textsuperscript{33} and Article 13(1) of the Inter-American Convention.\textsuperscript{34}

Working with allied groups from different regions in Colombia, we found 1,280 women of reproductive age from around the country who agreed to file the complaint jointly, alleging the Procurador’s lies and misleading statements violated their fundamental right to information on reproductive rights. The \textit{tutela} argued that public officials must separate their personal opinions from legal standards and factual information when executing their duties. We first filed the claim in October 2011 with a court of first instance; it reached the Constitutional Court in January 2012.
At this point, Women’s Link solicited *amicus* briefs supporting our position from other national and international civil society organizations. Within Colombia, a group of men supporting reproductive rights, a group of journalists, and several civil society organizations submitted briefs supporting the right to information argument. Internationally, several organizations submitted briefs outlining the support in international law for the right to accurate information from the state within a reproductive rights framework. This broadened the support network internationally, which could have been highly relevant had the case reached a regional or international tribunal.

The message used in the communications strategy was based on the new framing. We argued that the Procurador and his deputies were lying in order to sabotage the implementation of reproductive rights. We held that they could be personally opposed to the recognition of certain rights, but as public servants they were obliged to provide accurate and reliable information. This resonated with people who oppose certain reproductive rights, but believe the authorities must be transparent and truthful in complying with their constitutional duties. This new frame allowed us to expand our base of supporters.

### 7.4. ACHIEVING OUR OBJECTIVE

On August 10, 2012, the Constitutional Court issued Judgment T-627/12, finding that Procurador Ordóñez, Procuradora Hoyos, and Procuradora Carreño had provided false information regarding reproductive rights and threatened or violated the right to access to reproductive health services, including abortion, and the right to physical and mental health. The Court ordered the Procurador and his deputies to correct the false information they had published within seventy-two hours. Disobeying a court order could have carried jail time.³⁵

The Court specifically required the Procurador to retract his statements that the health campaigns on reproductive rights were campaigns to promote abortion, that emergency contraception was a form of abortion, that
misoprostol was unsafe, that the authorities should not enforce abortion because it is not a right, and that institutions as a whole are allowed to claim conscientious objection. The Procurador further had to publicly affirm that emergency contraception was freely available for Colombian women to access through the public health system. Procuradora Hoyos was forced to retract her letter to the Head of the National Health Department stating abortion was not a right and that he was not required to remove legal obstacles to accessing abortion. Additionally, the Court ordered the Health Regulation Commission to move forward with the process for including misoprostol on the list of essential medicines.

The Procurador and his deputies were forced to make these statements publicly in the same manner in which they made their initial untrue or misleading statements. The news received widespread media attention. \textsuperscript{36} Revista Semana, a weekly magazine, reported on the historic nature of the decision. \textsuperscript{37} El Tiempo, a leading Colombian newspaper, ran a full-page story with a photograph of a group of plaintiffs. Organizations working on reproductive rights in Colombia came together and jointly paid for a full-page advertisement in the Sunday paper clearly stating the false information the Procurador had used, the correct information, and the impact the legal victory would have on women’s lives.

As a result, emergency contraception continues to be legal and accessible, misoprostol is included in the health plan, institutions are not allowed to be conscientious objectors, and the National Health Department has issued new guidelines on how to provide legal and safe abortions as ordered by constitutional jurisprudence. At the time of this writing, however, sex education campaigns with a reproductive rights component have not yet been implemented.

Both of the cases in this chapter illustrate the interplay of the four conditions presented in Chapter 3 (“The Four Conditions Test”). They show how strategic litigation can be used to promote social change by bringing a case to judges who can apply a rights framework and create inter-related legal, communications, and alliance strategies in order to transcend the
courtroom and connect with public opinion and social movements, thus enhancing the overall conditions to address the rights violation.

The disciplinary complaint demonstrates that without independent and committed judges, it is very difficult to succeed legally, even if the rights framework is generous, the violations are clear, the case is well built, and civil society organizations have successfully engaged public opinion. However, it also reveals the value of incorporating an alliance and communications strategy as part of the litigation process. Even though the complaint was finally dismissed and no legal victory was achieved, it allowed us to position the message that the Procurador was a threat to fundamental rights and freedoms, especially for women. It also created a platform to mobilize groups from around the country and consolidate a network of civil society organizations, including, but going well beyond, those concerned with reproductive health, that continues to critically examine the actions of the Procurador and his deputies, denouncing those who oppose human rights and the rule of law.

The *tutela* on the right to information proved that it is possible for civil society to hold powerful authorities accountable when an organization has the capacity to craft creative arguments that frame problems as rights violations and access the courts to demand a solution. By basing the claim on the right to information, any woman of reproductive age who was denied information and wanted to become a plaintiff could do so. The coordination with the women’s and reproductive health movements through the use of *amicus* briefs significantly increased the impact of the decision while empowering those who joined as plaintiffs.

2 *Id.* Article 277.

3 *Id.* Article 278.


17 *Supra* note 1 (Constitution of Colombia, 1991).

