Supporting participatory access to justice for socially excluded and criminalized groups as crucial to health

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PHP Strategy - Illustrative Concept 1.5: For the last eight years, in all geographies in which we are engaged, PHP has supported a number of different approaches of access to justice for socially excluded (people living with HIV, Roma, people in need of palliative care, people with mental disabilities) and criminalized groups (sex workers, people who use drugs), recognizing both the positive link between access to justice and public health and the limitations of traditional legal aid approaches for our target populations. By 2017, we aim to document and share lessons about approaches that have proven most effective, to continue support for projects that implement good practice and are linked to the broader PHP strategy, to define and help implement a research agenda demonstrating the public health benefits of a participatory approach to access to justice, and ultimately to secure support from other donors (and, when possible and desirable, from governments), for this work so that it can be replicated and scaled up.

This portfolio review will look back at our work for people living with HIV, sex workers, and people who use drugs. Our access to justice work for Roma, people in need of palliative care and people with mental disabilities will benefit from this review, but raises some different or additional issues and will therefore be the subject of other portfolio reviews.

Problem

Rather than finding a source of redress and protection for injustice, people who use drugs, sex workers, and people living with HIV often experience the legal system and law enforcement as a source of rights violations, which impacts their health and well-being. Police harassment, arbitrary detention, and violence are part and parcel of everyday life for people who use drugs and sex workers. Violence against women and discrimination in access to land and housing are drivers of the HIV epidemic and inhibit ability to cope with the disease. Moreover, these groups experience discrimination in employment and child custody and abuse in health care, including forced HIV testing and forced sterilization of women living with HIV. Abuse or fear of abuse by health providers in clinical settings or by police, who frequently wait outside these settings, impede health seeking behavior, make carrying condoms or sterile injecting equipment dangerous, and increase risk of HIV acquisition. Painful withdrawal from drug use is used to coerce confessions, and freedom from detention is often conditioned on bribes, coerced sex, or other degrading practices.

An underlying assumption of the portfolio is that socially excluded and criminalized groups have a number of unique characteristics that make traditional legal aid approaches inadequate. For example:

- Because of their experience of deep social stigma and criminalized status, many members of these groups regard themselves as undeserving of human rights, requiring surfacing a sense of one's own agency, human rights awareness and training as a first step.
- For a variety of reasons, including fear of an escalation with law enforcement officials and further deterioration of the situation to which they will go back, many sex workers and people who use drugs tend to "plead out" informally prior to any court case, often through informal bribes or offer of other services, and the hours or days following detention are times of particular danger to their health.

- For many reasons, people living with HIV are afraid to, or cannot afford to, access mainstream legal services, even where they exist. If they do, they often face the same stigma and discrimination as in other areas of life. Just as HIV-specific clinics can tailor their medical care to the specific health needs of their patients, HIV-specific legal services housed in these clinics enable provision of legal services and more holistic care in a climate of trust and respect. Similarly, customary justice structures provide a more realistic way to uphold the rights of widows living with HIV, ensuring access to land and housing when courts are far and expensive and implementation depends on community cooperation.

Broadly speaking, our approaches seek to respond to these circumstances by directly engaging members of the groups in question, training them as community legal workers, and connecting them with "street lawyers" or other legal experts dedicated to working with the marginalized and criminalized.

Question 1: Is our assumption that socially excluded and criminalized groups have unique needs warranting specific access to justice approaches a valid and sustainable one? What are the pros and cons of an approach that emphasizes their difference from, rather than solidarity with, the general population seeking legal aid?

The field, our place in it, and other key players

The field of HIV, itself a major source of funding, has begun to recognize the value of access to justice interventions as critical to health. At least in part due to our efforts, UNAIDS has included access to justice in its list of seven key human rights interventions that should be included in each national AIDS program, and the Global Fund to Fight AIDS, TB and Malaria has included human rights as a key objective in its new strategic plan.

