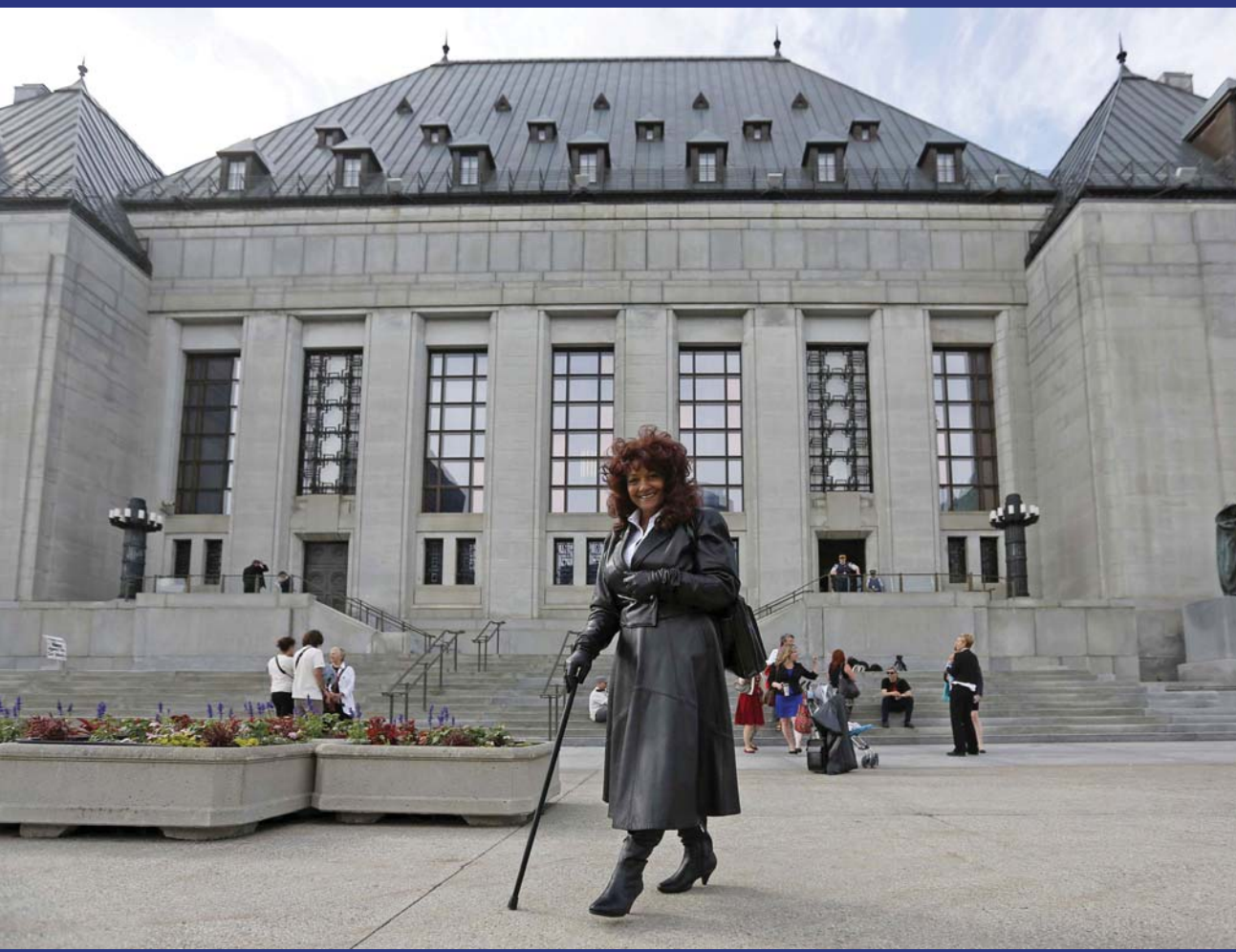
Advancing Public Health through Strategic Litigation



LESSONS FROM FIVE COUNTRIES

OPEN SOCIETY FOUNDATIONS

Advancing Public Health through Strategic Litigation

Lessons from Five Countries

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Cover photo: Chris Wattie | REUTERS | Terri-Jean Bedford, an applicant challenging Canada's sex work laws, leaves the Supreme Court of Canada following a hearing in June of 2013.
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Acknowledgments

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Introduction

The law has a critical role to play in advancing public health in general, and in promoting the health of marginalized populations in particular.[1] The Global Commission on HIV and the Law, for instance, has documented the positive role that strong legal protections can play specifically in addressing HIV. In its view, with interventions for an enhanced legal and policy environment, there could be one million fewer HIV infections than if no action were taken to enhance the current legal and policy environment.[2] The World Health Organization (WHO) and the United Nations (UN) have highlighted the importance of law for positive health outcomes for women, adolescents, lesbian, gay, bisexual and transgender (LGBT) populations, refugees, migrants and persons with disabilities.

What is more, laws focused on protecting the rights of marginalized populations lead to greater access to prevention and treatment services for a greater number of people and benefit public health.[3] For example, with respect to HIV, the UN Secretary General Ban Ki-moon has stated,

> In countries without laws to protect sex workers, drug users and men who have sex with men, only a fraction of the population has access to prevention. Conversely, in countries with legal protection and the protection of human rights for these people, many more have access to services. As a result, there are fewer infections, less demand for antiretroviral treatment and fewer deaths. Not only is it unethical not to protect these groups; it makes no sense from a health perspective.[4]

However, many countries have failed to develop and enforce legal protections that could improve public health outcomes. Indeed, some countries have laws that undermine public health outcomes. In some countries, national laws fail to provide for and protect core rights, including the right to health and freedom from discrimination. Moreover, some countries have laws that criminalize marginalized populations and drive them underground, increasing their risk of poorer health outcomes and limiting the effectiveness of public health programs. Even when good laws exist that could protect health, they are not always enforced or implemented.

Strategic litigation is a test of the rule of law and its proper implementation. It contributes to both the construction and consolidation of the rule of law. It can also prompt a more equitable interpretation of certain laws that may have a discriminatory impact. As such, strategic litigation is a key tool that organizations and individuals can use to strengthen and change laws to ensure better public health outcomes.[5] However, it must be noted that strategic litigation is dependent on the political and legal environment in which it is used and thus, both should be assessed when determining the efficacy of strategic litigation.

In this report, we define strategic litigation expansively—it is litigation with an intended impact beyond a particular case to influence broader change at the level of law, policy, practice, or social discourse.[6] This definition recognizes that change is not always aimed at the level of law or policy, but sometimes at enforcement and practice or raising the visibility of an issue and changing attitudes.

What qualifies as strategic is context-specific—the same case may be strategic in one context but not in another. This requires an analysis of the specific legal landscape, as well as the broader social and political context. As such, strategic litigation is generally most effective if undertaken as an integral component of a broader advocacy strategy. There is a reciprocal relationship where litigation can create an opening for other advocacy, while other advocacy can also influence the context in which the litigation takes place.

Despite the potential of strategic litigation to secure improved public health outcomes, it remains an underused tool throughout the world. This is the result of a number of factors:

- **Health is not seen as a legal matter:** Some do not see laws as impacting health outcomes, instead seeing health outcomes as issues better addressed by medical practitioners and public health experts. As a result, strategic litigation is sometimes overlooked as a means of addressing health-related concerns.
- **Health-related litigation is viewed as the sole provenance of lawyers:** Human rights activists as well as individuals who have suffered human rights abuses often perceive litigation as the sole provenance of lawyers and are unaware of

its ability to impact health outcomes. Further, potential litigants are skeptical of the litigation process, wary of the length of time litigation can take, concerned about the possibility of exposure of one's private information and fearful of court processes, such as cross-examination. Though lawyers are integral to litigation as this publication shows, strategic litigation requires the involvement of civil society organizations, community organizations and other activists.

- **Necessary expertise is out of reach:** Strategic litigation that aims to strengthen public health outcomes often requires not only legal expertise but also scientific and medical expertise. At times, litigants and their advocacy partners do not have ready access to—or relationships with—the medical, public health, scientific or legal experts they need to develop their case effectively. Moreover, medical experts are often unwilling to participate in litigation particularly if it requires that they testify or provide other evidence that pits them against their colleagues or the broader medical community within which they operate.
- **Lack of access to funding:** Strategic litigation requires a sustained monetary commitment since it can take years to undertake and complete. Activists and advocacy organizations often lack access to multi-year funding and thus do not consider strategic litigation a viable option.
- **Litigation is seen as too adversarial:** Strategic litigation is generally carried out in an adversarial context with the government in the role of defendant. As a result, civil society organizations that hope to secure government support for their desired outcomes are fearful of antagonizing state bodies by bringing legal claims against them.
- **Difficulty in finding plaintiffs:** In most countries, there are restrictions on who can challenge a particular law, policy or practice. Usually it is limited to individuals who have been directly affected by the law, policy or practice being challenged. In such jurisdictions, litigation may be underused because finding someone who is directly affected and who is willing to undertake the litigation process can be difficult, especially in cases involving the violations against marginalized populations. Further, plaintiffs may fear having their personal medical information made public or antagonizing the very doctors on whom they are relying for care.
- **Legal structures and protections are underdeveloped.** In some countries, lawyers and the rule of law have so little role in shaping policy or regulation that litigation, even if strategic, may not be an effective tool in advancing advocacy, health or social change.

This report seeks to address these factors and explore how strategic litigation can best be harnessed as an advocacy tool to advance public health, and particularly the health of marginalized and socially excluded populations. It also aims to distill and share key lessons learned by the Open Society Foundations and our partners in carrying out this work over nearly a decade. While many of these lessons apply to all types of strategic litigation, others are relevant specifically to strategic litigation that concerns health rights.

In identifying these lessons, this report presents six strategic litigation case studies from different parts of the world. The case studies do not intend to convey best practices; they focus on various health rights issues and the concerns of the populations affected by each. These case studies both

(i) detail the specifics of the context in which the litigation was carried out; and

(ii) draw out general principles and lessons that can help inform other health-related strategic litigation efforts.

We hope this analysis and guidance will prove helpful both for practitioners interested in pursuing this work and for funders concerned about justice or health.

The remainder of this publication is organized as follows:

- Methodology
- Factors to consider when deciding to undertake strategic litigation
- Potential benefits of health-related strategic litigation
- Limitations and risks of health-related strategic litigation
- Six health-related strategic litigation case studies
- Key tactics to enhance public health strategic litigation

Methodology

This report is based on a desk review of written and audio materials, including academic papers, public statements and presentations, legal filings and decisions, notes from relevant meetings, and publications by practitioners, funders and international agencies. The findings also draw on facilitated discussions with OSF staff and partners, as well as interviews with key partners and lawyers regarding particular cases and their use of strategic litigation more broadly. These interviews covered litigation strategy and impact, the organization and implementation of complementary advocacy activities during litigation, issues arising in the implementation of particular judgments, and other challenges and lessons arising from strategic litigation.

