

Necessary but not sufficient: a scoping review of legal accountability for sexual and reproductive health in low-income and middle-income countries

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ABSTRACT

Background This paper is a scoping review of the impact of legal accountability efforts for sexual and reproductive health and rights (SRHR), exploring the links between legal accountability strategies and changes in the desired SRHR outcomes.

Methods We defined legal accountability as use of the judicial system following state failure to respect, protect or fulfil SRHR as enshrined in national law, as well as individuals' or the state's use of criminal law mechanisms to prevent unwanted behaviour and to provide remedy. We undertook a keyword search in PubMed, Scopus and LexisNexis and then consulted a group of experts to provide guidance regarding further peer-reviewed and grey literature, yielding a total of 191 articles.

Results The majority of the empirical, peer-reviewed articles identified were regarding abortion law and abortion care availability, followed by violence against women. Most of these articles explore the gaps between law and practice. We identified seven key factors that shape the efficacy of legal accountability efforts, including the ways a law or court decision is formulated, access to courts, the (dis)advantages of criminal law in the given context, cultural norms, politics, state capacity and resources and the potential for further litigation. Many articles explained that use of the judiciary may be necessary to effect change and that the act of claiming rights can empower, but that legal avenues for change can be imperfect tools for justice.

Conclusions Legal accountability can be effective as part of a broader, long-term strategy, with due attention to context.

BACKGROUND

Efforts to demand answerability, sanctions and remedy for state failure to respect, protect or fulfil health-related rights are often described as 'accountability strategies'. Drawing on learning from the broader fields of transparency, accountability, participatory development and human rights, accountability for health is coalescing into a distinct field of practice and research.¹⁻³ A recent systematic review undertaken by Van Belle *et al* identified three primary strategies for accountability that have

Key questions

What is already known?

► Legal accountability strategies typically rely on legislative or judicial responses to violations of human rights. These can range from individual cases to strategic and public interest litigation within national legal systems to uphold affirmative rights and entitlements or to provide a remedy in the case of a violation. They are often used to address violations of sexual and reproductive healthcare entitlements and rights.

What are the new findings?

► This paper reviews the literature regarding the impact of legal accountability strategies, finding that most papers identified explore the gaps between law and practice. Some analyses and studies describe factors that shape the efficacy of legal accountability efforts.

What do the findings imply?

► Reliance on the judiciary may be necessary to effect change in some settings, and the act of claiming rights can shift social norms. However, legal accountability strategies are generally more effective when they are part of a multipronged strategy to promote sexual and reproductive health and rights.

been applied to sexual and reproductive health and rights (SRHR) and documented in the peer-reviewed literature: social or community accountability, performance accountability and legal accountability.⁴ Legal accountability strategies typically rely on legislative or judicial responses to violations of human rights. These can range from individual cases to strategic and public interest litigation within national legal systems to uphold affirmative rights and entitlements or to provide a remedy in the case of a violation.⁴ Over the past 25 years, health justice advocacy has increasingly included the judicialisation of health-related rights.⁵

This paper is a scoping review of the impact of legal accountability efforts for SRHR. Human rights researchers and practitioners debate the long-term impacts of typical legal accountability strategies, primarily focusing on strategic litigation. In this paper, we use the term ‘strategic litigation’ to encompass what may variously be described as public interest litigation, cause lawyering and human rights litigation and define it as litigation with an intended impact beyond a particular case to influence broader change at the level of law, policy, practice or social discourse.⁶ Strategic litigation is a process rather than a single event; it can take several years to develop a case and for the case to move through court system. Cases are ‘strategic’ when they are emblematic of a broader pattern of state failure and are best pursued when the evidence of violation is sufficient to withstand examination in an adversarial or inquisitorial process in a court room, as loss in court could potentially result in the ossification of the status quo and the issue being ‘off the table’ for many years to come.^{7 8}

