

University of Miami Law School

University of Miami School of Law Institutional Repository

Articles

Faculty and Deans

2018

Strategic Litigation to Advance Public Health

Tamar Ezer

Priti Patil

Follow this and additional works at: https://repository.law.miami.edu/fac_articles



Part of the [Health Law and Policy Commons](#)

Strategic Litigation to Advance Public Health

TAMAR EZER AND PRITI PATEL

Abstract

The HIV movement has relied on strategic litigation as an important tool to develop and enforce legal protections critical to health. This experience contains lessons on the potential of strategic litigation to advance public health more generally. Beyond impacting laws and policies, strategic litigation can change practice, breathing life into existing legal rules never implemented. While cases may target a particular law, policy, or practice, indirect impacts beyond a particular court decision on future cases, other branches of government, and the public record may be just as important. Each case is only one step towards change, and a judgment can be helpful in laying groundwork and in other contexts. Strategic litigation can also shape public discourse on issues relevant to health through development of the court's record, integration of expert testimony, and the use of media advocacy. It provides a means to harness the law's potential to construct reality and historical truth, creating an opening for the narratives of marginalized and affected communities. Strategic litigation and social movements can also have a reciprocal relationship, strengthening each other. Connection to a movement gives a case a political dimension, and social movements can assist in identifying issues, supporting clients, mobilizing communities, engaging media, and following up on the implementation of judgments. Strategic litigation, in turn, can galvanize social movements, creating events around which mobilization and media engagement can occur and facilitating coalition-building and the development of leadership.

TAMAR EZER, LL.M, J.D, is the Associate Director and Lecturer in Law at the Human Rights Clinic at the University of Miami School of Law in Miami, Florida, USA.

PRITI PATEL, J.D, is an independent consultant with 15 years' experience working on health and human rights issues. She is based in Christchurch, New Zealand.

Please address correspondence to Priti Patel. Email: priti@patel.org.nz.

Competing interests: None declared.

Copyright © 2018 Ezer and Patel. This is an open access article distributed under the terms of the Creative Commons Attribution Non-Commercial License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits unrestricted non-commercial use, distribution, and reproduction in any medium, provided the original author and source are credited.

Introduction

The impacts of law on health have long been recognized.¹ This is particularly true in the context of HIV. The Global Commission on HIV and the Law has documented the positive role that strong legal protections can play.² In its view, changes to the legal and policy environment could lead to one million fewer HIV infections by 2030.³ The World Health Organization (WHO) and the United Nations (UN) have likewise highlighted the importance of law to address HIV.⁴ Moreover, laws focused on protecting the rights of marginalized populations are critical for HIV prevention and treatment.⁵ According to UN Development Programme (UNDP) administrator Achim Steiner,

*Equality, inclusion and non-discrimination are at the heart of the 2030 Agenda for Sustainable Development. Laws and policies that protect rather than punish, combined with programmes that reduce stigma and discrimination, exist and need to be scaled up if we are to achieve our goal of ending the AIDS epidemic by 2030.*⁶

Consequently, the HIV movement has relied on strategic litigation as an important tool to develop and enforce legal protections. In this paper, we take a rigorous look at cases in the context of HIV, drawing lessons to benefit future work, as well as strategic litigation in other health contexts.⁷ The paper takes a broad view of HIV-related cases, and includes litigation to protect the rights of groups with greater HIV vulnerability, including sex workers, transgender persons, and men who have sex with men (MSM). Many of the cases discussed in this article, involving populations disproportionately impacted by HIV, relate to rights and claims that go beyond the group's vulnerability to HIV, but also include an articulation of the rights of a marginalized population.

Strategic litigation has varied definitions. In this paper, we define strategic litigation expansively as litigation with an intended impact beyond a particular case to influence broader change at the level of law, policy, practice, or social discourse.⁸ 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. Moreover, strategic litigation is most powerful when embedded in broader advocacy.

This paper thus analyzes the benefits of strategic litigation and lessons from the HIV field along three dimensions.⁹ First, we delve into the more traditional aim of influencing law, policy, and practice. This reveals, however, that while cases may target a particular law, policy, or practice, indirect impacts beyond a particular court decision on future cases, other branches of government, and the public record are also critical. Next, we examine the role strategic litigation can play in shaping public discourse on issues relevant to health through development of the court's record, integration of expert testimony, and use of media advocacy. Finally, we interrogate the relationship between strategic litigation and social movements and how each can strengthen the other.

One or both of the authors were involved in most of the cases discussed in this paper through the provision of both financial and technical support as either the former Deputy Director of the Law and Health Initiative of the Open Society Public Health Program (Ezer) or as the former Deputy Director of the Southern Africa Litigation Centre (Patel). The cases discussed in this paper have been selected due to their relevance to the topic and the authors' personal experience with and understanding of the impact of the cases.

