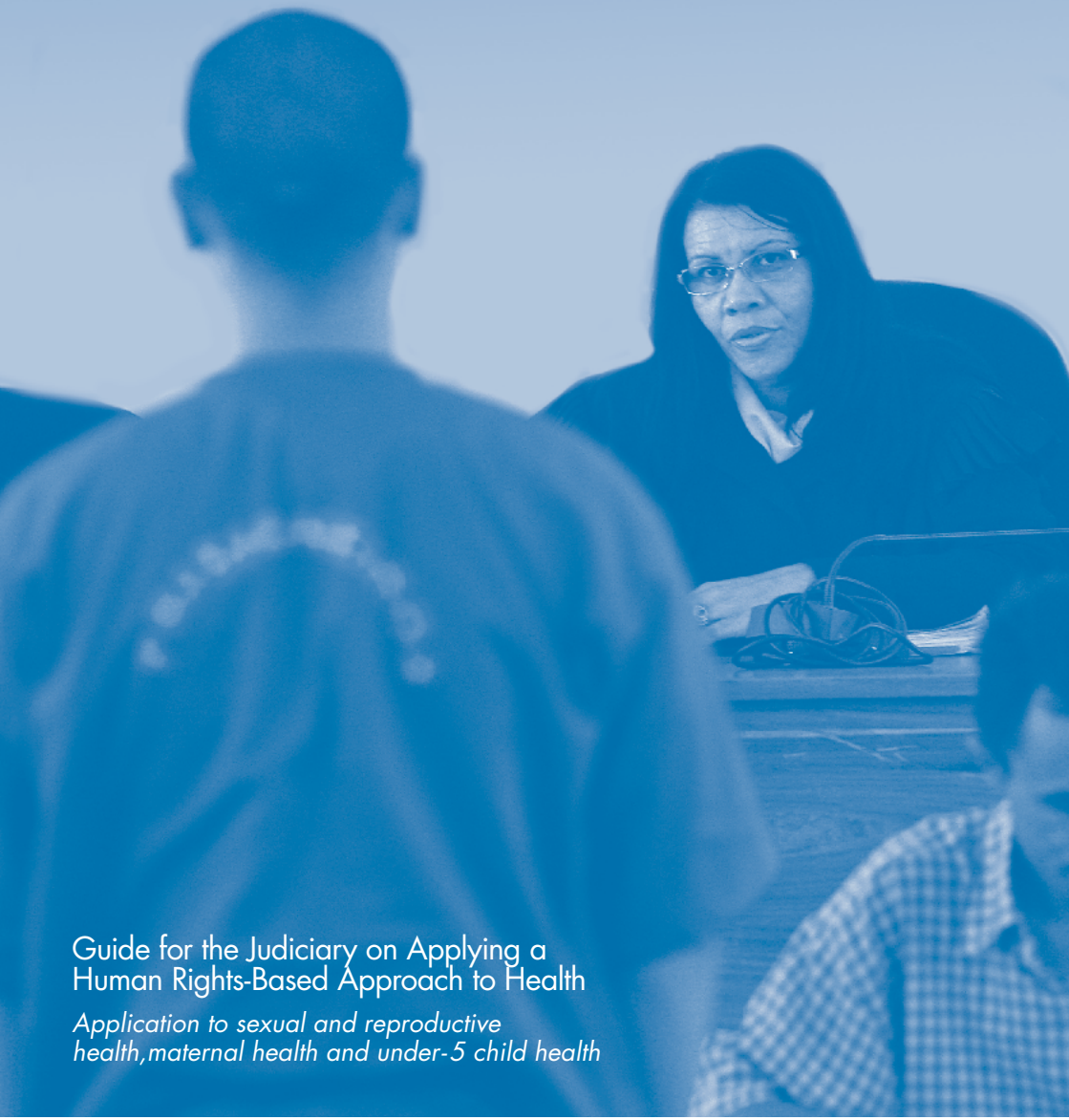
JUDICIARY



Guide for the Judiciary on Applying a Human Rights-Based Approach to Health

Application to sexual and reproductive health, maternal health and under-5 child health

UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER
HARVARD FXB CENTER FOR HEALTH & HUMAN RIGHTS
The Partnership for Maternal, Newborn & Child Health
UNFPA
World Health Organization

© UN: Mark Garten

CONTENTS

INTRODUCTION

Representatives of the judiciary have an important role to play in upholding the health rights of women and children, including adolescents. Realization of these rights has a direct bearing on the prevention of maternal and child mortality and morbidity. In particular, the judiciary contributes to influencing the understanding of health rights in a specific domestic context, addressing gaps in legislative guarantees of these rights and ensuring accountability for violations of these rights. Though legal systems and judicial practices vary across countries and regions, the role of the courts in enforcement of human rights, including economic, social and cultural rights, is fundamental. An essential starting point is the recognition that patterns of maternal and child mortality are not inevitable: they are the result of discriminatory laws and practices, and institutional arrangements that compound poverty, which are fundamental issues of rights and justice.

INTENTION OF THIS GUIDE

This quick reference guide for the judiciary is intended to enhance understanding of and accountability for the realization of rights related to sexual and reproductive health, maternal health and child health.
It complements other tools and builds on the two technical guidance documents of the Office of the United Nations High Commissioner for Human Rights on a human rights-based approach to the reduction of preventable maternal mortality and morbidity and under-5 mortality and morbidity,[1] which were both welcomed by the United Nations Human Rights Council.

WHAT IS A HUMAN RIGHTS-BASED APPROACH (HRBA):[2]

An HRBA identifies who has rights (rights-holders) and what freedoms and entitlements they have under international human rights law, as well as the obligations of those responsible for making sure rights-holders are enjoying their rights (duty-bearers). An HRBA empowers rights-holders to claim their rights, and encourages duty-bearers to meet their obligations. Promotion of accountability for meeting obligations is continuous in an HRBA; the "circle of accountability"[3] throughout the policy cycle helps to ensure that policies and programs are responsive to the needs of rights holders, including health system users. In its simplest terms, accountability ensures that those charged with protecting and fulfilling health rights actually meet these obligations at different points in the policy cycle, and if they do not or cannot, mechanisms exist both to lodge and receive a response to a complaint.

In addition to accountability, an HRBA also analyses a policy cycle through a framework of human rights principles of equality and non-discrimination, participation, indivisibility, and the rule of law, as well as the "AAAQ" framework, which identifies availability, accessibility, acceptability and quality of health care facilities, goods and services as essential components of the right to health. In the case of children, an HRBA

1 Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality, UN Doc. A/HRC/21/22 (2012); Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce and eliminate preventable mortality and morbidity of children under 5 years of age, UN Doc. A/HRC/27/31 (2014).

2 Center for Reproductive Rights and United Nations Population Fund, *Reproductive Rights: A Tool for Monitoring State Obligations Law* (2013); Harvard School of Public Health and United Nations Population Fund, *A Human Rights-Based Approach to Programming* (2010); Office of the United Nations High Commissioner for Human Rights, *Human Rights in Budget Monitoring, Analysis and Advocacy Training Guide* (2011); International Initiative on Maternal Mortality and Human Rights, *A Framework on Applying Human Rights-Based Approaches to Maternal Mortality and Morbidity* (2014).

3 Alicia Ely Yamin (2010) Toward Transformative Accountability: A Proposal for Rights-based Approaches to Fulfilling Maternal Health Obligations. *Sur: An International Journal 7*(12): 95-122; Alicia Ely Yamin and Rebecca Cantor (2014) Between Insurrectional Discourse and Technical Guidance: Challenges and Dilemmas in Operationalizing Human Rights-based Approaches in Relation to Sexual and Reproductive Health. *Journal of Human Rights Practice* 6(3): 451-485; Alicia Ely Yamin (2013) Applying Human Rights to Maternal Health: UN Technical Guidance on Rights-based Approaches. *International Journal of Gynecology and Obstetrics* 121(2):190-193.

also requires that "best interests of the child"[4] is a primary consideration in the design and implementation of policies which will affect children. Furthermore, children should be empowered to express their views and participate in decision making processes around their own health in accordance with their evolving capacity and level of maturity, with appropriate safeguards to their right to privacy, confidentiality, respect and informed consent in accessing health services.

DEFINING RIGHTS RELATED TO SEXUAL AND REPRODUCTIVE HEALTH, MATERNAL HEALTH, AND UNDER-5 CHILD HEALTH

Sexual and reproductive health rights, and child health rights, cut across civil and political rights, and economic social and cultural rights. For instance, in securing the right to health, individuals must be guaranteed their right to privacy, their right to information, freedom of association and expression, as well as equality before the law. Furthermore, certain health rights violations rise to the level or torture, or violations of the right to life. The interlinkages between these rights should be constantly borne in mind.

Under an HRBA, the content of sexual and reproductive health rights, and child health rights, includes both freedoms and entitlements.

"Freedoms" in the sexual and reproductive health rights context include, for example, freedom from discrimination, arbitrary detention, coercive medical treatment, forced sterilization, torture, sexual violence, and so on. A State is obliged to refrain from interfering with enjoyment of these freedoms, and must also prevent third parties from such inference. "Entitlements" in the sexual and reproductive health rights context include, for example, access to medicines (such as contraceptives), maternal and reproductive healthcare, and comprehensive sexuality education.