More broadly, access to justice and "legal empowerment" approaches are attracting attention from some donors and the UNDP, though these have often been vaguely defined. An important value-add for OSF is to document and clearly spell out the lessons PHP has learned from funding this work, including what works and what doesn't, and the values that should guide this work. We have also reflected on and begun to experiment with OSF's role in developing a research agenda aimed at increasing "hard data" on the public health impact of such access to justice interventions and to ensure that the agenda would indeed be implemented. This might prove useful as one of the elements to convince other donors to join the discussion, but ironically, while some donors say that their ability to fund access to justice interventions depends on evidence of the health benefits, donor decisions are in the end often driven by political and ideological views. Even donors who are persuaded of the link between health and access to justice may be inclined to work through conventional approaches that favor the status quo of legal services rather than approaches that actually engage and give decision-making power to socially excluded and criminalized groups.

Like parts of the Justice Initiative, we support interventions that seek to help people failed by the traditional legal system. Unlike legal aid programs that focus on lawyers, we try to focus on approaches that: (i) respond to the particular needs and prioritize participation and inclusion of socially excluded and criminalized groups as actors in the legal system, rather than as victims or beneficiaries of services; and (ii) continuing to build the evidence of the health benefits of legal aid. In this sense, our work is linked to the PHP's strategic goals of advancing public health and challenging power dynamics as much as it is linked to access to justice per se. Moreover, unlike programs that seek to embed paralegals in communities to empower the "poor," such as those promoted by, for example, Namati, we focus on

specific, socially excluded or criminalized populations and seek to meet them where they are at, recognizing that access to justice programs focusing broadly on "the poor" can be slow to secure health- and rights-related benefits for groups who are *socially* marginalized regardless of economic status. Sometimes, such programs targeting the poor can even perpetuate the marginalization of socially excluded groups, by giving the impression that the needs of all marginalized people are being met. Addressing this gap requires the recognition that those whose social behaviors, ethnicity, or health conditions are stigmatized may need special support in claiming their rights.

Question 2: How do we manage the tensions between advocacy for highly stigmatized and criminalized groups and the broader fields of poverty law, legal empowerment of the poor, and medical-legal partnerships?

Our work

Grantmaking overview

PHP has supported access to justice for people living with HIV, sex workers and people who use drugs since 2007, through both grants and operational work. Initially, we emphasized the provision of legal aid by trained lawyers on the assumption this would help to identify potential cases for strategic litigation. We were reluctant to fund services in their own right out of concerns related to sustainability. However, recognizing that strategic litigation cases have a long arc and that we could make a valuable contribution by piloting approaches to legal aid that responded what seemed to us like unique circumstances of people living with HIV, sex workers, and people who use drugs, we broadened our focus to include a number of approaches that were not courtroom focused or centered in lawyers' offices. Thus, we no longer considered our access to justice work simply as a means to source strategic litigation, but rather perceived the value of this work as an end in itself and PHP's role in piloting, documenting and promoting effective models. By about 2010, we had identified four "models" of access to justice that address issues related to the health of socially excluded and criminalized populations:

(i) legal empowerment (including online legal advice and paralegal services without the intervention of a lawyer);
(ii) lawyering for the marginalized (drawing on lawyers but through an approach that adapts to the specific needs and challenges facing socially excluded and criminalized populations);
(iii) health-legal partnerships (defined as collaborations between medical and legal professionals to provide legal services that aim to improve health); and
(iv) engagement with community justice structures (resolving disputes through mediation by community leaders with human rights training).

We have funded access to justice interventions as a complement to other PHP work and in partnership with socially excluded and criminalized groups to advance their health and human rights. Oftentimes, access to justice projects complement advocacy taken on by the groups. For instance, legal services for sex workers in South Africa take place alongside documentation by sex workers of violations experienced, which in turn supports advocacy to reform police practice and decriminalize sex work. In the various projects, we try to emphasize the participation of the affected groups in the design and delivery of services, in response to the often marginalizing impact of traditional legal aid approaches and in order to provide effective services.

Some examples of the access to justice models PHP has piloted

a. Legal Empowerment:

Paralegals: In South Africa and Kenya, sex workers trained as community paralegals have contributed to giving fellow sex workers the confidence to directly challenge the violations they endure by documenting violations, providing legal advice, and referring them to lawyers who can take cases where appropriate. Such activities are often complemented by police trainings and embedded in a broader system of outreach and support.

