TOOLKIT

ON LEGAL PROGRAMS

Practical guide on setting up and running legal programs for LGBTI people

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Enhancing the legal protection
of LGBTI people in Bulgaria

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Introduction

'Rainbow Shield: Enhancing the legal protection of LGBTI people in Bulgaria', referred to as 'Rainbow Shield' or 'the project' is a 2-years initiative aimed at building a comprehensive program for legal protection of LGBTI people in Bulgaria, along with community awareness raising, capacity building for legal practitioners and dissemination components. The project is implemented by a consortium of 3 grassroots LGBTI non-governmental organisations based in Bulgaria: LGBTI Deystive, Bilitis Foundation and GLAS Foundation; the partnership is complemented by the participation of the Romanian-based LGBTI organization ACCEPT and the Belgium-based Network of European LGBTIQ* Families Associations (NELFA).

The present Toolkit for legal programs had been drafted by Teodora-Ion Rotaru and Iustina Ionescu thus representing the expertise of Accept, Romania and further developed and edited by Veneta Limberova and Denitsa Ljubenova thus providing the LGBTI Deystvie and NELFA experience. The document might be used as a practical guide on setting up and running legal programs for LGBTI people with the aim to support and further develop strategic litigation within the LGBTI movement in Europe. Further, the toolkit might be applied by any social movement within the Europe that is seeking to build and develop their legal and strategic litigation programs.

The toolkit consists of 6 chapters and gives an overview of setting up a program for representation of LGBTI persons in national and European courts and provides guidelines for resolving practical issues on operating a legal program, the variety and accessibility of services within the program, the strategic litigation good practices, the communication efforts needed for both the community and general public and work with media and some closing remarks about keeping track and assuring the sustainability of a legal program.

Setting up a legal program for representations of LGBTI persons in national and European courts

Nongovernmental organizations can develop a plethora of activities to suit their purpose and serve their community. In Eastern Europe, organizations are often constructed either as advocacy organizations, aiming to mobilize citizens into participatory civic action, or as service providers, working with social assistance authorities and fulfilling the most basic needs of their beneficiaries. Historically, LGBTI associations in the region have appeared as groups aiming to raise awareness regarding LGBTI equality, or as forums where people could meet, convey needs, and set up goals and strategies for achieving equality. However, at least in the case of ACCEPT, it soon became apparent that at least a few key services were needed to support the very participation of LGBTI persons and activists in public life: legal counselling and psychological support services. These services were needed especially in the context of severe and widespread societal discrimination, where even self-acceptance remains a challenge and often the very basic access to public services is limited on grounds of sexual orientation, gender identity or sexual characteristics. Despite the apparent need, there are a few steps ACCEPT took before developing the legal program it runs today, steps we urge all organizations take before even fathoming engaging in litigation, especially strategic litigation.

First and foremost, organizations need to decide if and when they will be able to allocate resources for setting up a legal program that is sufficiently staffed and sustainable. This decision should involve an analysis of the litigation needs of the LGBT community as well as comprehensive evaluation regarding the gaps in law policy and practice of human rights protections available to the community in a particular country or federation. This analysis is vital because it will enable an organization to understand what type of resources will be needed in terms of staff and money before taking on this challenge.

Of course, no organization will ever be able to meet the need it sees immediately, but rather it will be able to create a long-term sustainable plan for developing it's legal and litigation program. Following this analysis, the organization needs to take e a formal decision to commit to developing such a legal program and decide for how long it plans to run it. This is strongly linked with the fact that most often strategic litigation cases that have a potential of significantly advancing the law last for over a decade. Consequently, deciding to establish and develop a legal program is a commitment for a long-term investment, and a choice that will take away from other programs

that you may wish to develop and that may be equally needed in the view of the community. Thus, at times deciding to develop a legal program may be an unpopular decision simply because the results of litigation are hard to come by, at least initially. Your members may see how time and money put into a trial have no concrete results for many years to come. However, patience and foresight, dedication, and resilience, are key in understanding that a litigation program led with vision and guided by human rights principles will consolidate like nothing else the legal framework for LGBTI equality, especially in spaces where the political leadership and public opinion are even more unfriendly than the courts. The initial needs and gaps assessment enables organizations to get a rough idea regarding the length and staffing of the litigation program, and based on that, resources need to be allocated, or fundraised.

Secondly, organizations need to manage well scant resources and understand that litigation involves a variety of staff, not only lawyers. For the development of a sound legal program, NGOs should involve community outreach staff and community facilitators, key personnel that support victims of human rights violation in gaining access to the organization and receiving information and aid. These positions are key because they are the first contact a victim has with the legal program, and the staff can ensure the person is directed towards what they may need most stringently – a medical checkup, emergency assistance, psychological aid or legal counselling.

By ensuring this triage is done, an organization avoids burdening a lawyer with activities that are mainly community-based and avoids generating unjustified expenses, all the while minding the needs of the victim first. Moreover, a legal program has as essential staff legal counsel, ideally in house that can develop a wide array of expertise over the years, and work efficiently with multiple beneficiaries at once, ensuring they are informed and directed towards the appropriate legal remedy or administrative procedure / institution. Not all cases should or could ever be picked up and represented in court by an organization, and this should not be the aim of any legal program developed by an NGO. Only strategic litigation cases or social cases should be picked up, to ensure that the workload and budgeting remain manageable and sustainable on the long run. Organizations need to develop and cultivate relationships with human rights lawyers, lawyers with proven expertise and drive. The capacity to understand and oversee a multi-decade litigation program develops, of course, in time and by gaining professional experience in the field of human rights. As such, organizations should be advised to attract legal experts, including litigating lawyers, as members of their association and keep them close and heed their advice.

