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Strategic litigation for women's rights: a Law and Economics perspective

Preliminary Draft

Abstract The present work offers an assessment of Strategic Litigation as a tool for achieving institutional change in the domain of women's rights in the realm of work, from the perspective of Law and Economics.

Strategic Litigation is about more than an individual's right - it is about change, about solving a social problem, about human rights. Our paper is about the use of Strategic Litigation to enforce women's rights to equal treatment in employment and to change institutions.

In Strategic Litigation, which has its origins in the struggle against slavery and the abolition of racial segregation, the litigants are strategically and financially supported by the so-called "parties behind the parties", the NGOs, organizations and associations. In such a process, the parties work towards a supreme court, European or international court decision and involve the public during the entire duration of the process in order to increase the pressure on the judicial bodies, legislators and politicians. The aim is to bring about a change in case law and legislation. In order for a case to be suitable for this type of litigation, it is necessary that the issue be one that affects the public. Due to the long duration of the process, the plaintiff also incurs enormous judicial and extrajudicial costs, which are usually paid by NGOs and organizations, insofar as legal aid is not an option.

The figures show that women today are still paid less and have fewer opportunities to enter and advance in the labour market: Women in the EU are less present in the labour market than men. The gender employment gap stood at 11.7% in 2019, with 67.3% of women across the EU being employed compared to 79% of men. The gender pay gap in the EU stands at 14.1% and has only changed minimally over the last decade. It means that women earn 14.1% on average less per hour than men. On the other hand, women's rights to equality at work are guaranteed internationally, at european level, at constitutional level and by national law. So why resort to a costly and time-consuming process when a strong legal framework already exists?

In our paper, we show that Strategic Litigation is the right type of litigation, both from a legal and from an institutional point of view, to work towards de facto equality for women in employment. On the one hand, an area that has a sound legal framework is better suited to achieving a supreme court decision than an area that has no legal backing. Moreover, it is the involvement of the public and the confrontation with ingrained social patterns that can lead to social change. We show that discrimination against women in employment is an institutional problem, since the long-established social institutions lead to the circumvention of existing rights, making de facto equal treatment impossible.

Goal of Strategic Litigation

Strategic litigation is a broad term that is used a lot nowadays, but has not yet been defined in a uniform way. Terms such as "public interest litigation", "cause lawyering", impact litigation" or "test-case litigation" (Ramsden/Gled hill 2019) are used to make clear the differences that exist from 'traditional' civil litigation. A strategically managed civil case goes beyond the scope provided for in the Civil Procedure Rules. The extension relates firstly to the purpose of the process and secondly to the parties involved in such a process. The purpose of civil litigation has always been the probation of objective law, the ascertainment of law among the parties and the maintenance of legal peace (Gaul, 1968). The primary purpose is generally considered to be the realization of rights, that is, the assertion of a subjective right. The plaintiff party, consisting of the client and his legal representative brings an action against the defendant party in order to assert his claims. A strategically conducted lawsuit is definitely about the realization of subjective right. However, the plaintiff party's request in this case goes beyond that purpose. The plaintiff party is concerned with more than the assertion of his claim. It is more a matter of principle. It is about making a difference. Strategic Litigation stands for the strengthening of human rights. Behind such a process is the pursuit of legal, social and societal change (Schokman/Creasey/Mohen, 2012). In order for this to happen, an individual affected person must take their case to court in order to set a precedent that can be relied upon by those affected (Varia, 2019). Civil law, unlike common law is not designed to create precedent. However, there are foundational decisions from the highest courts that are capable of influencing legislation and case law.

The binding effect of judgments

The problem in the domestic legal system of civil law is the binding effect of judgments. In the German legal system, only the decisions of the Federal Constitutional Court have binding effect for the lower instances, politics and the legislature. The citizen can activate this in the context of an individual constitutional complaint only if he has exhausted all instances beforehand (exhaustion of legal recourse). The Federal Constitutional Court then

has the possibility to declare public acts unconstitutional, to set aside decisions of other courts and to refer the case back to the competent court, or also to declare a law null and void because of its unconstitutionality (Bundesverfassungsgericht, https://www.bundesverfassungsgericht.de/DE/Verfahren/Wichtige Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html, data: 15.09.2021). On the other hand, there is no such binding effect for the case-law of the Federal Court of Justice or other courts. The limited binding effect has two disadvantages. The fact that the complainant must have exhausted all instances before he or she can file a constitutional complaint results in enormous costs for him or her and the path to the last domestic instance is usually very cost-intensive. In addition, constitutional complaints can only be asserted against violations of one's own fundamental rights, which precludes action against a private individual or an employer. However, the decisions of the courts with jurisdiction in private or labour law have no binding effect, even if their decisions are usually used as an aid to interpretation by other courts.