"Freedoms" in the context of the right of the child to health take on increasing importance according to growing capacity and maturity and include the right to control one's health and body. The "entitlements" in this context include access to a range of facilities, goods, services and conditions that provide equality of opportunity for every child to enjoy the highest attainable standard of health. In addition to the provision of health information and services, the right to the highest attainable standard of health includes, inter alia, ensuring access to the services and programmes necessary to address the underlying determinants of health.

It is a common misconception that securing freedoms does not require resources, while securing entitlements does. For instance, ensuring freedom from sexual violence or child abuse requires a proactive, well-trained police force to investigate violations and enforce laws, as well as public information and education campaigns to make the enjoyment of the

4 States are urged to place children's best interests at the center of all decisions affecting their health and development. The best interest of the child is based on their physical, emotional, social and educational needs, age, sex, relationship with parents and caregivers, and their family and social background. See: UN Committee on the Rights of the Child (CRC) General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc. CRC/C/GC/15: paras. 12-15 (2013).

right effective. This is important for judges to keep in mind when issues involving resource expenditure are raised, as the costs of ensuring civil freedoms while often made invisible in taxes, are nevertheless substantial. Yet protecting these and all fundamental rights is considered a cost inherent in meaningful democracy. (See Box 1 on Judicial enforcement of economic, social and cultural rights, including health rights).

BOX 1

Judicial enforcement of economic, social and cultural rights, including health rights

Decisions of courts in countries from all regions of the world covering all economic, social and cultural rights demonstrate that these rights can be subject to judicial enforcement. Three illustrative examples of courts taking action on health related rights are presented on the subsequent pages. Nonetheless, the justiciability of economic, social and cultural rights has traditionally been questioned for a number of reasons.

First, economic, social and cultural rights have been seen by some as being too "vaguely worded" to allow judges to justify decisions on whether violations have occurred. While adjudicating such rights may raise questions of what constitutes, for example, hunger, adequate housing, or a fair wage, judges have already dealt ably with questions of what constitutes torture, a fair trial or arbitrary or unlawful interference with privacy. Interpreting legislation is a clear function of the judiciary, not only in human rights law but in any area of law.

Second, the realization of economic, social and cultural rights depends heavily on Government policies. Yet, reviewing Government policies in this area, as in any other, to ensure that they are consistent with constitutional principles and obligations under international human rights law is clearly a function of the judiciary. While the role of the judiciary in reviewing Government policy may vary from country to country, policy review is not policymaking. The judiciary is therefore not overstepping its constitutional role by taking decisions on economic, social and cultural rights.

Third, and linked to the previous point, some have questioned whether it is possible for a court to assess the progressive realization of economic, social and cultural rights. Monitoring progressive realization can rely on several mechanisms, including the courts. … (C)ourts have assessed whether the State is meeting its obligations towards progressive realization by considering whether the steps taken by the Government are

reasonable. Furthermore, certain aspects of economic, social and cultural rights require immediate action.

Judicial enforcement of human rights is fundamental. A right without a remedy raises questions of whether it is in fact a right at all. This is not to say that judicial enforcement is the only, or indeed the best, way of protecting economic, social and cultural rights. However, judicial enforcement has a clear role in developing our understanding of these rights, in affording remedies in cases of clear violations and in providing decisions on test cases which can lead to systematic institutional change to prevent violations of rights in the future.

Furthermore, the adoption and entry into force of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights reflects international consensus on the possibility of adjudication of economic, social and cultural rights, as it recognizes both the role of domestic remedies in protecting these rights, and the competence of the Committee on Economic, Social and Cultural Rights to consider alleged violations.

Adapted from OHCHR, Fact Sheet 33, Frequently Asked Questions on Economic, Social and Cultural Rights, pp. 30-31.

© Creative Commons, Ben Houdijk

ROLE OF THE JUDICIARY IN IMPLEMENTING AN HRBA

A central aspect of an HRBA lies in the identification of *rights-holders* and *duty-bearers*, allowing for individuals to be transformed from passive targets of health programmes to active agents claiming their rights. In the context of sexual and reproductive health and child health litigation, the judiciary plays an exceptionally important role in determining *whether* the litigant has justiciable rights, *what* rights the litigant has (if any); what *obligations* flow from recognition of the right; and, *who* is responsible for realizing that right for the individual or group.

Judicial processes and remedies have a key role to play in relation to sexual and reproductive health rights and child health rights at every stage, and not just in compensating damages for violations.

For instance, judicial processes will have a determinative impact on whether a potential litigant has the means to bring a claim or meets the relevant standing requirements to assert a claim. In addition, when claims are brought to the courts, the judiciary can promote an enabling legal and policy framework, national plans of action, and appropriate budgets for claiming these rights through:

- Assessing the implementation of existing laws and policies;
- Calling for reforms in laws and policies that do not adequately protect sexual and reproductive health rights or child health rights, and for the creation of national plans of action (see Illustrative case 1, *Judicial involvement in policy reform*); and
- Stressing that budgets be formulated considering certain fundamental rights criteria, such as non-discrimination and equality (see Illustrative case 2: Judicial involvement in budgets)

Judiciaries can also promote the effective implementation of programmes through:

- Challenging discriminatory barriers to sexual and reproductive health care, maternal health care or child health care, including with respect to the underlying determinants of health;
- Providing redress for violations of human rights pertaining to sexual and reproductive health, and child health in practice; and
- Following up on rulings, and supervising that the executive branch is appropriately monitoring access to facilities, goods and services for sexual and reproductive health, maternal health, and child health, in ways that enable accountability of respective institutions, and can be disaggregated to show the effects of policies on specific population groups (see Illustrative case 3: *Judicial involvement in follow up to rulings*)

ILLUSTRATIVE CASE 1: JUDICIAL INVOLVEMENT IN POLICY REFORM

Minister of Health v Treatment Action Campaign (TAC) (2002) 5 SA 721 (CC)

In response to the HIV/AIDS pandemic, the Government in South Africa devised a health programme to address mother-to-child transmission of HIV at birth and identified nevirapine as the anti-retroviral drug for this purpose. Despite the Government having been offered this drug for free for five years, the programme was restricted to particular pilot sites so that an assessment of the operational challenges could be made before country-wide provision. Doctors in the public sector outside of these pilot sites were consequently unable to prescribe the drug for their patients. The policy was challenged before the High Court by Treatment Action Campaign (among others), who ruled in their favour. The subsequent appeal by the Minster of Health was rejected by the Constitutional Court who declared that the restriction of nevirapine to pilot sites failed to meet constitutional standards as it excluded those who could reasonably be included.

The Court then ordered the Government to "(r)emove the restrictions that prevent nevirapine from being made available" at public hospitals and clinics and to "devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their newborn children, and will include the administration of nevirapine where that is appropriate." The Government was further ordered to ensure that counsellors at public hospitals and clinics are trained in counselling on the use of nevirapine, as well as to "take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine." Moreover, in addressing the question of separation of powers, the Court noted that when "state policy is challenged, (…) courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations". Although "due regard must be paid to the roles of the legislature and the executive in a democracy, [w]hat must be made clear, however, is that when it is appropriate to do so, courts may - and if need be must - use their wide powers to make orders that affect policy as well as legislation".

ILLUSTRATIVE CASE 2: JUDICIAL INVOLVEMENT IN BUDGETS

Paschim Banga Khet Mazdoor Samity & Ors v State of West Bengal & Anor., (1996) AIR SC 2426/ (1996) 4 SCC 37

Despite having sustained serious head injuries after falling off a train and being in a grave medical condition, the petitioner was refused admission and treatment at six successive government-run hospitals in West Bengal, India. This was due either to the non-availability of beds or adequate medical facilities. The Supreme Court of India found that the right to life, as enshrined in the Indian Constitution, imposes an obligation on the State to provide timely emergency medical treatment necessary to preserve human life. The Court called on the Government of West Bengal to pay the petitioner suitable compensation for the loss suffered, as well as enact a number of remedial measures to ensure the availability of proper medical facilities to deal with emergency cases.

Acknowledging that financial resources are needed for providing these facilities, the Court emphasized that "[i]n the matter of allocation of funds for medical services the said constitutional obligation [to protect the right to life] of the State has to be kept in view." It further found that "the State cannot avoid its constitutional obligation [...] on account of financial constraints" and it stressed the State's constitutional obligation to "provide adequate medical services to preserve human life." Crucially in this respect, it ruled that it is "necessary that a time bound plan for providing these services should be chalked out keeping in view of (...) the requirements for ensuring availability of proper medical services in this regard as indicated by us" and that "steps should be taken to implement the same."

ILLUSTRATIVE CASE 3: JUDICIAL INVOLVEMENT IN FOLLOW UP TO RULINGS

Colombian Constitutional Court, Decision T-760/08, 31July 2008

The Constitutional Court reviewed *22* protection writs (tutela actions) which were selected to illustrate systemic problems in Colombia's public health system. The Court determined that the responsible authorities violated their constitutional obligations to respect, protect and fulfil the right to health. The vast majority of these tutela's concern the lack of government oversight and regulation over health care providers and insurance companies which had continuously failed to conform to principles the Court has repeatedly established. Consequently, it ordered remedies for each tutela but also called on the government to correct the structural failures in the public health system, noting that "the government agencies responsible for […] the regulation of the health system have not adopted measures to guarantee the right to health without having to seek recourse through the *tutela*."

