

ISLA SEXUAL RIGHTS LITIGATING NETWORK

LAWYERS CURRICULUM

INTRODUCTION

1. Background

The Initiative for Strategic Litigation in Africa (ISLA) is a feminist, Pan African organisation that uses the rule of law in African domestic and regional courts to advance women's human rights and sexual rights. Our work is based on the belief that strategic litigation is an immensely strong tool for social change because, it helps to reframe the understanding of entitlements before the law and it challenges the legal discourse. Yet in spite of its potential, on the continent, strategic litigation is an underutilised tool.

Through our work and interactions with several experts and organisations set up to do strategic litigation we have uncovered a number of reasons why strategic litigation has not been effectively harnessed for social change. These include, the limited capacity strengthening programs for strategic litigation, offered only sporadically by bar associations, and international non-profit organisations (NPOs).

The *ad hoc* nature of these programs, designed to increase a critical mass of lawyers pursuing strategic litigation, often means that it is not possible to follow up on individual lawyers and cases and offer adequate support on cases that are discussed during the programs. Another significant hurdle for follow-up is the fact that many of the lawyers who attend capacity strengthening programs come from institutions that are not equipped to conduct strategic litigation. The majority of organisations funded to do strategic litigation are legal-aid service providers, routinely providing advice and legal representations. Strategic litigation requires particular training, and the time and resources for lawyers to explore the broader legal context in which their cases are pursued. Consequently, the lawyers may not be supported to pursue strategic litigation after receiving the training, and eventually, competing legal-aid demands overshadow the nascent interest. These limitations impact capacity to seek effective redress through strategic litigation when rights are violated.

In response to the above mentioned challenges, ISLA's innovation is to work with select individuals and institutions over a period of time with the aim of developing a pool of

Black feminist lawyers with the necessary knowledge, skills and institutional support to undertake strategic litigation on gender and sexuality matters. We have established our Sexual Rights Litigating Network in which we have partnered with organisations that have an interest in using strategic litigation as an instrument to effect social change on sexual rights in Africa.

2. The Litigation Institutes

The litigation institutes (institutes) are the centrepiece of ISLA's capacity strengthening activities. They are a series of week capacity strengthening activities which will span over a period of three years. The carefully developed curriculum has the overarching goals of developing the knowledge and skills on strategic litigation before various fora, provide sound knowledge on the use of comparative and international law in strategic litigation, endow participants with the skills on using the different human rights mechanisms and enhance understanding of feminist legal theories and their utility in advancing litigation on sexual rights.

The institutes incorporate both theoretical and practical components. The structure includes contact sessions, with faculty members, which are interactive and include presentations, readings, discussions and activities. The practical aspect of the institutes includes a moot court competition at the end of the two-week period. Participants will be required to work in teams on a hypothetical case, from the beginning of the institute, and present submissions before a panel of judges, at the end of the institute.

The faculty comprises experts drawn from academia, and practitioners who have substantive expertise in areas covered by the curriculum. As our objective is to continuously work with the same lawyers and institutions, participants for the institute will be drawn mainly from the lawyers in these various organisations that we partner with. A maximum of twelve participants will be invited, a number that will allow for lively discussions and debate while at the same time small enough to allow each participant maximum engagement.

3. Objectives of the Litigation Institutes

The overarching objectives of the institutes are to:

- Strengthen the capacity of lawyers in the region to litigate SOGIE human rights cases at domestic, regional and international levels through the learning of the latest developments and interaction with experts;
- Facilitate collaborations and peer to peer learning of partner lawyers and social movement; and
- Foster cross learning between partner lawyers and ourselves on the capacity training needs and thematic issues that require addressing.

4. Expected Learning Outcomes of the Litigation Institutes

Ultimately, through the institutes, participants will:

- Enhance their ability to effectively undertake strategic litigation of SOGIE rights;
- Develop an understanding of the thematic areas covered;
- Gain an in-depth and sophisticated understanding of regional, international and comparative human rights mechanisms and institutions;
- Improve their understanding and use of constitutional, regional and international human rights in litigation; and
- Strengthen relationships with peers within the network in a way that fosters cross learning.

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YEAR ONE
INTRO TO SXLN

OVERVIEW

This module seeks to introduce the lawyers to the Sexual Rights Litigating Network, how and why it exists and came to be. The module will explore the existing conditions that gave rise to the need for the network as well as the unique model ISLA utilises.

OBJECTIVES

1. Build a solid understanding of the context that led to the necessity of the development of the network
2. Understand how the network operates
3. Develop a familiarity with the networks objectives

FORMAT & REQUIREMENTS

The module will be delivered through combined methods such as interactive lectures, presentations, and practical exercises. Participants are required to have engaged with the materials prescribed on the reading list prior to each session.

EVALUATION & ASSESSMENT

Evaluation and assessment of each module will be carried out by the Network Coordinator through the use of pre and post online evaluations as well as next-day recaps.

OUTLINE

Introduction to the Sexual Right Litigating Network

- III. Why the network exists - problem analysis:
 - a. predatory lawyers
 - i. feeding off of homophobia
 - b. global north prioritizing decriminalization
 - c. public health v human rights
 - d. lawyers who diverts movement from goal
- IIII. Theory of change / ISLA model
- IIIII. Network Objectives
 - a. Development of network
 - b. Relationship Management
 - c. Institutional Strengthening
 - d. Strengthening Capacity to Litigate Strategically
- IIIV. Role of network manager and activities

YEAR ONE
HUMAN RIGHTS

OVERVIEW

This module is aimed at introducing lawyers, working towards the advancement of SOGIE rights, to the history and framework of human rights and its use as an effective tool that citizens can use to challenge the state and hold it to account. The module will explore the concept of human rights, its historical development, challenges, and effective remedies.

