



**LESSONS FROM THE EVALUATION OF
THE GLOBAL COMMISSION ON HIV
AND THE LAW**

ISSUE BRIEF #2

The role of the judiciary in HIV responses

Drawing on the external evaluation of the Global Commission on HIV and the Law,ⁱ ⁱⁱ this issue brief shares lessons and reflections on the role of the judiciary in advancing rights-based HIV responses, to inform the implementation of key commitments in the 2021 Political Declaration on HIV and AIDS and the Global AIDS Strategy.

Introduction

Discriminatory and punitive laws, policies and practices adversely affects the ability of people living with HIV and key populations to enjoy their rights, access justice and to seek redress when their rights have been violated. The judiciary needs to keep abreast of new and complex scientific, legal and medical issues in the context of HIV because laws, policies and practices do not always keep pace with developments in HIV science. Sensitizing the judiciary to address HIV-related legal and human rights issues in light of the latest scientific developments is critical to creating an enabling legal environment that supports national responses to HIV.ⁱⁱⁱ

In the 2021 Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030 (the Political Declaration), UN Member States committed to securing access to justice for communities affected by HIV “through the establishment of legal literacy programmes, increasing their access to legal support and representation and expanding sensitization training for judges, law enforcement, health-care workers, social workers and other duty bearers”.^{iv} The Global AIDS Strategy 2021–2026: End Inequalities. End AIDS (the Global AIDS Strategy) calls for governments to increase “meaningful access to justice and accountability for people living with or affected by HIV and key populations,” setting the ambitious target that “more than 90% of people living with HIV who experienced rights abuses have sought redress by 2025.”^v

The commitments and targets are particularly relevant to the judiciary because judges have a critical role to play in guaranteeing access

to justice, ensuring redress for HIV-related human rights abuses and violations, and advancing enabling legal and policy environments for effective HIV responses. These actions contribute to improved HIV and health outcomes and the achievement of the Sustainable Development Goals (SDGs) target of ending AIDS as a public health threat by 2030.

Key lessons from the Global Commission on HIV and the Law

The external evaluation highlighted a few strategies for strengthening engagement with the judiciary on the issues of human rights, HIV and the law, and advancing rights-based HIV responses, which are presented below. Tailoring these strategies to local contexts and priorities is key to achieving positive results.

1. Judicial decisions are critical in shaping the HIV-related legal environment

While the enactment or removal of discriminatory and punitive laws and policies often requires legislative processes, judicial decisions have far-reaching impacts for the protection of human rights in the context of HIV, particularly those of the high courts. Parliaments may pass laws, but courts are often still required to interpret them. A well-informed judiciary is necessary to ensuring that judicial decisions are aligned with accurate legal, medical and public health evidence and to advance the protection of HIV-related human rights.

Just as rulings that are not evidence and rights-based can have devastating impacts,

far beyond the individual case at hand, rulings based on sound legal, medical and public health evidence can go a long way to protect the health and rights of people living with HIV and key populations. The sensitisation of judges should be an ongoing initiative. It is important to support judges to understand the real-world impact of punitive and discriminatory laws and the legal environment on people living with HIV and key populations, to ensure that justice is dispensed and rights are upheld. This is particularly important in contexts where advancing HIV-related rights is extremely challenging. A sensitised and informed judiciary can be potential change agents when the opportunity arises.

Furthermore, courts may apply relevant international standards and principles to protect human rights in the absence of national laws preventing HIV-related discrimination. Many examples of good practice exist where judges have passed important rulings by applying international human rights standards that promote HIV-related human rights. In Botswana, for example, even where there are no specific protective laws pertaining to HIV and discrimination, the labour court judges have been innovative in their use of international law to develop the jurisprudence to protect HIV-related human rights.^{vi}

2. Evolving HIV science has important legal implications

Innovations in science and technology play a critical role in shaping the direction of the HIV response. Developments in HIV therapies, including pre-exposure prophylaxis (PrEP) and the ability of people on antiretroviral therapy (ART) to achieve viral suppression, for example, all have implications for how