The case studies chosen were selected to cover different countries, a range of health rights issues, and a variety of marginalized populations. Five experts in the fields reviewed a draft of this document, and their feedback was incorporated to strengthen the content.

All sources used in preparing this report are listed in the endnotes.

Factors to Consider When Deciding to Undertake Strategic Litigation

Strategic litigation generally entails a multi-year commitment on the part of those who undertake it and those who fund it. When determining whether to pursue or support strategic litigation, the following factors should be taken into account:[7]

- **Nature of the problem:** How severe and widespread is the problem? Does the community affected by the problem view it as a priority issue? How well documented is the problem? Is the solution to the problem something that can be ordered by a court? What other advocacy has been conducted on the issue?
- **Identifying the goals of the litigation:** What does the organization undertaking the litigation hope to achieve? What do its partners and the affected population hope to achieve? Are these goals well aligned, and does the litigation strategy accord with them? Would the litigation further the organization's broader advocacy aims?
- **Adequacy of resources available:** How long is the litigation expected to take, and what are the cost implications of this estimate? Would it be cost-effective to undertake litigation and implementation of any judgment?
- **Potential partnerships with community-based groups and social movements:** Are there community-based groups and social movements willing to partner with the organization undertaking the litigation? Do they have the capacity and resources needed to contribute to such a partnership? If not, what additional capacity and resources might they need?

- **Potential impact of the litigation:** What are the potential legal, policy and social impacts of the litigation? What impact might the litigation have on the clients to the litigation as well as the broader community affected by the problem? Is there a plan to prevent unwanted exposure and harm to the client parties and their families? How might the litigation shift the discourse at national or regional levels?
- **Remedy:** What remedy should be sought? Is there potential to address systemic issues? Does this remedy reflect the priorities of the affected population? Has this remedy been sought before in this particular forum? How likely is it that the government and other relevant stakeholders will be able to implement the remedy? How can the implementation of a judgment be monitored?

Potential Benefits of Strategic Litigation

The case studies and desk review undertaken for this report show that strategic litigation can have important positive health outcomes. This is particularly the case where litigation is undertaken as part of a broader advocacy plan. Potential benefits of health-related strategic litigation include the following:

1. Strengthening grassroots movements

Strategic litigation can strengthen grassroots social movements by mobilizing individuals and communities affected by the issues at play in the litigation. Where these issues—or the populations affected by them—are stigmatized or criminalized, there may be limited opportunities for building such movements. Strategic litigation and complementary advocacy activities can help carve out the space and generate the momentum needed for individuals and communities to organize a powerful social movement or strengthen existing ones.

In 2010, the trial of a man and his transgender partner in Malawi who sought to marry helped mobilize and solidify the country's LGBT movement.[8] Prior to the trial, which included a constitutional challenge to the criminalization of sodomy, the only LGBT group in Malawi—the Centre for the Development of People (CEDEP)—had worked to raise awareness of the rights applicable to the LGB community and the health services available to them, but had not yet carried out any significant advocacy campaigns and were not well known among broader civil society in the country. Following the trial and the media engagement accompanying it, CEDEP was able to build

a strong LGB movement and connect with other civil society organizations in Malawi. As a result, CEDEP has shown itself well placed to speak out not only on issues affecting LGB persons but also on general issues concerning human rights and the rule of law.

Strategic litigation can also help strengthen existing social movements. In Canada, the *Bedford* case challenging the criminalization of sex work–related activities helped foster a more cohesive and nationwide sex worker movement. Prior to the litigation, many Canadian sex worker communities banded together in their respective cities but did not manage to coordinate their efforts on a national level. This changed over the course of the *Bedford* litigation. The powerful sex worker movement that resulted from this coalescence continues to collaborate on advocacy activities and responses to government action from coast to coast.

Strategic litigation helped strengthen these grassroots movements because of the advocacy opportunities and media interest that typically attend such cases. Media interest in strategic litigation tends to intensify at key moments, such as when a lawsuit is first filed, both during and immediately after the trial or hearing, and when a judgment is handed down. As key dates are generally known in advance, organizations can plan their advocacy activities accordingly. Court cases provide human stories about concrete events around which communities can mobilize, generating momentum and strengthening social movements.

2. Raising broader public awareness

Strategic litigation attracts media attention. This can assist in drawing attention to the issues at play, as well as of the communities that the issues affect most strongly. Organizations that integrate media engagement into their strategic litigation and broader advocacy activities typically find a positive increase in public attention to their priority issues, both as raised in the litigation and beyond. In Namibia, dozens of women living with HIV were sterilized without their consent in public hospitals. Three of them challenged the practice in the courts. One of the key outcomes of the litigation has been an increase in the awareness of the practice of forced sterilization throughout Africa.

Strategic litigation can also raise rights awareness within communities affected by the issue being litigated. Prior to litigation on the forced sterilization of women living with HIV in Namibia, even civil society organizations and activists were unaware of the practice and many women who had been subjected to it did not know they had the right to refuse it. Following this successful case, dozens of women living with HIV in Namibia and elsewhere in Africa have come forward to report their experiences with forced sterilization, having learned that it amounts to a serious human rights violation.

3. Positive impact on law, policy or practice

Strategic litigation can also obviously result in achieving the positive change in or implementation of law, policy or practice at which it aims directly. For instance, the Constitutional Court of South Africa decision in *The Minister of Health and Others v Treatment Action Campaign and Others* requiring the government to provide medication to prevent the transmission of HIV from mother to child changed the government's policy of denying pregnant, HIV-positive women necessary medication.

In addition, in some jurisdictions strategic litigation can result in a judgment that can be relied on to address other health rights violations. For example, in banning the forced sterilization of women living with HIV, the Supreme Court of Namibia clarified the concept of informed consent under Namibian law. This definition is a new and powerful tool that activists can use in seeking redress for other violations of informed consent in the country.

4. Positive impact on health

Strategic litigation on health-related issues can concretely strengthen health outcomes. The Constitutional Court of Colombia, for instance, issued a decision in 2006 ruling that abortion would be permitted when the mother's life was at risk, and in cases of incest and rape.[9] Prior to the ruling, Colombia had a complete ban on abortion. Though access to abortion even in the limited circumstances prescribed by the Court remains difficult, the decision means that women now can access abortion in more circumstances than before.[10]

5. Capacity-building of NGOs

The strategic litigation process can build the capacity of non-governmental organizations—and especially grassroots community-based organizations—to use litigation as an advocacy strategy and to engage with media and other stakeholders. In addition, it can increase the legal and rights literacy of organizations that may have been using human rights law in a somewhat more informal or general way.

6. Building coalitions and partnerships

Strategic litigation can build coalitions among both like-minded and unlikely allies, as well as fostering relationships between legal and human rights practitioners and with medical and other experts. In Uganda, a series of cases aimed at addressing maternal mortality resulted in a coalition of more than 100 local and international organizations working to address maternal mortality in the country. The coalition continues to

coordinate its activities on this issue long after the issuance of a number of favorable judicial decisions.

7. Empowering marginalized populations

The strategic litigation process can offer marginalized groups the opportunity to dispel pernicious myths about them, and to overcome popular or internalized assumptions that they are undeserving of rights protections. In *R v Kenya National Examinations Council*, a case brought by a transgender woman, the litigation had an empowering effect not only on plaintiff Audrey Mbugua Ithibu but on other transgender persons in Kenya. This is because of the inspiration they could draw from her filing the case, in making submissions as to her lived experiences, in asserting her rights in court, and in having the court affirm those experiences and rights.[11]

Broadly, strategic litigation can solidify the experiences of marginalized communities by converting them from merely subjective claims to objective truths affirmed by judicial recognition. For marginalized communities as well as the broader public, channeling these experiences through the evidentiary processes of court proceedings and having them culminate in a positive decision can transform their story into a historical record. Following the forced sterilization case in Namibia, the government's steadfast denial of the practice was forced to give way because of the plaintiffs' testimony as to their lived experiences, the corroboration of this testimony by medical experts, and the judiciary's acknowledgement and confirmation of their experiences.

Lastly, when strategic litigation is conducted in collaboration with affected communities, it can imbue or restore these communities with dignity and agency. Often, it can also help organizations identify potential leaders within these communities. In a challenge to a ban on OST, the plaintiffs have been motivated and empowered by their involvement in the case to carry out further advocacy activities on the rights of people who use drugs, despite the significant harassment they have faced because of their activism.[12]

8. Motivating other branches of government to take action

Strategic litigation can create a pressure point that spurs political change. For instance, when the law reform commissions of Tanzania and Uganda recommended changes to protect women's equality but the governments of those countries failed to take action, advocates took legal action to apply pressure on their parliaments to heed the commissions' proposals.

Positive judgments in individual strategic litigation cases can also pressure governments into making broad policy changes. For example, the favorable judicial decision in Namibia's forced sterilization case strengthened the bargaining position of

women living with HIV in their discussions with the Namibian government about the forced sterilization of women who did not participate in the lawsuit. The judgment made clear that at a minimum some women living with HIV had been forcibly sterilized in violation of the law. Thus, in negotiating with the government, women living with HIV had more support for their position that the government should investigate the claims of other women.

Finally, strategic litigation typically obliges governments to respond on the record to specific policies and practices at issue in the case. This can be useful in pressuring governments to change such policies and practices even if the litigation itself is unsuccessful.

9. Strengthening the rule of law and facilitating access to the courts:

Another positive outcome of strategic litigation is that it can strengthen the rule of law by promoting the accountability of state actors and the enforcement and implementation of rights-protecting laws so that they are meaningful in practice. Furthermore, strategic litigation conducted in collaboration with marginalized groups can promote these communities' access to the courts and demystify the judicial process as they participate in the litigation and attend court hearings.

Limitations and Risks of Strategic Litigation

Though strategic litigation can bring about many positive outcomes, it is subject to certain limitations and risks. These limitations and risks should be carefully considered to the extent possible before undertaking litigation, and they should be continually reassessed over the course of the litigation process.

Limitations

The limitations inherent in strategic litigation can include narrow rules regarding who has standing to bring a claim, and difficulties in the implementation of favorable judgments.