In this context, the Court called for key reforms. First, it ordered the Commission on Health Regulation (*Comisión Nacional de Regulación en Salud*) to unify and update the compulsory national insurance scheme's (*Plan Obligatorio de Salud, or POS*) two-tiered benefits system, which consisted of a contributory plan for those in formal employment or earning above twice the minimum wage, and a subsidized plan for those unable to contribute. In updating the POS, the Commission had to establish which health services are going to be included and removed, taking into account financial considerations and the sustainability of the health system. This update was to be conducted immediately and on an annual basis with the "direct and effective participation of the medical community and the users of the health system." Second, the Court, noting the government's failure to take steps to unify both health coverage plans as required by law, emphasised that although the update is useful to reduce the obstacles to access to health, these measures are not sufficient as long as disparities between the benefits included in the contributory and subsidized plans remain. While the Court did not impose the content of a unified POS, it stressed that the process of formulating a unification plan had to take into account certain criteria and be participatory, transparent, and evidence-based, and include relevant indicators and benchmarks. Third, the Court called on the government to adopt deliberate measures to progressively realize universal health coverage and set a 2010 deadline for this to be achieved.

Following the ruling, the Court stayed engaged in monitoring implementation, holding hearings and issuing dozens of follow-up orders. The judgement and follow-up by the Court is credited with spurring substantial reforms to the health system. In 2014, the Congress passed a new statutory law on health, based on the right to health, which the

Court later declared constitutional with some modifications. This law was subsequently signed into law in 2015. The judgement led to updating and equalization of the benefits schemes, and arguably played a significant role in considerably stronger regulation of the pharmaceutical industry and supervision of the insurance companies by the Ministry of Health and Social Protection. Though substantial problems persist in implementation, commentators point to the significance of the decision in, among other things, enhancing "public appropriation of health as a right instead of a commodity."*

*See Alicia Ely Yamin and Ariel Frisancho, *Human rights-based approaches to health in Latin America,* The Lancet, Vol. 385, No. 9975 (April 2015), e26; see also Alicia Ely Yamin and Fiona Lander, *Implementing a Circle of Accountability: A Proposed Framework for Judiciaries and Other Actors in Enforcing Health-Related Rights,* Journal of Human Rights, 14:3, 312-331 (2015); Alicia Ely Yamin, *Power, Suffering and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (2015), pp. 123-126.

Further case examples are included in the footnotes of this Reflection Guide. Please note that the cases that are referred to in this document are illustrative only, and not exhaustive. Some examples may be more or less applicable, depending on the reader's jurisdiction, whether the judicial system is based on common law or civil law, and the level, and mandate, of the court or other body considering the claim, among other factors. Although there are still countries in which there are limitations for the judiciary to adjudicate on economic, social and cultural rights, including health-related rights, international level guidance has cautioned against rigid approaches in this regard.[5] The comparative experience shows, however, a variety of approaches to the issue, including with regard to the justiciability of economic, social and cultural rights across all legal systems, as well as recognizing the dimensions of sexual and reproductive health and rights, and child health rights, which correspond to civil and political rights, or which are subject to immediate action. It is hoped that experiences from other jurisdictions will be instructive, and prompt reflection on ways through which protection and promotion of sexual and reproductive health and rights and child health rights can be improved within the constraints of each context.

5 See Report of the High Commissioner for Human Rights, Legal Protection of Economic, Social and Cultural Rights, UN Doc. E/2006/86.

PURPOSE OF THIS GUIDE

The purpose of this guide is to support persons working within the judiciary in applying a HRBA in the areas of sexual and reproductive health, maternal health, and under-5 child health. It is one of a series of reflection guides targeted to specific stakeholder groups.

Through reflective questions and building from the two technical guidances, this guide intends to stimulate reflection on the application of a rights-based approach to sexual and reproductive health, maternal health, and under-5 child health at different stages in the judicial process. It is essential that this reflection includes frank and open discussion of what problems are happening to whom and where; why are they happening; who or what institution is responsible for taking action. It is equally essential that corrective (remedial) actions based upon the diagnoses then be taken, because if they are not it is not a meaningful HRBA, or accountability for the fulfillment of rights.

SCOPE AND ORGANIZATION OF THIS GUIDE

The reflection guide is structured as follows:

1 PREPARATORY PHASE: legal opportunity structures

This section concerns the overarching environment and opportunities for bringing a case alleging rights infringements to the judiciary.

2 ADJUDICATION PHASE: the role of courts in framing rights related to sexual and reproductive health, maternal health and child health

This section concerns the elements of a right-based approach that apply during proceedings, where the court has a role in framing issues as well as defining rights – including with respect to judicial investigation and deliberation, selection of remedies, and in the actual conduct of proceedings.

3 POST-PROCEEDINGS PHASE: compliance, implementation, impact

This section concerns the enforcement and implementation of decisions following the end of proceedings, and the impact of judgements. The extent to which decisions are complied with and implemented influences accountability of duty-bearers, and the impact of rights-based litigation.

Under each section, there are three types of questions/comments:

CONSIDER

This is a question designed to trigger reflection on various aspects of a HRBA at different moments in the judicial process.

FOR EXAMPLE

This is an example to illustrate some of the various elements that one might consider in addressing the question at hand.

HRBA REFLECTION

This is an insight into why this issue matters from a human rights perspective.

This guide covers sexual and reproductive health, maternal health, and under-5 child health, in line with the continuum of care. In particular, maternal health is understood within the broader framework of sexual and reproductive health, and requires attention not only to women, but also to adolescents. While under-5 child health can be closely linked to maternal health, it also requires explicit attention to child rights. Applying an HRBA to health will sometimes require similar actions in sexual, reproductive and maternal health, and under-5 child health respectively, and will sometimes require explicit attention to the particularities of women's rights or children's rights. Where appropriate, this guide provides separate considerations and examples on sexual, reproductive and maternal health, and under-5 child health, in order to highlight where different dimensions will need to be factored in.

As an accompaniment to this guide, a list of resources is also available, with additional materials on an HRBA.

ACKNOWLEDGEMENTS
This document was jointly produced by the United Nations Office of the High Commissioner for Human Rights, Harvard FXB Center for Health and Human Rights, the Partnership for Maternal, Newborn and Child Health, the United Nations Population Fund, and the World Health Organisation.

Gratitude is expressed to the individuals and institutions who offered comments on earlier drafts of this document.

© 2016 United Nations. All worldwide rights reserved.

PHOTO CREDITS
Cover UN: Martine Perret ***Small photos*** UN: Louise Gubb, Chris Sattlberger, David Ohana. UNICEF: ZAK.
WHO: Christopher Black, Marko Kokic.
Creative Commons: DFID Doune Porter, GAVI; Asian Development Bank,
UN photo: Tobin Jones, EPA: Rafa Salafranca.

© UN: Mark Garten

1 PREPARATORY PHASE

LEGAL OPPORTUNITY STRUCTURES

The involvement of the judiciary in supporting rights-based approaches to sexual and reproductive health, maternal health and child health, first requires examination of issues which affect whether these claims are presented to the courts in the first place. Numerous issues will affect whether rights-holders pursue alleged violations before the courts including whether the issue at stake is recognized as a claimable right, whether they possess the necessary resources and information to access the courts, whether they are aware of their rights, and requirements around standing.

YOU, AS MEMBERS OF THE JUDICIARY, may also have opportunities to address barriers to access to justice, when considering the situation of disadvantaged and marginalized individuals – including, inter alia, by waiving judicial fees, simplifying formalities, allowing for public interest litigation or adopting a flexible interpretation of standing rules. The footnotes throughout this Section include reference to jurisdictions where the judiciary has taken such action.

CONSIDER

RECOGNITION OF RIGHTS

How are sexual and reproductive health and rights, and child health rights, protected in your jurisdiction?

FOR EXAMPLE

EDUCATION

Does your country have an enforceable constitutional right to health? Around 70% of the world's countries have enacted constitutions that protect health rights in some form; around 40% of these constitutions make the right to health justiciable.[6]

If your country does not have an enforceable right to health, has the right to health been "read into" other constitutionally guaranteed rights?

If the right to health is not contained in your country's constitution, are there other legal avenues through which sexual and reproductive health rights can be upheld?

Is there a Child Code or other national law incorporating the UN Convention on the Rights of the Child, through which child rights to health can be upheld?

6 C. Jung, R. Hirschl, and E. Rosevear, *Economic and social rights in national constitutions, American Journal of* Comparative Law (2014), pp. 6-9.

HRBA REFLECTION

EXPLICIT AND IMPLICIT RECOGNITION

Think about the ways in which sexual and reproductive health rights and child health rights can be upheld in your jurisdiction.

In some jurisdictions, even where health is not stated explicitly as a "fundamental right", it is nevertheless interpreted as such by a country's judiciary using other principles and rights guaranteed in the Constitution. For example, in the absence of clear constitutional obligations relating to health, there may be robust protections against discrimination and of related or enabling rights (including civil and political rights such as life, bodily integrity, freedoms of information, association, movement and expression).[7] How might these be applied in cases before you?

