How to wrestle an official to the ground, or strategic lawsuits: experience of American and Russian litigants with lawsuits of public importance.

«Introduction»

Strategic litigation, sometimes called impact litigation or law reform litigation, or litigation for social change is distinct from usual court lawsuits because its fundamental goals and purposes are different. Where litigation is ordinarily designed to win a legal matter for a particular client in a specific case, strategic litigation has broader, more long-range goals. The objective is not simply to give clients what they seek in the lawsuit, the lawsuit is a tool for social change and legal reform. Accordingly, the needs and outcome of the individual client are important, but they are not the sole aim of the litigation. Finally, strategic litigation is but one tool among many in service to the larger societal reform goal.

1. Identifying the building blocks of strategic litigation

Several concrete steps go into building an impact litigation case. The first is to identify and define the issue and problem. Topics basically come to you in three forms: from client to problem, or problem to client, and sometimes from problem to another problem. In the first, the problem can come to you or your NGO directly with a client or victim. In the second, you may have heard of the problem from different sources, identified that it was serious and important enough to commit to solve it and then looked for clients who encapsulated that issue. Additionally, often Russian human rights lawyers become victims themselves.

Finally often litigating one court case leads to uncovering more structural problems needing to be challenged [See Chapter 5, 7, 8 Burkov]. For example, when litigating Alina Sablina case on secret organ harvesting for transplantation, lawyers faced with an issue of closed chamber, secret consideration of such cases by courts, unlawful participation of the prosecutor as state representative in a dispute among private parties. Despite the fact that no personal data were discussed at the trial, no other interests required justice to be done in secret from the public and media. Further, another structural issue identified was courts' ordering the participation of a prosecutor in civil cases despite wishes of the parties. When litigating the Korolevs case on prohibition for prisoners and their wives to have an artificial insemination, lawyers started litigating numerous cases on lack of conjugal meetings. Litigators must decide whether to pursue these additional issues, whether they will add or subtract from the main case, and whether there are enough resources to do so and where to find more resources.

Advocates need to identify who is being harmed by a particular practice, law or policy, and by whom. This step may entail factual investigation regarding the extent of the issue, the

scope of legal restrictions, and the persons responsible or in positions of authority. Additionally, advocates must determine the crux of the problem and what specifically needs to change so that they separate the root cause from the symptoms or consequences of the targeted problem.

Once that is known, advocates should decide whether to initially target the effects of a policy or directly attack its core causes. For example, mid-twentieth century US civil rights litigators battling racial segregation were faced with a hostile historical, cultural and political environment, and adverse Supreme Court precedent. Accordingly, advocates decided to challenge the effects of the "separate but equal" facilities doctrine by suing because facilities were unequal, rather than challenge the underlying discriminatory policy. Advocates filed a series of lawsuits arguing that various state attempts to provide equal but separate schools were not truly the same. These cases focused first on situations where there was no school for Blacks at all even though there was a school for Whites, then on ones where the Black school had inferior facilities, and finally on a case about a single classroom where a curtain literally divided the sole Black student from his White classmates. This latter case illustrated that mere racial separation itself caused injury despite all students being located in the same classroom and taught by the same professor and hearing the same lectures. Accordingly, by focusing on the effects of "separate but equal", litigators carefully laid the groundwork for a direct attack on the core problem of segregation. That case, Brown v. Board of Education (US Supreme Court, 1954), was the culmination of that strategic litigation [See Chapter 4, Levi & Mintner, for another example of multiple-case litigation strategy as well as Chapter by Russell Newfeld on abolition of the death penalty].

However, SL campaign can be of a smaller scale compared with the anti-"separate but equal" campaign which took around half a century to come to its culmination in Brown. Smaller scale campaigns could be called single-case campaigns conducted to attract attention to the structural problem. Those subsequent cases, can be later worked on by the advocates or picked up by others. An example of these cases are discussed in the chapters by Jennifer Kinsley, Vic Walczak, Alexand Peredruk, Anton Burkov [See Chapters 2, 3, 5, 7, 8]

In this initial identification stage, advocates should also investigate what others have done in and out of court to address the problem in order to organize a comprehensive attack [see Chapter ___, Walczak]. In addition to litigation, other advocacy tools include lobbying elected officials, public education campaigns, community meetings, and the use of media – both domestic and foreign, and traditional broadcast/print press and modern social media. For good examples, see chapters by Walczak and Newfeld. Since strategic litigation is one channel in a larger enterprise of social change, integrating all instruments and avenues of change is most effective. Coordination is key; advocates cannot have a social media or publicity campaign sending messages at odds with the claims of the litigation, or lobbyists pressing for a legislative solution inconsistent with the relief sought in the lawsuit.