Before delving into the benefits of strategic litigation, it is important to recognize that strategic litigation is resource-intensive and brings risks, and the strategic value of a particular case is context-dependent, requiring an understanding of the specific legal, political, and social environment. Risks to consider before engaging in litigation include potential harm to clients and the affected population, the possibility of a negative legal outcome, and political and social backlash. At the same time, risks can be mitigated. Clients and affected communities should be made fully aware of any potential for harm, and precautions can be taken to minimize danger. It is possible to plan for next steps in case of a negative legal outcome, and it is crucial to assess if

even a negative outcome can help advance an issue in positive ways. For example, in Malawi, in *R. v. Monjeza and Another* the criminal prosecution of a man and transgender woman seeking a same-sex marriage resulted in both individuals being sentenced to 14 years in prison with hard labor, and resulted in psychological harm to both individuals, despite the community's best efforts to provide necessary psychological support.¹⁰ However, media coverage and other advocacy related to the case have strengthened the lesbian, gay, and bisexual (LGB) movement in Malawi and increased public discussion of LGB rights, potentially paving the way for more effective future litigation and policy change.¹¹

Changing laws, policies, and practices

Strategic litigation generally aims to change laws, policies, or practices. This is critical in the context of HIV, where many countries fail to provide legal protections for core rights, including the right to health and freedom from discrimination on the basis of health status.¹² Some countries further criminalize marginalized populations and drive them underground, limiting the effectiveness of public health programs.¹³ Even when good laws exist, they are not always enforced.¹⁴ Cases from the HIV context reveal the importance of planning for both direct and indirect impacts. Each individual case is only one step towards change—a judgment may be helpful in other health contexts, can lay the groundwork for additional litigation, and can motivate other branches of government to act. The court case itself, through building a public record, serves a vital role beyond the final judgment.

Examples abound of strategic litigation resulting directly in a positive change in law and policy impacting health. The classic case is *Minister of Health v. Treatment Action Campaign* (TAC), where the Constitutional Court of South Africa required the government to provide medication to prevent mother-to-child transmission of HIV (PMTCT) and reversed the government's policy of denying necessary medication to pregnant, HIV-positive women.¹⁵ Monitoring implementa-

tion of the TAC decision has been a challenge, and access to PMTCT services varies widely across South Africa's provinces.¹⁶ Nonetheless, the case increased access to medication significantly, saving lives. It is estimated that in 2010, the introduction of PMTCT prevented 19,500 HIV infections, saving more than one million life years.¹⁷ According to a study in KwaZulu-Natal, between the 2001 TAC decision and 2006, infant mortality declined by 57% due to the availability of PMTCT programs and antiretroviral treatment.¹⁸ More recently, in *Attorney General v. Tapela*, the Court of Appeal in Botswana struck down a government policy denying free HIV treatment to non-citizen prisoners, resulting in more HIV-positive prisoners obtaining access to necessary HIV treatment.¹⁹ Such results can directly increase access to health services and treatment for marginalized populations.

However, strategic litigation can also play an important role in changing practice and breathing life into existing inadequately implemented laws and policies. For instance, the High Court in Botswana in *ND v. Attorney General* ordered the relevant government agency to change the gender marker on the identity document of a transgender man from female to male, ruling that the failure to do so violated his constitutional rights.²⁰ ND had argued that under the National Registration Act, the registrar can issue a person a new identity card if there has been a material change to their circumstances. In this way, strategic litigation is a test of the rule of law and its proper implementation, contributing to both its construction and consolidation. It can also prompt a more equitable interpretation of certain laws that may have a discriminatory impact. In 2011, the Supreme Court of Canada interpreted a provision of the Controlled Drugs and Substances Act (CDSA), which criminalizes drug possession, to exempt Insite, a supervised injection site, from the CDSA's application, and accordingly ordered the federal minister of health to provide Insite an exemption. The CDSA permits the federal minister of health to exempt drug possession from criminalization if it "is necessary for a medical or scientific purpose or is otherwise in the public interest." Insite had initially received that exemption,

but later the exemption was not renewed. The court held that the failure to exempt Insite threatened the health and life of people who inject drugs, thereby violating their constitutional rights.²¹

Court decisions in one country can also have relevance in other similarly situated countries. For instance, in Kenya in *R. v. Kenya National Examinations Council*, Audrey Mbugua Ithibu used a legal case seeking a change of her gender on a school certificate as a way to advance the rights of transgender persons more broadly.²² The High Court cited a case from the Supreme Court of India and the Supreme Court of Nepal recognizing a third gender.²³

Additionally, strategic litigation can result in a judgment helpful for health issues more broadly. 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.²⁴ The central issue in the case was what constituted informed consent. The government argued that the women's informed consent was given, while the women claimed it had not.²⁵ The Supreme Court held that "[i]nformed consent implies an understanding and appreciation of one's rights and the risks, consequences and available alternatives to the patient. An individual must also be able to make a decision regarding sterilisation freely and voluntarily."²⁶ This definition is a new and powerful tool that activists can use in seeking redress for other violations of informed consent.