OBJECTIVES

1. To enhance the lawyers' knowledge and understanding of human rights discourse.
2. To build an appreciation of history, methods, and tactics for defending and enforcing human rights.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Display an improved understanding of human rights framework and background to the right to remedy.
2. Be able to appreciate the value of upholding human rights discourse.
3. Understanding the importance and utility of human rights litigation as a way to hold governments accountable for human rights violations.
4. Have a sense of the current challenges to human rights, such as the “un-African” discourse to de-legitimise the human rights regime.

OUTLINE

An Introduction to Human Rights

- i. The post-WWII history of human rights
- ii. State obligations
- iii. Human rights framework
- iv. Right to remedy
- v. Why is it important to uphold human rights discourse?
- vi. Holding states accountable via human rights
- vii. Current challenges to human rights – is it “un-African”?

ACTIVITES (ASSESSMENTS)

- 1.

READING LIST: Human Rights

Articles

- Amanda Spies, “Considering the impact of amicus curiae participation on feminist litigation strategy” 2015 SAJHR 136.
- PM Collins 'Lobbyists before the US Supreme Court Investigating the Influence of Amicus Curiae Briefs' (2007) 60 Political Research Quarterly 55, 58
- Lovemore Chiduzza & Paterson Nkosemntu Makiwane “Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution”

Case Law

Kenya

- *Trusted Society of Human Rights Alliance v Mumo Matemu* Petition No. 12 of 2013 [2015] eKLR

South Africa

- *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)
- *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
- *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC)

Nigeria

- *Adesanya v President of the Federal Republic of Nigeria* 1981 1 All NLR 1
- *Thomas and Others v Olufusoye* (1986) 1 NWLR part 18 669

ECOWAS:

- *SERAP v. Nigeria*, ECW/CCJ/APP/0808 (ECOWAS, Oct. 27, 2009)

African Commission

- ACommHPR, *Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, Merits Decision, 51st Ordinary Session (2012), available at <http://www.achpr.org/communications/decision/288.04/>

YEAR ONE
RIGHT TO NON-DISCRIMINATION

OVERVIEW

Participants will explore discrimination, the various forms that it takes, and how to structure a discrimination claim. This includes identifying the grounds for discrimination under domestic and regional laws, identifying direct and indirect discrimination, how to structure a discrimination claim including the evidence needed, the burden of proof, and the remedies available under discrimination claims.

OBJECTIVES

1. To enhance the lawyers' understanding of how discrimination manifest in various contexts.
2. To build an appreciation of the elements of a discrimination claim for the purpose of pursuing litigation.
3. To expand knowledge of comparative discrimination jurisprudence regionally and internationally.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Display an improved understanding of the structure of a discrimination claim.
2. Be able to identify when discrimination occurs in various scenarios.
3. Utilise key legal principles in discrimination law.
4. Be able to understand how to effectively deal with problems of evidence.
5. Demonstrate a knowledge of the major comparative discrimination precedents.

OUTLINE

- II. **An Introduction to Discrimination**
 - i. What is the right to non-discrimination and how did it develop historically?
 - ii. International human rights framework
 - iii. The scope and content of the right to freedom from discrimination.
 - i. formal v substantive equality
 - ii. affirmative action & reasonable accommodation
 - iv. A state's positive and negative obligations
 - v. Basic structure of discrimination claim
 - i. prima facie case
 - vi. Justifications for discriminatory actions:
 - i. legitimate goal,
 - ii. objective link, and

- iii. proportionality
- vii. Direct and indirect discrimination
 - i. Apparently neutral with disproportionate impact
 - ii. Lack of justification
- viii. Overcoming evidentiary difficulties:
 - i. Problems with comparators
 - ii. Judicial notice
 - iii. Inferences
 - iv. Statistics
- ix. Remedies for discrimination claims

ACTIVITIES

READING LIST: Non-Discrimination

YEAR ONE
MOVEMENT LAWYERING

OVERVIEW

The participants will explore the background context that created the need for lawyers to be embedded in social movements. Since activists and lawyers have often had a tense relationship due to hierarchy of the legal system and lawyer superstars, it is imperative for the network to avoid falling into these pitfalls and create a partnership where the lawyers in the network can truly empower the movement and help it achieve its legal and social goals.

OBJECTIVES

1. To enhance lawyer's understanding of the historical challenges that can arise between lawyers and movements.
2. To build an appreciation for how lawyers can be of service to movements within and beyond the courtroom.

LEARNING OUTCOMES

1. Be able to identify sources of conflict that can arise between movements and lawyers
2. Commitment to the essential elements of movement lawyering
3. Display an understanding of the different forms that public interest lawyering can take.
4. Dedication to embedding themselves in the social movements they serve.

OUTLINE

- i. Common models of human rights lawyering
 - a. Legal Aid
 - b. Impact Litigation
 - c. Movement Lawyering
- ii. Understanding social movements
- iii. Movements' critiques of lawyers
- iv. Lawyers: Movement Lawyers v Hired Guns
- v. Objectives of Movement lawyering
- vi. Essential Elements of Movement Lawyering
- vii. Cooperative Strategies for Movements & Lawyers

ACTIVITIES

READING LIST: Movement Lawyering

YEAR ONE
FREEDOM FROM VIOLENCE & DUE DILIGENCE

OVERVIEW

Violence is an experience that many SOGIE movements are subjected to, thus, we will discuss various experiences of violence and the state's failure to act. In particular, we will explore due diligence principles, which provides an assessment framework for ascertaining what constitutes effective fulfilment of a state's obligations, and for analysing its actions or omissions. The international due diligence framework includes the duty to protect, prevent, investigate, prosecute, punish, and remedy.

