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SHORT GUIDE – STRATEGIC LITIGATION AND ITS ROLE IN PROMOTING AND PROTECTING HUMAN RIGHTS

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Introduction

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

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

Advantages and Disadvantages of Strategic Litigation

Strategic litigation has both advantages and disadvantages. When run well and in the right circumstances, strategic litigation can create significant systemic change that can have a positive impact on a large number of people. However, litigation is not the only tactic or indeed the most appropriate strategy in all circumstances.

Advantages:

- Strategic litigation can be a key tool in changing the law by setting important legal precedent;
- The incidental effects of strategic litigation, such as heightened media coverage and placing an issue in the public forum, can be significant, even if the case itself fails.

Disadvantages:

- Litigation is costly and can be a huge strain on resources. It may also result in an unsuccessful applicant having to pay the legal costs of the opposing party;
- By its nature, litigation is uncertain and therefore does not guarantee a successful outcome for the applicant;
- An unsuccessful case may generate negative publicity that may be damagingly channelled towards the organisation or applicant personally;
- Limitations of appropriate cases, or forums in which to bring them in, may mean strategic litigation is not appropriate for all cases.

Key Considerations

When an organisation is deciding whether considering strategic litigation is the appropriate route for them to take, it is important to consider:

- ***The organisation*** - what are the organisation's objectives, areas of expertise and capacity? Does strategic litigation fit within these?
- ***The case*** - do the facts of the case support the legal challenge and the systemic change that is sought to be achieved?
- ***An appropriate forum*** - is there an appropriate forum to bring the case and if so which court or jurisdiction is the most appropriate to file the claim in?

The Organisation

Mission and objectives

By reference to clear objectives, a successful human rights organisation can determine where the greatest impact can be achieved with limited resources.

Before taking on a strategic litigation case, human rights organisations should consider not only whether a case is meritorious, but also whether the issues raised in the case clearly fit within the organisation's mission and objectives. If it does not, then the case may be more appropriately dealt with by another organisation or legal service provider.

Capacity and expertise

The human rights organisation must also have the capacity to take on any proposed strategic litigation. Determining whether this is the case involves the consideration of factors such as:

- whether the organisation has either staff or access to lawyers with appropriate legal skills and expertise to conduct the case;
- are there any conflicts of interest with parties or key stakeholders;
- whether the organisation's insurance will cover the case or matter adequately;
- the likelihood of any adverse costs orders in the event that the case is unsuccessful;
- pending limitation periods for bringing any action;
- the capability of the organisation to retain its reputation and support amid any public or political backlash;
- whether the organisation has sufficient resources and funding to take on the litigation.

The Case

Facts

The facts of any proposed strategic litigation are highly important. They must:

- be capable of demonstrating the legal merits of the case;
- demonstrate the injustice the organisation wants to highlight; and
- be backed up by sufficient and attainable evidence.

Any strategic litigation case should have strong prospects of success and the claimant should be the most ideal claimant to demonstrate the injustice.

Parties

In strategic litigation, the clients should ideally have the same goals as the human rights organisation. However this may not always be the case.

- The client is often primarily interested in resolving their personal problem. A quest for wider justice or reform may be a secondary concern.
- For the human rights organisation with limited resources, strategic litigation is about effecting wider justice and reform through the litigation of one case.
- Litigation can be lengthy and draining on clients, particularly where cases are high profile or deal with personally sensitive issues. If a client is not committed to the wider cause they may take an early settlement or discontinue the action.

It is also important to consider issues relating to the other party that will be subject to the litigation, including:

- any key weaknesses in the other party's case;
- any opportunities or indeed adverse threats that may come out of litigating the case;
- the level of commitment of the opposing party and their supporters;
- if it is a group claim or class action, whether the claiming group is missing any integral claimants.

Appropriate Forum

When considering conducting any strategic litigation, a human rights organisation should consider the effectiveness of the forum they intend to litigate in. The legal system in some countries may not be effective or may not be receptive to legal arguments that support the promotion and protection of human rights.

Ideally a court should be competent, independent and impartial. Any limitations of the courts and the bias that may exist within them should be taken into account when lawyers develop litigation strategies.

The court must also have the power to hear the case the human rights organisation wants to bring before it. In order to come before a court certain jurisdictions require a case to contain a question of law or infringement of legally recognised rights. If such a question or infringement does not exist then the case cannot come before the court at all and strategic litigation is therefore not an option.

It may also be useful to consider institutions other than courts which may be useful, such as an ombudsman, national human rights institution, truth commission or regulatory body. If there is no effective local forum in which to bring a complaint, organisations may wish to consider whether regional or international forums may be available.

Consideration of regional and international remedies

Lawyers considering bringing strategic litigation should be aware of regional bodies that can be utilized at a higher level or incorporated into local strategies. Often, however, any effective domestic remedies must be exhausted before taking a complaint to a regional or international forum.

- Depending on the jurisdiction of the case, regional bodies that could be appealed to include the European Court of Human Rights, the African Court on Human and Peoples' Rights or the Inter-American Court of Human Rights.
- International bodies that receive complaints include the treaty bodies, or committees, which are established to oversee implementation of the core international human rights treaties, such as the International Covenant on Civil and Political Rights. It is important to check with the relevant state has accepted the jurisdiction of such bodies to receive complaints.
- Even if resource restrictions mean an organisation cannot afford to appeal a case to regional bodies, it is important to know how to apply international human rights laws and treaties in domestic courts. In less developed jurisdictions this may require lawyers to construct a legal argument for the importing of international law and human rights principles.

Other Considerations

Intervening as a third party in cases

Some legal systems allow for organisations to intervene in running court cases as a friend of the court (known as "amicus curiae"). In this situation, an organisation need not seek out a client to run a strategic litigation case on, but rather may

strategically choose existing cases in which to get involved on to help further their change agenda.

Alternative avenues for change

Given possible limitations of the system and the high cost and pressure of litigation, there often is a more appropriate avenue for change than strategic litigation. In any event strategic litigation is most effective when used by a human rights organisation as part of a wider campaign which may involve:

- political lobbying;
- increasing public awareness and education;
- use of the media both to raise community awareness and disseminate legal information;
- advocating at global forums such as the United Nations World Conferences.

Wider campaign methods are particularly important to apply pressure in systems where getting a judgment may not necessarily mean it is complied with.

Other impacts of strategic litigation

An effectively pursued individual claim can have a broad legal and political impact regardless of the outcome of the case.

Strategic litigation can place an issue in the public spotlight. Argued properly it can be an opportunity to place a reasoned view in the public spotlight, in opposition to any dominant political or corporate perspective.

Coupled with media coverage, failed test cases can also often lead to legislative reform or increased awareness of an issue that may lead to long-term change.