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# Right to Health Litigation and HIV/AIDS Policy

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**D**omestic litigation has become a principal strategy for realizing international treaty obligations for the human right to health, providing causes of action for the public's health and empowering individuals to raise human rights claims for HIV prevention, treatment, and care. In the past 15 years, advocates have laid the groundwork on which a rapidly expanding enforcement paradigm has arisen at the intersection of human rights litigation and HIV/AIDS policy. As this enforcement develops across multiple countries, human rights are translated from principle to practice in the global response to HIV/AIDS, transforming aspirational declarations into justiciable obligations and implementing human rights through national policies and programs.

Yet despite this national progress in creating accountability for health-related rights, there is scarce empirical research on the scope, content, and effect of legal claims pursuant to these human rights standards. As judicial enforcement has increased, rising to the forefront of a budding health and human rights movement, both proponents and opponents of rights-based policy have questioned the limits of this litigation strategy and the impact of litigation on global HIV/AIDS efforts. Reflecting on this growing backlash, there arises an imperative for interdisciplinary analysis — to survey these rights-based claims, com-

pare divergent legal strategies conducive to the realization of human rights, and assess the effects of this litigation on public health outcomes.

This article sketches the evolving interaction between human rights case law and HIV/AIDS policy. To clarify the need for such analysis, this article discusses the promise of human rights litigation in providing accountability for state public health commitments. Given the promise of this litigation in realizing public health outcomes, this article reviews the origins and development of human rights jurisprudence for HIV/AIDS. With this enforcement movement facing increasing criticism for distorting the global health governance agenda, the authors examine the backlash against this human rights jurisprudence in setting HIV/AIDS policy. This article concludes that scholars and practitioners must engage in comparative analyses of these rights-based litigation strategies and empirical research on their public health impacts.

## **Meeting Health Needs through Human Rights Litigation**

International human rights provides a powerful discourse to advance justice in health. Addressing threats to public health as “rights violations” offers international standards by which to frame government responsibilities and evaluate health policies and out-

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comes under law, shifting the debate from political aspiration to legal accountability.<sup>1</sup> Although states long remained unaccountable for health-related rights, as there was no recourse for violations, the mid-1990s saw a movement toward domestic legal enforcement. With this enforcement facilitated by the codification of international human rights standards in national constitutions and legislation, litigation emerged as a means to create rights-based accountability for disease prevention and health promotion. This litigation has helped to make human rights a reality, giving meaning to states' longstanding commitment to realize the highest attainable standard of health for all.

Through the international legal frameworks developed since the end of World War II and the founding of the United Nations (UN), international human rights law identifies individual rights-holders and their entitlements, together with corresponding duty-bearers and their obligations, empowering individuals to seek legal redress for health violations rather than remain passive recipients of governmental largesse. Proclaimed seminally in the International Covenant on Economic, Social and Cultural Rights — providing for “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” — the human right to health has evolved in subsequent international instruments to offer normative guidance for health policy.<sup>2</sup> Building from these legal standards, a wide range of UN agencies, development organizations, and advocacy groups have increasingly invoked a “rights-based approach” to health (grounded in the right to health and rights to various underlying and interdependent determinants of health) as a means to frame the legal and policy environment, integrate core principles into policy and programming, and facilitate government accountability.<sup>3</sup>

Litigation has proven a key avenue of securing individual health needs for treatment while holding governments accountable for *de jure* and *de facto* violations of human rights.<sup>4</sup> Out of this burgeoning enforcement movement, such cases have proven effective in realizing rights, with courts in Argentina, Brazil, Colombia, India, South Africa, and elsewhere expansively exercising their authorities to interpret national law, frame individual claims, and prescribe national policies in response to leading threats to health.<sup>5</sup> In many of these countries, it was precisely when the political branches of government faced increasing international constraints related to intellectual property, trade agreements, and structural adjustment that the judiciary stood firm as the last defender of social entitlements, resourcefully applying human rights to programmatic ends through health care policy. Nowhere have these gains been felt more strongly than in the context of HIV/AIDS.

### Human Rights Litigation Evolves to Meet the Challenges of HIV/AIDS

Global health governance has come to look explicitly to human rights in framing a policy response to the HIV/AIDS pandemic.<sup>6</sup> With the emergence of HIV treatment as a means to prolong life, human rights advocacy shifted from its emphasis on the prevention of rights violations relating to discrimination and stigmatization to include a focus on the provision of anti-retroviral drugs, employing human rights litigation to advance treatment access and hold states accountable for their HIV policies.<sup>7</sup> Emphasizing the importance of the law, legal recourse, and public accountability, litigation empowered individuals and nongovernmental organizations (NGOs) to raise human rights claims in national courts, pressing states to deliver medications as an immediate matter of life and death.<sup>8</sup>

In concert with these national efforts, the UN moved to clarify human rights obligations under the right to health — through the complementary efforts of, among others, the UN High Commissioner for Human Rights, UN Committee on Economic, Social and Cultural Rights, and UN Special Rapporteur on the Right to Health — providing domestic advocates with authoritative interpretations of the state obligations necessary to respect, protect, and fulfill a rights-based approach to HIV/AIDS policy.<sup>9</sup>