We will review the regional case law development of due diligence in relation to LGBT violence and how courts have interrogated and analysed a state's duty and failure to prevent and respond to violence. The session will narrow in on state's specific obligation in relation to minority groups or people with a heightened vulnerability who are often subjected to numerous human rights abuses.

OBJECTIVES

1. Equip lawyers with an understanding of the state obligation to protect from violence.
2. To build an appreciation of the various due diligence principles.
3. To expand knowledge of development due diligence jurisprudence regionally and internationally.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Demonstrate a deep understanding of the due diligence principles.
2. Be able to identify a heightened risk of vulnerable groups.
3. Be able to identify the steps required under the due diligence principles in order to hold perpetrators accountable.
4. Demonstrate knowledge of the various forms of redress available.

OUTLINE

- I. **An Introduction to Violence and Due Diligence**
 - i. Manifestations, causes and consequences of SOGIE based violence
 - ii. What is due diligence and how did it develop?
 - a. Prevent acts of violence
 - b. Protect victims and survivors of violence
 - c. Prosecute and Investigate the incidents of violence

- d. Punish the perpetrators
- e. Provide redress to the victims/ survivors for the harm suffered
- iii. The scope and content of the due diligence.
- iv. A state's positive and negative obligations
- v. International human rights framework, norms, & standards
- vi. Heightened risk of vulnerable groups
- vii. Duty to Investigate
- viii. Duty to provide redress

ACTIVITIES

READING LIST: Violence & Due Diligence

INTRO TO SEXUALITY

OVERVIEW

Sexuality is incredibly diverse but ubiquitously mis-understood, especially in post-colonial Africa. The SXLN Network lawyers are well-established human rights lawyers but venturing into the realm of sexual rights is often new territory for them. Thus, it is important for the Network lawyers to be well versed and comfortable in their understanding of sexuality and gender. As movement lawyers, it is imperative that the lack of understanding about the movements they represent is eradicated and the lawyers are well equipped to fight the ever-present misconceptions about the LGBT community. This module will provide definitions and space for discussion about concepts and terms that may be misunderstood. This unpacking of sexuality is the necessary precursor to the module on sexual rights.

OBJECTIVES

1. To enhance the lawyers' understanding of sexuality and gender identity.
2. To create space for discussion to safely inquire about and unpack sexuality.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Have a firm understand of the fluidity of sexuality and gender.
2. Be able to define the meaning of various identities and concepts

OUTLINE

- i. Introduction
- ii. What is sexuality, sexual identity, and gender identity?
- iii. Definitions
 - a. LBGTQ
 - b. Beyond LGBT – pansexual, asexual, intersex, gender non-comfrming
 - c. Concepts – coming out, homophobia, in the closet, etc

READING LIST: Sexuality & Gender

YEAR TWO
SEXUALITY RIGHTS & THE LAW

OVERVIEW

Sexual rights is the study of the legal development of sexuality and gender. The pervasive human rights violations toward the LGBT community occur on the real or perceived basis of their sexual orientation and gender identity. Therefore, it is crucial for the lawyers to explore the ways in which existing and developing legal frameworks implicitly and explicitly protect people from SOGIE based violations. Domestic, regional, and international sexual rights jurisprudence has been advanced in different realms such as right to bodily autonomy and exploring the private / public life divide. SOGIE sexual rights has been the latest to develop, thus this module will equip the participants with this recent history, understanding, and analyse situations for further development.

OBJECTIVES

1. To enhance the lawyers' knowledge of sexual rights as a legal framework.
2. To understand the ways in which sexual rights intersects with established human rights.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Be able to identify which legal standards can be applied to sexual rights and in what ways.
2. To analyse the necessary conditions that can advance sexual rights through litigation.

OUTLINE

- i. What are sexual rights and how did it develop?
- ii. The areas of life which are protected
- iii. Challenges to the sexual rights framework
- iv. Opportunities for developing the framework
- v. Sexual rights in human rights law
- vi. Applying sexual rights in the human rights context
- vii. International human rights framework & sexual right
- ix. Applicable international laws and state obligations

READING LIST: Sexual rights

FREEDOM OF ASSOCIATION

OVERVIEW

Freedom of association involves an individual's right to come together with other individuals to collectively express, promote, pursue and/or defend common interests without interference, and the right of the group to take collective action to pursue the interests of its members. The right to freedom of association is one of the key human rights areas where the social movement faces continued violation, whether it is registration of an organization, or arbitrary raids conducted by government officials and law enforcement officers. This right protects against the interference of the state in both the right to form an association and the right to join or remain a member of an existing one.

We will review how minority groups who seek a change in the legal structure or merely aim to promote their distinct identity through exercising their freedom of association are protected by international law. However, international law does allow for restrictions to be imposed on rights where those restrictions are provided by law, serve a legitimate aim, and are necessary.

OBJECTIVES

1. To build familiarity with regional and comparative African jurisprudence on the right to freedom of association.
2. To establish an understanding of the principles guiding legal interpretation of the right of association.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Demonstrate a knowledge and application of the permissible restrictions of the right to freedom of association.
2. Be able to identify regional jurisprudential trends related to the right of freedom of association of SOGIE contexts.

