

Strategic litigation and OSH

Purposes, Challenges and Opportunities

Nicola Countouris – ETUI - 25 Feb 2021

Strategic litigation and OSH

1. Purposes

A. Legal purposes (*Stricto sensu* Strategic litigation)

- i. **Change *Within the law*** (e.g. achieve a more favourable interpretation, application of the law; clarify a point in law; etc.)
- ii. **Changes *Against the law*** (Actions for annulment; judicial review to quash a provision; overturn established 'negative' precedents; etc.)
- iii. **Changes *Beyond the law*** (challenge the law both to quash it and obtain legal changes)

Strategic litigation and OSH

2. Broader and meta-legal purposes

- i. **Mobilisation*** (internal mobilisation of members, workers, recruitment, renewal by targeting certain groups particularly exposed to certain risks, solidarity between different groups)
- ii. **Campaigning*** (external campaigning, to highlight how certain practices harm the H&S of workers; to raise the profile of a cause or encourage public or media debate; to lobby and influence law makers)
- iii. **European integration*** (ensure upward integration and level playing field; ensure integration between different European legal regimes, e.g. EU, ESC, ECHR, and ILO instruments; building a European 'Civil Society')

Strategic litigation and OSH

2. Challenges (and possible responses)

- i. **Access** (costs; procedural and jurisdictional hurdles; multiplicity of fora but some mutually exclusive)
 - ‘activist’ lawyers and experts; crowdfunding; staggering/scattering claims strategically – a ‘global strategy’ across jurisdictions; use of Article 6 ECHR and EU principles
- ii. **The negative precedent**
 - Calculate risks; political choices; avoid too many negative precedents; ‘dual parent’ theory; sympathy vote and the long game
- iii. **Losing sight of the ‘individual’** (individual v strategic interests; victimisation)
 - Rely on activists and union/H&S representatives; involve and connect
- iv. **Backlash?** (e.g. campaigning and mobilisation adversely affect legal process? The ‘nanny state/snowflake’ criticism from hostile media)
 - Union involvement; political backing; seizing the narrative; attention to communication

Strategic litigation and OSH

3. Opportunities

- i. An area shaped by **‘fundamental’ and ‘supreme’ principles** (dignity; bodily integrity; prevention; precaution; care; Constitutional/EU/CoE/ILO standards) and prone to **purposive/expansive** interpretation – ideal for **campaigning**
- ii. **Transferability** (victories in this area can positively affect other contiguous areas of the law; other legal systems)
- iii. **Links with other social actors** and the creation of social movements (environmental NGOs; civil society; ...)