Lastly, communication staff is essential in the success of a legal program. They are key for advertising the resources to victims of discrimination and hate crime, while also ensuring the achievements of strategic litigation have an impact beyond the court of law, an impact in the court of public opinion. Communication staff needs to be capable to engage in public relations, media pitching, social media marketing and knowledgeable in graphic design and video editing. Moreover, this staff needs to be permanently creative and resourceful, to tackle the ever-growing polarization of media, and, in Eastern Europe, the growing anti-gender movement and the liter-

al blockade on mainstream media for LGBTI activists.

Once the decision to set up a legal program has been made, and staff or volunteers have been identified, the actual work can begin. One must note that most legal programs start very small, with a handful of cases, because the program is yet to be popular, but even more so because victims continue to fear reporting and tackling discrimination and hate crime. However, regardless of the size and the background and experience of those setting up the legal program, the only way sustainability can be maintained is by having a concrete fundraising strategy in place. This should focus on fundraising for establishing the program itself and additional staff needed. Some sources for fundraising include project applications to donors who consider legal and strategic litigation relevant and essential in improving the human rights of LGBTI persons. There is an increasing number of such applications open, to a variety of private foundations and institutional sources, including the European Commission or the European Economic Area and Norway Grants. Or course, the required expertise of the applicant organization can at times make it difficult to access project funding, but smaller and younger organizations can engage with pro bono lawyers and do community fundraising for essential legal costs. Most organizations with reputable legal programs started very small and with meager funding for such activities, ACCEPT included. It is essential that organizations who want to establish a legal program consider attracting this type of expertise as part of their membership, to identify those persons who will stay with the organization and engage in these activities on the long term, irrespective of funding, in order to cover the 10 plus years that cases end up lasting in different court jurisdictions until a court decision is obtained

Lastly, there are a few formalistic issues one should think about when designing the legal program:

1. Set up rules for what your organization can and cannot provide. Oftentimes, individuals will consider the organization responsible for handling private law matters completely unrelated to the field of equality. LGBTI organization should consider addressing primarily cases that focus on equality policies, access to fundamental rights, including family life, freedom of speech, freedom of assembly, protection from discrimination and hate crimes. Moreover, not all litigation costs can and should be provided by the organization. Translations, legalization of documents, travel for plaintiffs are costs that ideally we would like to cover, but legitimate expectations should be managed and beneficiaries should be told explicitly to take on these expenses should this be necessary from the time a contract of representation is signed. Clear communication is essential in the management of legitimate expectations not only regarding expenses, but also regarding the outcome of the case – do not promise to resolve situations, but rather take on the obligation of diligently representing your beneficiaries. Do your best to ensure you tell beneficiaries about all potential outcomes, risks (such as breach of confidentiality by state parties, etc.), plan for risk management and discuss the length of the procedures.

2. Organize internally to set up GDPR rules for your beneficiaries and protect their confidentiality. This is very important because we work with very sensitive personal information, that needs to be handled with care. Nothing destroys confidence in your organization as a breach of confidentiality does.

3. Set up a format to keep track of current cases. Do not underestimate how soon the case work can become overwhelming and difficult to keep in touch with your beneficiaries. A case management system, ideally a digital one, which sets reminders for checking on the status of cases, documents filed, court dates, and clear team members responsible for each action is of paramount importance.

4. Differentiate between legal aid and strategic litigation. It is very unlikely any one organization would have resources to develop a program that is entirely able to represent every case coming their way in court. In reality, primary legal information and legal aid provided to beneficiaries helps most understand what the next steps are. Common cases should be referred to a wider network of LGBTI-friendly lawyers, who can represent beneficiaries, especially those who can afford paying for legal representation, in order to allow your organization to focus on those cases that will change the world. How do you know which cases these are? Well, you need to set up criteria for strategic litigation, criteria which will help you evaluate the strategic potential of a legal conflict together with the implications for case beneficiaries and the added values which can be created by a concurrent communication effort. Moreover, these criteria will allow you to be transparent to your beneficiaries and always explain why a case cannot be picked up for legal representation in court by your organization. Such reasons could include the lack of concrete violations, as oftentimes people identify a situation in which they could be treated unfairly, but fear to put themselves precisely because of that fear in that particular situation. However, if there is no human rights violation, there is really no case – a potential situation is not enough to justify going to court. We will discuss the criteria in depth below.

5. Train your staff for working with victims. It is essential to develop a code of conduct for your organization, as well as policies regarding conflicts of interest and sexual harassment. Moreover, you should consider the mental wellbeing of human rights defenders and even set up counselling and supervision sessions for your staff in particularly demanding cases, especially those addressing victims of violence.

6. Set up a complaint mechanism for beneficiaries. They should feel confident to tell you if those assigned to work on their case are missing the mark on the quality of their job, or any relevant policy has been breached.

Types of services provided for beneficiaries and means of building legal literacy

To successfully organize a legal program, the organization needs to develop a clear structure for it and manage its own expectations regarding the community. The simple fact that legal aid, for instance, is available, is by no means a guarantee that LGBTI persons will seek help or even notify your group regarding the human rights violations people face. Building trust is an essential step in this work, and the best way it can be built, together with the legal profile of your group, is to simply ensure that you try to proactively build the legal literacy of your community. This is essential because individuals cannot intrinsically identify human rights violations when the entire world, they live is built on rules written by cisgender heterosexual people to fit their needs. Moreover, legal aid needs to be part of a more complex set of victim support measures. These can include legal representation in court if the case fits the strategic litigation criteria of your organization.

Building legal literacy in the community

To build legal literacy, you could consider some outreach activities to your local LGBTI community:

(1) Speak about human rights and potential violation with every opportunity, even in LGBTI cultural events, and provide informative workshops on specific topics regarding human rights. For example, ACCEPT organizes periodically a workshop for transgender persons on the legal procedure for legal gender recognition.