Such cases point to a role for creative opportunism, using ordinary cases to push for change. Rather than waiting for the "perfect" case, advocates can use ordinary cases to change laws, policies, or practices. For instance, the *Center for Health, Human Rights and Development (CEHURD) and Others v. Nakaseke District Local Administration* case could easily have been a simple matter involving the negligence of an individual doctor, who was absent for eight hours during an obstructed labor; in fact, the trial court judge admonished the lawyers for not joining the doctor as a party in the suit.²⁷ However, CEHURD, which brought the case, recognized that it could be used to address larger systemic gaps affecting maternal health, including

shortages in essential medical supplies and limited dedicated medical personnel. It thus anchored the case in constitutional rights, addressing the government's failure to provide basic maternal health care to pregnant women and creating an incentive for structural change, rather than punishment of individual doctors.²⁸

This also reflects the importance of an incremental approach, where cases slowly build on each other to create change. An incremental approach is particularly useful when it comes to asserting the rights of marginalized groups. In Malawi, organizations seeking the decriminalization of sex work first sought to challenge the forced HIV testing of sex workers. The resulting judgment affirmed that sex workers are entitled to fundamental constitutional rights, which were violated when they were subjected to mandatory HIV testing.²⁹ Following this case, organizations challenged the offense of living on the earnings of prostitution, arguing that the offense did not prevent sex workers themselves from living on their earnings. In 2016, the High Court in Malawi found that section 146 of the penal code, which criminalizes living off the earnings of prostitution, prevents another individual from living on the earnings of their prostitution, but was designed to protect sex workers from exploitation by third parties.³⁰ Further, in 2017, Malawi organizations sought to challenge laws criminalizing being a rogue and vagabond, which have been used to harass sex workers. The High Court agreed and struck these laws down as unconstitutional.³¹ These three decisions affirming the rights of sex workers have laid a solid foundation from which a challenge to the laws criminalizing sex work can be initiated.

Furthermore, strategic litigation can create a pressure point that spurs action from other branches of government. For example, the favorable judicial decision in Namibia's forced sterilization case on behalf of three women strengthened the overall bargaining position of women living with HIV in their negotiations with the Namibian government regarding investigating other claims of forced sterilization and compensation, as it affirmed that at a minimum the courts had found that at least three women had been subjected to forced sterilization.³²

Likewise, when Uganda's parliament failed to act after the law reform commission recommended statutory changes to protect women's equal rights to inheritance, advocates applied additional pressure through legal action.³³ While their court case has not yet resulted in statutory reform, it was successful in nullifying certain discriminatory provisions of the Succession Act.³⁴

Additionally, strategic litigation 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 these policies and practices, even if the litigation itself is unsuccessful. For instance, in Canada, litigation initiated by a former prisoner, the Canadian HIV/AIDS Legal Network, and three other HIV organizations to challenge the federal government's refusal to permit access to sterile injection equipment for drug use in prisons established a record of the successes of these programs elsewhere, and of the Canadian government's failure to respond to multiple national and international recommendations for such programs. As a result, the government was called upon to provide evidence to support its prohibition of access to sterile injection equipment. The government filed affidavits attempting to justify its position based on security concerns, but the affidavits did not address the effectiveness of policies and practices of international programs enabling access. The government did finally confirm its position that all injection equipment for drug use (sterile or otherwise) is considered "contraband" and that this characterization is founded on security concerns—points not clearly communicated previously. Having this information, advocates are in a better position to respond to governmental arguments both in and out of court.³⁵

Shaping public discourse

Strategic litigation can play an important role in shaping public discourse relevant to health. This takes place through the court process itself, and through the development of a public record, integration of expert testimony, and the use of media advocacy.

Strategic litigation is a powerful tool since it harnesses the potential of law to state reality and construct historical truth. Through the hearing of evidence and judicial recognition, litigation converts the stories of clients and affected communities into fact, captured in a public record. For marginalized groups, in particular, this is a valuable means to influence the historical narrative. For instance, as mentioned previously, when three women living with HIV in Namibia brought a case challenging their forced sterilization, the government's steadfast denial of this practice was forced to give way in the face of the women's testimony, which medical experts corroborated and the judiciary confirmed.³⁶ Strategic litigation can also enable marginalized groups to overcome popular or internalized assumptions that they are undeserving of rights protections. *R. v. Kenya National Examinations Council*, had an empowering effect not only on the plaintiff, Audrey Mbugua Ithibu, but on other transgender persons in Kenya. They drew inspiration from Audrey's assertion of her rights, testimony regarding her lived experiences, and affirmation by the court.³⁷