Standing: The standing rules of many countries and international and regional human rights systems often restrict those who can bring claims to those individuals who have been specifically affected by the impugned law, policy or practice. As such, lawsuits generally cannot be brought by organizations representing marginalized populations affected by the law, policy or practice in question. This means in practical terms that advocacy organizations must identify particular individuals who have been so affected and ensure those individuals are interested in bringing a legal action. This includes ensuring the individuals are aware both of the potential toll the action might take on their personal life and of the long-term commitment required on their part. This can

be difficult to do in the context of health-related cases. For example, to challenge laws permitting marital rape, a married woman who has been raped by her husband would have to bring her case to court. Finding a married woman willing to take legal action against her husband is obviously difficult, and as a result such laws remain in force in some countries.

Limitations due to implementation: In addition, the implementation of positive judgments cannot be assumed and should be planned for from the beginning of the litigation process. Implementation of judgments can be very difficult and require significant resources that are not always readily available. For example, the challenge to Kenya's *Anti-Counterfeit Act* (*ACA*) resulted in a strong judicial rebuke to the government's denial of access to generic medications to people living with HIV. The Kenyan government, however, has failed to substantively change the definition of 'counterfeit' under the *ACA*, and the reality remains that people living with HIV may still be unjustly denied access to affordable medications.

Risks

Strategic litigation can also involve a number of risks. These include potential harm to clients and the affected population, the possibility of a negative legal outcome, and certain unintended and unexpected consequences of litigating. While these risks can be minimized, they must be thoroughly considered before deciding to litigate.

Risk of violence: Strategic litigation can put clients and other members of the population affected by the issue litigated at significant risk of violence and harassment. For instance, three individuals who have challenged a ban on OST have faced significant harassment, as have organizations working with people who use drugs.[13] To counter risks of this sort, clients and affected communities should be made aware of the potential harm they may suffer as a result or byproduct of the litigation, and steps should be taken to the extent possible to minimize danger to them and provide legal and other protections from reprisal where possible. These risks should be assessed and addressed both prior to and throughout the litigation process.

Possible negative judicial outcome: Of course, the legal outcome of strategic litigation is never certain, and thus there is always the risk of a negative result. This risk can be mitigated to some extent by assessing the likelihood of a negative outcome in advance and planning for next steps in such an event. It also bears noting that even negative

legal outcomes can help advance an issue in positive ways. For example, in Malawi, the criminal prosecution of two men who wished to marry resulted in both individuals being sentenced to 14 years in prison with hard labor. However, the media and other advocacy related to the case have resulted in a stronger lesbian, gay and bisexual (LGB) movement in Malawi and greater public discussion of LGB rights, such that LGB advocates may be better placed to make their case the next time a case involving LGB rights surfaces.

Possible negative consequences for affected population: Finally, litigation can also bring about unintended and unexpected negative consequences for the affected population and their health outcomes. For example, in the challenge to the forced sterilization of women living with HIV in Namibia, the litigation resulted in medical personnel requiring women who wish to be sterilized to provide a signed affidavit before they could undergo the surgery. This has resulted in obstructing many women from accessing a medical procedure to which they should have ready access when desired.

Case Studies

Namibia: Confronting the Forced Sterilization of Women Living with HIV

> There can be no place in this day and age for medical paternalism when it comes to the important moment of deciding whether or not to undergo a sterilization procedure. The principles of individual autonomy and self-determination are the overriding principles towards which our jurisprudence should move in this area of the law.[14]
>
> —Chief Justice Peter Shivute
> Supreme Court of Namibia

On November 3, 2014, the Supreme Court of Namibia affirmed in *Namibia v LM and Others* that three women living with HIV had been subjected to unlawful sterilization in violation of their rights. In reaching its decision, the Supreme Court noted that "none of the [women] gave informed consent because they were in varying degrees of labour and may not have fully and rationally comprehended the consequences of giving consent for the sterilization procedure."[15]

This Supreme Court decision was the result of over six years of work attempting to address the forced sterilization of women living with HIV in Namibia. Starting in

2008, the Namibian Women's Health Network (NWHN) and its partners implemented a broad advocacy plan aimed at ending this practice and providing redress for those women who had been subjected to it. This advocacy included publishing a report documenting the discrimination, stigma and abuse that women living with HIV faced in accessing health care services in Namibia's public hospitals, including forced sterilization.[16] In this report, women described

(i) being given numerous papers to sign while they were in labor, including consent forms for sterilization;

(ii) being told they had to consent to sterilization if they wished to obtain access to other medical procedures; and

(iii) being sterilized while undergoing a caesarean section, only to learn later—upon attempting to access contraception—that they had been subjected to the procedure.

The advocacy plan also included the submission of a report providing all relevant information about the forced sterilization of 13 women at public hospitals in Namibia to the Deputy Minister of Health and Social Services, requesting among other things that he investigate the documented cases, hold accountable those found responsible, and provide training on informed consent to the country's public health care workers. Civil society organizations also engaged with the media prior to litigation in order to raise public awareness of the practice and to inform women living with HIV of their right to refuse sterilization.

Despite these measures, the Namibian government claimed the women in question had signed the appropriate consent forms and that the doctors were therefore cleared of any wrongdoing. The government further refused to train its health care workers on obtaining informed consent for sterilization procedures.

> They were in pain. They were told to sign [consent forms for sterilization]. They didn't know what it was. They thought that it was part of their HIV treatment. None of them knew what sterilization was, including those from urban areas, because it was never explained to them.
>
> —Jennifer Gatsi Mallet
> Director, Namibian Women's Health Network

Litigation

In light of the government's refusal to address the issue, a strategic decision was made to litigate three individual cases. The plan was to persuade a court to rule decisively that a number of women had been unlawfully sterilized.

The case was filed in the High Court of Namibia in 2008. The plaintiffs argued that subjecting them to forced sterilization violated their common law rights to bodily and psychological integrity, their constitutional rights to life, liberty and dignity, and their constitutional rights to found a family and to be free from cruel, inhuman or degrading treatment. They also argued that subjecting them to forced sterilization because of their HIV status violated their constitutional rights to be free from discrimination.[17] The plaintiffs requested monetary damages.

After a delay resulting from procedural objections raised by the Namibian government, the trial eventually concluded in January 2011. The plaintiffs were represented by a well-respected senior advocate, who has since been appointed to the bench.[18] All three women testified about their experience, supported by the testimony of a senior medical doctor who had examined them.

On July 30, 2012, the High Court ruled that all three women had been subjected to sterilization without their informed consent, in violation of Namibian law. In its judgment, the High Court outlined what was required for informed consent and held that all patients should be informed of the advantages and disadvantages of all contraception methods, including sterilization. The High Court rejected the plaintiffs' discrimination argument, however, finding that there was insufficient evidence that they had been subjected to the procedure because of their HIV status. The government appealed the decision to the Supreme Court of Namibia, which affirmed the High Court's ruling.

Advocacy

As mentioned above, this litigation formed part of a broader and multi-faceted advocacy strategy. This advocacy took place at community, national, regional and international levels, and was led by the NWHN and its local and regional partners.

At the community level, local civil society organizations focused on raising awareness among partner organizations and women living with HIV about forced sterilization and the rights-based arguments for putting a stop to it. This resulted in mobilizing many women living with HIV to pack the courtroom during the trial and appeal hearing. It also spurred NWHN's partner organizations to keep their members apprised of the litigation and to provide support to the three women at its center.

At the national level, organizations worked with traditional leaders to garner their support and raise awareness of forced sterilization among their communities. They also prepared and circulated petitions for submission to the Ministry of Health

and Social Services, and organized sit-ins at public hospitals and marches to the courthouse.

At the regional level, organizations submitted letters to the Gender Unit of the Southern Africa Development Community as well as the Special Rapporteur on the Rights of Women in Africa, to alert them of the practice of forced sterilization in Namibia. They further sensitized Commissioners from the African Commission on Human and Peoples' Rights on the issue, which resulted in the Commission querying the Namibian government about how it was addressing the issue. Allies also publicly raised questions about how Namibia was addressing the forced sterilization of women living with HIV at the Africa Dialogue of the Global Commission on HIV and the Law, which was attended by the Deputy Minister of Health and Social Services. This advocacy resulted in the Commission's issuance of a resolution condemning the practice of forced sterilization throughout Africa.[19]

At the international level, a broad coalition of organizations submitted letters to the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; the Special Rapporteur on Violence Against Women, Its Causes and Consequences; and the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. In addition, local and regional organizations made a submission to the United Nations Human Rights Committee raising the issue of forced sterilization.[20] Most recently, the Southern Africa Litigation Centre submitted a parallel report to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), highlighting the issue.[21] As a result, the CEDAW Committee has urged Namibia to adopt legislative and policy measures that clearly define the requirement of free, prior and informed consent with respect to sterilizations, to conduct a study on the extent of the problem, and to adopt specific measures including investigating past cases of forced sterilizations, holding perpetrators accountable, and compensating those who suffered human rights violations.[22]

Lastly, civil society organizations also engaged in a broad media campaign to raise public awareness and garner public support for the case. In particular, they engaged local and international journalists to sensitize them on the problem, issued press releases, placed opinion pieces in regional and international media outlets, and held press conferences. Civil society organizations also used social media to disseminate regular updates on the court case, including tweeting from the courtroom and publishing regular updates on a blog dedicated to the issue.[23]

Impact and Reflection

This litigation had an enormous impact in Namibia and across Africa, helping raise public awareness of the issue and empowering women living with HIV to challenge the

practice of forced sterilization. Prior to 2008, women living with HIV in Namibia were largely unaware that sterilization without their informed consent violated their legal rights. Since the litigation, more women have come forward to report their subjection to the practice and to seek redress for the violation, both in Namibia and in other countries in Africa. In Kenya, for example, a group of women living with HIV and civil society organizations have sued medical institutions and the government for forced sterilization.[24] Organizations in Lesotho, moreover, have published a report documenting the forced sterilization of women living with HIV, while in Swaziland, cases are expected to be filed to challenge the practice.[25]

The Namibian litigation has also resulted in strengthening NWHN and the grassroots movement of women living with HIV by giving them a clear focus point around which to mobilize and organize.

The impact of the litigation on the health outcomes of women living with HIV, however, has been mixed. The Supreme Court's decision arguably addressed women's fear of accessing health care by affirming that existing protocols on acquiring informed consent for sterilizations in public hospitals were inadequate. However, a number of organizations report that since the litigation, medical personnel at public hospitals have asked women who seek sterilization to draft and sign an affidavit to that effect as a prerequisite to the procedure. The requirement that these women sign the affidavit before the police or a notary is an insurmountable hurdle for many women seeking the operation as they are wary of the police and do not have the money to pay for a notary.[26]

Further, despite the litigation's positive outcome, the Namibian government has yet to agree on damages for the three plaintiffs and to address the claims of dozens of other Namibian women living with HIV who were subjected to forced sterilization. Organizations continue to use a variety of advocacy strategies to pressure the government to provide appropriate redress, provide appropriate training to medical personnel, and implement policies regarding informed consent in public hospitals.