Circumspect researchers point to a lack of evidence regarding the outcome of strategic litigation and other types of legal accountability efforts, their impact on health outcomes, systems and policies and their social implications, including to what extent legal cases represent the priorities of the most marginalised.^{9 10} In addition, researchers working in the field of accountability more broadly note the specificities of SRHR that complicate accountability efforts, such as the way that dominant political, religious and cultural ideologies about gender, sexuality and reproduction influence the claims articulated, as well as responsiveness by duty bearers.¹¹ Critical legal scholars posit that legal action can reflect and perpetuate dominant social hierarchies by moving social action from communities to remote court rooms, by de-radicalising emancipatory movements and by forcing advocates to rely on rights and entitlements that are already—or can be—established in law, rather than making more proactive demands.^{8 10 12} ‘Legal realists’ believe that legislation or other governmental action is required for impactful social change and that advocates should prioritise influencing the legislative and policy-making process, rather than litigating.¹⁰ On the other hand, many researchers, including the 2019 Lancet Commission on the Legal Determinants of Health, conclude that legal strategies can be successful in promoting equity and may be the best option available to historically oppressed populations, so long as a host of other favourable contextual conditions is in place.^{8 13–16}

The objective of this scoping review of legal accountability for SRHR was to explore the links between legal accountability strategies and changes in the desired SRHR outcomes. We do this by describing the body of the conceptual and empirical discussions about when and how legal accountability achieves its goals and by identifying more specific research questions that could inform further development of the field.

METHODS

Scoping reviews are appropriate for synthesising a wide range of research and non-research material to provide greater clarity about a given topic.¹⁷ This scoping review was ‘topic driven’, in that it aims to describe the effectiveness of existing approaches and outstanding research questions.¹⁸ We used the scoping review framework proposed by Arksey and O’Malley and further refined by Levac *et al*, which specifies several distinct stages of a scoping review.^{19 20} We describe each of these stages below.

Identifying the research question

Based on a preliminary review of the literature, we articulated the following research questions:

- ▶ How has legal accountability for SRHR been described and studied?
- ▶ What do we know about the effectiveness of these strategies in effecting change in people’s SRHR and the broader context and mechanisms associated with successful legal accountability efforts?

The burgeoning field of legal epidemiology entails the study of law as a factor in the cause, distribution and prevention of particular outcomes.²¹ However, some legal mobilisation scholars reject what they describe as a positivist approach that assesses whether or not law or legal cases achieve the desired outcome and argue for a more interpretivist approach to law that sees the formation of laws and legal discourse as part of a larger social process.^{10 22–24} This is echoed in public health discussions about how changing laws can help to transform social norms and are thus meaningful, separate from the question of whether or not there is a direct causal chain from a change in law (or a judicial decision) to implementation and immediate changes in people’s lives.^{15 25} Our key research questions fit within a more positivist, instrumentalist approach, as our central concern is the effectiveness of legal accountability as a strategy to improve SRHR. That being said, our analysis reflects what has been described as the ‘law and society’ perspective, as we discuss empirical research assessing gaps between law and actual behaviour and consider how legal accountability contributes to broader social changes.²⁴

Identifying relevant studies

We defined legal accountability as use (or threat of use) of the judicial system to seek redress and remedies resulting from state failure to respect, protect or fulfil SRHR as enshrined in international law or national law, including the constitution, as well as individuals’ or the state’s use of criminal law mechanisms to prevent unwanted behaviour and to provide access to remedy in the event of a violation. Our definition of legal accountability did not include recourse to international human rights mechanisms and processes, as this body of literature is distinct and robust.