Strategic litigation further provides an opportunity for engagement with health experts, impacting both the court's and public's understanding of an issue. For instance, in a case involving access to opioid substitution treatment (OST) in Russia, the government questioned the efficacy of the treatment as 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 claims about OST's potential harms. Working with the international medical community also focused attention on global standards and good practices, dispelling myths.³⁸ In *Attorney-General v. Tapela*, the non-citizen prisoners living with HIV in Botswana supported their argument that denial of HIV treatment violated their constitutional rights by including a submission from a well-respected epidemiologist outlining in medical terms what can occur if a person living with HIV is denied treatment and the relationship between HIV and tuberculosis.³⁹ The Court of Appeal relied on this

submission in finding that HIV treatment can greatly reduce the incidence of tuberculosis in prisons, where high rates of tuberculosis persist, thereby keeping all prisoners safer from illness.⁴⁰

In many cases, media advocacy is an essential complement to strategic litigation that can impact public discourse significantly. As Mark Heywood, head of South Africa's AIDS Law Project and a founder of TAC, explains, the TAC case made good use of media coverage "to amplify stories of the human cost of denial of HIV medication to a national and international audience. The violation of the human right of access to treatment for HIV was made into a moral dilemma for society as a whole."⁴¹ Media advocacy includes:

- sensitizing and building relationships with key journalists covering the issue;
- issuing press releases when key events occur and organizing press conferences;
- placing opinion pieces in influential newspapers and blogs; and
- using social media—including Facebook, Twitter, and blogs—to keep mainstream media and others apprised throughout the litigation.

In Namibia, organizations engaged the media when litigating cases of forced sterilization. In particular, they engaged local and international journalists to sensitize them to 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.⁴² This raised public awareness of forced sterilization not only in Namibia but throughout Africa. Since the litigation, more women have come forward to report they were forcibly sterilized in Namibia and in other African countries. 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. Organizations in Lesotho, moreover, have

published a report documenting the forced sterilization of women living with HIV.⁴³

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 difficult for the average outsider to understand. Translating such information into plain language through media coverage can be critical to changing public discourse and raising understanding of issues. In a case involving a challenge to Kenya's Anti-Counterfeit Act, which limited access to generic HIV medications, the media advocacy sought to assist the public in understanding what was at stake in the case and how legislation that appeared to deal with counterfeit medications actually restricted access to affordable, HIV treatment.⁴⁴

Strengthening movements

Strategic litigation has a reciprocal relationship with social movements. It can strengthen and help build social movements and, at the same time, often depends on them. Strategic litigation is generally most effective as part of broader advocacy. Connection to the community gives a case a political dimension—it becomes a matter for systemic change rather than just a problem for certain individuals. Social movements can assist in the following areas: identifying cases and supporting clients throughout the litigation process; documenting violations and providing a nuanced understanding of experiences; mobilizing communities to amplify the impact of litigation; engaging media; and ensuring accountability for the implementation of judgments. Strategic litigation, in turn, galvanizes social movements, creating events around which mobilization and media engagement can occur, and facilitating coalition building and the development of leadership.

Social movements play a crucial role in identifying cases and providing clients with ongoing support. Many countries have stringent rules regarding who can bring a lawsuit. This often requires that advocates seeking to challenge particular laws, policies, or practices find individuals directly af-

affected by them, who are willing to be involved in litigation. Grassroots organizations can assist in identifying appropriate plaintiffs and providing them with psychosocial support throughout litigation that is often lengthy. For example, in *Tapela*, a case challenging Botswana's policy of denying free HIV treatment to non-citizen prisoners living with HIV, the 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. As a leader in the HIV movement, BONELA was known by the two plaintiffs, who wrote to them requesting assistance.⁴⁵ In Malawi, the Centre for the Development of People (CEDEP) worked closely with two individuals, Steven Monjeza and Tiwonge Chimbalanga, who were being criminally prosecuted for organizing their same-sex wedding ceremony, to provide them with psychosocial and other support. CEDEP visited them in prison, where they were being held during the trial, providing them with necessities including food and basic toiletries.⁴⁶ Among other support, CEDEP helped Chimbalanga obtain asylum in South Africa upon his release.⁴⁷

Additionally, social movements can help in documenting and defining violations. In order to craft an appropriate remedy in HIV-related cases, it is often necessary to have detailed documentation of a violation to prove its occurrence and gravity. Grassroots organizations with strong links to the affected community can assist in this documentation process. In the Namibia sterilization case, the grassroots organizations' strong relationships with women living with HIV helped them identify and document additional cases of forced sterilization.⁴⁸ This is particularly true 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. In *Canada v. Bedford*, a case challenging the criminalization of sex work-related activities, sex worker-led organizations had spent years working with sex workers in the community to document their experiences and violations suffered. During this time, they produced numerous reports and gained a deep understanding of how the laws

impacted sex workers in their daily lives.⁴⁹ This documentation then formed the basis of the case focused on the risk of serious physical harm facing sex workers.⁵⁰