The next phase is to define the approaches to the problem. First, advocates must define their objectives: e.g., overturn a statute, create a new policy, improve services or facilities, open access to institutions, attract attention to a structural problem [See Chapter 4, Levi & Mintner]. This conclusion will help determine the relief sought in the broader litigation or series of cases, and in each individual lawsuit. Do the long- and short-term outcomes require an injunction, money damages, reversal of legal precedent, overturning a criminal conviction or expungement of a criminal record?

In strategic litigation, vindication of individual clients is a primary, but instrumental objective; there is a larger, longer-term target. Indeed, sometimes objectives are gained or attention to the problem is gained even though the case is lost (see examples of Korolevs, Sablinan Peredrik cases lost in Russian courts but still pending before the European Court of Human Rights in both chapters by Burkov and in Chapter by Peredruk). Winning a case is not always an objective or even a tool of SL. As a countervailing consideration, lawyers have ethical obligations to their clients; the overall, strategic goal cannot compromise representation of the client. This potential for tension is something the advocates and their clients must keep in mind throughout the litigation process.

Moreover, advocates have to determine who has the power to effectuate this change. There may be other avenues for relief: various levels of legislative decision makers, executive or administrative processes, or alternate judicial venues [See Chapter 3, Kinsley]. If a lawsuit is the desired procedure, determining the persons responsible for the targeted policy will shape the choice of potential defendants or other parties to the litigation. Other typical litigation decisions like jurisdiction, venue, choice of law, exhaustion of administrative remedies also follow from these investigations (Chapters by Walczak, Kinsley, Peredruk, Burkov).

Note that these decisions are not final. They may need to be reassessed over time and in reaction to subsequent legal and social developments. For example, when assessing short-term, medium-range and long-term goals, priorities may shift and strategies should be reevaluated to ensure that they continue to achieve their intended outcomes.

Moreover, some short-term goals may be worthwhile in themselves. In other cases, advocates may want to forego short-term solutions for long-range gains. In the medium term, it helps to set specific checkpoints to assess and evaluate the original objectives, the progress towards those objectives, and the successes and set-backs. Finally, long-term goals may change over time, or remain the same. The important thing is to make these decisions consciously. Advocates cannot automatically follow the path originally planned, since that may have been determined many years earlier, under different circumstances and social or political climates.

The assessment of circumstances can be broken down further into evaluating the legal and socio-political landscapes [See Chapters 2, 4, Levi & Mintner; Walczak]. Legally, the advocate should identify statutes, policies or rulings that have occurred that support or harm the case. Additionally, research other lawsuits or events that may already exist or are pending involving similar problems or communities (See, for example, the use of Khoroshenko v. Russia in the litigation of the case of Korolevs in Chapter by Burkov). And of course, advocates must identify the likelihood of prevailing in specific courts and before particular judges.

Advocates must be aware of the political, cultural and social environment. They must think strategically not only about the case, but also about engaging with cultural mores and political realities [See Chapter 2,5,8]. They must determine what will facilitate success, or at least will minimize the consequences of loss. Advocates should consider ways strategically to expand or maximize the impact of the litigation. The contextual awareness reinforces and deepens advocates' engagement with the broader plan to promote legislative goals, educate public

or elected officials, and affect public opinion.

Because the litigation is part of a campaign to correct a social problem, it is important to identify likely and unlikely allies who can be enlisted to support the larger issue [See Chapter 2, Walczak]. Likely allies include similarly focused organizations and individuals, or others who have aims or interests that may be aligned politically, culturally or emotionally. This latter group may include unlikely allies – groups that may not share the advocates' core beliefs or long-term goals, but who may have interests that coincide with the litigation strategy. Allies could also appear in the middle of the SL where you do not expect them. Other allies could come from unexpected groups. The important thing is not to miss an opportunity to connect with them.

Not all persons who appear to be allies, will actually be so. Advocates must always keep in mind the effect that strategic alliances or pooling of resources with other groups may have on the ultimate outcome of the case and also on the desired societal change. Association or disassociation in the eyes of the public or of decision makers with certain groups or causes can significantly influence outcomes. There may be groups or endorsements that advocates encourage or discourage regardless of the merits or resources that they may bring to the table. Also, do not be misled by false allies who claim to support the cause but in fact serve the other side. For example, the orthodox church appeared to support a legal challenge to secret organ removal, but in fact the church backed the state hospitals use of that secret organ removal.

Finally, advocates need to take a hard look in the mirror and honestly and accurately assess their own strengths, capacities, resources and weaknesses [See Chapter 2, Walczak]. Is it possible for them and their colleagues to handle this matter or do they need to enlist co-counsel, or associate in some way with other persons or organizations? Only by looking at these questions in advance, will advocates know what pitfalls lie ahead and how to avoid them. When taking up the SL one must plan possible ways of gaining additional resources for running SL (ex., pro bono assistance from law firms..., law clinics' assistance).