As we were developing the protocol, we piloted different search strategies. Focusing on ‘legal accountability’ per se

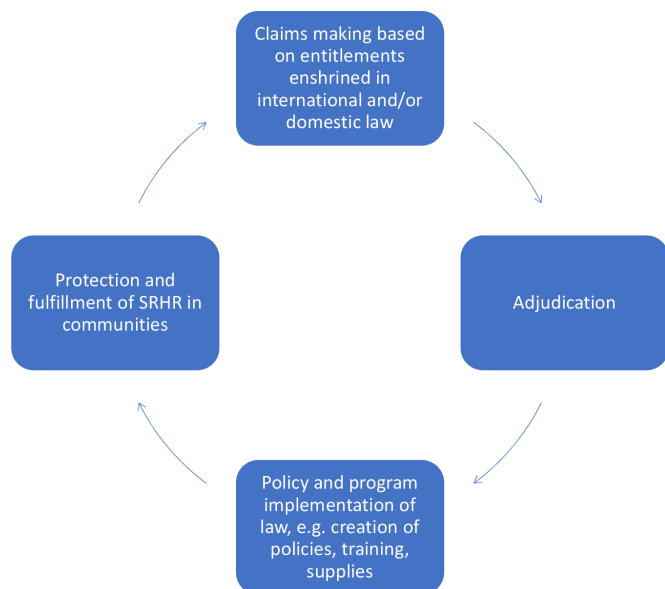


Figure 1 Legal accountability schema. SRHR, sexual and reproductive health and rights.

resulted in a limited number of studies that were focused on legal strategies, such as strategic litigation. These papers focused on strategy and often said little about the impact of the litigation, beyond whether the litigation itself resulted in the desired decision. We then expanded search terms based on our background reading. A broader list yielded a wide, diverse set of peer-reviewed articles. There were several well-known cases that were associated with tens of articles. For example, there were many public health, health and human rights and law review articles regarding changes in the abortion law in Colombia to bring it more in line with human rights obligations and public health guidance. Some of these articles went in depth about the strategy that resulted in changes to the law, others did not even mention the strategy used, but focused on the link between law and practice. Our main research question relates to the link between legal accountability and subsequent impact on people's lives. Thus, the question of to what extent a law is implemented is germane to our research, irrespective of whether or not that article describes the process for developing the law, and to some extent irrespective of whether or not a law resulted from litigation, the threat of litigation or the legislature and executive branch. Thus, in order to capture the concepts related to our research question and identify relevant studies, we simplified and

adapted a schema presented in Gloppen that identified four related constructs.⁹

Gluppen's formulation was linear, but we made figure 1 circular because our initial literature search suggested that governmental failure to fulfil obligations related to SRHR can result in claims formation anew, as advocates use legal accountability strategies to demand remedy or that a law be clarified. We sought to identify studies that related to at least two of these concepts—or one step in the chain—for inclusion in our review. That being said, our search terms reflected our overarching focus on legal accountability; it is possible that a search focusing on law reform, for example, would identify further articles that meet our inclusion criteria.

First, we searched the terms presented in table 1 in PubMed, Scopus and LexisNexis; LexisNexis is a database with law review articles. The scoping review methodology allows the inclusion of papers that fall outside of a traditional scientific paradigm and after an initial search, we saw that law journals included relevant conceptual and empirical papers.

Study selection

We had two phases of study selection. The first phase, described here, is when we identified 64% (n=122) of the articles ultimately included in the review. The second phase is described in the 'Consultation' subsection.

These searches resulted in 158 articles in PubMed and 4300 in SCOPUS. Based on title, we imported 31 PubMed articles and 167 SCOPUS articles to Zotero. The search on LexisNexis produced more than 10 000 results, so we added search terms to clarify our Low and Middle Income Country (LMIC) focus, producing 4109 results. We sorted these by relevance and stopped looking after we deemed 50 results in a row to be irrelevant. We imported 13 LexisNexis articles into Zotero. Finally, we searched Google Scholar, which uses a different algorithm, to verify the completeness of our results by seeing if Google Scholar produced similar results. We sorted the 4109 results by relevance and stopped looking after we deemed 50 results in a row to be irrelevant (at record 230). Excluding duplicates, we identified 13 relevant results in Google Scholar that we then imported into Zotero.

