

# **Meeting on Strategic Litigation**

**Organized by Asian Institute for Human Rights**

**6<sup>th</sup> – 7<sup>th</sup> April 2012**

**Sasa International House, Bangkok**

## **REPORT**

### **Background**

The Asian Institute for Human Rights (AIHR) is based in Bangkok and strives to strengthen the theory and practice of human rights activism, facilitate systematic linkages between academics and meetings and contribute to a continuous process of action and reflection. In February 2010, AIHR had facilitated a dialogue on challenges in human rights practice. The participants in the dialogue had expressed the need to strengthen the capacity of young lawyers and activists to use social action litigation as a strategy for promoting and protecting human rights and enable them to learn from the experiences of groups in other countries.

As a step towards fulfilling this need, AIHR plans to compile a resource book on strategic litigation. The purpose of the two-day meeting in Bangkok was to bring together a group of lawyers and activists and brainstorm on the idea of the resource book.

The participants included representatives of legal aid organizations from Bangladesh, Indonesia, Nepal and Thailand, independent lawyers working with social action groups in India, and activists and agencies such as the Law Reform Commission of Thailand. The present report is a brief summary of the discussions during the dialogue and the ideas regarding the resource book.

### **Importance of Strategic Litigation**

Strategic Litigation;

- Plays a role in ensuring that laws are interpreted in ways that protect the rights of the people (case of privatization of PTT in Thailand; case relating to disability rights, imposition of extra-judicial punishments by village dispute resolution bodies in Bangladesh)
- Plays a role in getting courts to review the implementation of laws (case relating to regulation of Maptaphut Industrial Zone in Thailand)
- Can play a role in pushing the legislature to enact laws that protect people's rights (habeas corpus cases that led to the drafting of a bill on enforced disappearances in Nepal, challenging laws relating to property that were discriminatory towards women in Nepal)

- Has a role in bringing peoples narratives before the courts when the formal law results in their exclusion (case of Karen people in Thailand who were evicted from their land under laws relating to forests and national parks)

## **Process of Strategic Litigation**

- Should have the impact of empowering people. In many cases courts have given landmark decisions. However these judgments have not helped to bring any changes in the lives of the affected people. It is important to give attention to the process of a strategic litigation before and after court proceedings as well.
- Lawyers sometimes have the attitude that they know best about how to frame the arguments in a case. The people are not involved in the decision-making. This kind of attitude may result in excluding the voices of the people and their experiences. Lawyers must work with a sense of modesty, have respect for the people and see themselves as a part of a movement working for strengthening democracy and human rights.
- While framing strategic litigation we may need to think 'outside the box', meaning outside the traditional legal framework.
- Social change does not happen so easily. Social change is brought about by changes in the mindset of the society. Thus litigation has to be closely linked with movements and advocacy efforts outside the courtroom (ship-breaking case Bangladesh, the forest cases in India).
- Strategic litigation is usually part of a legal empowerment process, which involves; critically understanding a law and the impact of its enforcement, research, fact-finding and documentation, reflection on different strategies that would address the issue and monitoring of cases before the Courts.

## **The resource book**

### ***Who should be the target?***

Law is considered to be a specialized, technical terrain and people and social movements are reluctant to engage with it. The resource book should target lawyers, social activists and peoples movements. It should help in creating understanding about how litigation can be used as a resource to bring social change.

### ***What should the resource book contain?***

1. Should inspire the readers to think 'outside the box'.
2. Should include an understanding of human rights and the relationship between the State and individuals and communities. There should be a discussion on State obligations.

3. Legal education in some countries is influenced by the positivist theory of law and there is an understanding that Courts do not have the power of judicial review. The book should include jurisprudential arguments about judicial review that can help in highlighting the importance of strategic litigation as well as its limits.
4. Should have discussion on the concept of strategic litigation. Strategic litigation is not the same as public interest litigations but also includes cases filed in district courts and administrative courts. However as the name suggests, it is 'strategic' and is not the same as ordinary litigation. What makes it different?
5. Should include illustrative case studies where lawyers and communities have used litigation as a tool and worked together to bring change in systems and structures.
6. The case studies should highlight the strategies that were used to support the strategic litigation before, during and after the court proceedings. This would also help to draw out the meaning of strategic litigation.
7. Should highlight the importance of involving the client (individual/community) in all stages; before, during and after the court proceedings.
8. Should include discussion on strategies of collecting evidence. These can include the investigative powers available to the judiciary in common law systems, the strategy of using the Right to Information Act to get information from state agencies that can be used as evidence, the strategy of using sworn affidavits of affected persons or persons to present before the court, etc.
9. Should include challenges such as
  - In litigation where the State is accused of committing violations of rights, such as torture or enforced disappearances.
  - Cases involving economic, social and cultural rights, which involve as respondents non-state actors such as corporations.
  - Evidence gathering: The State is able to produce an army of experts to strengthen their case. At the same time the plaintiffs are examined against very high standards of morality and by raising questions about their reputation, attempts are made to discredit their case before the court.
  - Sharing of information with media and other networks for advocacy purposes in sensitive cases.
  - Using media for advocacy purposes in the context of laws relating to contempt of court.
10. Deciding when not to litigate (this would also include challenges such as when the courts are not accountable).

11. As part of introduction should include an explanation on the civil law and common law system and the difference between dualism and monoism and whether the differences between the systems have a bearing on the practice of strategic litigation.
12. Should have links to bibliographies and websites that can be used by readers for reference.
13. Can include perspectives of people (lawyers, clients, etc.) who have been involved in strategic litigations.

### **Process of Moving Forward**

AIHR will prepare the brief report and circulate to all participants for their comments. AIHR will develop the plan for producing the handbook in collaboration with all the participants. The participants shared that it was an enriching opportunity where they could learn from the experience of other groups in other contexts working on similar issues. They shared that there was much to learn from each other and expressed their willingness to be part of the initiative of compiling a resource book on strategic litigation.

**Meeting to discuss resource book on Strategic Litigation  
6<sup>th</sup> - 7<sup>th</sup> April 2012, Sasa International House, Bangkok  
Organised by Asian Institute for Human Rights**

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