Virtual Legal Aid: In Russia, the Institute of Human Rights has worked with harm reduction organizations and people who use drugs to establish a "virtual legal aid" website whereby clients anonymously submit legal questions online to a group of experts who post responses for everyone's benefit. In this way, all users and their legal advisors benefit from the advice provided to individuals and the flow of legal information is democratized.

b. Lawyering for the Marginalized: In Canada, street lawyers working in neighborhoods hard hit by HIV epidemics among sex workers and people who use drugs have collaborated directly with these populations to design low-threshold legal services within a harm-reduction framework—for example, combining legal aid with needle exchange, establishing mobile legal aid, and planning litigation strategy with clients of existing harm reduction and sex worker outreach programs.

c. Health-Legal Partnerships: The Christian Health Association of Kenya (CHAK) has integrated HIV-related legal services and human rights awareness within 17 of its 435 health care facilities across Kenya. It employs one full-time lawyer who travels regularly to these sites, coordinates their human rights training efforts, and oversees their legal aid clinics for people living with HIV. These clinics are offered by CHAK's partner legal aid organizations and *pro bono* lawyers drawn from private practice.

d. Engaging Customary Justice Structures: Since 2009, the Kenya Ethical and Legal Issues Network on HIV/AIDS (KELIN) has worked with the customary legal system in Homabay and Kisumu Counties to facilitate access to justice for widows and their children and ensure they enjoy their right to inherit and own property. Need is particularly great in these counties where families have been impacted by the AIDS epidemic. These are also rural areas where courts are not easily accessible and community ties are strong. Through a series of community dialogues and human rights trainings, elders are empowered to tackle violations of women's and children's rights, and women have greater understanding of their rights and recognition by the community. Customary structures then mediate family disputes and help reinstate widows and children in their homes and family land.

Field building overview

Complementing grantmaking for access to justice projects, PHP has supported a number of field-building and operational activities, including needs assessments, technical assistance and peer learning by grantees, documentation and dissemination of good practices, research and evaluation, and fund leveraging. Our assumption is that access to justice for socially excluded and criminalized groups is a sub-field both of the broader field of health and human rights and access to justice/legal aid.

In 2013 and 2014, we made the decision to shift emphasis towards greater focus on field-building, while still giving grants to organizations that implement good models that are linked to the broader PHP strategy. The increased operational emphasis has included: (i) analyzing this body of work, documenting what has worked and what has not, and helping forge a consensus on models of good practice of increasing access to justice for socially excluded and criminalized groups; (ii) developing and helping implement a research agenda to further increase the evidence base for the public health outcomes of a participatory and inclusive model of access to justice; (iii) drawing new donors to the field, and firmly establishing such a model of access to justice as a critical public health intervention rather than an "add-on" supported only after health funding is allocated; and (v) where viable, seeking to secure support from governments.

Some examples of the operational/field-building activities the PHP has undertaken

a. Needs assessment

Prior to developing access to justice work in new geographic areas, we have sometimes supported a needs assessment to identify key partners and critical issues. This was our approach before initiating projects focused on people living with HIV, sex workers, and people who use drugs in Eastern and Southern Africa. In other regions, we were able to build on other projects already supported and on the knowledge of national foundation partners. We have also found needs assessments useful as a baseline or reference point for later evaluation of progress and project results.

b. Technical Assistance/ Peer Learning

We have provided technical assistance to the grantees both directly ourselves and through consultants. However, we have found support for peer learning among the various partners one of the most effective means for strengthening the projects. This has taken place virtually as through a sex worker community of learning (http://www.sexworkersrightscommunity.org/) or in-person either through study visits. PHP has also facilitated national, regional, and global opportunities for groups to exchange experiences and grapple with common problems. For instance, at a 2012 meeting, partners in Eastern Africa shared lessons on developing partnerships and referrals, increasing accountability by duty bearers, and media engagement.