(2) Organize support groups where people can get help and encouragement. Currently, ACCEPT organizes a community wide support group, a group for transgender persons, a group for parents of LGBTI individuals and we plan to expand to a group dedicated to persons living with HIV. At times, legal experts are invited to speak to the group on topics of interest related to discrimination.

(3) Offer free primary legal assistance to persons from our community who consider themselves victims of human rights violations, as this is the best way of finding strategic

litigation cases or patterns of violations, gaps in the legislation and practices. This in itself builds the knowledge regarding anti-discrimination avenues for beneficiaries, who in time may return to you with a different situation or case, but with a better understanding already regarding their options.

(4) Keep communication transparent and expectations realistic by communicating to your potential litigants exactly what the outcomes of litigation can be (ex. Coman CJUE judgment was never about the EU enshrining the freedom to marry, but limited to freedom of movement). Some might decide not to go on, despite a perfectly strategic case, simply because this is not what they want for their life and future. This is a decision that needs to be respected and accepted, regardless of how much time your organization has already invested in documenting and building the case.

(5) Do plenty of community building activities – litigation falls short of its potential without this vital community work.

In practice, ACCEPT organized an outreach strategy in order to build the Buhuceanu and Ciobotaru Case reuniting 42 applicants, before the ECtHR[1]. The applicants are same sex couples who complain that the Romanian legislation does not allow them to get married or to enter into any other type of civil union and thus they are being discriminated against as a result of their sexual orientation and disadvantaged by the lack of legal recognition of their relationship. They invoke Article 8 taken alone and in conjunction with Article 14 of the Convention. To reach these persons, ACCEPT used every opportunity for years and years to communicate on the topic of infringements on family life, in the media and during community events. We organized dedicated workshops for families, to make them aware of the rights denied to same sex couples. ACCEPT had direct calls and meetings with more than 200 persons, accompanied the couples though the refusal process and decided together with them what to invoke before the court.

These individuals that remained in the case were then engaged in different support and community building activities, were put in touch to maintain open channels of communications between beneficiaries and are constantly updated regarding any developments in their case. In time, people became friends and remain united in their stance for equal rights.

Building legal literacy in your organization

In certain areas, we need to do more investigation to argument the cases brought to our attention. These can be more complex cases, that are cvaused by structural challenges, where evidence is not easily available, it is not clear whose primary responsibility is, or where the violations of rights take place at various levels of decision. Moreover, serious legal research and documentation allows for better arguments and human rights fact finding permits the systematization of arguments and evidence.

1. Application no. 20081/19 Florin BUHUCEANU and Victor CIOBOTARU against Romania and 12 other applications, https://hudoc.echr.coe.int/eng?i=001-200952 and Application no. 5926/20 S.K.K. and A.C.G. against Romania and 7 other application, https://hudoc.echr.coe.int/eng?i=001-202677

For instance, ACCEPT is working to develop a body of research that allows our organization to do fact based political, legal and media advocacy. We found that sociological research on the needs of the community, coupled with legal research and analysis of national law and international standards, as well as national and international case law, allows us to build a complete picture. ACCEPT organized such a study with a focus on the trans community in Romania. Moreover, we often employ strategies for human rights fact finding when the time and investment for drafting a comprehensive study is insufficient. We will look at these two case studies below.

Case study: Trans in Romania - Community, individual and legal experiences of transgender people in Romania

The report begins with a glossary that defines the specific terms for this line of research. It presents the essential difference between sex and gender, within a constellation of concepts such as gender identity, gender roles, gender expression, transgender, gender-fluid, transsexual, transition, gender dysphoria and transphobia. The concepts related to sexual orientation are defined at the end of this section, drawing a clear boundary between gender identity and sexuality. This report comprises three main sections: quantitative research that analyzes the data obtained from the application of an online questionnaire on a sample of 123 trans people, qualitative research that closely depicts essential aspects in the lives of transgender people in Romania, and a legal research on relevant legislation and on court decisions regarding trans persons. The quantitative research was developed with the support of Trans Mreža Balkan and activist Arian Kajtezovic, by applying an adapted version of the questionnaire used to assess the health of transgender people in the Balkans. Overall, there have been addressed issues related to: how trans people perceive (their) gender identity, the difficulties they encountered regarding the transition (social, medical, legal), the nature of relationships with the family and the circle of close people, the incidents they had in the public space, the experiences at work, the relationship with the authorities, the relationship with the health care system and personnel. Also, a major part of the report is the analysis of the implications (at legislative, judicial, community and personal level) arising from the necessity to recognize the right to self-determination, versus excessive bureaucracy and psychiatric pathologizing of transgender people. The report includes a rich casuistry, but also a statistical perspective. The quantitative research was conducted on a sample of 123 people who are part of the transgender community (trans women, trans men, non-binary people and agender people), aged between 16 and 60 years. These people were contacted by the ACCEPT Association, so the sample is an explorative one, an availability sample. Transgender people included in both qualitative and quantitative research are part of heterogeneous socio-professional and economic categories (artists, psychologists, lawyers, human rights activists, people in academics, freelancers, pupils, students, electronics engineers, translators), live mainly in urban areas (Bucharest, Timișoara, Iași, Cluj, Constanța, and in cities in the diaspora).

The methods and tools used to collect information for this report were: 123 questionnaires applied online, nationally and in the diaspora, answered by 27 trans women, 74 trans men, 12 gender-fluid people, 5 non-binary people, 3 agender people and 2 people who did not want to define their gender identity; 2 focus groups (in Constanța and Iași), attended by 5 and 3 transgender people, respectively. 9 individual interviews (with respondents from Bucharest and the diaspora), attended by 4 trans women, 4 trans men and a gender-fluid person; 1 group interview (in Cluj), attended by one trans man and one trans woman. We chose to protect the identities of the participants in this study and to anonymize the personal data that would have made them easily recognizable and would have risked putting them in a vulnerable position. The quantitative and qualitative researches were held during the period 2018-2019. The legal research on the court decisions given in the trans field took place in the first part of 2018 and includes the state of jurisprudence for the period 2006-2017. Although in Romania there are legal provisions that consider the possibility of modifying the entry for "sex" in the civil status documents, trans persons requesting this face the absence of clear conditions and procedures and the lack of specific information and training in the trans field of those who should apply these legal provisions - judges, prosecutors, lawyers and doctors. This situation leads to contradictory jurisprudence, interpretations based on prejudices and gender stereotypes, or even abuses.

