ABA Rule of Law Initiative
Internet Freedom in Southeast Asia

Learning Module 3:
Strategic Litigation & Advocacy in Defense of Internet Freedom
This curriculum introduces lawyers to the purposes and methods of conducting strategic litigation and advocacy in defense of Internet freedom, primarily freedom of expression and privacy rights. The goal is to equip lawyers in Myanmar, Indonesia, Malaysia, the Philippines, and Thailand with an understanding of the legal and methodological frameworks employed by lawyers the world over to promote and defend basic human rights.

The outline curriculum is organized into five Parts: (I) A Snapshot of Strategic Litigation and Advocacy (SLA) in Action; (II) Definition, Purposes and Methods of Strategic Litigation; (III) Obstacles and Challenges to SLA; (IV) Practice Scenario; and (V) Bibliography and Internet Resources. Part I is an introductory hypothetical designed to get participants thinking about SLA in practice from the outset. Part II, which is the most extensive, has three sections covering the following topics: (a) Introduction to Strategic Litigation and Advocacy; (b) Strategic Litigation per se; and (c) Advocacy in Support of Strategic Litigation. Part III identifies the principal obstacles to effective strategic litigation, as well as the challenges facing successful advocacy.

Part IV contains a second hypothetical scenario with accompanying exercise to help further illustrate the dynamics of SLA in practice. The final Part is a select bibliography of the English language sources consulted in the preparation of this Learning Module, along with a number of Internet resources.
# Learning Module 3: Strategic Litigation & Advocacy in Defense of Internet Freedom

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The American Bar Association Rule of Law Initiative (ROLI) - Asia Division and The George Washington University Law School International Human Rights Clinic partnered to create this Learning Module publication, to be used in preparation for ROLI Internet Freedom workshops in Indonesia, the Philippines, Malaysia, and Thailand.
I. A SNAPSHOT OF STRATEGIC LITIGATION AND ADVOCACY (SLA) IN ACTION

Read the description below of how public interest attorneys dealt with one particular legal problem, and then consider the questions at the end.

In the country of Corbanesia, an undocumented migrant worker from Florivania named Maria arrives at the offices of the civil rights NGO called Justicia Global. She claims that the authorities have refused repeatedly to issue a birth certificate for her son, who was recently born in Corbanesia. They claim that the boy has no right to receive citizenship. Because his parents are undocumented migrants, they are considered to be “in transit.” This means that their offspring born in Corbanesia is not entitled to the benefit from the ius soli principle consecrated in the Constitution, which would otherwise make him eligible for Corbanesian citizenship. Maria claims that this situation is common, affecting thousands of children born to Florivanian migrant workers.

Ordinarily, a legal aid organization like Justicia Global would seek to solve Maria’s specific problem through legal actions aimed at forcing the local civil authorities to register her child as required by law. Most likely they would bring a constitutional action or writ on behalf of Maria and her son challenging the civil authorities interpretation of the Constitution and seeking specific relief. The lawyers would also appeal to equity and invoke humanitarian reasons to persuade the judge hearing the case to order the civil authorities to issue the birth certificate for Maria’s son. Once that goal was achieved, the case would be closed. Justicia Global would have done its job. Maria would be happy. But the next day, two more migrant workers with newborns who were refused birth certificates would show up at the Justicia Global offices asking for help. The lawyers would have to prepare to implement the legal strategy over again, for each new client.

Fortunately, Justicia Global is not an ordinary legal aid organization. They have a policy of engaging in strategic litigation and advocacy, as well as experienced lawyers to carry it out. With the help of a local university, they have carried out an in-depth study on the situation and legal status of migrant workers in Corbanesia. They found that the practice of denying birth certificates to their children is a widespread and systematic problem affecting thousands of immigrants. After careful analysis, the authors of the study concluded that this practice is arbitrary and illegal under both Corbanesian and international law. Accordingly, Justicia Global has decided to challenge as unconstitutional the generalized practice of denying birth certificates—and citizenship—to the children of undocumented migrant workers.
The Justicia Global lawyers begin to put together such a case on behalf of Maria and several other migrant worker clients and their children, arguing that these claimants represent the interests of all migrant workers who are similarly situated. Their goal is to have the judiciary denounce the practice as unconstitutional and in violation of Corbanesia’s obligations under the International Covenant on Civil and Political Rights (ICCPR). They want the judges to recognize that the children of migrant workers born in Corbanesia are entitled to citizenship, and to order the civil authorities to issue these children their birth certificates.