OUTLINE

An Introduction to the Right to Freedom of Association

- i. What is freedom of association and its development from a labour context
- ii. International and regional legal framework, norms, & standards protecting association
- iii. The content of the right
- iv. A state's positive obligation to protect and negative obligation to not interfere
- v. Scope of the right

- vi. Permissible restrictions on the right to associate
 - i. Prescribed by law;
 - ii. Serves a legitimate aim; and
 - iii. Necessary in a democratic society
 - proportionality
- vii. Regional case studies
 - i. Kenya
 - ii. Uganda
 - iii. Botswana
 - iv. Nigeria

ACTIVITIES

READING LIST: Association

STRATEGIC LITIGATION

OVERVIEW

This module is aimed at introducing lawyers, working towards the advancement of SOGIE rights, to strategic litigation and its use as an effective advocacy tool that brings about significant changes in the law, social and legal practice and/or public awareness on SOGIE rights. The module will explore the concept of strategic litigation, its broader goals as well as key considerations and approaches.

OBJECTIVES

1. To enhance the lawyers' knowledge and understanding of strategic litigation.
2. To build an appreciation of conditions, strategies and tactics for defending and enforcing human rights.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Display an improved understanding of strategic litigation.
2. Be able to appreciate the value of strategic litigation and how it can be used to effect social change.
3. Understanding the importance and usefulness of comparative research on developments in other jurisdictions to see how particular issues have been litigated in other jurisdictions.
4. Have a sense of the components necessary for strategic litigation in order to recognise whether strategic litigation is a viable option in certain domestic jurisdictions.
5. Be able to understand whether an issue is ripe for strategic litigation.
6. Demonstrate an understanding of the impact (both negative and positive) and unintended consequences of strategic litigation at every stage.

OUTLINE

An Introduction to Strategic Litigation

- I. What is strategic litigation?
- II. Theory of change
- III. Limitations of, and barriers to, strategic litigation – 4 conditions necessary to litigate:
 - a. existing rights framework;
 - b. independent and knowledgeable judiciary;
 - c. civil society organizations with the capacity to frame social problems as rights violations and to litigate; and
 - d. a network to support and leverage the opportunities presented by litigation.
- IV. What is “strategic” about strategic litigation?
- V. Forms of impact of strategic litigation

- VI. Understanding and assessing impact of strategic litigation
- VII. Strategic Litigation in practice
- VIII. Considerations for pursuing strategic litigation
- IX. Managing clients' interests
- X. Challenges of strategic litigation
- XI. Opportunities
- XII. Strategic litigation issues specific to the protection of SOGIE rights

ACTIVITIES

READING LIST: Strategic Litigation

RIGHT TO PRIVACY

OVERVIEW

The right to privacy ensures that individuals can make personal decisions about their body, home, family, relationships, and intimacy without intrusion from the state or other members of society. The way persons give expression to their sexuality has been recognized by various courts as the core of private intimacy and an intrusion by the state in such matters is a breach of the human right to privacy. We will review the successful and unsuccessful developments of the right to privacy in relation to SOGIE with case studies from the European System, the United States, the UN system and across Africa.

OBJECTIVES

1. To build familiarity with international, regional and comparative African jurisprudence on the right to privacy in relation to SOGIE.
2. To establish an understanding of the principles guiding legal interpretation of the right to privacy.
3. To develop an understanding of the right to privacy's intersection with other fundamental rights, such as the rights to dignity, non-discrimination and equality.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Identify the various ways in which LGBT persons are commonly violated in terms of their right to privacy, individually and collectively.
2. Demonstrate a knowledge of how the right to privacy has been interpreted in SOGIE contexts.
3. Be able to identify possible legal restrictions to the right to privacy and the legal principles and precedents to challenge such restrictions.

OUTLINE

An Introduction to the Right to Privacy

- i. What is the right to privacy
- ii. Background and historical development
- iii. International and regional legal framework, norms, & standards protecting privacy
- iv. The content of the right
 - a. privacy from whom?
 - b. privacy for whom?
- v. Scope of the right to privacy
 - a. legitimate expectation to privacy
 - b. continuum of privacy interests

- vi. Possible restrictions on the right to privacy
 - a. legitimate aim
 - b. provided by law
 - c. proportionality & necessity
 - d. distinction between public and private persons
- vii. Privacy & Bodily Autonomy
 - a. contraception
 - b. abortion
 - c. forced sterilisation
 - d. forced anal exams
- viii. Comparative jurisprudence
 - a. Kenya - anal exams
 - b. Inter-American Court of Human Rights - parental rights, sexuality
 - c. Uganda - publication of identifying information
 - d. Botswana - gender marker change
 - e. Uganda - privacy of home & person; search & seizure
 - f. European Court of Human Rights - medical records

ACTIVITIES

READING LIST: Right to Privacy

HUMAN RIGHTS LITIGATION

OVERVIEW

This module focuses on the principal ways in which human rights claims are litigated as part of strategic litigation. The module will also encompass the historical contexts and evolution of human rights principles, methods of judicial interpretation and analysis and basic doctrines concerning the protection of human rights. It will consider the various rules peculiar to human rights fora that are often relevant to human rights litigation, such as admission of an *amicus curiae*, standing, costs, and remedies and positive or negative implications these rules can have on human rights litigants.