Finally, the plaintiffs sought only monetary damages. The difficulty in addressing the broader issue of sterilization of HIV-positive women may have been alleviated had a more comprehensive remedy been sought from the court and been granted.

Canada: Decriminalizing Sex Work

> This is where we spend one day in front of nine judges, telling them in no uncertain terms that these laws are a matter of life or death for [sex workers]... We're going to go in with a very clear message that our clients have a clear vision for social change, but it requires legal change. It requires that the law support them, that their rights be valued...
>
> —Katrina Pacey
> Executive Director, Pivot Legal Society

In many countries, sex workers routinely face numerous human rights violations due to the stigma they face and the application of the criminal law against them. While Canada has never fully criminalized the sale of sex, it did have longstanding laws criminalizing most facets of sex work, including the keeping of a bawdy house, living on the avails of prostitution, and communicating in public with respect to a proposed act of prostitution. Canadian sex workers identified these laws as hampering their ability to work safely and to take measures to protect themselves.[27]

For decades, civil society organizations—including organizations led by sex workers—sought to change these laws using a variety of advocacy strategies. These included documenting violations and publishing reports on the impact of the criminal law on sex workers, and lobbying the Canadian government to decriminalize sex work by making submissions to relevant government agencies—among other activities.[28]

Lobbying the Canadian government to repeal these laws failed, however, as no political benefit flowed for Members of Parliament (MPs) who supported decriminalization. In view of these limitations, the Downtown Eastside Sex Workers United Against Violence Society (SWUAV)—a sex worker–led organization—and former sex worker Sheryl Kiselbach sought to challenge key sections of the *Criminal Code of Canada* in the courts. To bring their case, they retained Pivot Legal Society (Pivot), a non-profit legal organization.

> The political process failed to actually address the laws, and it became clear that a response from the courts was going to be necessary to actually achieve change.
>
> —Elin Sigurdson
> Member of Pivot's legal team

Kiselbach and SWUAV argued that the impugned provisions violated sex workers' freedom of expression and association, their right to equality before the law, and their rights to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms* (*Charter*). The Canadian government first countered these arguments, however, by contending that Kiselbach and SWUAV lacked the legal standing necessary for them to challenge the provisions, as they themselves were not in any danger of being prosecuted for violating key sections of the *Criminal Code*.[29]

While Kiselbach and SWUAV were addressing the access to justice issues, the Ontario Superior Court of Justice heard arguments in *Bedford et al. v Attorney General (Canada)*. In this case, Terri-Jean Bedford, Amy Lebovitch and Valerie Scott—one current sex worker and two former sex workers who wished to return to the profession—challenged ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code*. The Ontario Superior Court of Justice issued its ruling in the matter on September 28, 2010, striking down all of the impugned provisions.[30] The Canadian government appealed.

Litigation

SWUAV, Kiselbach and Pivot sought and obtained leave to intervene as *amicus curiae* in *Bedford* when it was appealed to the Court of Appeal for Ontario and the Supreme Court of Canada, on the basis that it raised the same issues as their case.

Bedford's argument focused on the fact that the impugned criminal law provisions significantly harmed sex workers' life and physical safety and were thus unconstitutional. They provided detailed evidence to the courts to this end, showing how the criminal law prevented sex workers from taking key physical safety precautions.

As groups representing primarily street-based sex workers, SWUAV, Pivot and their partner PACE Society chose to focus their submissions on the criminalization of discussing in public anything related to a proposed act of sex work, given that this placed street-based sex workers at serious risk of violence and other harm. This submission documented the risk of serious physical harm facing street-based sex workers, arguing that this risk overrode the government's interest in addressing public nuisance. One of the key goals of this intervention was to represent the experience of street-based sex workers to help the courts understand how they work, and the nature of the risks they regularly encounter.

The *Bedford* case attracted several other *amicus* interventions as well, most notably that of the Joint United Nations Programme on HIV/AIDS (UNAIDS), which rarely intervenes in ongoing, domestic litigation. UNAIDS made written submissions outlining the impact of criminalizing sex work on human rights and the response to HIV.[31]

On December 20, 2013, the Supreme Court of Canada struck down the impugned sections of the *Criminal Code*, finding that they violated sex workers' *Charter*-protected

right to security of the person. A critical component of the Court's analysis was that sex work itself was not criminalized in Canada. As such, the Court found that the impugned provisions "do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky—but legal—activity from taking steps to protect themselves from the risks."[32]

Advocacy

This litigation was part of a broader, decades-long advocacy strategy aimed at decriminalizing sex work in Canada. Civil society organizations—including sex worker–led organizations—lobbied the Canadian government, mobilized sex workers across Canada, organized mass demonstrations, engaged in a broad-based media strategy, and documented their work. Advocacy activities during the litigation were also coordinated to avoid a duplication of efforts.

A number of sex worker–led organizations worked to mobilize their members to participate in advocacy activities. These included organizing and leading marches to the courthouse and demonstrations in major Canadian cities, with activists wearing red t-shirts to signal their support for the decriminalization of sex work.

In addition, civil society organizations interested in the case employed a varied media strategy, including engaging with, updating, and sensitizing the Canadian media on the issues raised in the case. This enabled journalists to report positively and accurately on the views and positions held by sex workers. Their strategy also included placing a series of opinion pieces in key newspapers across Canada over the course of the case.

Lastly, Pivot documented its work and involvement and those of its partners in the case. One result of this documentary work is a nearly 14-minute video recounting Pivot's efforts to decriminalize sex work. Further video footage and photographs of activities related to the litigation have since been used by Pivot and its partners to raise awareness of the case.

Impact and Reflection

The *Bedford* litigation has had a tremendous impact in Canada. Advocates' engagement with the media resulted in a great shift in the national conversation on sex work, with many journalists critical of the criminalization of aspects of sex work and the broader public proving more willing to discuss the issue.[33]

The litigation also bolstered the sex worker rights movement in Canada by strengthening their nationwide coordination. Prior to *Bedford*, Canadian sex workers were often organized only locally, with minimal coordination at the national level. The

coordination of advocacy activities during the *Bedford* case, however, has resulted in a strong, nationally organized sex worker community.

As for the decision's legal impact, the results have been mixed. The Supreme Court suspended its declaration of invalidity in respect of the impugned laws for one year in order to give Parliament time to determine whether to pass new laws addressing sex work. During that year, civil society organizations lobbied the government to refrain from criminalizing sex work further and educated the media to this same end. However, in December 2014 the Conservative government passed the *Protection of Communities and Exploited Persons Act* (PCEPA), which among other measures criminalizes the advertising of sex and bans all communications on the part of clients as well as those of sex workers themselves near schools and parks. The new law also criminalizes the buying of sex for the first time in Canadian history.[34]

The passing of the PCEPA could be attributed to partly to the fact that the advocates of decriminalization had not developed a plan setting out what Parliament needed to do to legally provide for decriminalization of sex work.

The Liberal Party and the New Democratic Party both voted against the law when it was tabled in the House of Commons. This marked significant progress given that neither party had taken a strong progressive position on sex work prior to the Supreme Court decision. This is particularly significant now that the Liberal Party is in power.

Pivot and its partners are now considering how best to challenge this new legislation. Regardless of the tactics they select, many activists believe that they are in a better position now than before the Supreme Court's decision in *Bedford*, as a result of both the precedent set by this case and the change in public opinion stemming from *Bedford* and related advocacy.

Kenya: Protecting Access to Life-saving HIV Medications

> The primary concern of the [government] should be the interests of the petitioners and others infected with HIV/AIDS to whom it owes the duty to ensure access to appropriate health care and essential medicines... There can be no room for ambiguity where the right[s] to health and life of the petitioners and the many other Kenyans who are affected by HIV/AIDS are at stake.[35]
>
> —Judge Grace Mumbi Ngugi
> High Court of Kenya

The discovery of anti-retroviral treatment dramatically changed HIV from a near-certain death sentence for almost all who were living with HIV to a chronic condition that could be managed with regular medication. For most developing countries, however, it was the development and marketing of generic anti-retroviral medicines (ARVs) that truly permitted the provision of life-saving treatment to greater numbers of those who need it.

Within this context, Kenya initially established a parallel importation regime to ensure the availability of ARVs for the 400,000 people living with HIV in Kenya.[36] This regime permitted the importation of generic ARVs without the permission of the patent holder.

In 2008, Kenya passed the *Anti-Counterfeit Act* (*ACA*), ostensibly with the objective of prohibiting trade in counterfeit goods. The *ACA* was enacted within the context of big pharmaceutical companies seeking such measures to protect the market share of labelled medications and limit access to safe generic medications.[37] The *ACA* also significantly limited access to generic ARVs by people living with HIV. Under the new legislation, a patent holder could ask the Anti-Counterfeit Commissioner to seize all generic ARVs, as they were included on the list of counterfeit goods. This meant that hundreds of thousands of people living with HIV in Kenya would be unable to access ARVs altogether.

While the *ACA* was still being debated in Parliament, a coalition of civil society organizations made submissions to Parliament and liaised with the Parliamentary Health Committee and individual Members of Parliament to highlight problems with the bill and attempt to have it amended.[38] Unfortunately, despite this advocacy the bill passed without the amendments sought.

Litigation

The *ACA* significantly restricted access by people living with HIV in Kenya to life-saving ARVs. In response, civil society organizations in the country—including organizations of people living with HIV—sought an immediate interim ruling staying key provisions of the legislation while they prepared to bring a further challenge to sections of the *ACA* as violating the Constitution.

In 2009, three individuals living with HIV retained a well-respected lawyer and sued the Attorney General of Kenya, arguing that sections 2, 32 and 34 of the *ACA* would affect their ability to access affordable and essential medicines, including generic medicines. A greater number of people living with HIV had also expressed interest in challenging the law, but were fearful of the potential public exposure a lawsuit would bring upon them.[39]

Before the High Court of Kenya, the plaintiffs argued that sections 2, 32 and 34 of the *ACA* would infringe their rights to life, dignity and the highest attainable standard of health as guaranteed in Articles 26(1), 28 and 43(1)a of the Constitution, respectively.[40] They further argued that the impugned sections of the *ACA* contravened the *HIV and AIDS Prevention and Control Act*, which required the state to take measures to ensure the availability and affordability of essential medicines to people living with HIV.[41]

On April 23, 2010, the High Court of Kenya issued an interim order staying sections 2, 32 and 34 of the *ACA* and restraining the Anti-Counterfeit Agency from enforcing those sections as they related to the importation of generic drugs.[42] This stage of the litigation was critical, as the final judgment took a further two years to issue.