Moreover, social movements can lead mobilization campaigns around litigation. Organizations specializing in litigation often lack the expertise and connections needed to mobilize affected communities and organize advocacy activities, such as marches and sit-ins. For example, in a case challenging the forced sterilization of HIV-positive women in Namibia, the Namibia Women's Health Network (NWHN), a grassroots organization addressing the needs of women living with HIV, mobilized women living with HIV around the case. NWHN ensured that the women were present in the courtroom during the case, organized marches on the days of the trial, established a website providing daily information on the litigation, and identified spokespeople to share with the media how forced sterilization affected their health and lives.⁵¹ The Legal Assistance Centre lacked this mobilizing capacity and could focus its efforts on representing the three plaintiffs.⁵²

Social movements also play a vital role in media advocacy. In many jurisdictions, lawyers are unable to communicate with the media due to professional restrictions. However, civil society organizations not directly involved in the litigation are well-placed to speak on the litigation's significance. For example, Zambia continues to implement the *sub judice* rule requiring lawyers to refrain from media commentary and preventing them from speaking publicly about ongoing court cases and on the view that only the arguments made in court should affect the case.⁵³ In a case challenging the mandatory HIV testing and subsequent dismissal of two former military employees, the Zambian AIDS Law and Research Network (ZARAN)—a civil society organization—was able to engage the media and public, while the lawyers could not speak publicly about the issues raised. ZARAN issued press releases, organized press conferences, and informed other stakeholders of the litigation.⁵⁴

Furthermore, social movements can assist in ensuring the proper implementation of positive

judicial decisions, as implementation can require ongoing monitoring and, in some cases, returning to court to enforce positive judicial decisions.⁵⁵ In many cases, obtaining a positive judgment is only the midway point in advocacy. In Namibia, social movements have been critical in the long process of obtaining redress for women subjected to forced sterilization. Despite positive judicial decisions in three cases, 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. Organizations have sought to address these hurdles through advocacy.⁵⁶

At the same time, the involvement of social movements in strategic litigation can also strengthen them. Alicia Ely Yamin notes that with regard to HIV movements in particular, “Litigation did not so much displace social struggle—rather it became an integral tool of social struggle across a number of widely varying contexts.”⁵⁷ This was the case with the TAC litigation in South Africa, which supported a larger campaign. Mark Heywood describes that it “caught the attention of young women with HIV and—for the first time in Africa—began to galvanize a social movement that was made up of people who were predominantly poor, black, and living with HIV.”⁵⁸ The critical point is that “litigation was not left to lawyers, but used to strengthen and empower a social movement and backed by marches, media, legal education, and social mobilization.”⁵⁹

Court cases provide human stories and concrete events around which communities can mobilize, generating momentum and galvanizing media attention. Media interest intensifies—and advocacy opportunities are presented—when a case is 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 advocacy activities accordingly. In 2010, the trial in *R v. Monjeza and*

Another helped mobilize and solidify the country’s LGB movement.⁶⁰ Prior to the trial, which included a constitutional challenge to the criminalization of sodomy, the only LGB group in Malawi—CEDEP—had worked to raise awareness of the rights and health issues relevant to the LGB community, but had not carried out any significant advocacy campaigns and was not well known in the country.⁶¹ 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 more generally on human rights and the rule of law.⁶²

Similarly, in Canada, the case challenging the criminalization of sex work-related activities—*Canada v. Bedford*—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 they did not coordinate efforts on a national level.⁶³ This changed over the course of the *Bedford* litigation. The powerful sex worker movement that resulted continues to collaborate on advocacy activities and responses to government action from coast to coast.⁶⁴

Strategic litigation can also strengthen social movements by providing an opportunity for coalition building and connecting the experience of marginalized groups with issues of concern to the larger public. In Uganda, a series of cases aimed at addressing maternal mortality resulted in a coalition of about 150 organizations working to advance maternal health in the country and strengthened the connection between local and international advocates. This coalition continues to coordinate its activities on this issue long after the issuance of a number of favorable judicial decisions and has facilitated the development of unlikely allies, including between health service organizations and legal organizations.⁶⁵ 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.”⁶⁶ The case was part of a broader push by NGOs to address laws limiting their ability to engage in advocacy, enabling connection between the LGBT community and other groups.⁶⁷