CONSIDER

LEGAL STANDING

How do rules around legal standing affect access to justice in your jurisdiction?

FOR EXAMPLE

WHO CAN BRING A CASE

Does your jurisdiction have special mechanisms that "relax" the traditional rules around legal standing in relation to rights-based or public interest litigation?

Does your jurisdiction have legal rules or norms that inhibit women and girls from bringing claims of sexual and reproductive health rights violations, based on their gender, age, or other factors?

How does your jurisdiction handle the legal standing of children on whose behalf parents/legal guardians or other third parties make claims?

HRBA REFLECTION

STANDING RULES AFFECT ACCESS TO JUSTICE

In order to seek a remedy for a violation of sexual and reproductive health rights or child health rights, a litigant must first have standing to bring a claim. Procedural rules around legal standing can impact positively or negatively upon an individual's ability to access justice.

7 *Qobalia v. Ministry of Labour, Health and Social Affairs (bs-434-25 3k-05)* (Georgia) [child developed encephalomyelitis following vaccination; court upheld a violation of Georgia's Statute on Consumers' Rights, based on information concerning Hepatitis B vaccine not being made available to parents, which would have allowed them to make a proper choice to vaccinate their child].

Think about how the judiciary in your country might take actions to improve the legal opportunity structures in your country in respect of standing. Some judiciaries have made special provision for standing rules to be relaxed in cases of public interest, which potentially allow for more ready enforcement of sexual and reproductive health rights.[8] Similarly, rules regarding in loco parentis can affect the best interests of the child, and the ability to vindicate child health rights.

CONSIDER

BARRIERS TO ACCESSING JUSTICE

What are the other barriers to accessing justice in your jurisdiction?

FOR EXAMPLE

MALFUNCTIONING COURT SYSTEM, COSTS, GEOGRAPHIC AND CULTURAL BARRIERS

Is there adequate funding to support the judicial system itself, together with legal support?[9] Does the time required for processing of cases make it impossible to vindicate rights involving critical health issues on a timely basis? Is legal aid available to claimants in cases involving alleged rights violations?

Are there community perceptions about unfairness or unjust processes or outcomes for women or children in the judicial system that might discourage litigants from bringing claims regarding sexual and reproductive health rights and child health rights infringements to formal courts as opposed to traditional justice mechanisms? Is the formal judicial system respected as trustworthy and uncorrupted, as well as independent in your jurisdiction?

What costs are involved in bringing a claim in your jurisdiction? (e.g. filing fees). Are fees waived for litigants who cannot afford them or abolished altogether for certain public interest matters? Are unsuccessful litigants in sexual and reproductive health rights, and child health rights, matters required to pay costs to the winning party?

Are there physical or geographic barriers to certain women accessing justice, including women and girls with disabilities?

Are there legal barriers preventing women from making a claim without a third party authorization (spousal, parental, guardingsdhip, or of another kind)?

Are there any cultural or language barriers in courts that prevent women from accessing justice? Or parents or guardians from accessing justice for their child?

8 *Vishaka v. State of Rajasthan*, Supp. 3 S.C.R. 404. (India) [case brought as a class action by non-government organizations and civil activists concerning an alleged gang-rape; in this case, the court confirmed standing rules can be relaxed in public interest litigation, to allow other parties to bring public interest litigation concerning breaches of fundamental rights].

9 UN Human Rights Council (2012) Technical Guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality. UN Doc. A/HRC/21/22.

Are there cultural norms, taboos, or practices that pervade the courtroom as well as society, which might inhibit women, or certain sub-populations, such as sex workers or lesbian, gay, bisexual or transgender individuals, from seeking justice for sexual and reproductive health, maternal health and child health issues through the courts?

HRBA REFLECTION

JUSTICE MUST BE ACCESSIBLE FOR EVERYONE

An HRBA is premised upon empowering people to claim their rights. In order to do so, significant barriers that discourage parents, women, or groups of women or children from bringing claims need to be eliminated to the extent possible. How might accountability for sexual and reproductive health rights and child health rights be improved in your jurisdiction by taking specific measures to remove or break down existing barriers to justice?

CONSIDER

AWARENESS RAISING

How does your Government raise awareness of sexual and reproductive health rights and child health rights among the legal profession and the wider community, in an effort to enhance accountability?

FOR EXAMPLE

PUBLIC AND JUDICIAL EDUCATION

How does your Government educate the public regarding their constitutional or other sexual and reproductive health rights and child health rights, and the judicial mechanisms through which these can be enforced? Are there any education programs available through national human rights institutions, schools or otherwise, concerning sexual and reproductive health rights and child health rights, for judges and lawyers as well as the public?

What efforts are undertaken by judicial training institutes and law schools, as well as other institutions, to train legal practitioners and judges in the content and interpretation of rights relating to sexual and reproductive health, maternal health and child health?

HRBA REFLECTION

ACCOUNTABILITY REQUIRES AWARENESS OF RIGHTS AND REMEDIES

In order for an individual to be able to make a claim that his or her rights have been infringed, or for parents/guardians to make a claim on behalf of a child, they must be aware of their rights, and how to seek remedies for infringements.

Similarly, judges and lawyers must be made aware of the content and application of sexual and reproductive health rights and child health rights (aspects of which are often enshrined in other rights, such as freedoms of expression and association). Awareness raising about rights and remedies should be included in the national plan of action, including funds for dissemination of information about legal remedies.

What role can the judiciary in your country play in raising awareness about legal remedies?

© UN: Victoria Hazou

CONSIDER

ACCESS TO HEALTH INFORMATION

How accessible is health information in your jurisdiction?

FOR EXAMPLE

HEALTH CARE USER ACCESS TO RECORDS

Do women and adolescents (or their families where there has been a death or otherwise necessary) in your jurisdiction have difficulty accessing medical records for the purposes of rights-based litigation?

Do parents/guardians seeking to make health claims on behalf of a child have difficulty accessing the child's records?

Have you seen any instances where institutions deny access to medical records on the basis of privilege or confidentiality in the setting of litigation?

Does your jurisdiction have adequate freedom of information legislation to cover sexual and reproductive health, maternal health, and child health-related information, including budgetary allocations, health inputs and outputs, as well as health outcomes?

HRBA REFLECTION

RIGHT TO INFORMATION AND CONFIDENTIALITY

Access to necessary health information is critical for the realization of sexual and reproductive health rights and child health rights. All health system users hold the privilege of confidentiality in relation to their own medical records; when a girl or woman dies in pregnancy or childbirth, these rights transfer to their estate. In the setting of litigation, in particular, it is vital that all individuals have access to their medical records, in order to be able to prove any rights-based claims they bring.[10]

The rights of health system users to confidentiality must not be conflated with institutional rights. Although it is important to safeguard confidentiality under a HRBA, confidentiality is held by the health system user and not the institution. This principle must never mean denying women the right to access their own records, or denying parents/guardians access to their child's records.

Similarly, it is vital that freedom of information legislation permit claimants to access information regarding health budgets and distributions in the patterns of disease, and require the government to justify such decisions. Without such legislation, it is near impossible for claimants to bring a case because they may be unable to demonstrate patterns of discrimination (e.g. on the basis of HIV status, ethnicity or race) or unreasonableness in collective or class action suits.

10 *K.H. and Others v. Slovakia*, European Court of Human Rights, (Application no. 32881/04) [court held that eight women of Roma ethnicity must be allowed to access files containing their medical records; disallowing access to their records would create a disproportionate burden on an individual litigant attempting to prove their case in court]HRC/21/22.

2 ADJUDICATION PHASE

THE ROLE OF COURTS IN FRAMING RIGHTS RELATED TO SEXUAL AND REPRODUCTIVE HEALTH, MATERNAL HEALTH AND CHILD HEALTH

The adjudication phase is a central function of the judiciary. During this phase, a court will decide whether to accept a case, consider the legal arguments involved in the case, hand down a judgement and determine appropriate remedies. A key consideration during adjudication for **YOU, AS MEMBERS OF THE JUDICIARY**, is how claims related to sexual and reproductive health, maternal health and child health, are conceptualized and the availability of venues for the judicial review of decisions taken by the executive and legislative branches of Government in these areas. The footnotes throughout this Section include reference to instances where the judiciary has played this role.

2.1 EVALUATING GOVERNMENT DECISIONS

Although the principle of separation of powers requires independence between the executive branch, legislative branch and judiciary, this does not require "rigid" separation, and domestic approaches vary. The judiciary is often the only body that can require the Government to take measures to meet its constitutional obligations, and determine the reasonableness of its actions.

This power may have budgetary implications but, as other courts have held, this need not be construed as "rearranging" budgets.[11]

© UN: UNICEF ZAK

11 *Minister of Health v. Treatment Action Campaign (No. 2)*, [2002] ZACC 15 (South Africa) [court held that the judiciary can make determinations around reasonableness that have budgetary implications, but are not directed at "rearranging budgets" (which would mean that the role of the executive was usurped)]

CONSIDER

ASSESSING EXECUTIVE ACTIONS

How do courts in your jurisdiction address issues around judicial competence to determine whether Government actions are reasonable?