In the final litigation, the civil society organizations involved were able to secure an *amicus* intervention by Anand Grover, the UN Special Rapporteur on Health at the time.[43] This intervention helped explain to the court the breadth and content of the right to health as well as complex issues related to patents.

On April 20, 2012, Judge Mumbi Ngugi found that sections 2, 32 and 34 of the *ACA* severely limited or threatened access to affordable and essential drugs, including generic medicines for HIV, and therefore violated articles 26(1), 28 and 43(1)a of the Constitution, which guarantee the rights to life, dignity and health, respectively. Judge Mumbi Ngugi specifically singled out section 2 of the *ACA*, which defined "counterfeit," and required the government to amend it so that it would be constitutionally sound.

In her judgment, Judge Mumbi Ngugi questioned the government's claim that the *ACA*'s purpose was to safeguard people living with HIV from counterfeit medicines, and found instead that its purpose appeared to be to protect the intellectual property rights of patent holders.

The Kenyan government did not appeal the High Court's decision.

Advocacy

Accompanying this court case, a coalition of civil society organizations undertook a comprehensive media strategy, including the sensitization and engagement of both local and international journalists on the issues raised in the litigation. This resulted in widespread coverage of the case on the issue of access to generic medicines.[44]

In addition, civil society groups organized marches and ensured the presence of people living with HIV and other activists in the courtroom during the hearing, signaling to the court that the community was watching the case closely.[45]

Impact and Reflection

The High Court's judgment had a significant impact on the health outcomes of people living with HIV in Kenya, ensuring continued access to ARVs for over 400,000 people. The litigation also raised regional awareness of the issue; for instance, civil society organizations in Uganda subsequently used the decision to defeat a similar bill in their country.[46] Lastly, the litigation enabled civil society organizations in Kenya to develop an important relationship with the Special Rapporteur on Health.

Despite the litigation's success, however, advocacy following the judgment was not adequately planned or carried out. As required by Judge Mumbi Ngugi's order, the government amended section 2 of the *ACA*, among others. However, this amendment consisted merely of the deletion of two words—"to elsewhere"—in the definition of "counterfeit," and thus left the term broad enough to cover generic medicines, including ARVs.[47] Unfortunately, civil society has not been sufficiently organized to challenge these amendments in light of the High Court's ruling, and thus the Kenyan government remains able to seize generic drugs under the legislation.

Ukraine: Addressing the Needs of People Who Use Drugs

> Litigation is often the only avenue for marginalized groups to assert their rights. It can also be a vehicle to restore dignity and agency to a community and to grow community leaders.
>
> —Mikhail Golichenko
> Lawyer, Canadian HIV and AIDS Legal Network

Opioid substitution therapy (OST) is the most effective means of treating opioid dependence,[48] and it has been approved by the World Health Organization. When combined with psychosocial assistance, OST has also been endorsed by the UN General Assembly, the Commission on Narcotic Drugs, the UN Economic and Social Council, the International Narcotics Control Board, and the UN Office on Drugs and Crime.[49] In Ukraine and many other countries, however, access to OST for people who use drugs is limited due to legal restrictions.

In 2012, the Ministry of Health of Ukraine (MoH) passed Order No. 200, which addressed access to opioid substitution treatment for people who use drugs.[50] The order raised concerns that many of its provisions restricted access to OST for people who use drugs. Among the provisions that raised concerns were a requirement that a patient must prove two previously failed attempts at drug treatment; drug users under 18 were not permitted to access to OST; patients must provide a passport or other identity document to access OST; and the termination or exclusion from OST for anyone who commits an administrative infraction, such as smoking in public or violation of traffic rules.

Following the enactment of Order No. 200, the International HIV/AIDS Alliance in Ukraine (now Alliance for Public Health) and partners advocated for the repeal of specified sections of Order No. 200. In particular, they sent letters to the Ministry of Health and other government agencies outlining how aspects of Order No. 200 violated key rights and existing laws, and impeded access to OST—thereby undermining public health.

Litigation

‚After six months of advocacy with no significant changes to Order No. 200, civil society organizations chose to legally challenge Order No. 200.[51] The legal strategy was to exhaust domestic remedies and eventually file a challenge with the European Court of Human Rights (ECHR), where the Alliance for Public Health and partners thought the case was most likely to succeed

In December 2012, the Alliance for Public Health and the Association of Substitution Therapy Advocates of Ukraine (the Association) challenged Order No. 200 in the Kyiv Administrative District Court, arguing that specified aspects of Order No. 200 violated rights guaranteed in the Constitution and the European Convention on Human Rights, among other laws. In particular, they argued that Order No. 200 violated the right to be free from inhuman or degrading treatment or punishment and the right to non-discrimination.

In 2013, the District Court rejected their claims and upheld Order No. 200 and the Alliance for Public Health and the Association appealed the decision, Order No. 200 was then upheld by both higher courts. The Alliance for Public Health and the Association finally lodged an appeal with the European Court of Human Rights arguing that Order No. 200 violated the European Convention on Human Rights. The challenge was eventually rejected by the ECHR.

Advocacy

Civil society partners used a range of advocacy strategies alongside litigation. These included engaging with the media, mobilizing OST patients, and raising awareness among stakeholders.[52] Civil society organizations engaged regularly with the media to ensure the litigation and the concerns over Order No. 200 were covered in the local press. This included issuing press releases and working with journalists to keep them updated on the legal proceedings.

In addition, civil society organizations mobilized patients and their representatives to ensure they attended arguments in court. Such mobilization raised the visibility of OST patients both within and outside of the courtroom.[53] Finally, civil society partners worked to raise awareness of the issues among key government officials resulting in the issues being discussed within key government bodies, such as the National Council on tuberculosis and HIV.

Impact and Reflection

The litigation had a significant impact on Order No. 200 despite the failure to achieve a legal victory. In particular, due to the pressure created by the litigation and the accompanying advocacy, the MoH amended Order No. 200 to address many of the concerns civil society organizations raised. These included removing provisions requiring that patients present evidence of at least two unsuccessful attempts at drug treatment prior to receiving OST, providing access to OST for drug users under 18, and permiting individuals who have committed administrative infractions to access OST.

The litigation also served to mobilize OST patients, empowering them to speak out on issues affecting them. Prior to the litigation, it was difficult to mobilize injecting drug users.[54] However, the mobilization of OST patients during the legal case has resulted in the potential for longer-term community mobilization.[55]

Kenya: Advocating for Gender Identity

> We have managed to break barriers or limits that no one thought transgender people would [break] on their own. It wasn't just about human rights but a desire to prove ourselves capable and [do] the best we could. We were also able to redefine the word 'courage.'[56]
>
> —Audrey Mbugua Ithibu
> Programs Manager, Transgender Education and Advocacy (TEA)

Transgender persons have long been invisible in Kenya due in part to stigma and harassment they face from police, and due in part to their inability to obtain identification documents that feature their correct gender and name.[57] To raise awareness of the rights of transgender persons and to secure these rights, the Kenyan NGO Transgender Education and Advocacy (TEA) sought to use strategic litigation as part of their broader advocacy strategy. The complementary advocacy tactics employed by TEA include mobilizing and providing support to transgender persons, working with the Kenyan government to ensure protections for the transgender community and training key stakeholders.

Litigation

In 2013, Audrey Mbugua Ithibu, TEA's founder and a transgender woman, launched a legal challenge in the High Court of Kenya seeking to compel the Kenya National Examination Council (KNEC) to change her name and remove her gender marker on her school certificate. Because the name and gender listed on her school certificate were different from those on her other identification documents, she was having trouble obtaining work and subsequently experienced depression.[58] Audrey Mbugua argued that KNEC's refusal to make the changes she requested was unreasonable, unjustified and unfair in the circumstances; in breach of the rules of natural justice; against her legitimate expectations; and in bad faith.[59]

Both KNEC and the Attorney General of Kenya opposed Audrey Mbugua's application. KNEC argued that changing Audrey Mbugua's name and gender marker on her school certificate would lead to fraud and be too expensive, and that it was her responsibility to prove her identity and qualifications to potential employers. KNEC further argued that the documents clarifying Audrey Mbugua's medical condition were vague and that it was unclear whether any gender transition had occurred and, if so, whether it was legal.[60]

The Kenya Christian Lawyers Fellowship (KCLF) initially sought leave to intervene in the matter, in order to argue against permitting the changes to Audrey Mbugua's school certificate. However, Audrey Mbugua's lawyer—a member of the KCLF—was able to meet with other members of the organization and persuade them to withdraw their application.[61]

The High Court of Kenya dismissed all of KNEC's arguments. Relying on the fact that there is no legal requirement to include a gender marker on school certificates, and invoking the right to dignity guaranteed under the Kenyan Constitution, the High Court ordered KNEC to change Audrey Mbugua Ithibu's name and remove the gender marker from the school certificate. Notably, the High Court helped situate the case within a broader context by quoting extensively from a United Kingdom judicial decision that described what is meant by "transsexual".[62] The High Court also referenced decisions from Kenya and India regarding the recognition of a third gender, noting however that this issue was not before the High Court in this case.[63]

The KNEC has appealed the High Court decision to the Court of Appeal of Kenya, and TEA is currently awaiting a hearing before this latter court.

Advocacy

This case has formed part of a broader litigation and advocacy strategy developed and implemented by TEA. Indeed, TEA has filed a series of cases seeking to strengthen the rights of transgender persons, including a challenge to police abuse of a transgender person, a case seeking a court order requiring the government to register TEA, which was successful, a case compelling the government to issue guidelines on surgery for transgender persons and a case compelling the government to change the names and photos in national identity cards of transgender persons.

The two primary goals of TEA's litigation and advocacy strategy have been to strengthen the rights of transgender persons and to raise public awareness of them. To these ends, TEA has used Audrey Mbugua Ithibu's case to educate, engage and sensitize the media as well as key stakeholders, the judiciary and other human rights organizations on these issues.[64]

Prior to the litigation, TEA had trained a number of Kenyan lawyers on issues affecting their community. Initially, these lawyers were concerned about being seen as "transgender lawyers" and being set apart on this basis from broader society. By including the family members of transgender persons and other non-transgender allies in their training, however, TEA was able to convince some lawyers to assist them with particular cases.[65]

Impact and Reflection

TEA's litigation and the High Court decision have resulted in a significant increase in public awareness about what it means to be transgender, and the difference between being transgender and gay, lesbian or bisexual. The High Court decision itself helpfully outlined what "transgender" means and how it differs from homosexuality. Highlighting the difference between transgender and gay, lesbian, and bisexual is important as the latter addresses an individual's sexual orientation, while the former addresses an individual's gender. This distinction is critical for understanding the experiences of transgender persons.