This report highlights the major difficulties faced by transgender people. Aspects such as the following have been examined and substantiated sociologically, psychologically and legally: marginalization and social stigma, negative reactions from the family, difficult procedures for changing civil status documents, expectations of others regarding gender identity and gender roles, discrimination at work, the difficulties of the transition process, the lack of certainty in access to justice, the socio-economic status that prevents access to specific medical services, the abuses suffered by trans people within the medical system, the avoidance of reproductive health services, depression and anxiety experienced by trans people, the very high risk of suicide and the feeling of social isolation.

The report is available here: https://transinromania.ro/wp-content/uploads/Trans-in-Romania_EN.pdf

Case study - human rights fact finding regarding non-discrimination in access to health services for persons living with HIV

Step one: Assessing a case and discussing with the victim

In general, in order to prove the existence of an act of discrimination sanctioned by law in relation to the right to health, the following key elements must be demonstrated:

a. Existence of differentiated treatment (difference, restriction, exclusion, preference).

b. This differential treatment is applied to people who are in similar or comparable situations (comparable situations may be present, past or even hypothetical).

c. Differentiated treatment must be based on HIV-positive status.

d. Differentiated treatment must pursue or have the effect of restricting or removing the recognition, use or exercise, on equal terms, of the right to health.

e. Differentiated treatment should not be objectively justified by a legitimate aim and the methods for achieving that aim should not be adequate and necessary.

We should take each key element and go through a series of questions that a person analyzing a situation, in which they want to see whether or not there is discrimination, must ask themselves in order to properly frame the case. These questions can be set up in NGO checklists to go through each case they are referred to, to make a thorough documentation, essential for monitoring and finding the best legal solutions - legal ways to file complaints, develop recommendations for measures to improve the situation, drafting of human rights reports containing typologies of human rights violations.

a. Identification of differential treatment:

- By the questions we ask ourselves, we want to understand whether a differentiated treatment has been reported, what it is, whether there has been a difference, restriction, exclusion or preference.
- It is important to gather all available information through medical records, public information, witness statements, other people's statements, other evidence so that we can document the exclusion, restriction, preference, or difference and who is legally responsible for different treatment.
- In the case of people living with HIV, they face situations in which medical staff refuse them general health care that is not related to HIV, such as dental, gynecological, general medicine, and surgery services.

b. Identifying the comparable situation

- By asking questions, we want to compare how the person living with HIV was treated, as opposed to other patients or individuals, in order to identify certain differences to the detriment of the person living with HIV, if any.

- For example, the person living with HIV was denied the kidney surgery he or she needed, while other patients were received and operated on.

C. Identification of the criterion on the basis of which the differential treatment was applied

- By asking questions, we want to identify whether the differential treatment applied is due to HIV-positive status or other circumstances, and whether the different treatment affects only one person living with HIV or more than one person living with HIV or the whole community of people living with HIV, whether the HIV status is positive, obvious or known, in the case of the victim.

- In the sense above, it helps us to check based on the evidence gathered whether the medical staff explicitly used expressions, statements, words, phrases related to the victim's HIV positive status.

- In the context of the discrimination criterion, particular attention should be paid to the difference between multiple discrimination and intersectional discrimination.

- Multiple discrimination, by adding more discrimination criteria, occurs when a person is denied enrollment in the family doctor because of his or her HIV-positive status and the fact that he or she is Roma and insults in both respects (HIV-positive and ethnic discrimination).

- Intersectional discrimination occurs when it is not possible to identify a single criterion (or several) for which a person has been treated differently from other people in comparable situations, but it is about the fact that the person suffers in the exercise of his rights precisely because it has a number of disadvantages that come from being identified as belonging to those groups exposed to discrimination - for example, a pregnant woman living with HIV and of Roma ethnicity may face intersectional discrimination when the doctor does not provide information about prevention of mother-to-child transmission of HIV, assuming about this particular patient, that she could not put the prevention measures into practice due to the socio-economic and housing context in which she finds herself. Such an approach is intended exclusively because she is a woman, since men are not in the situation of being pregnant. Moreover, the doctor would probably not have made such an assumption if the patient was not Roma. The behavior of the doctor impacts the patient because she is HIV positive, and this prevention information is a specific health care service that she needs as a patient living with HIV. Instead of keeping this crucial information away from the patient, the doctor could have talked with the patient and try to find together those ways

appropriate to her special context, if the housing difficulties were real.

d. Identification of the infringed right

- Not every different treatment constitutes discrimination, it must be in connection with certain rights recognized by law or international conventions.
- In the context of the discussion on non-discrimination in the field of health, in order to be able to argue discrimination we need to show what were the consequences of different treatment on the person in relation to his right to health, such as choosing a family doctor, health care, health insurance, emergency services or other health services.

e. Identification of justification

Not all situations in which differential treatment has taken place that puts a person living with HIV at a disadvantage constitute discrimination punished by law. Differentiated treatment may have been justified by a legitimate aim to be achieved if the methods by which that legitimate aim is pursued are adequate and necessary, that is to say, they are proportionate to the gravity of the situation. For example, the mere lack of medical supplies to ensure compliance with universal precautions should not be considered a justified reason if it is an accredited hospital that operates under normal conditions and treats patients on a regular basis - hospital management must ensure that universal precautions are taken for each patient, regardless of their HIV status.