OBJECTIVES

1. To introduce participants to the practice and the procedures involved in litigating human rights issues.
2. To develop and refine the participants' critical thinking in respect to specific court procedures in human rights litigation.
3. To get participants to identify best practices and procedural challenges to human rights litigation in their jurisdiction.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Have developed the capacity to think strategically and tactically about how to advance human rights issues and remedies.
2. Have the ability to plan to design and construct a human rights case, including being able to assess the rules of court and possibly challenge procedural barriers.

OUTLINE

Introduction to Human Rights Litigation

- i. What is human rights litigation?
- ii. Domestic human rights litigation - locating rights in constitutions
 - a. application
 - b. interpretation
 - c. limitation clauses
 - d. non-derogation
- iii. Key procedures impacting human rights litigation
 - a. public interest standing
 - b. *amicus curiae*
 - i. impact of *amicus curiae*

- c. costs
 - d. remedies
- iv. How does human rights litigation differ from other forms of litigation?
 - a. Constitutions
 - b. Regional and international treaties
- v. Best practices
- vi. Challenging procedural barriers to litigation in relevant jurisdiction

ACTIVITIES

READING LIST: Human Rights Litigation

Articles

- Amanda Spies, "Considering the impact of amicus curiae participation on feminist litigation strategy" 2015 SAJHR 136.
- PM Collins 'Lobbyists before the US Supreme Court Investigating the Influence of Amicus Curiae Briefs' (2007) 60 Political Research Quarterly 55, 58
- Lovemore Chiduzo & Paterson Nkosemtu Makiwane "Strengthening locus standi in human rights litigation in Zimbabwe: An analysis of the provisions in the new Zimbabwean Constitution"

Case Law:

Kenya

- *Trusted Society of Human Rights Alliance v Mumo Matemu* Petition No. 12 of 2013 [2015] eKLR

South Africa

- *Hoffmann v South African Airways* 2001 (1) SA 1 (CC)
- *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC)
- *Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC)

Nigeria

- *Adesanya v President of the Federal Republic of Nigeria* 1981 1 All NLR 1
- *Thomas and Others v Olufusoye* (1986) 1 NWLR part 18 669

ECOWAS:

- *SERAP v. Nigeria*, ECW/CCJ/APP/0808 (ECOWAS, Oct. 27, 2009)

African Commission

- *ACommHPR, Gabriel Shumba v. Zimbabwe*, Communication No. 288/2004, Merits Decision, 51st Ordinary Session (2012), available at <http://www.achpr.org/communications/decision/288.04/>

RIGHT TO HEALTH

OVERVIEW

The right to health is a socio-economic right that involves an individual's right to the enjoyment of the highest attainable standard of physical and mental health. There has been a surge in right to health litigation during the past several decades, particularly in the global south. Most of the cases pertain to issues of denial of emergency medical treatment, denial of access to life-saving medication, denial of access to health goods and services such as contraception, and denial of health care services based on sex, sexuality or HIV status. We will review how litigation has developed and expanded access to health care, particularly in a SOGIE context. Although most constitutions do not contain a justiciable right to health, this module will explore the innovative ways in which lawyers can develop litigation around this right since SOGIE based violations of the right to health are ubiquitous amongst the SXLN Network.

OBJECTIVES

1. To understand how SOGIE based violations of the right to health manifest
2. To build familiarity with international, regional and comparative jurisprudence on the right to health.
3. To establish an understanding of the principles guiding legal interpretation of the right to health.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Analyse the various sources of law, standards, and norms concerning the right to health.
2. Demonstrate a knowledge of the opportunities and barriers to litigating the right to freedom to health.
3. Be able to identify jurisprudential trends related to the right to health in SOGIE contexts.

OUTLINE

An Introduction to the Right to Health

- i. What is the right to health and its historical development
- ii. International and regional legal framework, norms, & standards protecting and promoting the right to health
- iii. The scope and content of the right
 - a. Freedoms
 - b. Entitlements
 - c. Availability, Accessibility, Acceptability, Good Quality
- iv. State Obligations

- a. Non-discrimination
 - b. Steps toward realisation
 - c. Minimum essential level
- v. Manifestations, causes and consequences of the SOGIE based violations of the right to health
- vi. Barriers to health rights litigation
 - a. Recognition of the right in constitutions
 - b. Lack of knowledge of such a right / claim
 - c. Need to exhaust local remedies
 - d. Judicial versus public policy issue
- vii. How and where to bring a claim
 - a. Domestic feasibility
 - b. Regional and international fora
- viii. Comparative jurisprudence
 - a. Botswana - denial of access to medicines
 - b. Namibia - coerced sterilisation
 - c. South Africa - denial of access to medicines
 - d. India - criminalisation as violation to health
 - e. African Commission - poor medical quality and treatment
- ix. International mechanisms

ACTIVITIES

READING LIST: Right to Health

Cases

- Botswana: *Tapela and Another v Attorney General and Others* [2014] 2 BLR 353 (HC)
- Botswana: *Attorney General, et al. v. Dickson Tapela, et al.* CACGB-096-14
- Namibia: *Government of the Republic of Namibia v. LM, et al.* (SA 49/2012) [2014] NASC 1
- India: *Navtej Singh Johar & Ors. V. Union of India* 2018 (SCC) – part G
- South Africa: *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721
- Kenya: *J.M. v. Attorney General and 6 others* High Court of Kenya at Bungoma (2018)
- African Commission: *Purohit and Moore v. The Gambia* Communication No. 241/2001 (2003)
- CEDAW: *A.S. v Hungary* (no. 4/2004, CEDAW),