Finally, when strategic litigation is conducted in collaboration with affected communities, it can restore dignity and agency to these communities and contribute to the development of leadership. In a challenge to a ban on OST in Russia, the plaintiffs in the litigation 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.⁶⁸ In Kenya, Audrey Mbugua Ithibu’s case requesting that her gender marker be changed on her education certificate cemented her as a leader and representative of the transgender community in Kenya. She speaks publicly regarding being a transgender person in Kenya, and the need to strengthen and enforce the rights of transgender persons.⁶⁹ The TAC case, as Mark Heywood recounts, showed how “access to accurate information about health and linking this information to rights empowered marginalized people who began to assume both a public voice and visibility.”⁷⁰

Conclusion

This paper draws on lessons from the HIV field to explore the benefits of strategic litigation for health along three dimensions: (1) impacts on law, policy, and practice; (2) impacts on public discourse; and (3) impacts on movement building. It reveals the importance of taking a broader focus, which includes both direct and indirect impacts, and viewing strategic litigation within a larger context of future cases, actions by the various branches of government, and construction of a social discourse and historical record. Moreover, strategic litigation has a reciprocal relationship with social movements. Social movements often play a critical, complementary role to the litigation, and the litigation, in turn, strengthens them. Strategic litigation provides vital opportunities for advocacy, media

engagement, coalition building, and the emergence of leadership. Strategic litigation can be a powerful tool to advance health, and it is to be hoped that an understanding of its functioning across the various dimensions can make it more effective.

References

1. S. Talbot, “Advancing human rights in patient care through strategic litigation: Challenging medical confidentiality issues in countries in transition” *Health and Human Rights Journal* 15/2 (2013), p. 69; AE Yamin and S. Gloppen, eds, *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011); Health and Human Rights Resource Guide, available at <https://fxb.harvard.edu/health-and-human-rights-resource-guide/>. This publication defines health in terms of mental, physical, and social well-being. See *Constitution of the World Health Organization*, WHA 26.37, WHA 29.38, WHA 39.6 and WHA 51.23 (2006), p. 1. Available at http://www.who.int/governance/eb/who_constitution_en.pdf.
2. Global Commission on HIV and the Law, *Risks, rights and health* (New York: United Nations Development Programme, July 2012).
3. *Constitution of the World Health Organization*, WHA 26.37, WHA 29.38, WHA 39.6 and WHA 51.23 (2006), p. 11.
4. Ibid. World Health Organization, “Human rights – A central concern for the global HIV response” (November 30, 2010). Available at http://www.who.int/mediacentre/news/statements/2010/AIDS_Day_20101130/en/.
5. Global Commission on HIV and the Law (see note 2); Canadian HIV/AIDS Legal Network and Joint United Nations Programme on HIV/AIDS (UNAIDS), *Courting rights: Case studies in litigating the human rights of people living with HIV* (Geneva: UNAIDS, March 2006).
6. UN Development Programme, “Evidence- and rights-based laws and policies are key to ending AIDS” (June 13, 2017). Available at <http://www.undp.org/content/undp/en/home/presscenter/pressreleases/2017/07/13/evidence-and-rights-based-laws-and-policies-are-key-to-ending-aids-.html>. See also UN Secretary General Ban Ki Moon, SG/SM/11727/AIDS/142, Speech to the International AIDS Conference, Mexico City, August 3, 2008 (“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 [HIV] 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.”).
7. Alicia Yamin recognizes the pioneering impact of HIV cases on other health rights litigation and that “early successes

in HIV/AIDS litigation would lead to health rights litigation in other areas.” AE Yamin, “Power, suffering, and courts: Reflections on promoting health rights through judicialization,” in AE Yamin and S. Gloppen (eds), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011), p. 348.

8. Open Society Foundations, *Justice programs for public health: A good practice guide* (New York: Open Society Foundations, 2015). Available at <https://www.opensocietyfoundations.org/publications/justice-programs-public-health>.

9. For a broader discussion of the impact of strategic litigation and lessons learned, see M. Roa and B. Klugman, “Considering strategic litigation as an advocacy tool: A case study of the defence of reproductive rights in Colombia,” *Reproductive Health Matters*, 22/44 (November, 2014), pp. 31-41; C. C. Barber, “Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations,” *The International Journal of Human Rights*, 16 (2012), pp. 411-435. S. L. Cummings and D. L. Rhode, “Public interest litigation: Insights from theory and practice,” *Fordham Urban Law Journal*, 36 (2009), p. 603. For additional case studies and discussion of strategic litigation in the context of health, please see AE Yamin and S. Gloppen, eds, *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011).

10. G. Mapondera and D. Smith, “Malawian gay couple jailed for 14 years,” *The Guardian* (May 20, 2010). Available at <https://www.theguardian.com/world/2010/may/20/malawian-gay-couple-jailed-14-years>; M. Gevisser, “Love in exile,” *The Guardian* (27 November 2014). Available at <https://www.theguardian.com/news/2014/nov/27/-sp-transgender-relationship-jail-exile-tiwonge-chimbalanga>; G. Mapondera and D. Smith, “Love fails to conquer all as Malawi gay couple separate,” *The Guardian* (June 8, 2010). Available at <https://www.theguardian.com/world/2010/jun/08/malawi-steven-monjeza-tiwonge-chimbalanga>.