- To know whether it is a justified treatment, we need to answer questions such as: Can a justification for the treatment applied be considered? Is there an objective cause for this treatment? Was this cause beyond the real possibilities of the doctor or was it a subjective decision? Is there a behavior that has been induced by the victim's attitude? Did the victim cooperate, did he have a proper, polite attitude? Were there any complaints against the victim's own behavior? Is the refusal to provide the medical service, justified by the lack of medical instruments, the appropriate medication, the appropriate medical equipment, the specialists in the respective field, the qualified staff?

Infringements on personal dignity while exercising the right to health on the basis of HIV-positive status

If during the exercise of the right to health - either accessing a medical service or pursuing the defense of the right to health - the person is subjected to insults, gestures or humiliating, hostile, intimidating statements on the basis of HIV positive status, then we are dealing with the violation of the right to health and with the attainment of personal dignity as a particular form of discrimination sanctioned in the Romanian legislation. The National Council for Combating Discrimination, the national authority dealing with the prevention

and sanctioning of discrimination in Romania, has established that the use of certain statements, words or phrases can be considered to infringe the right to dignity of Roma people when used in a certain context, related to the way, place, reason for which they did, their impact and effect - "sidos".

The medical staff has the obligation according to the rules of professional ethics to respect the dignity of the human person, without discrimination, including based on HIV positive status.

Some questions you can ask a person who complains about discrimination to document such a situation of abuse are:

Do you try to remember exactly what the medical staff told you? Did they say something that bothered / upset you?

- Where were the gestures, the respective statements made? Who else was present?
- How did you feel when those statements were made to you?
- How did those statements affect you? What did you do after that?

Step two: What does it mean to monitor the situation of the right to health among people living with HIV?

Monitoring means constantly being aware of the status of respect for the right to health among people living with HIV in the community through observation and analysis, and how the state protects them from violations of the right to health by people outside the system, as well as the way in which the authorities take proactive measures to ensure the attainment of the highest standard of health for such persons. Monitoring helps you to always have an overview of the situation in this area, to identify violations of the right to health, to evaluate and to decide in particular cases.

The first thing that needs to be clear to us in human rights documentation is the possible sources of information for monitoring. A first source of information consists of their own observations and contacts and involves going on the spot - visits to places where people living with HIV or health care providers working with them may meet - and direct contact with those concerned or others who might know about their situation. This method can be supplemented from the office, by addressing public information requests to competent authorities. In this regard, we must know that if the requested information does not involve the identification of the patient, but refers to general data or statistical data, the information may be of public interest and its communication does not violate the privacy and confidentiality of the person. Information of public interest, selected and interpreted, can also be found in the local media, for example when recording incidents or events that have occurred at the local level, as well as from reports, studies, strategies, policies, action plans, collaboration protocols or statistics at the local or national level. Another valuable source of information can be found in local civil society organizations (HIV organizations, human rights organizations, social service organizations) and in press releases, activity reports,

budgets of local authorities and institutions, some of which can be found even on the websites of local authorities and institutions. The participation of those who monitor the human rights situation in seminars, conferences, meetings at the local level, even if it does not particularly address the issue of the right to health of people living with HIV, provides good opportunities to find out the general health situation at the local level, who are the people responsible for certain competencies in the field of health and local public administration. At the same time, it is essential that the monitors have direct contacts with the medical staff, social workers, community nurses, health mediators, pharmacists; people in the system who know certain information directly from the source and can have an overview and can indicate certain problems and solutions. To the extent that there is permission from the person concerned, relevant information from medical records, court decisions, indictments of prosecutors, forensic examinations may be used.

I. Documentation and reporting

The purpose of the documentation is to gather information to support a particular allegation of evidence. A person who documents a possible violation of human rights wants to be able to describe what happened, that is, to find out: WHO did what, to whom? WHEN, WHERE and HOW DID IT HAPPEN? The documentation helps us to make a useful case report and to identify the types of violations of the right to health among people living with HIV.

To this end, the documentation process involves several steps, from gathering all the information about the incident (without omitting important details), their logical organization and their evaluation in such a way as to answer the question of whether the legal criteria for finding a violation of human rights are fulfilled or not. As we gather information, we make sure it is true by comparing the information with each other, checking whether the statements are similar or contradictory, whether the answers to a question converge or are contradictory, whether the allegations are in the pattern of similar violations in the past. Both consistent information and contradictions must be recorded. The types of evidence admitted according to the Romanian anti-discrimination procedures are: written statements of the victim, written statements of witnesses, medical documents, forensic examinations, official documents, photographs, audio-video recordings, statistical data.

When writing a report on a particular case or incident, we need to keep in mind that we need to detail as much as possible, without deviating from the reported violation, to order the information systematically in order to answer the key questions above, to use concise and clear language, without offensive words, political opinions that may illustrate a lack of impartiality, without personal or emotional involvement.

II. Finding on the spot

The finding on the spot involves the investigation of certain incidents or allegations of human rights violations. The purpose of the on-site investigation is to gather evidence as to the

circumstances of the incident, whether the allegations are confirmed or not. Specifically, we want to know what kind of violation took place, what actually happened, under what circumstances, who is the victim, who is the alleged perpetrator, what are the possible causes and consequences of the violation, if it is part of a series of violations.

Thorough preparation of the mission is very important before traveling to the site. Our security and our contacts must be at the forefront. In this context, we need to be prepared to answer questions about why we are there and why we are asking questions. Careful preparation involves investigating the context in which the incident occurred - from similar allegations reported earlier to national law and the standards that apply in such situations, as well as the organization and functioning of the institutions or organizations we have in mind, their leadership etc. Because we have limited time for on-site research, it is important to go on target, keeping in mind a number of questions about what we want to clarify on the spot that complement what we already know, who the possible contacts and sources are, what official meetings we want to organize, if necessary. It is very important to have support in the human rights organization we work with, and it needs to know the purpose of the visit and the potential risks involved in the visit.