General Comments

- “General Comments No.1 on Article 14 (1) (d) and (e) of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” African Commission on Human and Peoples’ Rights, (2012). Available at: <https://www.achpr.org/legalinstruments/detail?id=14>
- “General Comment 2 on Article 14.1 (a), (b), (c) and (f) and Article 14. 2 (a) and (c), to the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa” African Commission on Human and Peoples’ Rights, (2014). Available at: <https://www.achpr.org/legalinstruments/detail?id=13>
- “General Comment No. 14: The Right to the Highest Attainable Standard of Health” Committee on Economic, Social and Cultural Rights, UN Doc. No. E/C.12/2000/4. 2000. Available at: <http://www.unhchr.ch/tbs/doc.nsf/0/40d009901358b0e2c1256915005090be?Op=endocument>

United Nations Treaties and Documents:

- International Covenant on Economic, Social and Cultural Rights of 1966
- “Factsheet on the Right to Health” Office of the United Nations High Commissioner for Human Rights, 2008

Articles & Book Chapters

- Ebenezer Durojaye, “The approaches of the African Commission to the right to health under the African Charter” *Law Democracy & Development* 17 (2013): 393-418.

- Ebenezer Durojaye “Litigating the right to health in Nigeria: Challenges and prospects” *International Law and Domestic Human Rights Litigation in Africa* Magnus Killander (editor) 149-172
- Tamar Ezer, & Priti Patel. "Strategic Litigation to Advance Public Health." *Health and Human Rights* 20, no. 2 (2018): 149-60.
- Alexandra Müller, “Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Health Care in South Africa” *Health and Human Rights*. 18, no. 2 (2016): 195–208.
- Richard Baker & Vanessa Taylor, "The Right to Health: A Right on the Rise," *Journal Jurisprudence* 19 (2013): 275-304
- Michael Krennerich "The Human Right to Health.: Fundamentals of a Complex Right." In *Healthcare as a Human Rights Issue: Normative Profile, Conflicts and Implementation*, edited by Klotz Sabine, Bielefeldt Heiner, Schmidhuber Martina, and Frewer Andreas, 23-54. Bielefeld: Transcript Verlag, 2017

YEAR THREE
CONSTITUTIONAL LITIGATION

OVERVIEW

This module focuses on the principal ways in which constitutional claims are litigated as part of strategic litigation in each relevant Network jurisdiction. The module will also encompass the historical contexts and evolution of constitutional principles, methods of constitutional interpretation and analysis and basic doctrines concerning the protection of fundamental rights. It will consider the various rules and procedures particular to national constitutional courts that are most relevant to human rights constitutional litigation, such as admission of an *amicus curiae* and the duty to raise a constitutional matter as early as possible in the proceedings. Participants will also explore the essentials of successful constitutional litigation and the choice of effective remedies.

OBJECTIVES

1. To introduce participants to the practice and the procedures involved in litigating constitutional issues in their jurisdiction.
2. To understand the history and development of their country's constitutional history, doctrine, and principles.
3. To develop and refine the participants' critical thinking in respect to specific aspects of constitutional law.
4. To get participants to critically analyse remedies in constitutional litigation.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Have developed the capacity to think strategically and tactically about how to advance constitutional issues and remedies.
2. Have the ability to plan to design and construct a constitutional case, including being able to strategically apply and advance procedural rules.
3. Be familiar with the precedents that have shaped constitutional litigation.

OUTLINE

Introduction to Constitutional Litigation (as per jurisdiction)

a. Part i: Introduction

- i. The history and development of our Constitution
- ii. What is constitutional litigation?
- iii. How does constitutional litigation differ from other forms of litigation?

- iv. Key constitutional principles and doctrines
 - The two stage approach
 - Separation of powers
 - Constitutional interpretation
 - Limitation of rights
 - v. The constitutional jurisdiction of various courts
 - vi. Judicial attitudes to constitutional law and how it impacts on public attitudes on constitutional law and constitutional rights.
 - vii. Constitutional frameworks for state obligations
- b. Part ii: Procedure and Rules of Court**
- i. Court rules applicable in litigating violations of fundamental rights
 - Action versus summons
 - Direct Access
 - Standing
 - *Amicus curiae*
 - Joinder
 - Intervention
 - Costs
 - ii. Onus
 - iii. Remedies
 - Declarations of rights
 - Prohibitory and mandatory interdicts
 - Orders of invalidity
 - Damages
 - Other forms of relief
 - Enforcing court orders

READING LIST: Constitutional Litigation in Nigeria

- Gloppen, S 'Public interest litigation, social rights and social policy' (2005) Arusha Conference, "New Frontiers of Social Policy" Budlender, S et al Public interest litigation and social change in South Africa: Strategies, tactics and lessons (Atlantic Philanthropies 2014) 27-34
- Leachman, G 'From protest to perry: how litigation shaped the LGBT movement's agenda' (2014) 47 UC Davis Law Review 1667-1751
- Ebobrah, ST 'Africanising human rights in the 21st century: Gay rights, African values and the dilemma of the African legislator' (2012) 1 International Human Rights Law Review 110
- The Initiative for Equal Rights (2017) 'Bad laws: Compendium of laws discriminating against persons based on sexual orientation and gender identity expression in Nigeria'
- Jjuuko, A 'Beyond court victories: Using strategic litigation to stimulate social change in favour of lesbian, gay and bisexual persons in common law Africa' doctoral thesis
- Oloka-Onyango, J 'Human rights and public interest litigation in East Africa: A bird's eye view' (2015) 47 The George Washington International Law Review 763
- Jjuuko, A 'The protection and promotion of LGBTI rights in the African regional human rights system: opportunities and challenges' in Protecting the human rights of sexual minorities in contemporary Africa (Pretoria: Pretoria University Law Press 2017) 260-300
- Sogunro, A 'One more nation bound in freedom' (2014) 114 Transition: An International Review 54 - 57.
- Sogunro, A 'Citizenship in the Shadows: Insights on Queer Advocacy in Nigeria. (2018) 45 College Literature 632-640.