c. Documentation/Promoting Good Practices

As we refined a number of approaches to access to justice for marginalized and criminalized groups, we devoted time and resources to documenting our and our partners' experiences and to building the literature of the field. This has included a special edition of the HIV/AIDS Law and Policy Review, a publication aimed at donors profiling 11 legal empowerment projects and their impact on health, and multi-media pieces bringing to life the stories of various projects and the people they serve. Currently, we are in the process of drafting a Good Practice Guide, drawing lessons to strengthen our work, build the capacity of peer NGOs to replicate effective projects, and provide guidance to other funders in this area.

d. Research and Evaluation

A rigorous evaluation of four HIV-based legal aid programs in Kenya was conducted in collaboration with the Harvard School of Public Health and University of Nairobi. Patients showed a notable increase in knowledge and awareness about how to access legal aid and claim their rights, in addition to an enhanced ability to communicate with their health care providers. They also used their training to empower others in their communities, advising them about their rights and access to legal aid. In turn, health care providers themselves became more adept at identifying human rights violations and other legal difficulties, which enabled them to refer patients to legal aid, assisting them with legal documentation, and providing them with information about their rights.

Currently, together with researchers at Johns Hopkins University, we are engaging in an effort to develop a realistic and feasible research agenda aimed at further strengthening the evidence of the health impact of access to justice interventions.

PHP staff, sometimes working with researchers and grantees, have also worked to build the peer-reviewed literature on the health impact of access to justice interventions.

e. Fund leveraging

In 2013, we commissioned a report on the donor landscape for access to justice and health, seeking to identify and ultimately engage a diverse set of donors working on health, human rights, access to justice, civil society and development for three purposes: (1) To bring additional resources to innovative access to justice projects by focusing on their health and human rights outcomes and potential to improve social accountability in the realm of health-related development goals. (2) To explore whether collaboration or knowledge sharing among donors with different entry points to work on access to justice and health can have strategic impact. (3) To create a resource for NGOs and community organizations seeking support for innovative access to justice projects aimed at promoting the health and human rights of marginalized and criminalized populations.

The findings of the report were discussed at a regional donor dialogue on the topic of "bringing justice to health" in Nairobi in October 2013, as well as at meetings at UNAIDS and the Global Fund to Fight AIDS , Tuberculosis and Malaria. Follow-up activities are planned for 2014.

Question 3: Have we struck the right balance between grant-making to pilot projects and investment in operational activities to build the field? What should our priority be going forward?

Foundation partners

PHP's access to justice portfolio benefits from close collaboration with a number of OSF foundation partners. Grantmaking is jointly conceptualized, developed, and supported by national and regional foundations and initiatives, who have contributed approximately one third to all project costs. Key partners include the national foundations in Armenia, Georgia, Kyrgyzstan, Macedonia, Moldova, South Africa, and Ukraine; the Open Society Initiatives for Eastern and Southern Africa; and the Russia Project. Additionally, since 2012, we have collaborated on our field building activities with the Justice Initiative, particularly on technical assistance, the documentation and dissemination of good practices, and fund leveraging. In 2013, we co-produced a number of publications, including multi-media projects featuring effective access to justice models and engaging other funders in this work, and we are currently working together on the Good Practice Guide.

Question 4: Have we engaged enough and with the right partners, both within and outside OSF?

Some key insights to date

- A critical insight we gained from years of funding and monitoring this work is that access to justice for socially marginalized groups requires partnership and the offering of legal services in settings well beyond lawyers' offices and courtrooms and outside regular business hours. Indeed, legal services are sorely needed in street-based outreach settings, within health care service points, and at all stages of contact with the law enforcement system. This has required an openness to transforming common conceptions of legal services. It has involved efforts to engage members of socially excluded groups and, by doing so, to shift the power balance somewhat from the hands of lawyers and state officials to socially excluded groups that now can understand and use the law to their benefit.

- Additionally, it is not possible to strive for systemic change without addressing a community's pressing day to day concerns. Individual legal services and advocacy are thus interlinked and complement each other.

- Legal aid can be a form of health care. Addressing violence, discrimination, and economic disempowerment is as crucial as a condom to promoting and protecting health.