HIV-related laws should be understood and applied. It is therefore important for judges to rely on the best available medical and scientific evidence for their rulings. Courts may call subject matter experts to provide evidence or rely on publications by experts on matters they are adjudicating. Given the complexity and rapidly evolving nature of HIV science, judicial sensitisation is a useful approach to ensuring that judges have access to and knowledge of the best available medical and scientific evidence they need to reach just verdicts in HIV-related cases. The Expert Consensus Statement on the Science of HIV in the Context of Criminal Law published in 2018 by 27 of the world's leading HIV scientists provided a detailed analysis of the best available scientific and medical research data on HIV transmission, treatment effectiveness and forensic phylogenetic evidence so that it may be better understood in criminal law contexts.^{vii} The Consensus Statement has proved an important tool for judicial sensitization and in support of litigation challenging HIV criminalization.^{viii}

The fora of regional judges in Africa, the Caribbean, and Eastern Europe and Central Asia, created in response to the Global Commission's call to engage and sensitise the judiciary, have been an opportunity for participating judges, to access knowledge. These included recent medical and scientific evidence about HIV and TB, data about resources and health care provision, and legal judgments in other jurisdictions. The fora have also been an opportunity for judges to hear directly from members of key and vulnerable populations including those whose behaviours or identities may be criminalised. With a view to building their knowledge base, judges and other representatives of the judiciary are best

supported when they can meet regularly and collectively interact with scientific experts as well as with representatives of affected communities. These sorts of interactions allow judges to deepen their understanding of the latest science relating to HIV as well as how relevant laws impact affected populations' lives. In 2017, for example, the High Court of Malawi overturned the conviction of an HIV-positive woman for exposing a child to HIV through breastfeeding where HIV was not transmitted. The presiding judge cited the scientific information she had learned through the African Judges' Forum about the negligible risk of HIV transmission through breastfeeding when the woman has an undetectable viral load.

3. Sensitising judges to people's lived experiences is key

Justice for people living with or affected by HIV requires judges who are familiar with the latest science, public health and related topics as well as the lived experiences of people affected by the law. A judge's capacity to advance human rights in the context of HIV can be greatly enhanced through sensitisation that familiarises judges with issues, areas and experiences to which they may not otherwise have been exposed. Participation of people living with HIV and key populations to talk about the impact of the legal environment on their lives can help humanize the potential impacts of the law through these sorts of interactions. For example, the 2018 Supreme Court judgment in India that effectively decriminalized homosexuality was issued by a judge who was aware of the law and public health evidence issues relating to HIV, as well as the challenges faced by key populations.^{ix} Judges who have participated in the regional

judges' fora have reported that repeated engagement with representatives of key populations helped them to see people from these groups as equal to others, to understand how the law can negatively impact their health and lives, and to see how good law can help to create an enabling legal environment in which people can live healthier lives.

4. Safe spaces for respectful discussion and learning among justice sector peers supports more informed rulings

The opportunity to learn about HIV and related public health in a space with other judges and in which they feel comfortable is critical. The value of peer learning outside the confines of a national context can be invaluable in fostering important and difficult conversations and support amongst judges and creating in-country traction and momentum for addressing challenging issues. The regional judges' fora are an example of what can be accomplished by bringing judges together from across countries to engage in mutual learning and support. With a focus on HIV, the participating judges determine the forum's agenda with a view to ensuring access to up-to-date public health evidence, as well as exposure to the stories of key populations about how HIV-related laws have affected their lives. These meetings create an environment of peers where judges can ask questions and learn outside the structures of their courtroom and country, share this learning with other judges in their home country, and bring these lessons into their rulings. Several judges who have participated in the fora have gone on to hand down precedent-setting judgments based on scientific evidence that protect the rights of people living with HIV and key

populations. In countries with similar legal systems, similar HIV-related cases may arise in court. Access to public health evidence and information on different courts' views and interpretations of law on a range of issues can help judges make informed rulings.