The litigation also resulted in mobilizing other transgender persons in Kenya and raising awareness within the trans community of their rights and health care options. Following the High Court's judgment, TEA received several requests from transgender persons seeking further information on medical transitioning and addressing rights violations.

TEA's litigation and complementary advocacy have also helped increase its profile in Kenya, to such an extent that they are often asked by Members of Parliament to come and educate them on transgender issues.[66]

It is clear, however, that much work remains to be done. As a result of the litigation, one of Audrey Mbugua's doctors was harassed and is now hesitant to work on transgender issues. Furthermore, although the High Court affirmed Audrey Mbugua's rights in the circumstances of the case, it also failed to refer to her as female throughout the decision.[67]

Uganda: Fighting for Effective Maternal Health Care Services

> The court has given me justice. I'm hopeful that from now on, doctors and health workers across Uganda will be more careful in handling patients that go to them when in need.[68]
>
> —Mugerwa David
> Plaintiff, lost wife and child in childbirth

In 2011, Irene Nanteza was admitted to the Nakaseke Hospital after her water had broken and she was in the advanced stages of labor. There, she was diagnosed with obstructed labor, a condition that causes the death of the mother if left unattended. The doctor on duty at the hospital, however, remained absent for eight hours, and Nanteza and her child died in the interim.

Nanteza's case is representative of the experience of hundreds of women in Uganda, a country with high rates of maternal mortality.[69] This is due in part to shortages in basic medical equipment, and in part to limited medical personnel dedicated to maternal health.[70] To address the causes and prevalence of maternal mortality in Uganda, the Center for Health, Human Rights and Development (CEHURD) decided to undertake strategic litigation.

Litigation

In 2011, CEHURD and three individuals sued the Attorney General of Uganda in the Constitutional Court, arguing that the government's failure to provide basic maternal health care to expectant mothers was unconstitutional.[71] On June 5, 2012, the Constitutional Court sidestepped the issue in a ruling holding that the case raised political questions that were better addressed by the other branches of the Ugandan government.[72] CEHURD appealed this decision to the Supreme Court of Uganda.

On October 30, 2015, the Supreme Court rejected the Constitutional Court's argument that the matter was a political question and remanded the matter back to the Constitutional Court to hear and make a determination on the merits of the case. In reaching his decision, Chief Justice Bart Magunda Katureebe stated the following:

> With great respect to the Constitutional Court, I think they misunderstood what was required of the court. I do not think the court was required to determine, formulate or implement the health policies of government. In my view, the court is required to determine whether the government has provided or taken all practical measures to ensure the basic medical services to the population. In this case it is maternal services in issue.[73]

Nanteza's case was one of the first litigated by CEHURD, which was approached by her family through its direct legal services program. Nanteza's family and CEHURD also sued the local administration of Nakaseke, arguing that the failure to attend to Nanteza for eight hours violated her right to be free from cruel, inhuman and degrading treatment and her right to equality guaranteed in the Constitution. They further asked for general and punitive damages.[74]

On June 17, 2015, the High Court of Uganda found the local government of Nakaseke liable for the violation of Nanteza's constitutional rights and those of her family.[75] In its decision, the court expressed outrage at the doctor's absence and found that the local government could be held liable for this absence based on its responsibility for the administrative and supervisory oversight of the Nakaseke Hospital.

In addition to these two cases, CEHURD has litigated a number of individual cases related to access to adequate maternal health care. In each case, CEHURD has strategically chosen not to sue individual medical personnel but rather to sue the local government for its failure to adequately carry out its supervisory responsibility concerning health care in the district hospital. CEHURD has further anchored its legal actions in constitutional rights as opposed to medical negligence, their aim being to highlight the structural nature of the problem and thus pave the way for a structural solution, rather than allowing the government to punish individual medical personnel without addressing underlying issues.

Advocacy

The Nanteza case formed part of CEHURD's broader advocacy strategy aimed at ending maternal mortality in Uganda. With its partners, CEHURD has engaged in several advocacy activities since the constitutional petition was filed. These have included establishing a broad coalition of community-based organizations, civil society organizations and international organizations to address maternal mortality, as well as engaging and sensitizing the media and attempting to sensitize government officials.

With respect to Nanteza's case, CEHURD held a press conference when the case was first filed and also alerted the media when the High Court judge sought to visit the hospital to verify the doctor's version of events. This represented the first time a High

Court judge had conducted an on-site visit and, for this reason, CEHURD was able to garner significant media interest in the visit and simultaneously raise awareness of the issues at play and the case itself. However, in its judgment the High Court did reprimand CEHURD for inviting, "without leave of court, [...] a horde of photographers and video recorders, [...] in a manner that disrupted the operations of the hospital during the visit."[76]

Impact and Reflection

The impact of the constitutional petition and the High Court decision has been enormous, not least in raising awareness about the state of maternal health care in Uganda.[77] Legally, the High Court decision is the first time a court in Uganda has acknowledged that the government can be vicariously liable for the negligence of employees at a public hospital. Further, by finding that medical negligence can violate an individual's constitutional rights, the decision is a significant step toward ensuring that Ugandans have access to adequate health care.

Finally, CEHURD's litigation has resulted in the establishment of a coalition of approximately 150 community-based, civil society, academic and international organizations working on right to health, and particularly on maternal mortality.[78] The members of this coalition meet regularly to discuss ongoing advocacy projects and next steps on maternal health care in Uganda. Furthermore, the coalition ensures uniform messaging about maternal health care in the country in order to amplify its members' impact. Finally, the coalition has also proven able to develop a consensus on certain controversial issues. For instance, it has decided to address the issue of access to safe abortions, as unsafe abortions have been shown to be a major cause of maternal deaths.[79]

Though the High Court and Supreme Court decisions were successes, the Constitutional Court must still issue a decision on the merits of the constitutional petition, and it is possible that it will find in the government's favor. However, CEHURD and its partners have noted that if this is the case, they will consider an appeal to the African Court on Human and Peoples' Rights.[80]

Key Tactics to Enhance Public Health Strategic Litigation

Summary of key lessons learned

1. Strategic litigation is more effective when part of a *broader, long-term advocacy strategy*.

2. It is critical to have *a range of partners involved*, *especially social movements* either directly in the litigation as plaintiffs or *amicus curiae* or in advocacy activities related to the litigation.

3. It is important for funders to consider *providing multi-year funding to a range of organizations* when funding strategic litigation.

4. *Legal arguments can shape the messaging of an issue* and thus should be thought through carefully, not only with a view to legal success but also taking into account the broader aims of the organization representing the affected community.

5. Litigation on health requires varied and very specialized expertise and evidence. Thus, it is important for organizations to *build relationships with demonstrably qualified experts* who can provide the necessary evidence to inform and strengthen the litigation.

6. Organizations should *identify what they hope to achieve* prior to embarking on strategic litigation.

7. Organizations should have an *implementation strategy* prior to embarking on litigation and should reassess it as the litigation continues, including immediately following delivery of the judgment.

8. Organizations and advocates should consider *taking an incremental approach to litigation*, including *considering the use of non-strategic cases* for strategic litigation.

9. *Media advocacy* is a critical component of strategic litigation.

10. In strategic litigation on health, *crafting an appropriate remedy is often necessary* to ensure the issue raised in the litigation is adequately addressed.

It is impossible to take a formulaic approach to strategic litigation. How best to proceed will depend on the particular political, social and legal context in which the case is undertaken, as well as the particular issues at play. However, a number of lessons and good practices are broadly applicable and can assist organizations engaged in, and funders supporting, health-related strategic litigation. These lessons draw from the six case studies presented in this report, as well as other strategic litigation cases in the context of health.

1. Strategic litigation is more effective when part of a *broader, long-term advocacy strategy.*

Strategic litigation is a way to give life to laws and policies that are not enforced or to strike or amend laws and policies that are not in compliance with fundamental rights. Ensuring that litigation is part of a broader, long-term advocacy plan can assist in making good laws more of a reality for all people. Ideally, all strategic litigation would be a part of multi-tactic advocacy campaigns. This connection to advocacy assists in the litigation itself, in terms of identifying plaintiffs and providing support to clients, but also helps in the implementation of favorable judgments. In all cases illustrated in this report, the litigation formed part of a broad, multi-pronged advocacy plan, which included the mobilization of affected populations, media engagement, coalition building with similarly minded allies and lobbying governments, among others.

Advocacy strategies that can be undertaken in conjunction with litigation include

- Mobilization of affected groups
- Letters to relevant international and regional human rights bodies and mechanisms
- Engagement with and lobbying relevant government officials, ministries and members of parliament
- Establishing coalitions of similarly minded organizations and partners
- Organizing demonstrations
- Collecting and documenting evidence
- Media engagement and sensitization

2. It is critical to have *a range of partners involved, especially social movements* either directly in the litigation as plaintiffs or *amicus curiae* or in advocacy activities related to the litigation.

These partners should ideally include grassroots organizations, high-level advocacy organizations and other high-profile champions and organizations that may support the issue. It is also beneficial for civil society organizations to build relationships with lawyers with the necessary expertise to bring health-related litigation.

Collaboration of this sort is necessary for a number of reasons. First, organizations specializing in litigation and other legal advocacy often lack the expertise or resources needed to mobilize affected communities or to organize advocacy activities such as marches and sit-ins. For example, in the challenge to forced sterilization in Namibia, the NWHN was able to mobilize women living with HIV, ensuring they were present in the courtroom during the case and enabling them to speak to the media about how forced sterilization affected their health and their lives more broadly. The Legal Assistance Centre, which represented the three plaintiffs, did not have the necessary expertise or resources to mobilize the community in this way.

Second, in health-related cases it is often necessary to have detailed documentation of the violation at issue in order to prove that it is occurring and to show its nature and gravity, such that an appropriate remedy can be crafted. Grassroots organizations can assist in this documentation process because of their typically strong links to the affected community. This is particularly critical when addressing the health rights of marginalized populations, as members of the community may be skeptical of unfamiliar organizations and individuals eager to work with them. Further, affected communities have a more detailed understanding of the violations and can assist when drafting the legal papers. In the *Bedford* case in Canada, sex worker–led organizations had spent years working with sex workers in the community to document their experiences and, in particular, the human rights violations they had suffered. This information helped inform Pivot's legal submission outlining how laws criminalizing aspects of sex worker affected sex workers themselves.