On the spot, possible sources of information may be: victims, witnesses, relatives, friends, neighbors, medical staff (talk to them as long as your investigation is not endangered; respect their confidentiality, they may be able to communicate more easily this way), health mediator, social worker, community nurse, security guard, nurse, stretcher bearer, other patients, documents (such as medical file, observation sheet, hospital discharge ticket, registration in the medical consultation register, medical letter etc.), material evidence (such as conditions in the hospital ward, medical tests), photographs, audio-video recordings.

Interviewing is the most commonly used on-site research method. It is important to record the words as accurately as possible, for this we can use a tape recorder, with the permission of the person we are talking to. Again, pre-interview preparation is important, including a list of questions with the information we need. We must follow the basic rules of politeness and respect for each other that help us establish the human contact essential for a successful communication. This involves introducing ourselves, telling us what we are going to use the information for, verifying the details about keeping the person's identity confidential, asking for permission to record information in writing or audio, maintaining eye contact, staying neutral and objective, we ask open-ended questions, allow the story to be told fluently, without interrupting, and ask questions for completion or clarification at the end, thanking for the interview. The interviewer must take into account certain cultural sensitivities about how to ask questions or how he or she will receive certain answers, whether it is gender sensitivities, such as addressing the appropriate pronouns and politeness formulas in the case of trans people, the interview of a woman about her body or taboo subjects (sex life) or about the use of language inappropriate to the knowledge and experiences of the interviewees (the use of medical expressions).

A special sensitivity is needed when interviewing victims, some of whom may be abused, traumatized, and want to avoid re-victimization. In addition to the above common-sense rules, we can consider not prolonging the interview, striving to give them an amicable discussion rather than an interrogation, without getting emotionally involved, and being prepared to provide information to the victim about places where he or she can get medical advice or care or other help.

Human rights violations can be isolated incidents, but they often occur systematically, affecting multiple individuals or groups of individuals and communities. Identifying typologies helps us in reporting and building cases. The typologies can be depending on the identity of the victims, the location, the methods by which certain violations of rights are committed, the circumstances in which the violations take place, the identity of the perpetrators, the reaction of the authorities. The organization of the information and its correct rendering ensures the premises for the identification of the typologies of human rights violations, if we periodically return to the documented cases and confront the above elements. The correct identification of some types of violations helps us to find those responsible for the violation of rights, as well as to find the best solutions.

Offering victim support

Offering victim support is the essential step in your legal program, and should consist of:

(1) Primary legal counseling, which needs to occur on an ongoing basic to let the community know you have an open door policy.

(2) Set clear limits of what your legal counselor can and cannot offer beneficiaries: strict handling of cases involving discrimination, hate crime and other human rights abuses, exclude private issues of LGBTI persons. Refer cases when possible.

(3) Cooperate with organizations that can offer types of victim support when you cannot (shelter, housing, employment, psychological counseling for children, etc.) and build and integrated victim support system at NGO level.

The provision of victim support can only occur following the significant and persisting building of internal capacity. When the organizations lack the internal resources, only by helping each other and networking can they cater to the comprehensive needs of the victims. We will not engage into standards regarding legal counseling and legal representation, nor on issues regulating psychological counselling or social assistance. These professions are well regulated in each EU member state, and all groups and organizations need to follow said regulation. Moreover, there are many resources on victim support, and we feel that expanding the topic would double unnecessarily already existing work.

Flow chart for legal service provision

Primary Information

Legal rights (nondiscrimination and protection from hate speech and hate crimes) – to help people understand when they are faced with discriminatory practices

Information on accessing healthcare, education, social rights and benefits, what constitutes hate speech – to let people know what the standard is

Victim support

Legal counseling by primary legal officer
Case evaluation against criteria for strategic impact

Community facilitators evaluate the needs of the victims and direct them to specialized services (psychological counseling, shelter or independent housing, medical aid, hospitalization, legal medical evaluation, etc.)

Strategic litigation

Legal representation in court
Engaging with allies and amici curiae

Media communication
Public engagement and campaigning

Success in court depends greatly on case selection. Above we discussed the diligent work needed to be done within your organization before you are ready to engage in strategic litigation. However, it is important that we set up criteria on which we can decide if a case has the potential to make a wide impact and thus should be part of a strategic litigation program. Below we will discuss the profile of strategic cases, as well as a set of criteria and best practices in strategic litigation, including the relationship with the media and beneficiaries.

Recruiting strategic litigation cases – Profile of cases

We should actively seek to represent cases that take into account these items:

1) the case is representative, and its solution involves the interpretation or modification of the existing legislation and forces the harmonization with European and international human rights standards (by redefining some rights, covering the legislative vacuum, highlighting the inconsistency between the norms invoked and the Constitution or the different treaties and conventions ratified by national or EU legislation).

2) through its media coverage, the case can contribute to a better understanding of the specific issue by the public opinion, to increasing the capacity and the visibility of vulnerable communities of discrimination (on issues such as gender, ethnicity, sexual orientation, etc.).

3) the legal aid options of the beneficiary are limited and there is a risk that, in the absence of support by an organization, the beneficiary will not initiate actions before the authorities with the purpose of restoring his rights (including the possibility of the beneficiary being represented against payment by the members of the bar or other organizations or institutions providing similar services).

4) the stability and seriousness of the beneficiary and the possibility of long-term collaboration. The beneficiary's credibility and perseverance as well as his awareness of the limits imposed by the strategic assistance are essential.

5) the possibility of establishing strategic partnerships with other organizations or institutions, either during the period of granting legal assistance, or for the work of advocacy that aims to make the results obtained in court.