But that is not all. The lawyers have developed a parallel and complementary advocacy strategy around the litigation designed to create public awareness of the problem, and shape public opinion about it in a positive way. At the same time, this strategy is aimed at decision makers in Government who design and carry out the immigration policies. Among other things, Justicia Global has formed an alliance with several other civil society organizations (CSOs), including universities, to better coordinate their work in favor of migrant workers rights. The Alliance, as it is called, has commissioned further studies on the human rights of migrant workers. It has rolled out a new public education campaign on local radio and TV around the country, aimed at informing people about the worst abuses and how they can help. Alliance leaders meet regularly with parliament members and government officials working on migrant workers issues, to advocate on the immigrants’ behalf. Alliance leaders also speak with the press whenever an issue comes up or is covered by the media; recently, for example, journalists have been calling about the controversial case filed by Justicia Global regarding the citizenship rights of migrant workers’ children.

Next, the Alliance is thinking of expanding its advocacy to include the United Nations human rights mechanisms. It has been contacted by an international coalition of refugee and migrants rights organizations based in Geneva that works directly with the UN. The Coalition as it is called has invited the Alliance to consider bringing its case to the UN Human Rights Council and the Human Rights Committee, and has offered to provide the Alliance and its members with the resources and technical assistance needed to do so.

**QUERY:**

- How is strategic litigation and advocacy different from “ordinary” legal aid assistance?
- What would you say are the component “parts” or elements that go into effective strategic litigation?
- What would you say are the different “parts” or activities that make up an effective advocacy campaign?
- What obstacles can you see might exist to keep the strategic litigation initiative described from being effective?
- What challenges must be overcome to ensure that the complementary advocacy will have a positive impact?
- Assume the Supreme Court of Corbanesia ultimately rejects the case and others like it, foreclosing any possible judicial remedies for the time being. Did Justicia Global fail?
  - Is that the end of the advocacy strategy as well as the case?
  - What can Justicia Global and the Alliance do to move forward?
  - How does one measure “success” in the realm of public interest litigation and advocacy?

Keep this scenario in mind as you work through the rest of this Learning Module.
II. STRATEGIC LITIGATION AND ADVOCACY: DEFINITION, PURPOSES AND METHODS

a. Introduction to Strategic Litigation and Advocacy

What is Strategic Litigation and Advocacy?

“Strategic litigation involves an organisation or individual taking on a legal case as part of a strategy to achieve broader systemic change. The case may create change either through the success of the action and its impact on law, policy or practice, or by publicly exposing injustice, raising awareness and generating broader change. It is important that strategic litigation is used as one part of a wider campaign, rather than being conceived as an end in itself.” See Advocates for International Development, Short Guide - Strategic Litigation (2012), Supplement (Supp.) Part I at 3-9.

Strategic litigation is sometimes referred to as “public interest litigation” (Latin America, Africa) or “impact litigation” (United States). Here is a more nuanced definition from an Argentine NGO specializing in SLA:

“[Public interest] litigation in human rights seeks to generate an impact at the intersection of the legal and political spheres, building on the constitutional recognition of [those] rights and new procedural mechanisms for representing [social] interests. The assertion of strategic litigation in the judicial sphere with respect to “public interest” cases, as opposed to individual disputes, serves a number of purposes. One is to introduce topics into [public] debates on the social agenda. Another is to question the way that State policies are defined and implemented, as well as the content of those policies and their social impacts. Sometimes, when the State fails to act, [strategic litigation] seeks to activate decision making processes in the realm of public policy, or to generate the reform of the institutional and legal frameworks within which these policies are developed.” Centro de Estudios Legales y Sociales (CELS), LITIGIO ESTRATÉGICO Y DERECHOS HUMANOS. LA LUCHA POR EL DERECHO, Buenos Aires, Siglo XXI, 2008, page 17. (Translation from the original Spanish by Arturo J. Carrillo).