18 *Id.* Article 49.

19 *Id.* Article 93.
20 *Id.* Article 86.


24 *Id.* Article 231.

25 *Id.* Article 173.

26 *Id.* Article 232.

27 *Id.* Article 256.

28 *Id.* Article 233.


This workbook concludes with a final word on Women’s Link’s approach to strategic legal intervention and how we hope it will support efforts of other activists for social justice.
The judiciary does not hold the answer to all social justice problems, but its potential power should not be ignored. You can only resolve the question of whether a strategy involving the courts is the right option to advance a cause after you have carefully considered the structural and contextual factors discussed in Chapter 4 (“Introduction to Mapping”). You must evaluate such a strategy against other strategic options to see which may be most effective, or whether a legal strategy could be used to complement parallel efforts.

Even with its limitations, working with the courts can contribute to making change happen. In the right context and with the right actors, it can be a powerful means of realizing human rights and social justice. You will miss big opportunities by not considering the courts, but you also face considerable risks if you decide to litigate without developing a strategy beforehand. Being strategic in public interest litigation is about designing a plan that takes into account how the judiciary works procedurally and culturally within a given context and how it interacts with other players in the system in relation to achieving the desired change.

This guide has attempted to offer you an understanding of the complexities of working with the courts to promote social change (see Chapter 2: “Considering Litigation as an Advocacy Tool”) and the practical steps needed to shape strategies that have the greatest chance of success (see Chapter 6: “When Litigation Is a Good Strategy”). There are no right answers, but it is important to follow certain processes to ensure you will be mindful of key issues before making decisions. We encourage you to follow the steps, answer the questions, and do the matrixes when you start. After a while, all of these steps will shape a certain way of thinking in your mind, and you will be able to make strategic assessments more easily.

By offering you steps to follow, we hope to unpack the complexity of effective legal, mobilizing, and communications strategies in order to support social justice groups in developing a systematic and deep approach to strategizing. However, if you treat these steps as a mere checklist of tactics, you are unlikely to succeed. The key to success is to recognize
that this kind of analysis is not a linear set of steps, but an ongoing, interactive process of gathering intelligence in your shifting environment, continually mapping and remapping, and continually reflecting on which strategies are most viable at what times.

The purpose of this guide is to take strategic litigation a step further and understand that as an advocacy tool, it offers multiple opportunities to transcend the walls of the courtroom and impact people’s values and norms, even if a legal victory is not always achieved at a particular time. We have also shown the importance of a careful and detailed analysis of the terrain before deciding between litigation and other advocacy avenues, in order to make any decision to litigate responsibly, including the need to bear in mind the costs and potential length of legal strategies relative to other strategic options. While it is clear that the four conditions described in Chapter 3 (“The Four Conditions Test”) will never be fully met, as legal advocates, you must understand that if you want to see sustainable change in society as a result of your litigation efforts, you need to design and adapt strategies to develop or strengthen all of the four conditions, particularly the ones identified as weakest.

This goes straight to one of the underlying themes of this guide, which is that effective social justice strategies emerge when you are able to consider a wide range of potential strategies and choose among them based on a thorough analysis of the terrain. This guide aims to show why the frequent divides between public interest lawyers and activists using other advocacy tactics cannot be in the best interests of social change. Our message to readers of this guide who are legal advocates is to recognize that you possess some key skills for supporting social justice, but that other skills—such as mobilizing and building alliances, shaping messages that resonate with the public, and communicating those messages to very diverse audiences—are just as critical in promoting social change. Similarly, those of you reading this guide who see litigation as something that draws resources and political attention away from valuable advocacy efforts would do well to find ways to bring public interest lawyers into your movements in order to be able to draw on their knowledge of the law and
the legal context to assess if and when litigation may significantly move forward your agendas for change.

We encourage legal advocates not to think of the law as the one all-powerful, straightforward tool for social change, but to find inspiring angles to use all the flavors and opportunities litigation has to offer. We encourage non-legal activists to think of litigation not as the most rigid and co-optive tool, but as a solid platform that can, under the right conditions, convene other valuable efforts, guarantee public visibility, and ensure political gains, regardless of the legal outcome. Social change requires passion and a method. This guide is an invitation to renew our passion and improve our methods.
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Mónica Roa started working at Women’s Link Worldwide in 2003, during the early days of the organization. Her research on the role of the judiciary in the promotion and protection of human rights around the world led to the development of the methodology presented in this guide, which the organization has since used to design and implement multiple projects in Latin America, Europe, and Africa. Mónica left her position of Vice President of Strategy and External Relations for Women’s Link in June 2016 and currently works as an independent consultant, offering strategic thinking for social change, rights, justice, and equality globally. She is also a visiting associate professor at the Summer Academy of Human Rights and Humanitarian Law of the American University Washington School of Law. She holds a Law degree from the Universidad de los Andes in Bogotá, Colombia, and a Master in Laws (LLM) as a Global Public Service Scholar from New York University (NYU). Mónica can be contacted at consultant@monicaroa.com.

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