Criteria	Points (0/1)	Mentions
1. The case has a potential impact on the modification of legislation, policies or practices		
2. The case has potential for media impact		
3. The beneficiary has limited alternatives / has no alternatives to be reinstated		
4. Existence of resources and expertise		
5. Beneficiary profile (credibility, perseverance, seriousness)		
6. Multiple discrimination (intersectionality of the reasons for discrimination)		
7. Discrimination affects more people, groups, a community et.		

Generally, ACCEPT selects for litigation only cases meeting a minimum of 5 points.

Good practices on strategic litigation

1. Identifying potential cases of strategic litigation

Outreach activities of the LGBTI community

As described in previous chapters, this is an essential way of finding cases of human rights violations in our community. The activities can range from organizing cultural events, to providing informative workshops on specific topics regarding human rights. ACCEPT provides free primary legal assistance to persons from our community who consider themselves victims of human rights violations, a way of finding strategic litigation cases or patterns of violations, gaps in the legislation and practices.

The results need constant investment in maintaining the connection with the community. It might take some time until the outreach activities lead to finding potential cases of strategic litigation. Do not give up! Once the first cases arrive, they determine a snow-ball effect – the word will spread about the possibility to file cases and more people will be interested.

We also addressed the importance of human rights fact finding, legal research and analysis of national law and international standards. We are all bound by international human rights standards in the field of human rights – progressive or regressive, that our countries ratified. Therefore, we must act responsibly when we bring strategic litigation at international level! Communication and cooperation between the main players at the international level is important.

e.g. Two years prior to filing Coman Case, ACCEPT legal team carried out extensive research of national immigration law, ECHR standards and EU law on freedom of movement in order to identify gaps and standards regarding the issues at stake. We participated to regional workshops addressing the topic of equal family rights recognition and the future of European standards in the field.

2. Planning strategic litigation

Strategic litigation is part of your legal advocacy strategy

Strategic litigation is only a tool that you can choose to use to achieve your legal advocacy objectives. Sometimes there are more efficient tools, that require less resources, in terms of time, people, energy, money. ACCEPT uses strategic litigation when we see that soft advocacy does not work.

It is also important to integrate your strategic litigation into your advocacy strategy – to communicate the results of strategic litigation at the right time, to follow up on the implementation of judgments by the authorities, to educate professionals about precedents decided in strategic litigation.

e.g. Before filing Buhuceanu and Ciobotaru Case, ACCEPT worked with the national equality body to draft and promote the adoption in the Parliament of the civil partnership law, only to receive little political support despite the Constitutional Court and CJEU judgments in Coman Case.

ACCEPT decided to bring to the public attention full-on Coman Case at the Constitutional Court as a way to counter-balance the prominent public campaign for the referendum to restrict the definition of family in Romanian Constitution carried out by anti-LGBTI groups. We integrated the case in our wider advocacy campaign against the above-mentioned restrictive proposals, which gave face and a human story to our advocacy efforts.

Criteria for choosing a strategic litigation case

ACCEPT has a list of criteria for strategic litigation case and a group of persons who decide when to start a case of strategic litigation. We reiterate the criteria: the case falls under human rights violations, the case represents a systematic problem or affects a large number of persons, there are evidence available to prove the case, the decision in the case could influence legal change or a change in public policies, the person does not

have access to a lawyer or a specialized lawyer in the field is not available, the person is cooperating with ACCEPT.

e.g. If it is clear that the person does not have evidence to support their complaint, we cannot take a case. When the person does not write down the story of her case and does not provide the requested documents in time, it is a good indication that the case will not advance to become a strategic litigation case. When victims of human rights violations do not want to come out and bring cases because of stigma on our community, activists who find themselves genuinely in situations of human rights violations may qualify as you best option in terms of beneficiaries of strategic litigation.

Working with a team of legal and "para-legal" minds

ACCEPT has always worked with a team that planned the strategic litigation efforts and not only one lawyer. The team is always formed of lawyers and non-lawyers (members of the community who are part of ACCEPT board, people with different backgrounds that are involved in our advocacy work, international consultants who have experience on similar cases). This gives the opportunity of debating different opinions, approaches, and styles to a particular legal case and puts the lawyers in the position of finding the legal standards to address a particular social need, forcing them to step out of the mind setting of applying the existing law to the facts of the case (given that the law is oftentimes adopted by the majority and does not take into account the needs of the minority).

Think big!

We are entitled to equal rights by the simple fact that we were born human, and we are no less than anybody else. It is true that the legal standards, including the international human rights standards do not ensure full equality now, but they have been evolving in the last 50 years, and it was because of the work and the cases that were brought in front of the courts. So we should always think about ways to move forward the "conversation", instead of limiting our arguments to the consolidated standards. In the same time, organizations must be aware of the importance of creating a strong base of standards on which we can all add progressively more arguments and cases.

e.g. With family rights, ACCEPT did not start its strategic litigation with cases of equal marriage in Romania, because back in 2007 there were no legal standards in place at national or international level, which we could invoke even partially addressing the matter. Our first case was Coman Case (2012), which related to a situation involving EU law obligations that Romania already undertook, with respect to freedom of movement of EU citizens and their spouses. Buhuceanu and Ciobotaru Case (2019) came after the failure of the referendum and after the Constitutional Court decided that same sex families are equally entitled to protection of the constitutional right to private and family life and the Parliament was not willing to adopt any form of recognition and legal protection for same sex couples and their families.

3. Strengthening your position in cases of strategic litigation

Providing integrated services of support to beneficiaries

We provide our beneficiaries with legal support and representation, but also with psychological support, if needed. This is reassuring for our beneficiaries because the psychologists are familiar with LGBTI, but also to ACCEPT because we know our beneficiaries can maintain their well-being throughout the process.

e.g. In M.C. and A.C. v Romania, ECHR, 2016, after the violent incident, ACCEPT paid for a couple of sessions of group therapy with a psychologist for all victims affected by the incident. It proved to be important evidence that the ECtHR relied on when it decided on civil compensation for moral damages.