Similarly, many countries have stringent rules regarding who can bring a lawsuit. This often requires organizations and lawyers seeking to challenge particular laws, policies and practices to find individuals who have been directly affected by the problem and are willing to be involved in the litigation process. Grassroots organizations can assist in identifying appropriate plaintiffs and providing them with the psychosocial support they need during the litigation. For example, in *Tapela and Another v Government of Botswana*, a case challenging Botswana's policy of denying free HIV treatment to non-citizen prisoners living with HIV, the local NGO Botswana Network on Ethics, Law and HIV (BONELA) was able to identify two suitable plaintiffs as a result of its existing work on HIV in prisons.

Third, in many jurisdictions, lawyers are unable to engage with the media because of the professional restrictions to which they are subject. However, civil society organizations not directly involved in the litigation can and should be knowledgeable enough to speak authoritatively on the issues raised in the litigation, thereby enabling media engagement. For example, Zambia has rules preventing lawyers from speaking publicly about ongoing court cases. However, in a case challenging the mandatory HIV testing and subsequent dismissal of two former military employees, the Zambian AIDS Law and Research Network (ZARAN) was able to raise awareness of the case by engaging directly with the media.[81]

Finally, the litigation can be a key opportunity to connect the experience of marginalized groups with issues that the broader public is grappling with, and thereby assist in building stronger movements. For instance, in Kenya, the National Gay and Lesbian Human Rights Commission challenged the government's refusal to formally register their organization because the name was deemed "unacceptable" and because Kenya's penal code "criminalizes gay and lesbian liaisons."[82] The case was part of a broader push by NGOs to address laws limiting the ability of NGOs to engage in advocacy and other activities.

Sympathetic or ideal plaintiffs

The general wisdom in strategic litigation efforts is that a sympathetic client is critical to judicial success. However, in cases related to the health of marginalized populations, it can sometimes prove difficult to find a "sympathetic" client. For example, in cases concerning the accessibility of OST, it is precisely people who use drugs on a long-term basis who are affected by bans on OST—a population not readily sympathetic to the general public.

It may well be that in some cases factors other than sympathy are more important to find in a plaintiff. For example, in the Canadian case of *Bedford*, plaintiffs were identified based on their desire to challenge the public perception of those whom the law was affecting most harshly: sex workers.

Furthermore, strategic litigation can be an opportunity to dispel myths about specific populations, to restore dignity to marginalized groups, and to connect the experience of marginalized communities to the concerns of the broader public. When legal submissions are able to capture the lives of affected communities in a manner that the courts and the media can understand, their success is more likely. In *Bedford*, Pivot and its partners were able to capture the everyday fear and violence that street-based sex workers faced due to the criminal laws surrounding sex work. This reality was referenced and relied upon by the Supreme Court of Canada in its favorable judgment.

3. It is important for funders to consider *providing multi-year funding to a range of organizations* when funding strategic litigation.

Much more than legal support is needed for strategic litigation to result in sustained and substantial change. As noted above, additional advocacy strategies must be harnessed during litigation as well as after favorable judgments to ensure that court decisions are properly implemented and enforced. In most cases, organizations carrying out strategic litigation are not best placed to conduct the broad range of advocacy activities that are needed, such as mobilizing affected communities or monitoring compliance with positive judgments. Usually, grassroots organizations and other organizations with close ties to the affected population are better placed to carry out these activities.

Given this, the funding of strategic litigation should go hand in hand with funding for social movements and other advocacy initiatives. To this end, funders should consider funding organizations who can fulfill the range of activities identified here when seeking to fund strategic litigation. These organizations can include legal organizations as well as other partners that can carry out related advocacy activities.

Flexible multi-year funding should also be considered for strategic litigation. Health-related litigation can be especially unpredictable, requiring significant resources and taking years before a final decision is reached. Often, opponents in health-related litigation—and especially governments and big multinational companies—have virtually unlimited resources and are able to use the limited resources that marginalized populations have at their disposal against them in litigation. Furthermore, ensuring the proper implementation of positive judicial decisions requires ongoing monitoring and, in some cases, returning to court to enforce these decisions. This requires significant resources over a period of many years.

In the forced sterilization case in Namibia, the Open Society Foundations and others provided funding to NWHN for advocacy activities related to the case. They further provided funding for the legal representation. As a result, NWHN had the resources necessary to conceive of and implement a broad-based advocacy effort as part of the litigation itself.

4. *Legal arguments can shape the messaging of an issue* and thus should be thought through carefully, not only with a view to legal success but also taking into account the broader aims of the organization representing the affected community.

Legal arguments tell the story of the clients and the affected population. Choosing to focus on some legal arguments over others may result in legal success, but can also shape the legal and public narrative such that the broader, long-term aims of the movement are made more difficult. For example, the lawyers in *Bedford* focused their legal challenge on securing the safety of sex workers, as that was seen as the most compel-

ling argument at the time. Arguments related to health, equality and poverty were not addressed. The focus on safety resulted in a judgment focused on the victimhood of sex workers and on the need to protect them, rather than on the rights of sex workers to make their own decisions about their safety and well-being without interference by the government. It is unlikely that this would have occurred had the legal arguments focused instead on personal autonomy, equality or dignity. Unfortunately, the Canadian government was able to utilize this 'safety' narrative to enact subsequent legislation that criminalizes the buyers of sex, with the ostensible but dubious goal of protecting sex workers' safety.

Given the impact that legal arguments have on how the issue is—and becomes—framed, it is essential for groups to choose a lawyer who is knowledgeable both about the law and about the experiences and aims of the affected population. For example, in *R v Kenya National Examinations Council and Another*, it was critical for TEA to hire a lawyer who understood what being transgender meant and the issues affecting transgender persons, in order to ensure that the legal arguments made before the court did not undermine the broader aims of the transgender rights movement in Kenya.

The client's interests vs. the interests of the organization

In some cases, a client's interests may differ from the aims of the organization working with them and aiming to represent the affected population more broadly.[83] This can result in some legal arguments and strategies being more tailored to what the client wants, as opposed to what the organization hopes to achieve.

Some experts suggest that to circumvent this, an organization representing the affected population should seek to be included as a plaintiff, in countries where the legal rules on standing so permit. However, given that standing rules are generally restrictive in many countries, the potential divergence of interests described above signals the importance of a lawyer who understands the work of the organization and the community.

Other options include having multiple plaintiffs; taking the time to comprehensively explain the wider context and strategic aims of the case to the plaintiff and keeping her regularly informed, such that she may be more invested in the broader impact; and developing appropriate remedial strategies, which include both individual and general measures to address both the concerns of the individual plaintiff and the broader litigation aims.

5. Litigation on health requires varied and very specialized expertise and evidence. Thus, it is important for organizations to *build relationships with demonstrably qualified experts* who can provide the necessary evidence to inform and strengthen the litigation.

Health-related litigation often requires specific expert information regarding government resources, priorities and decision-making in health services. In cases involving access to medicines or medical treatment, governments often respond by claiming that their resources are inadequate. In *Tapela*, the Botswanan government claimed it lacked the necessary funds to provide HIV treatment to non-citizen prisoners. For this reason, expertise from health economists and experts in budgetary allocation are often necessary to understand how health is funded in the country in question, and to provide the court with evidence about how state refusal to provide a certain treatment or medicine may cost the government more than not providing it.

Litigation on health rights also often involves complicated issues of law, and thus evidence from nationally or internationally renowned experts on health rights and law may prove necessary. For example, the challenge to Kenya's *Anti-Counterfeit Act* concerned complicated issues involving patent law as well as the breadth of the right to health, a right that had only recently been provided for in Kenya's Constitution. As a result, the High Court of Kenya had very little domestic guidance to work with when addressing the right to health. To address this gap, civil society organizations were able to secure the *amicus* intervention of the Special Rapporteur on Health to brief the court on both international patent law and the international right to health. His expert submissions also lent further credibility to the plaintiffs' arguments.

Health rights litigation can also require specialized scientific or medical evidence. In a case involving access to OST, the government questioned the efficacy of the treatment in one of its central arguments for banning it. In response, the plaintiffs' lawyers secured opinions from medical organizations and experts to counter the government's dubious claims about the potential harms of OST. The OST litigation also benefited from working with the international medical community to establish global standards and good practices. These global standards were relied on to support the plaintiffs' arguments regarding the benefits of OST.[84]

In other instances, it may be useful to provide courts with evidence of the medical impact of the law, policy or practice at issue. In *Tapela*, the non-citizen prisoners living with HIV argued that the denial of HIV treatment violated their right to life. To support this argument, the prisoners included a submission from a well-respected epidemiologist outlining in medical terms what can occur if a person living with HIV is denied treatment.

Finally, cases concerning health often also require testimony by medical practitioners, and thus building relationships with the medical community can be important.

This can be difficult in that many doctors are unwilling to provide evidence against one or more of their colleagues. In the case challenging forced sterilization in Namibia, most doctors in the country were unwilling to examine the plaintiffs and to testify on their behalf. The lawyers and activists involved went so far as to consider having a medical doctor from South Africa examine the plaintiffs and testify. In the end, however, a local doctor did agree to testify, due in part to already-established relationships. This doctor's testimony was a critical component of the litigation, as he spoke not only about the specific impact that sterilization had on each plaintiff but also about Namibia's code of ethics for medical practitioners.

6. Organizations should *identify what they hope to achieve* prior to embarking on strategic litigation.

Determining what is hoped to be achieved through strategic litigation has a great bearing on litigation's structure, including the selection of plaintiffs, legal arguments, and advocacy tactics. Identifying these goals prior to filing a case or to getting involved in an existing case is critical to determining how best to proceed. For example, if the goal of case is to set a specific legal precedent, then determining which legal arguments will lead to a positive judicial decision will be of utmost importance.

Identifying what one hopes to achieve from litigation is also important in determining the best time to file a legal challenge. Generally, litigation is viewed as a last resort after other advocacy avenues have been exhausted. This is in part because litigation is typically time- and resource-intensive. However, for health-related issues—and especially those of marginalized populations—litigation is often the only avenue to assert or secure rights. For example, some organizations have chosen to litigate because lobbying the government to overturn legislation denying access to OST for people who use drugs was unlikely to have the desired impact, not least because the broader public was unlikely to have or develop sympathy for this population.

7. Organizations should have an *implementation strategy* prior to embarking on litigation and should reassess it as the litigation continues, including immediately following delivery of the judgment.

The implementation of favorable judicial decisions is a critical but often overlooked component of strategic litigation. Indeed, obtaining a positive judgment should be considered as the midpoint of a longer-term strategic litigation project. For many organizations, however, the delivery of the judgment often marks the end of their strategic litigation efforts. This can be due to many factors, including a lack of organizational resources after a litigation process lasting many years, a change in the priorities of the organization or of other key advocacy partners needed to monitor implementation, or

simply a failure to plan adequately for implementation. In the challenge to Kenya's *Anti-Counterfeit Act*, the litigation itself resulted in a positive judicial decision, but the government failed to substantively amend the impugned sections of the legislation. Unfortunately, Kenyan civil society has not been in a position to challenge the government's actions due in part to a lack of organizational resources and a change in organizational priorities.

