

An effective tool for impact litigation:

Strategic Jurisprudential Guides

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ECCHR is committed to developing best practices in transnational collaborative lawyering, and it has established itself as a hub for international collaboration and exchange. Through the Education Program, supported by the Bertha Foundation, we encourage continuous and shared learning, and this piece is one initiative to boost our common resources.

Good strategic litigation necessarily involves novel and creative thinking about law and politics. Can this be taught? It is probably helpful for the process of building strategic cases to say, “no, but it can be learned.” Any attempt at “teaching” strategic litigation should discard hierarchies or separation of teacher and pupils. It should abandon predefined understandings of expert knowledge, and rather be based on action-oriented and shared learning.

Strategic jurisprudential guides can be useful tools to facilitate discussions among different actors including lawyers, activists, community representatives, and thematic experts.

Reciprocal teaching among lawyers & activists

It is not unusual that lawyers face clients with issues and demands that they need to learn more about. The difference with strategic litigation is that the lawyer is not merely asked what the law is now, at this moment, on the basis of existing jurisprudence, i.e. the law as known through judgments that were made in comparable cases. Strategic litigation asks for everyone to use her particular knowledge and look at what could possibly be done legally, beyond already accepted jurisprudence. It needs to start with the realization that law is not the same as justice and that the strategic litigator is not a neutral representative of the client's individual interests. It is therefore important to analyze to what extent possible outcomes of a specific litigating path can become counterproductive to the cause and clients. This will necessarily involve political analyses, too. Given that strategic litigation often has a transnational dimension, it not only makes genuine “collaborative lawyering” (Vahlsing & co 2014) essential, but it demands an international eye when reviewing the legal options and contexts.

In various workshops and round tables, we have had the privilege of learning an enormous amount from the exchange between activists, lawyers, and thematic experts about the building of strategic cases as part of a broader socio-political movement. Nobody in the room has all the relevant expertise to answer the crucial key questions that determine any good project of strategic litigation: Who, Why, When, How and Where? Everyone is, thus, teacher and student at the same time.

Imagine, for example, anti-pesticides activists decide that they want to know how legal means might add to their repertoire of protest, agenda-setting, calls for accountability, and farmer-based theory of change. These activists then come face-to-face with lawyers that lack knowledge about pesticides, the lives of pesticides users, key past moments of victory, and the strengths and weaknesses of the specific allies, opponents and targets of possible legal action.

While the lawyers need to be educated on the topic, movement, and goals of the anti-pesticides activists, these in turn lack specific understanding of different options in the legal system, possible outcomes, loopholes, assessment of needed evidence, calculation of timelines or costs. Thus, the key questions can only be answered together.

What is special about a *strategic* jurisprudential guide?

We developed a tool to enable a creative outlook on case precedents in order to better inform important strategic litigation decisions. With the fairly straightforward name “Strategic Jurisprudential Guide”, it goes beyond classical compilations of jurisprudence. Ordinary analysis of jurisprudence aims to answer the question of what the law currently is for a given case. Key aspects are thus whether it is up-to-date, the relevant jurisdiction in which the cases were decided, the type of court that wrote the decision, and the comparability of cases for the issue at hand.

The guide for strategic litigation has entirely different purposes. It does not matter if the cases are from the relevant jurisdiction or whether the dictum is still in place. What matters is that the cases show the strategy that went into the case-building: which plaintiffs brought the case, against whom, for what violations, and on the basis of what legal tool? These lessons can be valuable for assessing the advantages and disadvantages of different avenues. Past cases can be examples to imitate and follow, or provide warnings of what did not work. The value lies in drawing attention to the various causes of action that exist on a general level, so that activists and lawyers may recognize what type of material could be important as evidence or how to decipher the legal significance of certain ways of corporate or state behavior.

Lessons that can be drawn: what to claim and in which forum?

The Strategic Jurisprudential Guides developed so far at ECCHR had as their focus corporate accountability. For example, the guide on litigation related to grievances in mining projects shows how plaintiff lawyers tried to establish a duty of care of the parent company vis-à-vis community members. Interestingly, and undoubtedly due to evidential challenges, many of the civil cases on grievances in related mining projects addressed injuries due to violence by police, military or private security companies, and did not focus on more structural problems like water contamination.

