Strategic Litigation as a Tool for Reform
What Is Strategic Litigation?

- Using the justice system to seek social change by advancing individual cases to resolve legal issues affecting large numbers of people.

- Usually used as part of a larger effort to advocate in connection with targeted issues.
Objectives of Strategic Litigation

- Ensure proper interpretation of the law
- Strike down laws that are unconstitutional
- Test implementation of laws
- Engage government officials – trigger action/reaction
- Raise public awareness of issues
- Provide a focal point for public debate
Disadvantages of Strategic Litigation

- Cost of litigation
- Uncertainty
- Potential for lengthy proceedings
- Effect of negative outcomes
Constitutional Reform through Strategic Litigation

- Change rights by changing the Constitution
  - Requires review by international body such as ECtHR
  - Requires implementation by government

- Change rights by changing how the Constitution is interpreted
  - Clarify scope of existing rights
  - Aim for court with authority to bind lower courts
Key Practical Considerations

- Choosing Legal Counsel
  - Funding
  - Legal Sector CSO
  - Pro Bono

- Choosing the Right Party
  - Standing
  - Interests are aligned/committed to the cause, not just the case
  - Dependability / Sympathetic / Public Face
Key Practical Considerations

- **Choosing the Right Court**
  - Jurisdiction /Exhaustion
  - Goals – Awareness vs. Precedent
  - Timing – Length of time to final decision

- **Clear and Binding Legal Standards**
  - Applicability of ECHR/ECtHR or other international standards
Advocacy Strategy

- Traditional Media
- Social Media
- Civil Society Supporters
- Amicus Curiae /Friend of the Court
Post-Decision Strategy

- Implementation
- Appeal
  - Domestic
  - International
- Further Litigation
- Follow-on Advocacy
International Review Bodies

- ECtHR
- CEDAW -- Committee on Elimination of Discrimination Against Women
- CCPR -- Human Rights Committee Under International Covenant on Civil and Political Rights
- CECSR -- Committee on Economic, Social, and Cultural Rights under the International Covenant on Economic, Social, and Cultural Rights
Strategic Litigation in Kosovo
Kosovo Case Studies

- Examples of strategic litigation cases brought by the Justice and the People Campaign
  - BIRN v. Kosovo Prosecutorial Council
  - Osmani v. Supreme Court of Kosovo
BIRN v. Kosovo Prosecutorial Council
Objective
- Establish precedent requiring KJC and KPC to disclose names of judges and prosecutors found guilty of misconduct
- Raise awareness of right to accountability in the justice system

Litigation Strategy
- Document a violation of Law on Access to Public Documents and Kosovo Constitution
- Complete quick administrative appeal
- Appeal administrative finding to Kosovo Supreme Court
- If necessary appeal further to Kosovo Constitutional Court
BIRN v. Kosovo Prosecutorial Council

- Identifying the Case
  - Start with the issue

- Choosing the Right Party
  - Standing: establish through violation of LAPD
  - Dependability/Public Face: trusted, independent media company

- Choosing the Right Court
  - Relatively quick path to Supreme Court verdict
  - Clear appellate jurisdiction / Exhaustion through administrative proceedings
  - Possible appeal to Constitutional Court
BIRN v. Kosovo Prosecutorial Council

• Advocacy Strategy
  ○ Traditional Media – guaranteed coverage in at least one prominent outlet
  ○ Parallel advocacy through our Campaign and partners
  ○ Friend of Court Briefs in Supreme Court if needed
BIRN v. KPC

Petition campaign calling for policy change by both KPC and KJC.
BIRN v. KPC

Petition campaign attracts public attention. Secretariat of KJC agrees to meeting to discuss possible amendment to internal regulations. Asks for petition and letter supporting the amendment.
BIRN v. KPC

Television programs organized to raise awareness of mechanisms for bringing citizen complaints for misconduct by judges and prosecutors.
BIRN v. Kosovo Prosecutorial Council

- **Status**
  - Awaiting decision
  - Minster of Justice on record at Justice and the People Roundtable
  - Continuing petitioning and advocacy
Kastrati v. Prishtina Municipal Court et al.
Kastrati v. Prishtina Municipal Court et al.