Amicus curiae

ACCEPT is often inviting other organizations or professionals with expertise in the issues that are being addressed in our strategic litigation cases to intervene and provide their expert opinion to courts. It is a way of raising the level of expertise of the judges and making them pay more attention to the case. e.g. In Coman Case in front of the Constitutional Court of Romania, we had several amicus curiae: from a group of international human rights organizations coordinated by ILGA Europe, from a coalition of Romanian civil society organizations, from a group of psychologists, from a group of religious organizations, from a professor of sociology expert on the sociology of family.

The national equality body (National Council for Combating Discrimination) was an intervener in Coman Case and in other strategic litigation cases. They are a public institution, but precisely because they have this nature, we try to involve them every time we know that their contribution will be to support the principles of equality and dignity of the person. It is a valuable addition to our strategic litigation effort.

Know your audience

ACCEPT is documenting the profile of professionals playing an important role in the case: judges who are called to decide, prosecutors who give their opinion, Government representatives etc., in terms of previous decisions they were involved in, legal opinions they shared in academic research and writing, area of expertise and previous professions, the country they are coming from. This research can give us a picture about the background of the persons which informs our range of reasoning, examples, principles we choose to emphasize in our argumentation.

e.g. In ACCEPT v CNCD Case, before the CJEU (2013), our legal team did a minimum documentation of the CVs of the judges of the chamber. After finding out that the president of the chamber was a former FIFA mediator, we were confident that he will be familiar to the issues discussed in the case, because it referred to recruitment by a football club.

Get pro bono support from experts (interdisciplinary)

Experts help our legal team to prepare their case work at various stages in the procedures. These experts can provide the non-legal knowledge that our team does not have or legal expertise that will take too much time from the limited timeframe of the case.

e.g. In Coman Case, ACCEPT received pro-bono legal assistance from White and Case, Brussels Branch, specialized in EU law. Their involvement came at a late stage in the case, when we were preparing for the oral hearing before the CJEU. However, their expertise of EU law and resources were a breath of fresh air for our legal team.

The power of numbers

It is important to show that we are many! When it is possible, strategic litigation cases should aim to bring several cases or have several complainants to show a systematic violation and the urgent need to adopt changes. The communication part is more difficult because you must deal with several persons. However, there are other advantages: arguments are to a large extent the same, the steps that you follow with each beneficiary are the same, there are electronic applications that make this communication effort easier, testing the same procedure or arguments for several times gives you insight how to improve the case.

e.g. In Buhuceanu and Ciobotaru Case, we managed to put together 42 complainants affected by the same legislative gap in the protection of gay families. We filed the cases in three bunches – compared to the first lot where only two couples did not ask for confidentiality within ECtHR procedures, in the third lot, the great majority of couples wanted their full-names to be communicated in the procedures.

Communication in cases of strategic litigation

Communication with beneficiaries

From the very beginning we inform our beneficiaries about reasonable expectations from the case: the assigned persons working with them, mutual rights, and obligations, what is their role, working rules, timeframe, level of engagement, obligations of confidentiality, rules of publicity, remedies available, risks of retaliation. The legal team is in contact with the beneficiaries and informs them of developments and what to expect in each step of the procedure.

We try to involve our beneficiaries into our legal advocacy work and give them a voice if they want. It's a gradual process, but it is very rewarding!

e.g. ACCEPT invited one of the survivors of the incident in M.C. and A.C. Case to speak at a working-group meeting with public authorities who had to implement an action plan for the execution of the ECtHR judgment in the case. Her testimony was impactful, it lead to stronger commitment from some of the representatives present at the meeting.

Communication with the public

It is essential to work with a communication specialist! Your communication should tell a story and the characters in the story are the best communicators, not your director or board member. ACCEPT works with its beneficiaries and the legal team to prepare them for communicating the story to the media.
e.g. Coman Case was the first case where ACCEPT had a communication expert working on the media campaign. It made a huge difference compared to the impact of the communication on our previous cases.

In conclusion

The design and development of legal programmes should consider all factors that could influence the development of legal programmes, e.g:

1) the political situation in the country concerned and the related NGO environment in general. In this regard, the establishment of or participation in coalitions advocating for human rights and the development of civil society in general are key to enabling the development of the relevant legal programs and strategic litigation tackticks.

2) The development and maintenance of an informed, empowered, and resourced community is key to the functioning of LGBTI legal programmes, and here should be considered any activities that bring knowledge, information, resources, services and supportive initiatives and activities to the LGBTI community, including the development of a network of supporters, allies and friends, both locally and at regional and European levels.

3) Ensuring an adequate and resourced working environment for the legal programs through various online applications to enable maximum effective and easy communication between team members as well as the ability to create a database, track progress, learn through experience are key for smooth development and easy catch of opportunities for further and sustainable influence.

4) Ensuring that the legal programs' team is skilled in different areas of work and has a database of volunteers and pro-bono experts in different areas is a key for assuring sustainability in a long term.

5) And most importantly, sustainability might be achieved by ensuring balanced and stable, diverse financial resources, such as project funding through European Commission mechanisms, Active Citizens Fund, local and national funding mechanisms, core funding and own funding generated through branded materials, initiatives, individual and corporate donations.

In conclusion, although the establishment and maintenance of legal programmes is a long and slow process, which involves following many of the steps and best practices mentioned above, the process one started will gradually ensure a sustainable development of a LGBTI and other social movements in Europe legal programs.

The authors and organizations involved into drafting and development of this toolkit remain available whenever possible to share further good practices for promotion and support of LGBTI and other social movements legal programss.

TOOLKIT ON LEGAL PROGRAMS

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RAINBOW SHIELD

Enchancing the legal protection of LGBTI people in Bulgaria

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