Strategic Jurisprudential Guides can show the range of what has been tried, in which forums and with a focus on which issues. For example: reviewing the litigation in relation to clinical trials showed that many proceedings focused on the issue of proper *consent* to the medical trial: whether and how it was given by the patient (see, for example, *Daum v. Spine Care Medical Group, Inc.* in the United States). Other claims addressed the issue of post-trial access to treatment (*Abney et al v. Amgen, Inc.* in the United States), whereas others demanded access to trial protocols and study reports (*Researchers v. European Medicines Agency* in the European Union).

The Guide on pesticides litigation, a piece of work accomplished thanks to the support of the Bertha Foundation, describes the case *Tellez v. Dole*, which was heard in 2007 in the

Supreme Court of California. The case was brought by twelve male Nicaraguan banana plantation workers. The plaintiffs argued that Dole Food as the employer and plantation owning company and Dow Chemical as the manufacturer were guilty of causing their sterility as they used the pesticide DBCP. This is a toxic chemical with many adverse health effects, such as cancer, still births and birth deformations resulting from prolonged exposure. However, the legal claim strategically only focused on bringing actions on behalf of sterile men. The fact that DBCP causes sterility is well-established in the science. Sterility is also not such a common occurrence in the general population. Comparatively, cases involving cancer are more difficult to prove on the issue that it was actually the DBCP which caused the cancer to occur, and not some other factors.

Several cases showed the willingness of some governments to act decisively in the regulation of corporations. Such cases can feed strategic discussions about the question of whether the goals pursued by the lawyers and clients are reached more effectively through direct legal action against the company or by bringing cases to regulatory governmental bodies. For example, in *Democratic Youth Federation of India v. Union of India*, 2011, the Supreme Court of India effectively imposed a nation-wide ban on the highly hazardous pesticide Endosulfan. And in Argentina, a court approved a fine against GlaxoSmithKline Argentina S.A. after irregularities in the consent in a clinical trial (*Abate Héctor – Tregnaghi Miguel*, 2011).

The Guide on pesticides litigation also drew attention to the possibility of filing claims on false advertisement which were successfully pursued in both France and the United States. By circumventing the difficulty to prove causation between a particular disease and the use of a particular pesticide, such cases can still draw attention to the problems with pesticides use. The Guide can also point to novel avenues, such as the possibility to approach the European Union Ombudsman (*Researchers v. European Medicines Agency*).

Lessons that can be drawn: claims against whom and on whose behalf?

The Guides can feed strategic thinking on which specific defendants to address – a sometimes daunting task when a range of actors is implicated, in particular in the context of corporate responsibility. For example, some of the proceedings on clinical trials addressed the obligations of investigators, whereas others specifically analyze the obligations of the trial sponsor (e.g. *Weiss v. Board of Regents for the University of Minnesota*, 2008). The unsuccessful attempt to hold the Toronto Stock Exchange liable for physical injuries of community members inflicted by private mining security personnel can be a fruitful basis for a discussion as to whether and how it can be a sensible strategy to address the responsibility of stock exchanges.

Not only the choice of defendant, also the decision on whose behalf a claim has been filed is strategic information to take in. For example, in pesticides litigation, claims can be filed for workers as employees on a plantation (*Argentina Tobacco Farmers v. Monsanto & Phillip Morris*, Carolina Leaf Tobacco, ongoing, Superior Court of the State of Delaware). A claim can also be filed for a farmer who is then a consumer of the pesticide, which can significantly change the legal argumentation (*Paul Francois v. Monsanto*, France, ongoing). Finally, a

claim can be filed on behalf of other affected persons, either living around contaminated water streams or, for example, on behalf of consumers of Coca Cola with pesticides residue in the bottles (Centre for Public Interest v. Union of India & Ors, 2013). Some of the cases draw attention to the particular value of so-called public interest litigation in India, which can be brought by a group or organization such as a community, NGO, trade union, or civil society coalition.

Towards transnational collaborative lawyering

By taking inspiration from the wealth (or lack) of cases in particular areas, lawyers, together with activists and community members are much better informed to discuss the ways in which legal cases can contribute to achieving justice. The concrete examples can bring out such a range of different perspectives that it can lead to more creative decisions.

In taking a transnational perspective, such Guides contribute to the global diffusion of legal thinking in which progressive law from the Global South, especially with regard to economic, social and cultural rights, can enter the thinking in the Global North.

Finally, we must keep in mind that each case has its own dynamic, and face-to-face consultations are crucial to devise a strategy.