Across a number of countries, the adoption of newly enacted constitutions in the 1980s and 1990s — proclaiming robust enumerations of economic, social and cultural rights, including health — set the stage for dramatic advances in holding governments accountable for HIV policies and programs. Taking up the jurisprudential challenges in enforcing this rights-based approach to HIV/AIDS, some courts have relied on international human rights standards related to health while others have been largely divorced from the interpretations of international instruments and have instead focused on the interpretation of national standards. As an example of this latter category, a right of access to medicines arose out of the South African Supreme Court's influential 2002 judgment, *Minister of Health v. Treatment Action Campaign*.<sup>10</sup> Brought pursuant to South Africa's constitutional codification of the human rights of the child and human rights to life and health, which provide positive rights for the provision of health care (including reproductive services and access to HIV treatment and prevention), this rights-based legal challenge sought to overturn the national government's unwillingness to extend the distribution of Nevirapine, a drug that researchers had found to be effective in preventing the transmission of HIV from mother to child.<sup>11</sup> With this civil society-driven litigation led by the Treatment Action

Campaign (TAC), a coalition of South African NGOs focused on treatment for the HIV-positive, these advocates successfully held the South African government responsible for expanding Nevirapine access to all public health centers and for devising and implementing a national policy on the prevention of mother-to-child transmission of HIV.<sup>12</sup>

TAC's successful claim in this case set a precedent for a wide range of claims for HIV treatment,<sup>13</sup> following from other challenges to the monopolistic practices of the international patent regime and seeking global justice through human rights litigation against national governments.<sup>14</sup> Drawing on the creation of the Global Fund to Fight HIV, Malaria and Tuberculosis and the inclusion of HIV in the Millennium Development Goals, this movement broadened to implicate international obligations on all manner of powerful states, organizations, and corporations with the ability either to support or to impede access to antiretroviral medications — a rights-based activism partially responsible for the explosive growth of foreign assistance channeled to the provision of antiretroviral therapy in the developing world.<sup>15</sup>

In the wake of this paradigm shift — reconceptualizing pharmaceutical knowledge as a global public good — the UN Special Rapporteur on the Right to Health interpreted a “human right to medicines” to be an “indispensable part” of the right to health, finding that “states have to do all they reasonably can to make sure that existing medicines are available in sufficient quantities in their jurisdictions.”<sup>16</sup> To assure that duty-bearers are meeting this obligation for the provision of medicines, advocates throughout the world have pursued a wide range of litigation strategies to realize the rights of HIV-positive claimants.<sup>17</sup> From India to Argentina, such litigation has produced changes in national health policies that require insurance coverage or direct access to medicines for HIV-positive individuals.

### **Global HIV/AIDS Human Rights Jurisprudence — Distorting Governance for Public Health?**

It is a tragic irony that this success of HIV advocacy, both in framing national health litigation and mobilizing international financial resources, has produced a backlash against the rights-based approach. Instead of extending these gains to other health harms and embedding these programs in sustainable health systems, critics argue that this treatment paradigm has privileged individual claims over underlying determinants of health and weakened state sovereignty to set public health priorities. Courts have been seen as ill-equipped to adjudicate national commitments to the progressive realization of rights and to

balance the competing governmental priorities necessary to fulfill the public's health.<sup>18</sup> Accused of operating without regard for national resource limitations and at the expense of universal public health measures, rights-based remedies for the HIV-positive have been criticized for distorting health policy in ways that strip resources away from other diseases, create inefficiencies in health policy, and exacerbate inequalities in health care.<sup>19</sup>

These expansive jurisprudential interpretations of the right to health — leading to criticisms of public interest litigation, questions of legal legitimacy, and claims of “judicial activism” — have renewed debates regarding the “exceptionalism” of HIV and led health and human rights advocates to reflect on the role of human rights litigation in public health policymaking. Given this reflexive analysis, even some proponents of a rights-based approach to health have argued that this right to health litigation, especially when extended beyond HIV to other individual medical treatments, may ignore principles of distributive justice and abandon those in greatest need.<sup>20</sup> To some outside the human rights movement, these potential distortions in governance for public health are seen as fatal flaws of justiciability and just cause for casting aside human rights in health policy.<sup>21</sup> Yet as this litigation agenda faces growing opposition in the absence of evidence, little is known about the multi-valent effects of these cases on the public's health.<sup>22</sup>

Rather than examining the effects of human rights standards on public health outcomes, some of these critical perspectives are pushing global HIV/AIDS policy away from deontological rights-based approaches and toward utilitarian cost-effectiveness frameworks that readily accept limited health budgets and fail to examine structural forces that constrain national policymaking.<sup>23</sup> This push away from rights-based approaches may only grow stronger given the global financial crisis, the feasibility of “treatment as prevention” programs, and the advent of biomedical HIV prevention technologies.<sup>24</sup> Given the potential of these criticisms to undermine the enforcement agenda for rights-based HIV/AIDS policy, one of the pillars of the right to health, human rights scholars must examine empirical and normative justifications for the use of these legal strategies.

### **Conclusion**

As the chronicle of HIV enters its fourth decade, with AIDS having claimed the lives of 25 million infected persons, the unfulfilled hope of HIV prevention, care, and treatment for all remains one of the greatest challenges at the intersection of health and human rights. In meeting this challenge, human rights jurisprudence is playing an increasing role in national health policy for HIV/AIDS, with right to health litigation structur-

ing state responsibilities in a number of AIDS-related programs. With a clear trend toward an expansion of litigation opportunities across many low- and middle-income countries, as individuals and NGOs seek to hold governments accountable for public health obligations in HIV/AIDS policy, there is limited empirical understanding of the link between these rights-based cases, health policies, and public health outcomes — for HIV and myriad other determinants of health. This is a pressing research and advocacy goal for the health and human rights community in seeking to understand the connections between human rights litigation and public health promotion.

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