At the level of European law, there is a strict formal obligation for the national court which has referred a question of interpretation in the preliminary ruling procedure. In the context of the main proceedings, the referring court as well as the instances involved are bound by the judgment. For other court proceedings, the binding effect is disputed, but for lower instance courts there is a de facto binding effect. The binding effect for courts of last instance can be inferred from the decision of the ECJ (ECJ, Case C. 283/81; Fink, 2019).

The judgments of the European Court of Human Rights are in principle binding on the states concerned. Individuals who claim a violation of their human rights are in principle entitled to appeal. The principle of exhaustion of rights also applies here, i.e. all domestic remedies must first be exhausted, unless domestic remedies are insufficient to ensure effective prosecution (Deutsches Institut für Menschenrechte, https://www.institut-fuer-menschenrechte.de/menschenrechtsschutz/europarat/europaeischer-gerichtshof-fuer-menschenrechte-egmr (16.09.2021).

Due to the limited binding effect of court decisions, it is therefore crucial for a lawsuit conducted within the framework of strategic litigation to be heard by the highest courts.

This entails high costs, which the plaintiffs or complainants are usually unable to bear on their own. To counter this problem, the plaintiffs in a strategic litigation are supported by NGOs, associations and aid organisations.

Key points of Strategic Litigation

Not only does the objective of a strategic litigation go beyond that of a normal trial, but the organization of a strategically managed trial is also more complex and demands a great deal from the parties. Due to the goal of bringing about far-reaching social changes, it is necessary to discuss the case in public. Plaintiffs usually cannot bring about this publicity on their own. The individual case must first be examined to determine whether it is at all suitable for a Strategic Litigation process. It must first be a legal issue that raises a social or societal problem. There must be legal recourse for this problem and a court decision must have a far-reaching effect. Cases that are likely to be adjudicated in the lower courts do not lend themselves to a Strategic Litigation process. Since public involvement is crucial to change, the case is only suitable if it presents the legal issue in a way that is easy to understand and accessible to the general public. Another question to ask when evaluating a potential Strategic Litigation process is whether the courts to be seized are free from the influence of the government and other institutions (Child Rights Information Network, 2009). The public relations work, the research work, the elaboration of the litigation strategy is very costly. Because a strategic litigation process is so complex and requires different knowledge and expertise, there is a professional team behind these processes that takes care of the legal and financial aspects in addition to the media work (European Network of Equality Bodies, 2017).

The parties behind the Strategic Litigation process

According to the formal concept of party, the parties in a civil action are the plaintiff and the defendant. The plaintiff is the person who has brought the action and the defendant is the person against whom the action is directed. The party must also have the capacity to be a party. Party capacity is the ability to appear as a party (plaintiff or defendant) in a lawsuit (Troidl 2013). Thus, a person who has legal capacity is a party (§ 50 ZPO). In order to obtain

a decision by the highest court of the constitutional jurisdiction, the European Court of Human Rights or the European Court of Justice, domestic legal recourse must first be exhausted.

Unlike in the USA, for example, the German or Italian legal system only allows collective actions (class actions) in a few cases. The class action known in the USA, in which res judicata extends to those persons who are affected in the same way by the subject matter of the dispute, even if they have not themselves become parties to the proceedings (Hahn 2019). In November 2020, Directive (EU) 2020/1828 the new European consumer class action was adopted. However, the action can only be brought on the basis of certain consumer rights and the resulting claims of consumers against traders. In contrast, a Strategic Litigation process relates to the assertion of human rights and not to the strengthening of consumer rights.

In a strategic litigation process, there are other parties besides the litigants (plaintiff and defendant) who act in the background. The so-called "parties behind the parties", i.e. NGOs, associations and non-profit organizations and human rights organizations, support the litigants in the development, implementation and financing of the strategic litigation process.

Strategic Litigation and the Rights of Women in the World of Work

Strategic Litigation is about strengthening, defending and enforcing human rights. In 1948, the United Nations proclaimed human rights for the first time. The Universal Declaration of Human Rights has endured to this day and is the cornerstone of international human rights protection (United Nations; https://www.un.org/en/about-us/universal-declaration-of-human-rights, (09/29/2021)). Human rights are all those rights which derive from and are founded on the dignity of the human person. They are inalienable, indivisible and indispensable and apply to every human being, making them a kind of global fundamental right. According to Article 1 of the Universal Declaration of Human Rights, "All human beings are born free and equal in dignity and rights." The prohibition of discrimination manifested in Art. 2 of the Declaration states that "Everyone is entitled to the rights and

freedoms set forth in the Declaration, without distinction of any kind, on the basis of race, color, ***sex,*** language, political or other opinion, national or social origin, property, birth or other status". Further, Article 23 states that "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment", and "Everyone, without any discrimination, has the right to equal pay for equal work", as well as that "Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (Universal Declaration of Human Rights). It follows that human rights are universal and that women have a right to equal pay and equal working conditions.