FOR EXAMPLE

REASONABLENESS

Would your court be able to assess the constitutionality of a national policy, using a test of reasonableness, regarding sexual and reproductive health, maternal health, or child health? In some countries, such national policies are directly enforceable. In others, courts have insisted that states make policies meaningful through budgeted national plans of action. What approach might be taken in your jurisdiction?

What would be required for you to make an assessment of the reasonableness of the measures adopted by the Government without impinging on the government's mandate to make laws and policies concerning sexual and reproductive healthcare, maternal healthcare and child healthcare?[12]

HRBA REFLECTION

STANDARDS OF REASONABLENESS

A court has the authority to consider whether particular measures adopted are "reasonable" in light of constitutional principles. This is different from legislating or merely considering whether more desirable or favorable measures could have been adopted, or public money better spent.[13] Courts may recognize that a wide range of measures may reasonably be adopted in order to meet human rights obligations.

If a court determines certain standards have to be met by a Government, regarding provision of child healthcare, or maternal, sexual and reproductive healthcare, for example, reaching these standards will still be subject to the principle of progressive realization. The government should be able to show it is taking deliberate measures to progressively achieve such standards, for instance through the adoption of a national plan of action. Reasonableness, under an HRBA, also requires governments to consider the most disadvantaged in promulgating policies relating to health and other social sectors. Thus, as courts have held, failure to consider the effects of a national policy on the poorest and most marginalized would not be considered reasonable and is inconsistent with applying a rights framework.[14]

12 Contrast *Center for Health Human Rights and Development (CEHURD) v Attorney General,* Constitutional Petition No. 16 of 2011 (Uganda) [petition brought before the court regarding inadequacy of State expenditure on maternal health care: the petition was struck out on the basis that the Court would be substituting its discretion for that of the executive].

13 *Government of the Republic of S. Afr. v. Grootboom,* [2000] ZACC 19 (South Africa) [court made orders requiring the state of South Africa to devise and implement (within its available resources) a comprehensive program to realize the right of access to adequate housing].

14 *Government of the Republic of S. Afr. v. Grootboom* [2000] ZACC 19 (South Africa).

CONSIDER

ASSESSING PARLIAMENTARY ACTION

How do courts in your jurisdiction address issues around potentially flawed Parliamentary processes regarding the development of legislation?

FOR EXAMPLE

MEANINGFUL DELIBERATION

If the Parliament had passed a law, where a litigant alleged there had not been meaningful deliberation or necessary debate, how would you assess the validity of such a law? When would it be appropriate for a court to review legislation that had not undergone certain procedures in Parliament?

HRBA REFLECTION

PROCESS REQUIREMENTS

The process through which laws are enacted is critical to the authority they have on people. Courts have a vital role to play in ensuring that health policies have been adequately considered by Parliament, and pass constitutional muster – for example, through meeting basic requirements concerning quorum to pass laws.[15]

CONSIDER

STATE RESOURCE CONSTRAINTS

How are State resource constraints considered in sexual and reproductive health rights or child health rights litigation in your jurisdiction?

FOR EXAMPLE

MAXIMUM AVAILABLE RESOURCES

If a litigant brought a claim concerning an infringement of sexual and reproductive health rights, such as a failure to provide affordable contraception, how would you determine whether the State has taken adequate steps to fulfill the sexual and reproductive health rights in question, in line with its resource availability and the obligation to spend maximum available resources for the realization of economic, social and cultural rights?

If a litigant brought a case seeking access to a very expensive drug which was not funded by the State through its social insurance scheme or otherwise, such as In Vitro Fertilization (IVF), or an overseas treatment for a rare childhood disease, and the State argued that it should not have to pay for the drug/treatment due to "resource constraints", how would you balance the right of the individual against the burden on the healthcare system that would occur if the State had to pay for the drug?

15 *Oloka-Onyango & 9 Ors v Attorney General* [2014] UGCC 14 (Uganda) [court declared an anti-homosexuality law invalid, on the basis that it was passed without meeting quorum requirements of Parliament].

HRBA REFLECTION

DELIBERATE AND PURPOSIVE APPROACH

If resource constraints make it impossible for the State to fulfill sexual and reproductive health rights, and child health rights, immediately, under international law, the State should present evidence to show that it is dedicating adequate resources, or that in its national plan, it will be doing so in a deliberate manner. Further under international law, if a State fails to fulfill a certain essential levels of sexual and reproductive health rights, and child health rights (such as contraception, vaccinations and emergency obstetric care), the burden is on the State to establish it is doing what it can within existing resources.

However, although a State is required to use the maximum of its available resources to fulfill sexual and reproductive health rights, and child health rights, under international law, an HRBA also requires the judiciary to balance the rights of the individual with the broader goal of ensuring equitable distribution of health-related resources throughout a society. Accordingly, a purposive approach may be most appropriate to ensure realization of sexual and reproductive health rights, and child health rights, as well as health rights more broadly.[16] In adjudicating claims, the judiciary should be aware of whether a specific service or treatment could be universalized to all individuals similarly situated. Evidence regarding the comparative effectiveness of interventions is also essential for judges to consider to ensure that realization of these litigants' rights does not exacerbate underlying inequalities or place an unsustainable burden on a health system.

16 *Soobramoney v. Minister of Health,* [1997] ZACC 17 (South Africa) [court held that right to emergency medical care did not mean that treatment of terminal illnesses had to be prioritized over other medical treatments. "When rights by their very nature are shared and inter-dependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights [...], but as defining the circumstances in which the rights may most fairly and effectively be enjoyed."] (Sachs, A. concurring, para. 54).

CONSIDER

BUDGET DECISIONS

How do courts in your jurisdiction consider situations in which funding or support for sexual and reproductive health rights, and child health rights, has been curtailed?

FOR EXAMPLE

ASSESSING DECREASES IN FUNDING

If your government removed funding from sexual and reproductive health programs, maternal health programs or child health programs in your country (or in relation to certain services) without explanation, what would you require the government to demonstrate in order for such an action to be constitutionally permissible? Would it make a difference to your judgement if the country were facing a budgetary crisis or austerity program?

If your government curtails funding for domestic and intimate partner violence programs or training for police, health care workers, and other state actors, what legal avenues are available to protect women and children from poor and marginalized households?

HRBA REFLECTION

NON-RETROGRESSION

The principle of non-retrogression under international law requires a State to demonstrate that any "backsliding" in terms of realizing sexual and reproductive health rights, and child health rights is justifiable under a HRBA. If the overall budget of the State decreases, resources for sexual and reproductive health programs or child health programs should not be decreased unless the State proves that it has taken all reasonable measures to avoid such reductions, and that there has been a deliberative process to determine that the best interests of the child have been protected in the process of formulation of the budget.

Respect for non-retrogression carries certain special requirements in respect of burden of proof, especially when retrogression appears to disproportionately burden marginalized or excluded populations. Reducing budgets for programs directed at low-income and marginalized women (such as birth kits), or at children in remote communities (such as antibiotic treatment for pneumonia) may constitute retrogression under international law, and by their nature would affect poorer populations disproportionately, so States bear a special burden in demonstrating the reasonableness of making such cuts, as opposed to others.

2.2 LEGAL STANDARDS APPLICABLE TO A CASE

The judiciary plays a central role in determining whether it will accept claims or accept to investigate claims pertaining to health-related rights, especially sexual and reproductive health, maternal health and child health, and if so, on what legal basis, in accordance with the Constitution and laws of the jurisdiction. The basis of the claim may be explicitly based on the right to health, or may imply other fundamental human rights guarantees.

YOU, AS MEMBERS OF THE JUDICIARY, are well placed to consider a diversity of legal standards for any given case.

© UN: EPA

CONSIDER

NON-DISCRIMINATION

How is non-discrimination in the context of sexual and reproductive health rights, and child health rights, understood in your jurisdiction?

FOR EXAMPLE

MARGINALIZED GROUPS

How would you judge a claim that the sexual and reproductive health rights, or child health rights, of cognitively disabled women and children are not being protected by the State, and that these groups are being discriminated against? What special measures should a State be required to take to secure peoples' sexual and reproductive health rights, and child health rights, with respect to physical accessibility, sign language, stigma reduction, etc?

If a case were brought before you concerning forced sterilization of a particular group of women, how would you determine whether this constituted a systemic pattern of discrimination rather than, or in addition to, violations of a particular individuals' bodily integrity?

HRBA REFLECTION

OBLIGATION OF IMMEDIATE EFFECT

Under an HRBA, States must take all appropriate measures to eliminate formal de jure as well as de facto discrimination against women, including gender-based violence, forced and early marriage, female genital mutilation/cutting and other harmful traditional practices.[17] Similarly, measures must be taken to eliminate formal and substantive discrimination against women and young children in the provision of health care and protection from harmful practices.[18] Non-discrimination is an HRBA obligation of immediate effect – it is not subject to the principle of *progressive realization*.

Not all denials of goods or services will constitute discrimination, but practice at the international level suggests that a finding of a pattern of discrimination based on group identity should not require an excessively rigid burden of proof from litigants to demonstrate they suffered abuse "as a result of being" members of a certain group, which is often difficult to demonstrate conclusively given evidentiary limitations.