What is interesting about the second definition is that it makes reference to several important aspects of the national context within which CSOs engaged in strategic litigation and advocacy operate. Some of the contextual elements most relevant to our study of SLA are these:

- The constitutional protection of human rights
- The role of public debate around social issues
- The importance of public policies and the processes behind their definition, implementation and impacts
- The need for legal responses to both State conduct and non-action regarding the realization of basic rights
- The goal of legal reform.
Traditionally, strategic litigation and advocacy has been utilized by advocates around the world to address a wide range of civil and human rights issues in their respective countries. These include legal cases primarily directed at challenging (i) systematic State abuses of civil and political rights, or (ii) the denial of fundamental economic, social and cultural rights. Examples:

- Abuses by State security forces
- Discrimination (racial, gender, ethnic, sexual orientation, religious)
- Labor rights
- Immigrants rights
- Children’s’ rights
- Environmental rights
- Health rights
- Freedom of expression

What Purposes Can SLA Serve?

Generally, SLA seeks to advance the modernization and strengthening of democratic institutions and processes, especially those responsible for citizens’ rights, public policies, and the administration of justice.

Depending on the issues addressed, SLA may also seek to:

- Expand and/or define the scope of application of citizens’ constitutional and human rights with a given legal system;
- Raise public awareness of abusive practices by State or private third parties against vulnerable sectors of society;
- Promote legal, policy, or institutional reform;
- Prevent future human rights abuses;
- Generate greater transparency and accountability with respect to State conduct and misconduct;
- Provide redress to victims of human rights abuses, whether perpetrated by State actors or private third parties;
- Combat impunity and strengthen the Rule of Law.

QUERY: Which of these objectives did Justicia Global pursue in its campaign to assist migrant worker families in Corbania?

From meaning to mechanics. Now that we have defined what it is, and examined the goals it seeks to achieve, the question is how does strategic litigation and advocacy work in practice? To examine this question, we will look at each component part separately. First, we will examine strategic litigation per se, focusing on the legal means and methods it employs. Second, we will focus on the non-legal advocacy carried out in support of strategic litigation.
b. Strategic Litigation per se

In this section, we look at strategic litigation only. Regardless of the issue(s) addressed or the goals sought, all strategic litigation is made up of certain basic elements. These can be divided into two groups: substantive and procedural. Generally:

1. The substantive elements of strategic litigation are those that relate to the subject matter of the legal action;
2. The procedural elements are those that relate to the processes through which the litigation is carried out.

Substantive Elements of Strategic Litigation per se

➔ Case Selection Criteria: What Case Do We Bring?

Problem Identification and Issue Diagnosis. It is important to analyze potential issues carefully to determine the legal, social and political significance of any possible claim or case. More often than not, the issues identified will implicate fundamental rights. More on this below.

Define Your Objectives. Once you have identified the issues and rights implicated, what are the overall goals you seek to achieve in terms of the various purposes that strategic litigation and advocacy can achieve? See supra. Identify them, and use them to guide your case development and litigation strategy.

Finding the Right Case. A good case should have:
- Solid legal theory and reasoning
- Strong facts and good evidence
- Sympathetic and committed client/victim
- Potential for broad social, political and/or legal impact
- Potential to address/redress systemic as well as individual injustice(s) and effect change
- Minimal or manageable risk of negative or unintended consequences

Ensuring resources and expertise required for the litigation. Make sure adequate economic and institutional resources are available!

➔ Developing a Legal Strategy: A Template

The hallmark of strategic litigation is the use of legal remedies to define, expand or defend fundamental rights. These remedies can be domestic or international.
Domestic Law and Remedies. Most strategic litigation starts with an analysis of constitutional rights as they relate to the problem or issue(s) identified, as well as the extent to which those rights reflect international standards. Threshold questions are these:

1. **What rights are protected by the constitution?** To what extent has that protection been implemented or made effective through remedies in the domestic legal system?

2. Where are the gaps or deficiencies in existing law, jurisprudence or practice with respect to these rights?

3. To what extent are international human rights standards incorporated into the constitution or otherwise reflected in the rights protected by the constitution?