HARASSMENT

OVERVIEW

The purpose of this module is to provide an introduction to the way in which SOGIE based harassment manifests and the ways in which it can be challenged. We will explore how police raids, arbitrary arrests, extortion, and targeted violence of persons based on SOGIE create an environment of systemic harassment that often leaves victims feeling like they have no recourse. Participants will learn which laws provide protections for SOGIE based harassment and the developing jurisprudence related to this issue.

OBJECTIVES

1. To establish an understanding of what constitutes SOGIE based harassment.
2. To expand knowledge of the emerging jurisprudence protecting victims of SOGIE based harassment.
3. To be able to identify when state harassment is a human rights violation and how to strategically challenge the practice.

LEARNING OUTCOMES

Upon completion of this module participants should:

1. Understand the ways SOGIE based harassment manifests and its consequences.
2. Differentiate harassment based on SOGIE and other forms of police misconduct.
3. Be able to assess the human rights violation experienced during the harassment.
4. Be able to explain the basis that exists in international human rights law to recognize, respect, and protect women's land and property rights.
5. Be able demonstrate how to bring a claim against the state domestically and regionally.

OUTLINE

Introduction to Harassment

- I. Manifestations, causes and consequences of the SOGIE based harassment
 - A. Police Raids
 - B. Bribery
 - C. Coercion
 - D. Arbitrary arrests
 - E. Targeting
 - F. Denial of police assistance
- II. Legal frameworks: domestic, regional, and international law
 - A. Right to liberty and security of persons – free from arbitrary arrests & detention
 - B. Right to information concerning arrest and prompt charges
 - C. Right to due process
 - D. Right to be free from arbitrary interference in private life
- III. How to bring a claim for various forms of harassment in relevant jurisdiction
 - A. Domestically
 - B. Regionally
- IV. Comparative jurisprudence
 - A. Uganda
 - B. Zimbabwe

ACTIVITIES

READING LIST: Harassment

INTERNATIONAL LAW

OVERVIEW

This module will provide the participants with an introductory overview of international law as a discipline in its historical context and in light of topical, contemporary case studies. It begins with an introduction to the development and nature of international law as well as relevant elements such as domestication and binding authority. We will explore pertinent international principles as well as methods of researching international law.

OBJECTIVES

1. To understand the basic principles and institutions of international law, including their origins and application in practice.
2. To be able to track the development of international law and its value when litigating on issues of SOGIE issues.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Understand the history and origins of international law.
2. Identify the different sources of international Law.
3. Be able to comfortably research international law
4. Understand what informs the content of the sources and their weight as standards.
5. Demonstrate a knowledge of relevant principles in international law

OUTLINE

An Introduction to International Law

- I. Introduction to Theory
 - A. The history of international law
 - B. What is international law?
 - C. The making of international law
 - D. Sources of international law
 1. Custom
 2. General principles
 3. Treaties
 4. Conventions
- II. International Law in Practice
 - A. Domestication
 - B. Weight given to international law
 1. Binding authority
 2. Persuasive authority

- III. International Principles
 - A. Bangalore Principles
 - B. Theory of legitimate expectation
 - C. Margin of appreciation
- IV. International law research
 - A. African Commission
 - B. African Court
 - C. European Court
 - D. Inter-American System
 - E. UN system

ACTIVITIES

READING LIST: International Law

AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS

OVERVIEW

The African Commission on Human and Peoples Rights is the oldest human rights mechanism in Africa and has produced important jurisprudence in respect to holding states accountable for various human rights violations. Therefore, this module will detail the background of the forum as well as the most important considerations in terms of accessing the Commission. Since the African Commission has signalled its concern for the frequent human rights violations based on SOGIE occurring in Africa, this forum may be a favourable setting for the network lawyers to bring novel cases in order to push the development of African sexual rights jurisprudence. This introduction to the African Commission forms one part of a larger study into the larger African human rights system in order to best determine which forum will be most advantageous in any given circumstance.

OBJECTIVES

1. Understand the challenges and opportunities of the African Commission.
2. Build familiarity with major precedents concerning substantial and procedural issues.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Demonstrate an understanding of the major admissibility criteria and how such requirements are interpreted by the Commission.
2. Identify if and which of their cases would meet the criteria for exhaustion of domestic remedies.

OUTLINE

Introduction to the African Commission

- I. History and establishment of the human rights system in Africa
- II. Mandate & functions of the African Commission.
- III. Communications procedure
 - A. three stages of a complaint procedure
 - B. Admissibility requirements of Art 56 of the African Charter
 - i. Exhaustion of domestic remedies
 - a. Available, effective, sufficient
 - b. Burden of proof
 - c. Exceptions
 - ii. Reasonable time period

- iii. Principle of pending litigation

ACTIVITIES

READING LIST: African Commission

AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS

OVERVIEW

The African Court on Human and Peoples Rights is a relatively new and limited human rights mechanism in Africa but it has the potential to develop important binding jurisprudence in respect to holding African states accountable for various human rights violations. Therefore, this module will detail the lengthy development of the Court, its challenges, as well as the most important considerations in terms of accessing the Court. Since the African Court has a complementary relationship with the African Commission, there may be circumstances when it is more favourable for the Network lawyers to pursue cases at the African Court in order to further binding sexual rights jurisprudence. This introduction to the African Court forms one part of a larger study into the entire African human rights system in order to best determine which forum will be most advantageous in any given circumstance.