17 See e.g. *Maria Mamerita Mestanza Chavez v. Peru*, Report No. 66/00, Case 12.191, October 3, 2000 (Peru) [case concerned program of alleged forced sterilization of women throughout Peru, in which poor, indigenous and rural women were targeted; the State settled the case privately with the family of the deceased woman, agreeing to provide the husband and children with health insurance and other benefits]

18 *Laxmi Mandal v. Deen Dayal Haringar Hospital and Ors*, Case INDLHC 2983 2010 (India) [case concerned systematic failure resulting in denial of state-provided health benefits to two women below the poverty line during their pregnancy and thereafter, such that one mother died and a second was provided only negligible care during childbirth. Court held that no woman should be denied treatment due to her social and economic background, and ordered the families to be provided compensation, including scholarships for the babies.

Remedying substantive discrimination can often require special measures to be adopted by the State, either temporarily or permanently. These measures should not be deemed impermissible when they are necessary to enable the effective enjoyment of sexual and reproductive health rights, and child health rights by individuals.[19]

CONSIDER

SPECIAL CONSIDERATION FOR CERTAIN GROUPS

Do pregnant women, children or other groups have specific health rights within your jurisdiction?

FOR EXAMPLE

PREGNANT WOMEN AND CHILDREN

If a pregnant woman or child brought a claim for denial of access to healthcare services before your court, would your government be held to provide such services under an obligation of immediate effect, or would this be subject to the principle of progressive realization? Have children and pregnant women been recognized as having specific protections under your constitution, or in judicial decisions in your jurisdiction that emphasize substantive equality?[20]

HRBA REFLECTION

SUBSTANTIVE EQUALITY

The right to health requires particular attention to the needs of marginalized and vulnerable groups. International human rights law, as well as the jurisprudence of some national courts, requires consideration of concerns of substantive equality – of enjoyment of rights in practice – and not merely formal equality. Thus, State laws and policies should consider the needs of such groups, and do not merely seek to maximize aggregate health.

In some jurisdictions, pregnant women and young children are considered a vulnerable group, and positive, immediate obligations are placed on the State in relation to their rights.[21] Any failure to provide healthcare or other services to pregnant women or

19 *Eldridge v British Columbia* [1997] 3 SCR 624 (Canada) [court determined that deaf patients, belonging to an "enumerated group" (the physically disabled) were entitled to sign language interpretation in the public hospital setting, in order to effectively obtain equal benefits under the law, i.e. access to healthcare services].

20 Case SU-225/98 (Colombia) [petitioners alleged failure to provide free meningitis vaccination program infringed the right to health of their children – court held that children were part of a vulnerable group whose basic health needs were not being met, their fundamental rights prevailed over those of others in society, and the State had failed to provide the "essential core" of the right to health of these minors].

21 See e.g. Cases of the Colombian Constitutional Court including T-606/95, T-739/98, T-1002/99; *International Federation of Human Rights Leagues (FIDH) v. France* (Complaint No. 14/2003) (European Committee of Social Rights) [Committee held that a French law restricting the entitlement of immigrant children to medical care violated Article 17 of the European Revised Social Charter, which protected the rights of children].

children may constitute a rights infringement for which resource constraints do not apply as a "defense".[22] Certain jurisdictions also provide for immediate fulfillment of obligations in relation to people with disabilities,[23] including in relation to sexual and reproductive health and child health services.

However, the immediacy of obligations relating to children and pregnant women in some jurisdictions cannot mean absolute priority over all other considerations of equity across the health system. A purposive reading of the rights at issue in a case, examining considerations of both formal and substantive equality, is essential to developing health rights jurisprudence that enhances equity across the health system.

CONSIDER

BODILY INTEGRITY

How is the principle of bodily integrity protected in your jurisdiction?

FOR EXAMPLE

CONSENT

Is your Government acting to ensure that consent is obtained for sterilization, as well as long-acting methods of contraception?[24]

What is the age of consent to treatment in your jurisdiction? If an adolescent girl seeks to exercise her sexual and reproductive health rights against the wishes of her parents, such as obtaining contraception pursuant to law, what considerations do you make in adjudicating her claim?

PHYSICAL OR SEXUAL ASSAULT

Is female genital mutilation illegal in your jurisdiction? Is this practice still carried out, even in settings where it is against the law? Has your State taken reasonable steps to implement legislation and policy combating this practice?

Do sex workers enjoy equal protection of the law, for instance in cases where they have been sexually assaulted by their clients?

22 See e.g. *Government of the Republic of S. Afr. v. Grootboom* [2000] ZACC 19 (South Africa) [High Court initially held that housing rights of children were not subject to progressive realization; principle extended to all persons in subsequent Constitutional Court decision].

23 *Campodónico de Beviacqua, Ana Carina v. Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas* (C. 823. XXXV) (Argentina) [court held that the failure of the State to continue supplying a drug, Neutromax 300, to the plaintiff's son (who suffered from Kostmann's disease) breached his right to health – in particular, because Argentinian law provided for comprehensive protection for persons with disabilities, which guaranteed medical treatment for such persons].

24 See e.g. *Maria Mamerita Mestanza Chavez v. Peru,* Report No. 66/00, Case 12.191, October 3, 2000 (Peru).

HRBA REFLECTION

RIGHTS TO HEALTH AND LIFE

Both the rights to health and life require the State to refrain from interfering with women's and children's bodily integrity, and to prevent other people in its jurisdiction from interference with bodily integrity, through refraining from treatments or practices that are coercive or conducted without consent. Examples include forced sterilization;[25] treatment without consent; and, harmful social or traditional practices (such as female genital mutilation), which often occur when people are children.[26] It is important to recognize that children have the right to respect of their bodily integrity, and their best interests may not always coincide with their parents' wishes.

The State must also take positive steps to prevent violence against women and children, as well as exercise due diligence in investigating, prosecuting and punishing such violence when it occurs.

CONSIDER

CONFLICT OF INTERESTS BETWEEN PARENTS AND CHILDREN

How are the interests of children protected in your jurisdiction in circumstances where there is a conflict of interest between children and other parties?

FOR EXAMPLE

FACTORS SUCH AS AGE OF CHILD AND HEALTH EVIDENCE

How would you approach a case where a child with deafness requested cochlear implantation, against the wishes of his or her deaf parents/guardians? Would your decision be different if a court order for cochlear implantation was sought by a medical professional or health facility for an infant against parental/guardian wishes?

Are there any laws in your jurisdiction that permit refusal of life-saving treatment for children on religious grounds? If a parent/guardian refused administration of a blood transfusion to their child on religious grounds, and a hospital sought a court order permitting the transfusion how would you balance the rights of the child against those of the parent?

25 *N.B. v Slovakia*, App. No. 29518/10, Eur. Ct. H.R. (2012) (Slovakia) [court determined that a 17-year-old Roma woman was coerced into sterilization, constituting inhuman and degrading treatment in breach of her constitutional rights, and that the State failed to provide sufficient legal protection of the reproductive health rights of Roma women in the jurisdiction].

26 *Emberá-Chamí Community FGM Case*, Juzgado Promiscuo Municipal (July 24, 2008) (Colombia) [court held indigenous authorities were failing to protect the personal integrity of girls in the Emberá-Chamí community through inadequate efforts to prevent female genital mutilation, and made orders prohibiting FGM and engaging NGOs to assist in eradicating the practice].

HRBA REFLECTION

BEST INTERESTS OF THE CHILD

International human rights law requires that the best interests of children are a primary consideration in all policies and programs aimed at guaranteeing the right to health,[27] and as for adults, children have the right to respect of their bodily integrity under international as well as much domestic law.[28] However, practical difficulties can arise when the wishes of children come into conflict with those of their parents or guardians – particularly, in cases where minors are seeking or refusing medical treatment. This must be assessed in accordance with the child's evolving capacities.

Children have the right to respect of their bodily integrity, and their best interests may not always coincide with their parents' wishes. Many national courts have confirmed that parents/guardians do not have the right to dictate what treatment their children will or will not receive (particularly where their children are mature adolescents).[29] Similarly, courts have held that requirements to vaccinate children, for instance, do not breach parental rights to freely exercise their own religion.[30]

CONSIDER

ASSESSING NATIONAL LAWS AGAINST CONSTITUTIONAL RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

Are there particular cases in which the application of laws and regulations that restrict access to certain sexual and reproductive health services can result in violations of international human rights law and/or constitutional rights? How can these rights as well as the principle of human dignity be protected in your jurisdiction?

FOR EXAMPLE

ABORTION

Are the rights to privacy, the right to security of one's person, the right to physical integrity, the freedom from torture, cruel inhuman or degrading treatment, and the right to health protected in your national legislation? Have you invoked any of these rights to guarantee access to an abortion if there is a conflict between the legal obligation to protect these rights and the existence of laws and regulations restricting access to an abortion?

27 Committee on Economic, Social and Cultural Rights (2000) General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12) UN Doc. E/C.12/2000/4.

28 *In re: A (children)* [2000] EWCA Civ 254 (United Kingdom) [court gave permission for conjoined twins to be separated surgically against parents' wishes, as it was held that the child's welfare was the court's paramount consideration, and extended beyond medical interests to encompass medical, emotional and other welfare issues].

29 *Planned Parenthood v Danforth* (428 U.S. 52 (1976)) (United States) [court held that a requirement for a minor to seek parental consent prior to obtaining a termination of pregnancy was invalid, and that a parent should not have absolute power to override the interests of a "competent" minor mature enough to have become pregnant].