4. To what extent is international law a part of domestic law? Is the legal system monist or dualist?

5. What international human rights treaties has the State ratified? To what extent have these treaties been implemented by the legislature, the judiciary or otherwise?

6. What other statutes, laws, executive orders, or legal norms exist to give effect to the relevant fundamental rights identified? Who enforces them? Is there a human rights ombudsman in your country?

7. What previous efforts if any have been made to seek legal protection under the constitution and laws of the State? What appropriate legal remedies are available? How effective have they been?

International Law and Remedies. Depending on what part of the world you live in, and what international human rights treaties your State has ratified, you may have access to international justice procedures. These are divided into universal and regional systems.

The **universal** human rights system is made up of the various United Nations human rights bodies and procedures, which monitor States’ compliance with international human rights treaties, in particular, the **International Covenant on Civil and Political Rights (ICCPR)**. These include:

- The Special Procedures of the United Nations Human Rights Council (HRC), like the **Special Rapporteur on Freedom of Expression and Opinion**
- HRC Universal Periodic Review (UPR)
- Treaty Bodies such as the **Human Rights Committee**, which in some cases can receive individual petitions.
- See next section *infra* for further discussion of how to use relevant UN human rights bodies and procedures as part of a complementary advocacy campaign.

The regional human rights systems are based on regional human rights treaties that cover Europe, the Americas, and Africa. Each regional system has its own court system that oversees compliance by States party to the respective treaty, respectively:

- The European Court of Human Rights
- The Inter-American Court of Human Rights
- The African Court on Human and Peoples’ Rights

The important thing to know about international justice remedies is that they are no substitute for effective implementation of appropriate domestic remedies for violations of fundamental rights. Even if international justice remedies are successfully invoked, compliance, implementation and enforcement will still depend on the political will of State authorities.

Procedural Elements of Strategic Litigation *per se*

*Case Development Process: How Do We Go About Bringing a Good Case?*

The Issue and Case Development Process. Many experienced organizations and advocates begin by carrying out preliminary research or studies of problems involving basic rights that affect their societies. Or they build upon the research and studies conducted by others. Once a problem is diagnosed in this way, the next step is to find or build a case that can raise the legal issues identified judicially or administratively. This usually means doing outreach to help identify good clients with good cases (see Case Selection Criteria, *supra*).

Note that often the inverse happens: a problem or issue can be discovered through individual cases that come to the lawyers’ attention and highlight a new problem or issue of social importance. In these instances, the potential clients are already identified. Also, note that in the realm of Internet freedom, finding clients may not be as straightforward as with traditional human rights abuses.

Risk assessment and management. Depending on the legal, political and social conditions, all strategic litigation has the potential to cause unintended and even negative consequences. A good case development process anticipates such possibilities and strives to minimize or avoid them.

*Litigating the Case: Strategy and Good Lawyering are Paramount*

Have a Comprehensive Strategy. In addition to a strong case and good lawyering, an effective litigation strategy in this area will need to take into account the following factors:

- Clear objectives for the case and the advocacy as a whole
- Security issues and risk management
- Coordinated advocacy initiatives (more on this below)
- A communications/media strategy
- Mobilization of domestic and international CSOs who support your cause.
Good Lawyering Principles and Practices. At the heart of effective SLA are good lawyering principles and practices. Some of these practices may vary from country to country. But generally, a firm grasp on the basic skills of the legal profession -- good case management; ensuring ethical client representation; maintaining constructive relationships with judges, opposing counsel, the media, co-counsel, other allies, among others -- will be crucial.

Client representation and relations. The lawyers and their clients must be on the same page about the goals of the litigation and the desired outcomes. Attorneys have ethical duties to keep their clients informed of the progress of their case, and to consult them regarding major litigation and strategic decisions such as settlement offers or media initiatives.

Strategic Alliances are Key. Issue or cause based networks exist at the national and international levels to bring together like-minded organizations and advocates in a partnership of mutual support and coordination. They usually take the form of alliances or coalitions of CSOs, which allows the organizations to better leverage their resources and maximize their impact.