11. M. Canavera, “Picking up the pieces in Malawi,” *The Huff Post* (June 4, 2010). Available at https://www.huffingtonpost.com/mark-canavera/picking-up-the-pieces-in_b_596371.html.

12. F. Viljoen, S. Precious, (eds), *Human rights under threat: Four perspectives in HIV, AIDS and the law in Southern Africa* (Pretoria: Pretoria University Law Press, 2007), p. 81.

13. See, for example, section 26 of Kenya’s Sexual Offences Act, No. 3 of 2006.

14. F. Viljoen, S. Precious, (eds), (see note 12), p. 81.

15. *The Minister of Health v. Treatment Action Campaign* (2002), 2002 (5) SA 703; 2002 (10) BCLR 1075.

16. C. Cooper, “South Africa: Health rights litigation: Cautious constitutionalism,” in A.E. Yamin and S. Gloppen (eds), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September

2011), p. 220.

17. O. Mastad et al., “Assessing the impact of health rights litigation,” in AE Yamin and S. Gloppen (eds), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011), p. 285.

18. C. Cooper, “South Africa: Health rights litigation: Cautious constitutionalism,” in A.E. Yamin and S. Gloppen (eds), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011), p. 221.

19. *Attorney General v. Tapela* (Court of Appeal, Civil Case No. CACGB-096-14, August 26, 2015).

20. T. Esterhuizen, “Op-Ed: Progressive Botswana court affirms that legal recognition of gender identity at core of human dignity,” *Daily Maverick* (November 21, 2017). Southern Africa Litigation Centre, *News release: Botswana registrar changes transgender man’s identity document from female to male* (8 January 2018). Available at <https://southernafricalitigationcentre.org/2018/01/08/news-release-botswana-registrar-changes-transgender-mans-identity-document-from-female-to-male/>.

21. *Attorney General v. PHS Community Services Society* (2011), 2011 SCC 44; S.K.H. Chu, “Case summary: Supreme Court of Canada orders Minister of Health to exempt supervised injection site from criminal prohibition on drug possession *Attorney General v. PHS Community Services Society*, 2011 SCC 44 (Supreme Court of Canada),” *Human Rights and Drugs* 2/1 (2012).

22. Open Society Foundations, *Advancing public health through strategic litigation: Lessons from five countries* (New York: Open Society Foundations, June 2016), pp. 39-41.

23. *R v. Kenya National Examinations Council and Another, Ex Parte Audrey Mbugua Ithibu* (JR Case No 147 of 2013).

24. *Government of the Republic of Namibia v LM and Others* (Case No. SA 49/2012, November 3, 2014).

25. *Ibid.*, p. 4.

26. *Ibid.*, pp. 3-4.

27. *The Center for Health, Human Rights and Development and Others v Nakaseke District Local Administration* (Civil Suit No. 111 of 2012, April 30, 2015).

28. Open Society Foundations, *Advancing public health through strategic litigation: Lessons from five countries* (New York: Open Society Foundations, June 2016), pp. 42-44.

29. L. Bisani, “Malawi: Commercial sex workers who were forced for HIV test win case in court,” *Allafrica.com* (May 20, 2015). Available at <http://allafrica.com/stories/201505210173.html>.

30. *R v. Banda and Others* (Review Case No. 58 of 2016, September 8, 2016). Available at <https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/Rep-v-Pempho-Banda.pdf>.

31. *Gwada v. S* (Constitutional Case No. 5 of 2015, January 10, 2017). Available at <https://southernafricalitigationcentre.org/2017/01/28/malawi-challenging-consti>

tutionality-of-rogue-and-vagabond-offence/.

32. Open Society Foundations (2016, see note 22), pp. 25-29.

33. *Ibid.*, p. 18.

34. *Law Advocacy for Women in Uganda v. Attorney General* (2007), [2007] UGCC 1.

35. Email from Sandra Ka Hon Chu, Director of Research and Advocacy, Canadian HIV/AIDS Legal Network to Tamar Ezer, Priti Patel, and Mikhail Golichenko on March 1, 2018 (available from the authors on request).

36. *Government of the Republic of Namibia v. LM and Others* (Case No. SA 49/2012, November 3, 2014).

37. Open Society Foundations (2016, see note 22), p. 41.

38. World Health Organization, *Guidelines for the psychosocially assisted pharmacological treatment of opioid dependence*, (Geneva, Switzerland: WHO, 2009), pp. X-XI. Available at http://www.who.int/substance_abuse/publications/opioid_dependence_guidelines.pdf; Andrey Rylkov Foundation for Social Justice and Health and Canadian HIV/AIDS Legal Network, *When science is just a decoration: Russian drug policy & the right to scientific progress, communication to the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the UN Independent Expert in the Field of Cultural Rights regarding violation by the Government of the Russian Federation of the right to enjoy the benefits of scientific progress and its applications* (March 28, 2012). Available at http://www.aidslaw.ca/site/wp-content/uploads/2013/04/ARF_UNESCO2April2012.pdf.