30 *Phillips v City of New York* (871 F.Supp.2d 200) (United States) [court held that a law allowing exclusion of children from public schools who had not been vaccinated (due to parents' religious or medical objections to vaccines) during an viral outbreak was valid, and did not infringe parental rights to practice their religion freely].

Can any of those rights as well as the right to health (including mental health) be interpreted in ways that preserve women's agency and dignity?

HIV/AIDS

Are people who are dying of HIV/AIDS (as well as other painful conditions), entitled to pain relief/palliative care, or do regulations make it difficult to access such medications in practice?

Have you invoked the right to privacy to protect a person who is obliged by a prospective employer to disclose his/her HIV positive status in order to get a job?

HRBA REFLECTION

INALIENABILITY OF HUMAN RIGHTS FOR A LIFE OF DIGNITY AND EQUALITY

The inalienability of human rights means that they cannot be given away by virtue of the inherent dignity of every human being. Furthermore, the concept of human dignity is integral to all human rights, as it requires acknowledging that people should have agency over their lives. Although dignity may not be a separate right under domestic law, it gives meaning to the interpretation of a number of rights that are crucially related to sexual and reproductive health rights, and child health rights.

In the ICPD programme of Action in 1994, States agreed that any measures or changes related to abortion within the health system can only be determined at the national level according to the national legislative process. UNFPA derives its mandate from the ICPD Programme of Action, including the provisions established in paragraph 8.25.

Judicial authorities, including in countries with highly restrictive abortion laws,have held that abortion is permissible under international human rights law as well as under the principles of dignity, self-determination and equality, particularly where the pregnancy results from rape or incest, or threatens the life and/or health of the woman.[31] For instance, requiring a woman to carry a pregnancy resulting from sexual abuse to term has been held to constitute an infringement to her dignity because it converts a human being into a "womb without a conscience".[32] The right to privacy has also been relied upon in some jurisdictions to allow access to abortion.[33]

31 See e.g. Constitutional Court, C-355/2006 (Colombia) *Christian Lawyers Association of SA and others v Minister of Health and others* (1998) (11) BCLR 1434 (T) (South Africa); Christian Lawyers Association of SA and Others v Minister of Health and Others (2004), (10) BCLR (1086) (T) (South Africa)

32 *F., A. L. s/ Medida Autosatisfactiva* Expte. N° 21.912-F-2010 (Argentina) [case concerned a requested termination of pregnancy arising from sexual abuse of a fifteen-year-old female by her stepfather: court held that interruption of pregnancies resulting from sexual abuse was lawful].

33 *Roe v. Wade*, 410 U.S. 113, 1973 (USA).

At the international level, UN treaty bodies have established that access to abortion should be granted in cases in which denying access is detrimental to human rights. For instance, the Human Rights Committee has found that Peru had violated several rights under the International Covenant on Civil and Political Rights, including the right to an effective remedy, the freedom from torture and cruel, inhuman and degrading treatment and the right to privacy, for denying access to an abortion to an adolescent girl whose foetus was diagnosed with a fatal birth defect, and who was found to have experienced severe mental suffering at being forced to carry the pregnancy to term, knowing that the infant would die soon after birth.[34]

CONSIDER

RESPONSIBILITY OF PRIVATE ACTORS

What role can courts play in ensuring non-interference with the right to health by private parties?

FOR EXAMPLE

STATE OVERSIGHT OF PRIVATE ACTORS

How would you approach a case in which petitioners alleged that sterilizations were being carried out by private medical practitioners in your country without the consent of women? How would you determine the extent to which the Government was liable for perpetrating, or failing to prevent, such acts?

How would you approach a case in which petitioners alleged that private salt manufacturers were marketing salt that was not fortified with iodine, contrary to national regulations? How would you determine the extent to which the Government was liable for perpetrating, or failing to prevent, such acts?

How would you assess the State's obligation in terms of regulating the supply of medications, ensuring appropriate standards of quality and guaranteeing universal access (e.g. including access to generic medications)?[35]

HRBA REFLECTION

DUE DILIGENCE

A State is not the only duty-bearer under human rights law. Third party actors, such as childhood vaccine manufacturers or contraceptive commodities manufacturers, private providers, and insurers, owe duties to rights-holders in relation to their sexual and reproductive health rights, and child health rights.

34 *K.L. v. Peru*, Human Rights Committee, UN Doc. CCPR/C/85/D/1153/2003 (2005).

35 *Patricia Ochieng and ors vs Attorney-General and ors* (No. 409 of 2009), High Court of Kenya (Kenya) [sections of the Kenyan Anti-Counterfeiting Act were held to infringe the right to life and health by failing to distinguish between generic and counterfeit medications, which would restrict access to HIV/AIDS medications for the petitioners].

© UN: Martine Perret

Under international law a State is obliged to protect the right to health of everyone, by preventing third parties from interfering with rights-holders' sexual and reproductive health rights, and child health rights.[36] That is, States have obligations of "due diligence" with respect to regulating private actors, and can be liable for their breaches of sexual and reproductive health rights and child health rights.[37]

36 *BLAST and Anr. V Government of Bangladesh* (Case 25 BLD(HDC) 2005-83) [case brought by a public interest NGO, alleging that the Government and manufacturers of edible, but non-iodized or insufficiently iodized, salt had violated the Iodine Deficiency Diseases Prevention Act, 1989 which prohibited the manufactor of edible salt without iodine. The Court held that the manufacturers had violated the Act in producing edible salt without the required quantity of iodine, and held the Government accountable for failure to ensure compliance with the law. The Court directed the Government to ensure that manufacturers violating the law are prosecuted. Further, the Government was ordered to ensure better regulation of salt manufacturers, including through collection and testing of samples of edible salt in the market with the obligation to report to the Court twice a year in this regard].

37 Office of the High Commissioner for Human Rights, Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality, UN Doc. A/HRC/21/22 (2012); Office of the High Commissioner for Human Rights, Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce and eliminate preventable mortality and morbidity of children under 5 years of age, UN Doc. A/ HRC/27/31 (2014).

2.3 RULES OF PROCEDURE AND REMEDIES

The rules of procedure during adjudication can have an important impact on the degree to which human rights are upheld. The availability of remedies will also have a direct bearing on whether victims of alleged violations perceive the judicial process as an appropriate place to bring their claim.

YOU, AS MEMBERS OF THE JUDICIARY, can establish procedural and remedial practices which aim to foster the enjoyment of rights related to sexual and reproductive health, maternal health and child health.

CONSIDER

THIRD PARTY INTERVENTIONS

What role can third parties have in litigation related to sexual and reproductive, maternal, and child health in your jurisdiction?

FOR EXAMPLE

AMICUS CURIAE AND EXPERT TESTIMONY

Does your country allow for the court to solicit an amicus curiae brief or other expert evidence/testimony in the absence of an application by that expert? If so, in which kind of proceedings is this permitted?

Do some or all of the courts in your country have a broad jurisdiction to accept amici curiae briefs or expert testimony regarding sexual and reproductive health rights and child health rights, or are judges prohibited from doing this in certain settings?

HRBA REFLECTION

PARTICIPATION

Third parties, including amici curiae, have an important role to play in proceedings around sexual and reproductive health rights, and child health rights. They can provide expert guidance on the broader societal implications of litigation, assist the court in determining the reasonableness of certain policies, and can represent the interests of those who are not a party to the proceedings who may be affected by the judgement.

The involvement of third parties, aside from assisting the court, also reflects the importance of the human rights principle of participation: where a range of stakeholders with different views should be allowed the chance to make representations in relation to matters that concern them.

CONSIDER

RULES REGARDING AMENDMENTS

What approach is taken to amendments to case documents during judicial proceedings in your jurisdiction?

FOR EXAMPLE

DEADLINES AND COURT FORMS

If you were considering a case where self-represented litigants have failed to comply with court deadlines, or submitted materials in the wrong form, how would you approach this situation? Is there any room for a less formalistic, purposive reading of the rules?

HRBA REFLECTION

ATTENTION TO DISADVANTAGED GROUPS

The procedural approach taken in the context of litigation can substantially impact upon the ability of litigants to realize their health rights. It is important to consider whether strict adherence to procedural rules will result in miscarriage of justice, especially where litigants may have substantially fewer resources than the State.

Courts in various jurisdictions have been flexible in their conduct of proceedings to ensure that litigants are not disadvantaged in the course of bringing claims, and to redress the imbalance of power that often exists between litigants and States.[38]

38 *Patricia Ochieng and ors vs Attorney-General and ors* (No. 409 of 2009), High Court of Kenya (Kenya).

CONSIDER

PROTECTION OF CLAIMANTS AND WITNESSES

How are marginalized and vulnerable litigants and witnesses protected in your jurisdiction, including children, with respect to claims on sexual and reproductive health rights or child health rights?

FOR EXAMPLE

MEANS FOR PROTECTING IDENTITY

Does your jurisdiction have regulations or rules allowing for sexual and reproductive health rights or child health rights claimants or witnesses to give evidence behind a screen, or via video-link (or other technology) to avoid having to give evidence in front of the accused?

Are there mechanisms for suppression of names of claimants and witnesses to avoid identification during and after proceedings, in your jurisdiction? How is the privacy of women and children protected during and after sexual and reproductive health rights or child health rights litigation?