This problem can be addressed if implementation is discussed and planned for at the outset of the litigation, and reassessed over the course of the litigation. Organizations should also aim to build implementation efforts into their organizational strategy and grant applications. In addition, when funders also think of a court decision as the midpoint of a project, they will be able to properly plan to ensure organizations have the necessary resources and technical expertise for implementation. Finally, as discussed later (see Key Lesson 10), it may be useful to craft a desired remedy that involves the court's oversight in ensuring implementation. This should include consideration of damages sought, as obtaining damages from governments can prove a difficult process in itself.

Questions to consider when determining an implementation plan:

- Is there a clearly defined and protected population?
- Are there clearly defined duty bearers?
- Are there allies who can assist?
- Is it clear what resources are needed?
- Do the remedies sought require the court to remain engaged?
- Is the social and political context favorable?

8. Organizations and advocates should consider *taking an incremental approach to litigation*, including *considering the use of non-strategic cases* for strategic litigation.

In cases involving marginalized communities, an incremental approach to strategic litigation may be necessary. In Malawi, organizations seeking the decriminalization of sex work first sought to challenge the forced HIV testing of sex workers.[85] The resulting judgment affirmed that sex workers are entitled to fundamental constitutional rights, which were violated when they were subjected to mandatory HIV testing. Activists in Malawi can use such judgments to build further jurisprudence affirming the rights of

sex workers, with the possibility of challenging laws that criminalize sex work materializing only when such jurisprudence is firmly embedded in Malawi.

Furthermore, organizations should monitor non-strategic cases to determine whether they can be used for strategic litigation, rather than waiting for an 'ideal' case. For example, in the Nanteza case challenging denial of maternal health care in Uganda, the case might simply have been a matter involving the negligence of an individual doctor. However, CEHURD recognized that the case could be used to hold the district liable for providing poor-quality health care services, and thus create an incentive for the district to make structural and substantive changes to its health care system. Similarly, in Kenya, the challenge concerning recognition of gender identity specifically affected Audrey Mbugua Ithibu's school certificate. She did not request that the court make a broader ruling regarding the rights of transgender persons. However, the case remained strategic in that it sought to use the litigation to raise awareness of the rights of transgender persons, and TEA and others will use the decision to bring other challenges involving transgender rights.

Finally, the initial groundwork for strategic litigation—including evidence-based research and identifying suitable experts—should be undertaken in advance. However, moments of crisis can offer key unplanned opportunities to be harnessed for strategic litigation. Thus, organizations and lawyers should try to remain flexible such that they can respond effectively to crises and opportunities as these present themselves, even while they plan ahead for litigation on specific issues.

Access to medical records

Access to medical records is often a critical component of health rights cases. However, in many countries medical records are not easily accessed even by the patients to whom they pertain.

In cases concerning access to health care, patients' medical records are essential for proving what occurred and why. In the challenge to forced sterilization in Namibia, however, the three plaintiffs were unable to access their medical records prior to litigation and obtained them only over the course of the case. This development had a significant impact on their lawyers' strategy.

It may well be that in some health rights cases, an initial case should be filed seeking access to the client's medical records, and future litigation planned only once those records are obtained.

9. *Media advocacy* is a critical component of strategic litigation.

Media advocacy in conjunction with litigation is a powerful tool. First, media coverage can help translate what occurs in the courtroom for the benefit of the broader public. Health rights cases in particular can involve technical information and health-related jargon that can be hard for the average outsider to understand. Translating such information into plain language via media coverage can be critical to changing public opinion and raising broader awareness about the issues at play.

Second, media attention in cases involving marginalized populations can help protect community members from violence, stigma and harassment, as potential perpetrators are made aware that others are watching. This has been somewhat successful in an OST litigation, where three plaintiffs challenging the state's ban on OST have been somewhat protected from state harassment because of the media attention surrounding the case.[86]

Third, media attention on an issue can play a critical role in ensuring the implementation of a favorable decision, as the media can help monitor the actions of the government and other stakeholders. However, media attention can be notoriously short-lived and thus, advocates should ensure their media plans account for this reality.

Fourth, media advocacy can help demystify court processes for the broader public. In many countries, most citizens remain unaware of how their court system functions and what exactly occurs in a courtroom and why. Having the media report on cases and using social media to provide regular updates on court hearings and legal issues can help raise awareness of the judicial system among the broader public.

Fifth, media advocacy can place the issue highly on the political agenda. One of the important things the media does is contribute to what issues are high on the government's priority. Media advocacy can make the issue a political priority that decision-makers have to respond to in some way, even before a decision is reached in court and often despite the eventual outcome.

Given the importance of media advocacy to strategic litigation, funders should consider providing technical assistance to organizations involved in this work. In particular, funders can play a role in providing training in media advocacy, publishing supportive blogs and carrying out other efforts that enable affected populations and the broader public to follow what is happening in the courts.

Media advocacy efforts that can serve as helpful components of strategic litigation include the following:

- Sensitizing and building relationships with key journalists covering the issue
- Issuing press releases when key events occur, including when litigation is first filed, before court hearings and following court decisions

- Identifying spokespeople to speak publicly about the case and the issues it concerns
- Organizing press conferences with spokespeople
- Developing key messages for the media with advocacy partners
- Placing opinion pieces in influential newspapers and blogs
- Using social media—including Facebook, Twitter and blogs—to keep mainstream media and others apprised of the litigation

10. In strategic litigation on health, *crafting an appropriate remedy is often necessary* to ensure the issue raised in the litigation is adequately addressed.

Generally, remedies in strategic litigation are standard: monetary compensation is awarded for rights violations; governments are ordered to take specific measures, such as providing specific medicines to specific populations; or specific laws are struck down. However, in health rights cases, standard remedies can potentially undermine the broader aim of strengthening the health outcomes of marginalized populations, especially if a broad view of the health care system is taken. In Brazil, individuals have sought to have their medical treatment paid for by the government by litigating their cases in court. Many of these cases have been successful in that the court has authorized free medical treatment for the particular litigants. However, the impact has been to burden the public health care system, resulting in treatment being provided to those individuals with the resources necessary to go to court, while those who lack such resources remain unable to access treatment.[87] However, had the remedies sought in those individual cases been more broadly conceived—for example, asking for a specific medical treatment to be provided to all persons who need it—it is more likely that the disparity in treatment would not have occurred.

Even in cases where a broader remedy is conceived, it may be insufficient to ask a court to merely order that the government provide a particular health care service or treatment, or to declare a specific practice as unconstitutional. For this reason, it may be helpful for advocates to tailor their remedies to require that the government take very specific actions. In a legal challenge to forced sterilization in Kenya, advocates have sought not only a declaration that the practice is unconstitutional but also that the government be required to train all relevant personnel, issue guidelines, conduct public awareness campaigns on the issue, and establish clear procedural guidelines for following up on complaints of rights violations.

In other cases, standard remedies may not adequately respond to the needs of the affected population. In the challenge to forced sterilization in Namibia, the lawyers sought monetary compensation for the violation of the plaintiffs' rights. However, many

women living with HIV who have been forcibly sterilized have indicated that they would prefer access to fertility services over monetary compensation.

Finally, advocates should consider crafting a remedy that requires the court to continue monitoring implementation of its decision. As noted above, the implementation of positive decisions can require significant resources. A court's involvement in ensuring implementation can ease that burden for civil society and community-based organizations.

Endnotes

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11. See *infra* case studies.

12. Documents available upon request.

13. Documents available upon request.

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19. African Commission on Human and Peoples' Rights Resolution No 260: "Resolution on Involuntary Sterilisation and the Protection of Human Rights in Access to HIV Services" (2013).

20. Southern Africa Litigation Centre, "Submission to the Human Rights Committee Regarding the Forced and Coerced Sterilisation of Women Living with HIV/AIDS in Namibia" (submitted in advance of the consideration of the list of Issues for Namibia's 2nd Periodic Review (April 2015) [hereinafter SALC submission].

21. Southern Africa Litigation Centre, "Submission to the Committee on the Elimination of All Forms of Discrimination Against Women Regarding the Government of Namibia's 4th and 5th Periodic Report" (2015).

22. Committee on the Elimination of Discrimination Against Women, "Concluding observations on the combined fourth and fifth periodic reports of Namibia (July 24, 2015) at para 37.

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26. SALC submission, *supra* note note 20.

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28. *Ibid.*

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38. Interview with Allan Maleche (June 19, 2015).

39. *Ibid.*

40. *Ochieng and Others v Attorney General, supra* note 35 at para 1.

41. *Ibid* at para 12.

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43. *Ochieng and Others v Attorney General,* supra note 35.

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74. *The Center for Health, Human Rights and Development and Others v Nakaseke District Local Administration*, Civil Suit 111 of 2012, available at https://www.escr-net.org/node/366203.

75. *Ibid.*

76. *Ibid* at 19.

77. Sarah Rudum, "Landmark Decision in Uganda in Case of Maternal Death is a Cause for Celebration" [guest blog] (May 2015) in *Reproductive Health Matters*, available at http://www.rhmjournal.org.uk/2015/05/landmark-decision-in-uganda-maternity-care-case-is-a-cause-for-celebration/; Alicia Ely Yamin, "From Ideals to Tools: Applying Human Rights to Maternal Health" (2013) *PLoS Med* 10(11): e1001546. doi:10.1371/journal.pmed.1001546.

78. Interview with Primah Kwagala (July 13, 2015).

79. *Ibid.*

80. *Ibid.*

81. "Court to hear whether mandatory HIV testing is constitutional in Zambia" (May 18, 2009) in *Lusaka Times*, available at https://www.lusakatimes.com/2009/05/18/court-to-hear-whether-mandatory-hiv-testing-is-constitutional-in-zambia/.

82. *Gitari v Non-Governmental Organisations Co-ordination Board & Others*, [2015] eKLR at para 11, available at http://kenyalaw.org/caselaw/cases/view/108412/.

83. There will, of course, be many instances when clients are not working with an organization and thus this discussion may not be relevant in such instances.

84. Documents available upon request.

85. Luke Bisani, "Malawi: Commercial Sex Workers Who Were Forced for HIV Test Win Case in Court" (May 20, 2015) in *allAfrica.com*, available at http://allafrica.com/stories/201505210173.html.

86. Documents available upon request.

87. Ana Paula de Barcellos, "Sanitations Rights, Public Law Litigation, and Inequality: A Case Study from Brazil" (September 2014) 16:2 *Health and Human Rights Journal* 35.

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