- **Objective**
  - Establish precedent establishing duty of justice system institutions to protect domestic violence victims from known threats of serious harm
  - Raise awareness of rights of domestic violence victims

- **Litigation Strategy**
  - Rely on binding precedent of ECtHR to clarify obligations of institutions under the Kosovo Constitution
  - Use high profile case to raise public awareness about domestic violence
Kastrati v. Prishtina Municipal Court et al.

- Identifying the Case
  - Start with the case
• Choosing the Right Party
  ○ Standing: broad standing under ECHR can cover parents
  ○ Dependability/Public Face: father committed to the cause, not just the case

• Choosing the Right Court
  ○ Trial court decision could take many years
  ○ Good argument that other avenues of relief did not exist
  ○ Constitutional Court decisions are binding precedent on lower courts
  ○ If ruled admissible, decision within about 1 year
Kastrati v. Pristina Municipal Court *et al*.

- **Advocacy Strategy**
  - Use case as focal point for public discussion of domestic violence and victims rights
  - Raise public awareness
Kastrati v. Prishtina Municipal Court et al.

Television programs raise awareness of the domestic violence and the need to improve the responsiveness of the courts to threats against citizens.
Kastrati v. Prishtina Municipal Court et al.

- Time to Decision – 10 Months

63. In such circumstances, the Constitutional Court concludes that the Municipal Court in Prishtina was responsible for taking actions foreseen by the Law on Protection against Domestic Violence and that its inaction presents violations of constitutional obligations that derive from Article 25 of the Constitution and Article 2 of ECHR.

74. Therefore, the Court concludes that the inaction of the Municipal Court in Prishtina regarding the request of the deceased D.K. for issuing an emergency protection order, as well as the practice developed by KJC in not addressing the inaction of regular courts, when they should, has obstructed the victim and the Applicants in exercising their rights to effective legal remedies, as foreseen by Articles 32 and 54 of the Constitution and Article 13 of ECHR.
Kastrati v. Prishtina Municipal Court et al.

- Post-Decision Strategy
  - Publicize and explain the decision
Kastrati v. Prishtina Municipal Court et al.

- Post-Decision Strategy
  - Taking the case another step
    - Possible criminal prosecution / represent parents as injured parties to illustrate victims’ rights under Criminal Procedure Code
    - Possible challenge to limitations on damages against public institutions
Osmani v. Kosovo Supreme Court
Osmani v. Kosovo Supreme Court

- **Objective**
  - Establish precedent clarifying constitutional limitations on pretrial detention
  - Raise awareness on issue of extended pretrial detention in Kosovo

- **Litigation Strategy**
  - Identify model case of unjustified and extended pretrial detention
  - Complete appeal process through Kosovo Supreme Court
  - Appeal to Kosovo Constitutional Court
Osmani v. Kosovo Supreme Court

- **Identifying the Case**
  - Start with the issue
  - Work with NGOs to identify case (Kosovo Council for Protection of Human Rights and Freedoms)

- **Choosing the Right Party**
  - Standing/Jurisdiction: Case where accused party has challenged detention orders in Supreme Court
  - Dependability/Public Face: Violation is clear and striking, accused party has no record of misconduct during detention
  - Represented by credible counsel

- **Choosing the Right Court**
  - Clear appellate jurisdiction in Constitutional Court
  - ECtHR supplies clear and binding precedent
  - Constitutional Court precedent binding throughout Kosovo
Osmani v. Kosovo Supreme Court

- Advocacy Strategy
  - Traditional Media
  - Parallel advocacy through our Campaign and partners
  - Friend of court briefs in Constitutional Court if needed
Osmani v. Kosovo Supreme Court
Osmani v. Kosovo Supreme Court

- Disadvantages
  - Risk of adverse outcome

DECIDES

I. TO REJECT the Referral as Inadmissible;

II. TO REJECT the Request for interim measures;

III. This Decision shall be notified to the Parties and shall be published in the Official Gazette, in accordance with Article 20.4 of the Law; and

IV. This Decision is effective immediately.

Judge Rapporteur
Snezhana Botusharova

President of the Constitutional Court
Prof.-Dr. Enver Hasani
Osmani v. Kosovo Supreme Court

- Post-Decision Strategy
  - Analyze likely reasons for outcome
  - Find another case and try again
  - Bring the same case again
    - Challenge subsequent detention ruling on independent but related grounds
    - Focus litigation and advocacy on facts that can’t reasonably be disputed
  - Don’t alienate the court