Now, with a view to setting up the next section, answer these questions:

- How did the Justicia Global lawyers design and implement an advocacy strategy to complement the strategic litigation?
- Who were the “targets” of the advocacy strategy?
- What goals did it have?
- What methods and means did it employ?
- What role did international advocacy play in the overall SLA campaign?

C. Advocacy in Support of Strategic Litigation

In terms of achieving systemic change, strategic litigation by itself is like boxing with one hand tied behind your back. To fully maximize the impact of your legal campaign, it is necessary to develop an advocacy strategy to complement and reinforce it. This will enhance the desired outcomes of positively influencing public opinion and policy makers and effecting lasting change to the benefit of vulnerable sectors of society.

Note that the goals of strategic litigation per se will overlap substantially with those of accompanying advocacy, though they may also differ in some respects. For example, using the Corbania scenario as a reference, litigation tends to focus on specific legal issues - recognizing citizenship rights -- while advocacy tends to encompass broader topics - the human rights of migrant workers generally.
Means and Methods of Advocacy in Support of Strategic Litigation:

- Fact-finding and documentation of abusive practices
- Publishing of public reports and analyses of abusive practices
- Media campaigns and communications strategy
- Increasing public awareness and education
- Political lobbying and engagement with government authorities
- Advocacy at the international level with international non-governmental (INGOs) as well as before inter-governmental organizations (IGOs)
- In the Internet freedom arena, multi-stakeholder initiatives (MSIs)

Effective SLA: Losing the Legal Battle but Winning the Policy War

To better understand the dynamic interrelationship between strategic litigation and advocacy, consider this experience from Chile:

The Public Interest Law Clinic of the Diego Portales University in Chile decided to advocate for the rights of persons living with HIV/AIDS. In particular, they claimed that under Chilean and international human rights law, it was unlawful for the State authorities to deny free diagnosis and access to medical treatment to people living with HIV/AIDS who could not afford it. Forming an alliance with a prominent NGO representing people with HIV/AIDS (Vivo Positivo), the University Clinic initiated a long-term process of bringing constitutional challenges to the practice of denying such access overseen by the Chilean Ministry of Health. In addition, they simultaneously requested precautionary measures from the Inter-American Commission on Human Rights to the same effect. They obtained favorable rulings from one court of appeals, although it was subsequently overturned by the Chilean Supreme Court, which ultimately rejected all the cases. Nevertheless, the comprehensive advocacy campaign implemented by the NGO and the Clinic, together with their proactive strategy of engagement with government authorities around the issue, led to significant legal reform and the eventual adoption of a new government policy that expressly granted all Chileans with HIV/AIDS the right to free diagnosis and medical treatment. Jorge Contesse & Domingo Lovera Parmo, Access to Medical Treatment for People Living with HIV/AIDS: Success without Victory in Chile, 8 SUR Int’l J. Hum. Rts. 143, 148 & n.24, 149, 151 (2008), see Supp. Part II at 3-31.

QUERY: Did the advocates in this scenario fail or succeed in their strategic litigation? Why or why not?

Strategic litigation and advocacy is not easy. Achieving social justice and change rarely is. In this Part, we examine the most common obstacles to effective strategic litigation per se, as well as a number of challenges involved in mounting a successful advocacy campaign. We also consider some of the possible disadvantages that must be weighed before making the decision to undertake long-term SLA.

Consider the examples of the types of obstacles, challenges and disadvantages associated with SLA outlined below. After you have done so, revisit the following questions in relation to the practice scenario in Part I:

♦ Which obstacles to successful litigation might arise in the Corbania scenario from Part I, and why?
♦ What possible challenges do you see to the success of the advocacy campaign in that scenario?
♦ Think about the possible disadvantages of SLA in that scenario. Why do you think the Justicia Global lawyers decided to proceed anyway?
♦ What measures or steps could the JG lawyers and other activists have taken to anticipate these types of problems and minimize their potential impact?

a. Common Obstacles to Effective Strategic Litigation per se may include the following:

♦ Lack of resources, institutional capacity, or expertise
♦ Substantive deficiencies in the laws protecting fundamental rights
♦ Inadequate legal remedies for abuses of those rights
♦ Denial of access to justice when abuses occur
♦ Delays in the administration of justice
♦ Weak or non-existent rule of law; ineffective legal remedies
♦ The lack of an independent and impartial judiciary
♦ The lack of other oversight mechanisms or jurisdictions
♦ Lack of enforcement of positive decisions
♦ Public animosity and resistance to work of advocates who question State conduct or policies
♦ Threats, intimidation or retaliatory acts in relation to the litigation
♦ Inadequate case development and management
♦ Difficult or deteriorating client relations
♦ Lack of evidence
b. Challenges to Successful Advocacy Campaigns in Support of Strategic Litigation may include:

- Lack of access to government officials and policy makers
- Lack of transparency in government decision and policy making
- Lack of political will on the part of government officials to recognize or address the problem
- Official corruption
- Lack of public awareness of a problem or the issues identified
- Restrictions on the free flow of information
- Restrictions on the freedom of expression and opinion
- Lack of a free and independent press
- Restrictions to freedom of association or assembly
- Difficulties in forming and maintain alliances and coalitions of like-minded CSOs
- Lack of resources and institutional capacity at any level
- Questions of legitimacy in the representation of victims of abuses
- Widespread public hostility to certain topics

c. Some of the Disadvantages of SLA to be considered are these:

- **SLA is costly** and can be a huge strain on resources. In the case of litigation, it may also result in an unsuccessful applicant having to pay the legal costs of the opposing party.
- By its nature, any kind of litigation is uncertain and therefore does not guarantee a successful outcome for the applicant or the sectors represented.
- Public interest litigation can sometimes lead to bad outcomes and even make “bad law” if not carefully thought through. **Risk management is essential.**
- An unsuccessful case or initiative may generate **negative publicity** that may be damagingly channeled towards the organization or claimants personally.
- High profile advocacy campaigns can backfire and create hostility among the public if conditions are unfavorable. This can **lead to backlash** on a number of fronts, and even attacks on advocates and their clients.
Recall Meena, the young woman from your Freedom of Expression Diagnostic Test.

Nineteen-year-old Meena lives in Qaarth, a village near the coast in the democratic Southeast Asian nation of Gingines. She regularly makes the trek into the city to visit one of the many Internet cafes there. Her favorite pastime is to review and update her personal blog, which often addresses different kinds of issues facing young people in her country. Gingines is a predominantly Muslim country. Meena’s family belongs to the Christian minority, though she herself practices no religion.

Last month, she posted an entry on her blog in which she quoted two European religious scholars who commented on the similarities and affinities of monotheistic religions, such as Islam and Christianity. She added her own reflection on whether atheism should be treated as a religious belief or not by the State. After numerous people complained about her post, local prosecutors last week brought charges against her under Article 331 of the Ginginean Criminal Code, which prohibits “religious defamation,” or blasphemy. They claimed that publishing her online reflections on religion for the world to see had the effect of “undermining” the main official religion of Islam by calling into question its “core principles.” She was placed under house arrest, and faces up to three years in prison.

Meena and her family have come to you and your organization for help because you have successfully represented persons accused of defamation before. In fact, this is the fourth case that has come to you in a less than a month involving students and young journalists writing on social topics online, two others of which involved religion defamation. As far as you know, there has never been a constitutional challenge to Article 331 before, though you are not sure why. Probably it has to do with the strong public support for its application.

In fact, Ginginean society is divided on this issue, as are the main political parties. On the one hand, conservative Muslims and Islamic organizations represent an important percentage of the population. They have been outspoken about the need to maintain strict controls on the way religion is practiced and discussed in public, so as not to deviate from or offend the one true Faith. On the other hand, progressive forces looking to promote a more pluralistic and tolerant Gingines have been gaining strength, especially as the country’s educated, tech savvy middle class rapidly expands. Judges belonging to the former sector dominate the Ginginean judiciary, especially at the appellate level and in the Supreme Court. However, recent modernization efforts have increased the number of younger, more cosmopolitan magistrates in the local and lower regional courts.

You are called to a meeting of your colleagues to discuss this situation and how best to respond to Meena’s family.
V. BIBLIOGRAPHY AND INTERNET SOURCES

Bibliography


Internet Resources

INTERIGHTS Strategic Litigation Page: http://www.interights.org/our-cases/index.html

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