OBJECTIVES

1. Understand the challenges and opportunities of the African Court.
2. Build familiarity with major precedents concerning substantial and procedural issues.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Demonstrate an understanding of the major admissibility criteria and how such requirements are interpreted by the Court.
2. Identify if and which of their cases would meet the criteria for exhaustion of domestic remedies.

OUTLINE

Introduction to the African Court

- I. History and establishment of the African Court
- II. Mandate & functions of the African Court
- III. Procedures of the Court
- IV. Applications procedure
 - A. three stages of a complaint procedure
 - B. Admissibility requirements of Art 56 of the African Charter
 - i. Exhaustion of domestic remedies
 - a. Available, effective, sufficient

- b. Burden of proof
 - c. Exceptions
 - ii. Reasonable time period
 - iii. Principle of pending litigation
- V. Relationship with the African Commission

READING LIST: African Court

AFRICAN REGIONAL ECONOMIC COMMUNITIES

OVERVIEW

The sub-regional mechanism as part of the African regional economic communities offer a potential opening for more expedient human rights litigation for the SXLN Network. This module will focus on the functioning and political context of African sub-regional bodies, namely the East African Court of Justice (EACJ), ECOWAS Community Court of Justice (ECCJ), and the former Southern African Development Community (SADC) tribunal. The module aims to equip the participants with the knowledge and skills necessary to effectively engage with these bodies and be able to assess when and why lodging a case at either the ECCJ or EACJ could be a better alternative to the African Court or African Commission. By understanding the challenges and opportunities of all the available human rights adjudicators in Africa, the Network lawyers should be better placed to strategically choose the most advantageous forum for their clients and the development of sexual rights.

OBJECTIVES

1. Understand the political and procedural challenges and opportunities of the EACJ and ECCJ.
2. Build familiarity with major precedents concerning substantial and procedural issues.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Demonstrate an understanding of the unique traits of the ECCJ and EACJ
2. Identify the potential challenges their Network cases could face at either sub-regional mechanism.

OUTLINE

Introduction to the African Sub-Regional Mechanisms

- I. Background of ECCJ
- II. Mandate & functions ECCJ
- III. Procedures of the Court
- IV. Applications procedure
 - A. Unique features of ECCJ
 - i. Direct access
 - ii. Applicable law
 - iii. No need to exhaust domestic remedies
 - iv. Landmark cases
- V. Background of EACJ

- VI. Jurisdiction
- VII. Access
 - i. standing
 - ii. amicus
 - iii. intervener
 - iv. admissibility
- VIII. Remedies
- IX. Enforcement
- X. Weakness of the EACJ
- XI. Landmark case extending human rights jurisdiction
- XII. Background of SADC Tribunal
 - i. History & jurisdiction
 - ii. Contentious case law
 - iii. Suspension & current status

READING LIST: African Regional Mechanisms

CRIMINAL DEFENCE

OVERVIEW

This module is aimed at equipping the participants with the skills and knowledge to defend their clients who are affected by the domestic criminal law system. Since many members of the LGBT movement are targeted by the state, and particularly the police, it is imperative that the lawyers can respond by providing quality criminal defence within the unique circumstances of SOGIE based harassment. We will also explore how even criminal cases can be made strategic in line with the movement's needs and goals. This can occur just by having ready legal representation to act when a violation or arrest occurs or by using a criminal case to lodge a larger constitutional challenge to a practice or law.

OBJECTIVES

1. To deepen an understanding of criminal procedures relevant to SOGIE based violations and arrests.
2. To become familiar with the ways in which lawyers have strategically pursued constitutional challenges during criminal proceedings in a SOGIE context.

3. To build capacity to have the participants willingly able to respond to arrests, police harassment, and criminal charges.

LEARNING OUTCOMES

On completion of the session, participants should:

1. Be able to identify the criminal procedures that are most relevant to SOGIE based arrests in the jurisdiction in which they practise.
2. Have a renewed commitment to legal ethics.
3. Understand the ways a seemingly straightforward criminal case may be turned strategic.

OUTLINE

Criminal Defence in relevant jurisdiction

- i. Legal Ethics
 - i. Law society mandated
 - ii. Bribery
- ii. Criminal procedure
 - i. Due process
 - ii. Formal charges
 - iii. Pre-trial detention
 - iv. Bail
 - v. Right to a lawyer
 - vi. Habeas corpus
- iii. Evidence
 - i. Relevant rules of evidence
- iv. Raising constitutional issues during criminal proceedings (eg challenging constitutionality of anal exams during trial for sodomy)
 - i. Stay of criminal proceedings during constitutional challenge
 - ii. Making criminal case strategic

READING LIST: Criminal Defence in Nigeria

- CO Okonkwo *Criminal law in Nigeria* (1990)
- Gupta, A (2008) 'This alien legacy: The origins of "sodomy" laws in British colonialism'
- VO Ayeni 'Human rights and the criminalisation of same-sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 222-223

- Human Rights Watch (HRW) ““Tell me where I can be safe” The impact of Nigeria’s Same Sex Marriage (Prohibition) Act’ (2016) available at https://www.hrw.org/sites/default/files/report_pdf/nigeria1016_web.pdf
- JB Woods ‘LGBT identity and crime’ (2017)105 *California Law Review* 667