Conclusion

Supporting and ending impunity for human rights violations against people living with HIV and key populations depends on an informed judiciary. The achievement of the targets set out in the SDGs, the Political Declaration and the Global AIDS Strategy rely

on the creation and enforcement of enabling HIV-related legal environments. The judiciary plays a critical role in securing access to justice for people living with HIV and key populations and addressing HIV-related stigma and discrimination. Ongoing efforts are needed in every region of the world to sensitise judges to the lived experiences of people living with and most affected by HIV, as well as evolving science and public health knowledge, ideally in spaces most conducive to their learning and sharing.

UNDP is a founding co-sponsor of the Joint UN Programme on HIV/AIDS (UNAIDS). UNDP convenes the Joint Programme's work on rights, law, stigma and discrimination and co-convenes the work on key populations (with UNFPA). UNDP also serves as interim Principal Recipient for Global Fund HIV grants in challenging operating environments. UNDP is a co-convenor of the Global Partnership for Action to Eliminate All Forms of HIV-related Stigma and Discrimination which works with countries to address stigma and discrimination across six priority settings: the community, education, health care, humanitarian and emergency settings, the justice system and the workplace.

On behalf of UNAIDS, UNDP convened the Global Commission on HIV and the Law in 2010.^x The Global Commission's 2012 Report and 2018 Supplement made recommendations to governments on a range of issues including criminalization, key populations, gender equality, rights-based service delivery, access to medicine and the use of digital technologies for HIV. The breadth and approach of follow-up activities to the Global Commission offer key lessons for what it will take to operationalize the ambitious commitments of the 2021 Political Declaration and the Global AIDS Strategy.

UNDP has worked with governments, civil society organizations and other partners to advance the recommendations of the Global Commission on HIV and the Law in 90 countries. In line with its Strategic Plan 2022–2025 and HIV and Health Strategy 2022–2025, UNDP supports countries and communities to create enabling legal and policy environments that respect human rights, and is committed to regaining lost ground on HIV, TB and malaria.

The external evaluation of the Global Commission on HIV and the Law was conducted by the University of Southern California (USC), Institute on Inequalities in Global Health in 2021. This issue brief was developed jointly by UNDP and the USC, Institute on Inequalities in Global Health.

Endnotes

ⁱ Program on Global Health and Human Rights, Institute on Inequalities in Global Health, University of Southern California. *Evaluation of the Global Commission on HIV and the Law*. 2020. Available at: <https://hivlawcommission.org/wp-content/uploads/2021/06/Final-Report-Independent-Evaluation-Global-Commission-HIV-and-the-Law.pdf>.

ⁱⁱ Program on Global Health and Human Rights, Institute on Inequalities in Global Health, University of Southern California. *Evaluation of the Global Commission on HIV and the Law: Executive Summary*. 2021. Available at: https://hivlawcommission.org/wp-content/uploads/2021/06/Global-Commission_evaluation_ExecSummary.pdf.

ⁱⁱⁱ UNAIDS. *Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law*. 2013. Available at: https://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf.

^{iv} UNGASS. *Political Declaration on HIV and AIDS: Ending Inequalities and Getting on Track to End AIDS by 2030*. 2021.

^v UNAIDS. *End Inequalities. End AIDS: Global AIDS Strategy 2021–2026*. 2021.

^{vi} Global Commission on HIV and the Law. *Report of the Africa Regional Dialogue of the Global Commission on HIV and the Law* (4 August 2011). Available at https://hivlawcommission.org/wp-content/uploads/2017/06/AfricaRD_ReportEn.pdf.

^{vii} F. Barré-Sinoussi, et al “Expert Consensus Statement on the Science of HIV in the Context of Criminal Law”. *Journal of the International AIDS Society* 2018, 21:e25161.

^{viii} The Expert Consensus Statement was cited in the decision of the Constitutional Court of Colombia which removed the section of the criminal code criminalizing HIV and hepatitis B exposure and transmission. Case File D-12883. Available at: www.hivjusticeworldwide.org/wp-content/uploads/2017/06/Colombia-Constitutional-Court-2019.pdf.

^{ix} *Navtej Singh Johar v. Union of India*. AIR 2018 SC 4321; W.P. (Crl.) No. 76 of 2018 D. No. 14961/2016.

^x Global Commission on HIV and the Law. www.hivlawcommission.org/.

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