39. *Attorney General v. Tapela* (Court of Appeal, Civil Case No. CACGB-096-14, 26 August 2015).

40. *Ibid.*

41. M. Heywood, "South Africa's Treatment Action Campaign: Combining law and social mobilization to realize the right to health," *Journal of Human Rights Practice* 1/1 (2009), p. 20.

42. See Justice for Namibian Women. Available at <https://endforcedsterilizationinamibia.wordpress.com/>.

43. Open Society Foundations (2016, see note 22), p. 29.

44. National Empowerment Network of People living with HIV/AIDS in Kenya (NEPHAK), et al, Joint press statement by health activists to engage government for review of the Anti-Counterfeit Act (31 October 2013). Available at <http://nephak.or.ke/joint-press-statement-by-health-activists-to-engage-government-for-review-of-the-anti-counterfeit-act/>.

45. Supporting Affidavit, Mbuso Piye, *Tapela and Others v Attorney General and Others* (MAHGB-000057-14, 22 August 2014), para. 7.

46. M. Canavera (see note 11).

47. M. Gevisser (2014, see note 10).

48. International Community of Women Living with HIV/AIDS, *The forced and coerced sterilization of HIV positive women in Namibia* (London: International Community of Women Living with HIV/AIDS, March 2009). Available at www.iamicw.org/_literature_144354/Issue_Paper_03_A4.

49. Open Society Foundations (2016, see note 22), pp. 30-33.

50. *Ibid.*

51. *Ibid.*, pp. 25-29.

52. *Ibid.*

53. See, for example, Legal Association of Zambia, *Press statement on the Post newspaper's publication of the taped conversation by Honourable Alexander Chikwanda* (28 May 2015). Available at <http://www.laz.org.zm/2015/05/28/press-statement-on-the-post-newspapers-publication-of-the-taped-conversation-by-honourable-alexander-chikwanda/>.

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

55. Alicia Yamin remarks on the important role of social movements in the implementation of judgements. In Brazil, for instance, a dynamic HIV movement contributed to higher implementation of judgements in HIV than other cases. A.E. Yamin, "Power, suffering, and courts: Reflections on promoting health rights through judicialization," in A.E. Yamin and S. Gloppen (eds), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011), p. 349.

56. Open Society Foundations (2016, see note 22), p. 29.

57. A.E. Yamin, "Power, suffering, and courts: Reflections on promoting health rights through judicialization," in A.E. Yamin and S. Gloppen (eds), *Litigating health rights: Can courts bring more justice to health?* (Cambridge: Harvard University Press, September 2011), p. 349.

58. M. Heywood, "South Africa's Treatment Action Campaign: Combining law and social mobilization to realize the right to health," *Journal of Human Rights Practice* 1/1 (2009), p. 20.

59. *Ibid.*, p. 22.

60. M. Gevisser (2014, see note 10).

61. Open Society Foundations (2016, see note 22), p. 15.

62. *Ibid.*, pp. 15-16. See also, M. Jagannath, N. Phillips, and J. Shah, "A rights-based approach to lawyering: Legal empowerment as an alternative to legal aid in post-disaster Haiti," *Northwestern Journal of International Human Rights* 10 (2011), p. 11.

63. Open Society Foundations (2016, see note 22), p. 16.

64. *Ibid.*

65. "Maternal Health is a Constitutional Right," *CE-HURD 2015 Events Digest* (2015). Available at <https://www.cehurd.org/wp-content/uploads/downloads/2016/02/Annual-newsletter-2015.pdf>.

66. *Gitari v. Non-Governmental Organisations Co-ordination Board & Others* (High Court, Petition 440 of 2013, 2015), para. 11. Available at <http://kenyalaw.org/caselaw/cases/view/108412/>.

67. Open Society Foundations (2016, see note 22), p. 49.

68. Documents available upon request.

69. Kenya Citizen TV, "Who Am I? Audrey Mbugua." Available at <https://www.youtube.com/watch?v=h9IH-BAiN2BQ>. M. Kowalska, "Interview with Audrey Mbugua Ithibu," *The Heroines of My Life* (January 22, 2014). Available at <http://theheroines.blogspot.co.nz/2014/01/interview-with-audrey-mbugua-ithibu.html>.

70. M. Heywood, "South Africa's Treatment Action Campaign: Combining law and social mobilization to realize the right to health," *Journal of Human Rights Practice* 1/1 (2009), p. 18.