

## Considering strategic litigation as an advocacy tool: a case study of the defence of reproductive rights in Colombia

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**Abstract:** *Women's Link Worldwide developed a test to determine when an environment is conducive to social change through strategic litigation. We first present our understanding of strategic litigation, and then discuss four conditions for successful and sustainable change using strategic litigation: (1) an existing rights framework; (2) an independent and knowledgeable judiciary; (3) civil society organizations with the capacity to frame social problems as rights violations and to litigate; and (4) a network able to support and leverage the opportunities presented by litigation. Next, we present examples from our work in Colombia that show how analysis of these conditions informed our litigation strategy when confronting a powerful public official who opposes reproductive rights. Two litigation strategies were adopted. The first case was not successful in the courts, but allowed us to introduce our message and build support amongst civil society. The second case built on this momentum and resulted in a victory. Strategic litigation is a powerful tool to advance rights as well as hold governments accountable and ensure compliance with human rights obligations. The strategies developed can be adapted for use in other contexts. We hope they inspire others to protect and promote reproductive rights through strategic litigation when women cannot fully enjoy their rights. © 2014 Reproductive Health Matters*

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*"The judiciary has the power to permit equality to grow and flourish to meet the legitimate demands and aspirations of the female majority of the world's population. They also have the power to deny it."* (Kathleen Mahoney<sup>1</sup>)

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.<sup>2</sup> In this approach, strategic litigation serves as a powerful and innovative advocacy tool by serving as a mechanism for government accountability.<sup>3</sup> National and international strategic litigation can be used as an invaluable instrument by the sexual and reproductive health and rights movement on a global level to raise awareness of rights, promote the need of vulnerable populations to have access to those rights and demand government compliance with human rights obligations.

### ***How to evaluate the potential of strategic litigation: the Four Conditions Test***

Women's Link Worldwide proposes a more comprehensive understanding of strategic litigation, not only to set progressive legal standards, but also to shape public opinion and bolster social movements by creating opportunities for activists to organize around a case. In our view, strategic litigation creates an opportunity for legal activists and judges to convene 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.<sup>4\*</sup>

\*This understanding is based on the framework of dialogical activism. Dialogical activism refers to the democratic debate with other branches of government and civil society that the judiciary can generate when they examine certain cases.<sup>3</sup>

Through this process, if there is a legal victory, the conditions for implementation will be enabled. However, if there is not a victory, the conditions to advance the cause through other avenues will have improved, the movement will be stronger, and public opinion better informed.<sup>5</sup> These are well recognized as critical factors in civil society efforts to promote social change.<sup>6,7</sup> Figure 1 presents the different components of the definition of strategic litigation presented by Women’s Link.

When legal advocates litigate, they give judges the opportunity to comply with their obligation to enforce the rights framework. Advocates should also find ways (legal and non-legal) to involve civil society in the litigation process both to empower them and at the same time to create a platform to demand the enforcement of rights. Indeed sometimes advocates will have been brought into the issue by civil society groups. Social mobilization and strong public opinion can facilitate the decision-making of judges, as they will see that the rights demanded 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.<sup>8</sup>

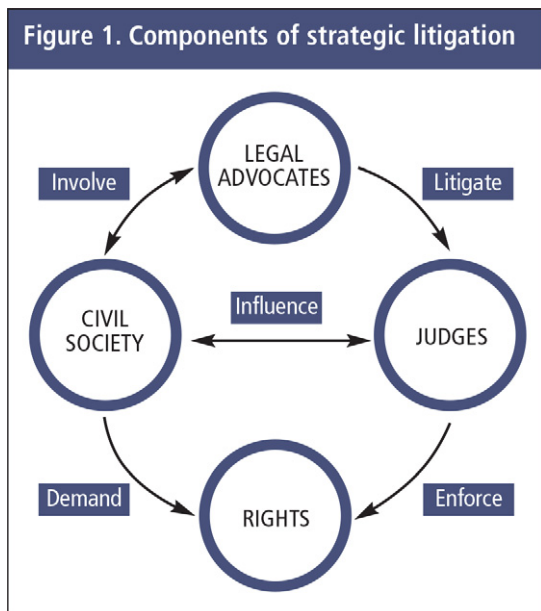
Women’s Link Worldwide brought its first case of strategic litigation in 2006 in Colombia to advance abortion rights at a time when few cases from the region had been litigated strategi-

cally.<sup>9,10</sup> The organization’s strategic and comprehensive approach to litigation led to the ground-breaking decision by the Colombia Constitutional Court C-355/06, which granted women the right to therapeutic abortion.<sup>11</sup> Women’s Link has since litigated cases in other countries and on different women’s rights issues as well as advised other organizations on engaging in this type of advocacy.\*

It is important to assess the viability of effective strategic litigation in a situation before embarking on it, by taking account of the political, social and legal context, a process that Women’s Link calls mapping. In order to assess whether social change could be achieved through litigation and inform the design of legal, communications and alliance strategies, Women’s Link Worldwide analyses four conditions. This test is based in the theory presented in Charles R Epp’s book, *The Rights Revolution*.<sup>12</sup> If these four conditions are present, or can be created or strengthened through the judicial process, strategic litigation can be used as a tool to advance human rights. These four conditions are: (1) an existing rights framework; (2) an independent and knowledgeable judiciary; (3) civil society organizations with the capacity to frame social problems as rights violations and to litigate; and (4) a network to support and leverage the opportunities presented by litigation. For the purposes of this article, we will evaluate each of these conditions from a reproductive rights perspective.

First, social change can only be achieved through the courts if activists can identify and frame problems as rights violations. This requires a constitutional or legal framework that recognizes human rights or the possibility to use international human rights law or comparative law. When citizens understand that the law guarantees them something they need but has not been granted by the elected government, activists can design strategies to demand judges take measures to correct this deficit.

There is no singular formula for an adequate rights framework. Some domestic constitutions contain a bill of rights, which explicitly articulates guaranteed fundamental rights. Countries may have signed regional or international treaties that ensure human rights. The foundation for reproductive rights can be located in almost



\*For more information on Women’s Link Worldwide’s litigation projects see [www.womenslinkworldwide.org](http://www.womenslinkworldwide.org).

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