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Member States must encourage strategic litigation as a tool for policy change

Summary:

The interaction between the State and Civil Society Organisations (CSOs) in policy dialogue, and public policy-making has undergone a significant paradigm shift globally, particularly in developing countries with democratic governance and the rule of law. The importance of organized civil society is increasing, despite concerns about their legitimacy and constituency. Global efforts to promote sustainable growth and well-being have been hampered by the COVID-19 epidemic and various conflicts in some states in the global south thus calling for a new approach to government and civil society engagement. CSOs traditionally play three key roles in countries with high tolerance and respect for human rights: participation in policy dialogues, mobilizing and educating communities on their rights, and monitoring policies for policy reform or behavior change. However, governments, particularly in less developed countries, have not fully embraced the parallel relationship between CSOs and governments. Strategic litigation, a methodical application of legal tools, procedures, and frameworks by civil society, is a potent tool for CSOs' advocacy is emerging as a potent tool that enables civil society to enforce national anti-corruption laws, utilize legal procedures from various countries, and address issues not adequately addressed by national legal infrastructures. Strategic litigation raises public awareness about the need to combat corruption, foster international cooperation, and strengthen international judiciary bodies. It also answers questions about the legal standing of civil society organizations and the right to represent victims of corruption in legal proceedings. Sadly, this potent advocacy tool is seldom used.

Introduction:

The interaction between the State, and Civil Society Organisations (CSOs) with regard to policy dialogue in particular and public policy making in general, has undergone a significant paradigm shift globally with developing countries where democratic governance and the rule of law is in their infant stages making remarkable progress. In fact, the importance of organized civil society in this progress cannot be discounted however options available to them to inform change are fast becoming limited especially when the issue of legitimacy, relative to the constituencies of CSOs comes up.

George Hegel and Thomas Paine, two political philosophers, created the concept of civil society as an area separate and concurrent with the state or public sector, according to Ghaus-Pasha (2005).

Over the years, the harsh realities of growing global inequality have become a major source of concern for the worldwide community, but the new century began with an extraordinary pledge of solidarity and will to end poverty. The Sustainable Development Goals (SDGs) replaced the Millennium Declaration, which was adopted in September 2000 and issued a clear challenge to all countries, rich or poor, to use all of their resources to eradicate poverty, promote equality and human dignity, and

establish environmental sustainability, peace, and democracy. Global leaders are dedicated to working together to realise these goals.

Strategic litigation, an advocacy tool:

However, with the passage of time (almost two and a half decades), the emergence of the pandemic (which has completely disrupted global efforts towards sustainable growth and well-being) and various incidence of conflicts, it is obvious that a comprehensive achievement of the global goals will be lacking by the year 2030 hence the need for a renewed strategy for civil society and government engagement. Traditionally, in countries with a high degree of tolerance and respect for human rights, CSOs have been seen to be playing three key roles, namely:

1. Participation in policy dialogues for the purposes of designing public policies
2. Mobilizing and educating communities on their rights and on new policies
3. Monitoring policies and undertaking advocacy for either policy reform or behaviour change.

The above roles of CSOs in nation-building notwithstanding, governments around the world particularly in less developed countries have not exactly waned themselves from the outmoded parallel relationship that existed between them and CSOs. Also, some CSOs have also continued to hold on to the militant approach of getting change to happen. Even in countries where there is greater tolerance for the activities of CSOs as complementary entities within the state, their alternative positions are hardly entertained by their respective governments, thus the need for an enhanced form of legitimate engagement between the state and CSOs. It is this need that birthed Strategic litigation as a potent tool for advocacy.

Controversial as the idea may be, Strategic litigation sometimes referred to as impact litigation has a complicated, albeit recent history. However, it suffices to define it as the methodically planned application of legal tools, procedures, and frameworks by members of civil society to advance social and policy reforms.

Barber (2012) identified classical cases where Strategic litigation has enhanced the quality of governance and the welfare of citizens. One such case is the following;

- *“In nearly 14 years of the case Wiwa v. Shell, Nigerian plaintiffs were able to use the Alien Tort Claims Act (ATCA) to bring a claim against Shell Oil Company in the US for human rights violations that occurred in Nigeria in the early 1990s. The two non-profit groups involved in the litigation, the Centre for Constitutional Rights (CCR) and EarthRights International (ERI), declared success when Shell agreed to an out-of-court settlement of 15 million US Dollars (USD) in June 2009, just days before the trial was slated to start”* (Barber, 2012, P. 412).

In the writings of Assis (2021), she acknowledges that despite having historical roots in the Global North and being a part of the public interest litigation movement, Strategic litigation has been spreading internationally thanks to transnational actors like universities, foundations, and international NGOs.

Burt (2021:2) through his writings also held a similar perspective as that of Mariana Prandini Assis on Strategic Litigation and indicated that Strategic litigation is:

“a crucial instrument for the defense and advancement of human rights, particularly in cases of international crimes. Strategic Litigation is a component of an overall advocacy strategy

created to increase awareness of a specific issue, advance the rights of disadvantaged groups, or encourage tangible policy changes. This strategy involves the selection of high-impact cases or cases that demonstrate patterns of human rights violations against vulnerable populations. In addition to seeking justice in the courtroom, Strategic Litigation aims to influence institutional, governmental, and legal changes. To accomplish its many-faceted goals in support of progressive social change, Strategic Litigation uses legal, political, and media techniques”.

In the specific field of the anti-corruption fight, Strategic litigation allows civil society to:

- Demand enforcement of national anti-corruption or right-to-information laws that otherwise would never be used;
- Use legal procedures from various countries against what has become a global economy of corruption, from corrupt deeds committed locally that steal the populations of the money needed for their basic needs, through international financial channels to the investment of the proceeds of corruption in other countries with the help of enablers;
- Move issues that are not adequately answered by the national legal infrastructures up to international courts, such as the ECOWAS Court of Justice.
- The use of Strategic Litigation by civil society raises awareness among national and global public opinion about the urgent need to combat corrupt practices or lack of enforcement, foster international judiciary cooperation, and strengthen international judiciary bodies. It also poses the question of the civil society organizations’ legal standing and the necessary right to represent the victims of corruption in legal proceedings.

In conclusion, as the world meets to discuss anti-corruption strategies and practices, one tool that must be encouraged amongst member states is strategic litigation as time alone holds the preserve to determine duty bearers and rights holders of today, one’s position in tomorrow is guaranteed.

References

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