2. Creating the litigation plan and employing non-litigation tools

In generating the litigation plan, one important task is to set benchmarks and a timeline for litigation. Thus, advocates can outline the anticipated steps in the litigation process and provide rubrics and measures to assess progress. These rubrics enable advocates and clients to monitor, evaluate, and recalibrate both progress and expectations when they are preoccupied with details and daily matters as well as during the periods of relative inactive that litigation always entails.

One crucial, early step in impact litigation is the selection of challenging parties for the court case. While it is sometimes possible to capitalize on a legal matter that comes into a law office and start the litigation in that manner, that serendipity is basically antithetical to the necessary planning and care that goes into strategic litigation. Advocates need to choose not only a good legal case, but also a good plaintiff – one whose story and circumstances contain the legal and social narrative they need to best advance and showcase the litigation. Sometimes the case must be constructed as chances that such case will come

across naturally is very rare (See Chapter 2, Walczak). Often litigation starts with one victim and continues to attract more and more victims representing different social groups — married couples, parents and older parents, kids - to join the cause (see Chapter on Korolevs by Burkov]. The increased number and visibility of different social groups is important for showing the broad impact of the problem).

Ideal challengers have three important characteristics. First, they need to be qualified messengers for the litigation. The advocate must consider their history, their ability to convey the wider objective of the case beyond their circumstances [See Chapter 3, Kinsley]. Second, they need to be committed to the wider cause beyond their own case – to understand and agree to the necessity of impact litigation, and the larger context of why case matters both personally and to the greater community. Third, the litigant must have the time, resources, and stamina to see the case through to the end. This entails dealing with the lawsuit itself but also having the fortitude to deal with any backlash or negative consequences while the litigation is progressing and beyond. Consideration should be given to finding people with sufficient support networks to carry the challengers through potentially rough times ahead for themselves and their family.

Particular steps of litigation can be laid out. In the Alina Sablina case [See Chapter 8, Burkov], initially the plan was to bring a case to the European Court of Human Rights immediately without exhausting domestic remedies. Advocates hoped to prove that no effective domestic remedies existed. This decision may have served to speed up consideration of the case before the ECHR by 1-2 years, which would have been the time needed for exhaustion. Litigators were aware of the risk of getting decision of inadmissibility due to non-exhaustion. Accordingly, they filed domestically to exhaust those remedies after bringing the application to the ECHR. That decision turned out to be wise; the domestic back up case exhausting domestic remedies worked to secure another chance to bring a second case to the ECHR. Additionally, discovery in that case uncovered important facts of the litigation.

Another important factor is the procedural posture of the litigation. Is the case best litigated as a civil or a criminal matter? In thinking about how to trigger the issue, would advocates prefer to start the legal claim or bring it up as a defense in a criminal matter [See Chapter 3, Kinsley]. Each carry different advantages and disadvantages procedurally (which motions and practices come into play), tactically (whether it is possible or desirable to ask for a jury or bench trial), and communicatively (how will the larger public view the litigation). Along with these considerations are choices of venue and jurisdiction, nationally and locally. What is the preferred court and legally can advocates initiate the litigation there, or in the case of a criminal trial, can they force advantageous legal action against the client appropriate in that venue? The advocate should consider whether this should be a single or multi-district litigation, individual plaintiffs or a class action.

Moving beyond the choice of jurisdiction and parties are issues about non-party involvement. Since this is impact litigation, other groups and organizations will have an interest or stake in the controversy. Some of these groups may be welcome and others not. Some might try to intervene in the lawsuit, file amicus briefs, or shift its direction. Advocates must consider how that will affect the case and strategy and whether this will cause a loss of control. In sum, the advocate needs a plan for dealing with intervenors and with amicus briefs, and their timing and messaging. Trial tactics and evidence are significant issues for human rights advocates. Often the availability

and quality of evidence, social science or other data form a significant element in the case. This material may often be introduced in order to show effects, attitudes, and other information or impacts of government policies and regulation (see chapter on surveys by Kudryakov).

A clear and well-planned communication scheme is also essential [See Chapter 2, Walczak]. Advocates must plan a media approach. Remember, winning a SL case does not only happen in the court of law but in the court of public opinion. Where, how, and how much contact do the lawyers, the clients, and others have to the media, and who is in control of those decisions are all important considerations. The communication scheme should also detail and identify appropriate communications tools. It should denominate how advocates frame the case and the larger issues, who will answer questions about those topics, and how they should respond.

Finally, even in the most successful of cases there are setbacks. Advocates must plan for both positive and negative outcomes. The most obvious negative consequences are unfavorable rulings or judgments. But advocates and their clients should discuss negative publicity, personal and professional attacks, and the potential for mobilized opposition. Faced with these adverse outcomes, advocates must foresee possible client mistrust or withdrawal, and figure out a plan for dealing with those issues.

Subsequent chapters of this manual will illustrate these principles in context through a discussion various strategic litigations. Those examples span a wide variety of significant, contemporaneous legal issues and demonstrate how impact litigation acting in concert with other advocacy partners can effectuate broad social change.

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