HRBA REFLECTION

RESPECTING HUMAN RIGHTS THROUGHOUT THE JUDICIAL PROCESS

Claimants who have brought proceedings alleging infringements of their sexual and reproductive health rights or child health rights can be at enormous personal risk during proceedings, as may witnesses. In particular, women who are victims of sexual or family violence may fear retribution as a result of bringing their claim, and experience high levels of stress when giving evidence.

Similarly, child victims of abuse and violence may be both stressed and at high risk when giving testimony, and should be protected by the adoption of child-friendly court procedures. Explaining procedures in simple language, screening children or allowing them to give testimony in a private setting outside the courtroom are among the child-friendly procedures that could be used to protect their rights and reduce the risk of retribution from adults who are, by definition, more powerful.

As part of an HRBA, it is vital that steps are taken to protect claimants throughout the course of a hearing – not just in trying to achieve a just outcome. Human rights must be respected at all times, including throughout the process of seeking accountability, and in the provision of remedies for abuses.

CONSIDER

REMEDIES

What remedies are available for infringements of rights in your jurisdiction, and how are these selected?

FOR EXAMPLE

CHOICE OF REMEDIES; INDIVIDUAL OR SYSTEMIC

How do courts choose remedies in your jurisdiction? Do applicants have to specify a certain remedy in their submissions or pleadings for a court to award it, or do judges have discretion in awarding remedies? Does it depend upon the court?

What circumstances would allow you to make orders that would result in institutional or systemic changes in the health system, as opposed individualized remedies? Under what circumstances might you order a remedy that requires the executive branch to propose a plan of action, or a new policy, to meet constitutional standards?[39] Do different courts have different remedies at their disposal?

HRBA REFLECTION

REMEDIES CAN HAVE IMPACT BEYOND THE INDIVIDUAL CLAIMANT

Depending on the jurisdiction, courts may have a broad range of remedies at their disposal for infringements of sexual and reproductive health rights, and child health rights: these include restitution, compensation, satisfaction or guarantees of non-repetition.[40]

In applying an HRBA, it is important to consider a wide range of remedies – even beyond those requested by litigants – and the broader impact of those remedies within society. In some cases, declarations striking down invalid laws, or orders requiring the government to complete specific tasks, may have more far-reaching effects than awards of compensation to individuals. It is important that courts seek to strike the appropriate balance in this regard. Careful tailoring of remedies, to the extent the court has this discretion, can enhance the indirect impacts of the judgement on the broader society beyond the litigants.

Further, courts can also preserve their constitutional legitimacy as well as potentially enhancing the institutional capacities and probabilities of implementation by engaging in dialogue concerning remedies with the Executive branch of government, and requiring the Executive to propose solutions and justify its actions with respect to the issues brought before the judiciary rather than attempting to dictate specific actions to the Executive. Such dialogical remedies may potentially also enhance public learning with respect to sexual and reproductive health rights, and child health rights.[41]

39 See e.g. *Judgement T-760* (Constitutional Court of Colombia, Sentencia T-760/08, July 31, 2008) (Colombia) [case concerned multiple breaches of right to health for various petitioners; court made orders to regulatory bodies to improve system and ensure effective enjoyment of right to health, rather than making orders on a case-by-case basis]; *PUCL vs Union of India and others* (Writ Petition [Civil] No. 196 of 2001 (India) [case concerned breach of right to food, particularly for children – orders made in this case directed the Indian State to introduce specific initiatives, such as cooked midday meals in all primary schools].

40 UN Docs. A/HRC/21/22, A/HRC/27/31.

41 *Judgement T-760* (Constitutional Court of Colombia, Sentencia T-760/08, July 31, 2008) (Colombia).

3 POST-PROCEEDINGS PHASE

COMPLIANCE, IMPLEMENTATION, IMPACT

The role of judicial bodies in ensuring accountability does not end with deliverance of a judgement, as adequate redress is only achieved when the remedies provided in the judgement are duly complied with.

Where possible, **YOU, AS MEMBERS OF THE JUDICIARY**, should actively follow-up on compliance with orders, imposing benchmarks when the nature of the judicial order takes time to be implemented, and issuing penalties to duty bearers that do not comply with deadlines.[42]

CONSIDER

COMPLIANCE WITH JUDGEMENTS

How are courts engaged in overseeing compliance with judgements in your jurisdiction?

FOR EXAMPLE

FOLLOW UP

In the event that you made an order declaring the unavailability of certain health services unconstitutional and ordering that these services be made available within a certain timeframe, how would you follow this up to ensure compliance with your orders? What options would be available to you in the event that the State did not make services available within the timeline you specified?

HRBA REFLECTION

ENFORCEMENT OF JUDGEMENTS IS CRITICAL FOR RIGHTS TO HAVE MEANING

After a decision is rendered, judicial bodies have an important role to play in holding parties accountable for performing their court-determined obligations. A court may have the option to issue "contempt" or other orders where a party has failed to comply with a judicial order.[43] Ensuring that judgements are fully enforced in this way allows courts a unique opportunity to ensure sexual and reproductive health rights and child health rights have meaning and content.

In some places, courts may not have strong enforcement powers. In these cases, civil society, the media, parliament and national human rights institutions, can play an important role to play in elevating the pressure for compliance by the government, including through processes of social accountability.

42 *Judgement T-760* (Constitutional Court of Colombia, Sentencia T-760/08, July 31, 2008) (Colombia).

43 *Jaitun v Maternity Home MCD Jangpura and Ors* (W.P. 10700/2009) (India) [Delhi High Court considered contempt petition relating to case of *Laxmi Mandal vs. Deen Dayal Harinagar Hospital & Ors.* (W.P. (C) 8852/2008), finding that the Union of India and the NCT had six weeks to comply with orders made in that case concerning the Janani Suraksha Yojana and National Maternity Benefit Scheme].

CONSIDER

MONITORING IMPLEMENTATION

Through what processes are courts engaged in monitoring implementation of judgements in your jurisdiction?

FOR EXAMPLE

MEANS OF MONITORING

Is it permissible in your jurisdiction for a court to remain seized of a case, to hold hearings and issue interim orders regarding specific aspects of a judgement? If the court does not have capacity to do so, are there other bodies (such as the national human rights institution) that can partially fulfill this role by holding participatory hearings? Are the ways to increase the capacity of the court to monitor implementation?

HRBA REFLECTION

PARTICIPATION

Some cases involving sexual and reproductive health rights and child health rights litigation involve complex orders rather than black-letter holdings, and will require ongoing monitoring and follow-up to ensure successful implementation. In some circumstances, judicial bodies have taken on an active role in ensuring that this process occurs. For example, a court might hold interim hearings to determine whether decisions have been implemented, and issue additional orders following the original hearing, to ensure momentum in achieving the outcomes specified in the case.[44]

Hearings, on-site visits and other modes of monitoring implementation not only track how a judgement has been complied with but also can create meaningful participation among a variety of actors from civil society as well as the government regarding sexual and reproductive health rights and child health rights.

Such participation serves both to legitimate processes in defining the contours of sexual and reproductive health rights and child health rights, and also as opportunities for public learning and discussion regarding the significance of treating such issues as matters of rights, as opposed to market commodities or public largesse. However, sustained financing is necessary for courts to be able to follow up on complex orders involving multiple levels of government and agencies. This approach requires funding and prioritization from the beginning of the circle of accountability.

44 *People's Union for Civil Liberties v Union of India* No. 196 of 2001 (Supreme Court of India 2001) (India).

CONSIDER

ASSESSING IMPACT

How can judicial officers in your jurisdiction assess the impact of their decisions, in respect of human rights?

FOR EXAMPLE

WHERE TO FIND INFORMATION ABOUT IMPACT

If you wished to obtain more information concerning the long-term effects of a judicial decision for members of a particular community, would you be able to access this information in your jurisdiction? Are there any bodies or organizations that can or with funding or training could provide such information?

HRBA REFLECTION

IMPACT OFTEN EXTENDS BEYOND INDIVIDUAL CASES

Judicial decisions may have far-reaching consequences beyond individual litigants in sexual and reproductive health rights or child health rights cases, including creating significant positive – or negative – changes in respect of equitable access to goods and services.[45] Some States or national human rights institutes compile information concerning rights-based litigation, which are a good resource for judicial officers who wish to better understand the implications and context of their decisions.[46]

As part of a circle of accountability, it is important for judicial officers to be cognizant of, and reflect upon, the broader impact of their decisions. Remedies for health rights are most likely to foster greater equity when judges adopt a purposive approach that considers formal and substantive equality across the system, rather than simply considering individual cases in isolation of the social context in which they occur.

45 Ana Paula De Barcellos, Sanitation Rights, Public Law Litigation, and Inequality: A Case Study from Brazil. *Journal of Human Rights Practice* 16(2): 35-46 (2014).

46 For example, Colombia's National Human Rights Institution routinely reports on cases that are litigated under the right to health, including geographic area, whether the treatment or service was included in the social insurance scheme, and in the past whether litigants were in the more expansive contributory regime, for wealthier people, or the subsidized regime. Used effectively, access to such information can allow judges to reflect on their role in the overall health system.

© UN: Basile Zoma