Nowadays, you would think that there is no difference between women and men in the world of work. After all, women have the same school qualifications, attend the same universities, have the same or better grades and work just as much or perhaps even more than their male colleagues. Equal rights for women and men are not only a human right, but are guaranteed both constitutionally and by simple law. Article 3 (2) of the Basic Law (GG) stipulates that "men and women shall have equal rights. The State shall promote the actual implementation of equal rights for women and men and shall work towards the elimination of existing disadvantages." According to article 37 of the Italian Constitution, "The working woman has the same rights and, for equal work performance, the same wages to which the worker is entitled. Working conditions must permit the performance of her essential duty in the service of the family and guarantee special, adequate protection for the mother and the child" (art. 37 of the Italian Constitution).

Simple legal norms also stipulate the equal treatment of women and men. The General Equal Treatment Act (AGG) is a German federal law that aims to "prevent or eliminate discrimination on grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual identity" (Art. 1 AGG). In its § 2 No. 2, the Act stipulates that discrimination on the aforementioned grounds in relation to "employment and working conditions, including pay" is prohibited. Equality between men and women has also been legally established at

the European level. Thus, the European Social Charter 1996 in its Art. 20 stipulates the right to equal opportunities and equal treatment in employment and occupation without discrimination on grounds of sex. Directive 2006/54 EC refers to the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Article 157 I of the Treaty on the Functioning of the European Union states that each Member State must ensure the application of the principle of equal pay for men and women, for equal work or work of equal value. In Italy, the "quote rosa" has been in place since 2011 to ensure the proportion of women on the board of directors and in management. Germany has also had a women's quota since 2016, although this was previously limited to supervisory boards of listed companies and companies subject to co-determination. In January 2021, the Cabinet approved a draft law by which the women's quota also applies to the composition of the Management Board (FüPoG II).

In practice, however, this unfortunately looks different. In 2020, the gender gap in Germany was 18%, with women generally earning around €4.16 less an hour (https://www.destatis.de/DE/Presse/Pressemitteilungen/2021/03/PD21_106_621.html (27.09.2021)). This is also confirmed when comparing women in professions with high earnings and in professions with low earnings. Only around 18.5% of managerial positions are held by women, whereas around 90.8% of hairdressers with low earnings are female (Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, Entgeltungsgleichheit zwischen Männern und Frauen in Deutschland, page 13).

However, how can the Strategic Litigation help to strengthen women's rights to equal pay and to be appointed to positions with higher salaries? Women who earn less than their male colleagues in the same job have the possibility to go to the labor court and sue the employer for the same salary (equal pay case). In the same way it is possible for women to sue the employer for not hiring them because of their gender, as long as there are no permissible exceptions for not hiring them. Lawsuits by women for hiring, damages and equal pay are accumulating in German labor courts. So why choose a type of litigation such as the Strategic Litigation, which can take years to reach a final decision, has much higher costs

and is not primarily aimed at compensating the plaintiff out of court for the discrimination she has experienced? *So that something fundamentally changes for women.*

Nevertheless, if one looks at the declared rights of women to equal pay and equal working conditions at the international, European, constitutional and simple legal level, one doubts whether it is appropriate to enact new laws establishing equal treatment of women in this area or obliging employers to hire a certain quota of female employees. The legal framework providing for equal rights for women in this field seems to be relatively strong but nevertheless the figures show that women earn less than their male counterparts and have poorer opportunities for entry and promotion in the profession. So what needs to change for the legal framework to be exhausted and for there to be de facto equal treatment for women? *Society, its thinking and the long-established institutions.*

Institutional economics (Basu, 2020; Aoki, 2001) has highlighted how effective norms are not simply the rules dictated by legislative acts. They are on the contrary the actual regularity of behavior followed by the players, as it is based on mutual expectations represented in the players' mental models on how they are playing the game and replicate it. The law can be said to generate an institution if it is the starting point of a process of convergence to equilibrium that leads to the realization of a regularity of behavior in which the prescriptive norm, affirmed by the law, is actually implemented though the players' strategic choices. The affirmation of a normative meaning by a legal norm (such as gender equality) is thus a necessary but not sufficient condition of the emergence of the corresponding institution. Moreover, there is a relationship of institutional complementarity among different domains of the economy (Aoki, 2001), which is reflected in the "varieties of capitalism" (Amable, 2003; Deakin et al., 2017) and an interplay between business corporations and society (Aoki, 2010).

Consequently, even when positive freedoms may be affirmed by the law, it is essential that they correspond to actual behaviors and beliefs in societal actors.

Our aim is to describe analytically how the strategic litigation process can foster an institutional change in those domains where the law already exists, but behaviors do not correspond to it.

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