We deleted 18 duplicates and excluded a further 78 results after reading abstracts and a further 30 after reading all of the articles in full. We also checked the citations of every article we reviewed and identified an additional 24 articles. Scoping reviews often do not apply

Table 1 Phase I search terms

Legal accountability term	AND	SRHR term
'Legal accountability', 'strategic litigation', 'impact litigation', 'jurisprudence', 'legal advocacy', 'public interest law', 'law'		'sexual', 'reproductive', 'LGBT', 'abortion', 'contraception', 'family planning', 'sterilization', 'GBV', 'Violence against women', 'intimate partner violence', 'domestic violence', 'rape', 'maternal'

SRHR, sexual and reproductive health and rights.

Table 2 Inclusion and exclusion criteria applied to phase I

Criteria	Inclusion	Exclusion
Article type	Empirical article, conceptual article, commentary/editorial	Interviews, book reviews
Location	Empirical articles related to low-income and middle-income countries; conceptual articles focused on Low and Middle Income Countries (LMICs) or that discussed LMICs	Articles focusing on Europe, the USA, Australia and other high-income countries that did not discuss LMICs
Date	Published after 1990	Published before 1990
Language	English, French, Spanish	Articles in languages other than English, French, Spanish
Key themes	Addresses at least two elements of figure 1 , including presumed intermediate variables, such as knowledge of the law	Addresses fewer than two elements of figure 1

quality criteria; we followed this convention because the literature we reviewed was heterogenous and was thus not amenable to universal quality criteria.²⁶

[Table 2](#) describes the inclusion and exclusion criteria we applied to phase I of the study selection process.

Charting the data

The articles fell under two broad rubrics: (1) studies detailing particular efforts for legal accountability or to improve the implementation of existing laws and (2) reviews, commentaries and conceptual pieces that describe, assess or propose legal accountability as a strategy more broadly.

We made an extraction tool for the articles falling under the first rubric (n=83) in Excel. The tool included basic information about the study, as well as its key findings about the elements of [figure 1](#), including contextual factors that may have shaped the outcome of a given case or strategy, such as political dynamics or the cultural salience of customary law. We hand coded articles falling under both rubrics 1 (n=83) and 2 (n=39), using thematic codes that we developed after preliminarily reading about half of them. The codes related to relevant contextual factors and largely mirror the rubrics in the Results section below.

We developed memos summarising our thematic codes and shortened the extraction table to formulate our preliminary findings.

Consultation

Phase II of our search was through expert consultation. We initiated an Expert Advisory Group (see the Acknowledgements section) to provide guidance regarding further peer-reviewed and grey literature that would flesh out our findings. In particular, we sought materials related to legal accountability as a general strategy, irrespective of whether or not it related to SRHR, and materials relating to actual efforts to use legal accountability as a strategy, identifying 69 additional sources. This step helped to ensure the programmatic relevance and trustworthiness of our findings. We sought out commonalities and discrepancies among all sources, as well as general differences between the peer-reviewed and the grey literature. To do this, we coded the articles and integrated the sources to our thematic memos.

Collating, summarising and reporting the results

[Table 3](#) summarises the resources reviewed.

Because this is a scoping review, we felt that it was important to specify what did and did not appear in our phase I search of the peer-reviewed literature. Thus, we explicitly note where there were differences between what we found in phase I and phase II. For example, we found no articles specifically focused on women with disabilities in phase I, though several articles mentioned this population. Thus, we note in the Results section that the paragraph relating to women with disabilities is drawn from sources identified during the expert consultation.

Patient and public involvement

Because this paper is not directly related to patient care, this research was done without patient involvement. Patients were not invited to comment on the study design and were not consulted to develop patient relevant outcomes or interpret the results. Nor were patients invited to contribute to the writing or editing of this document for readability or accuracy.

RESULTS

In part 1, we describe the foci of the empirical articles identified through our search terms. In part 2, we synthesise key findings and issues raised by the empirical and the conceptual articles identified through our search terms, as well as the resources identified through our Expert Advisory Group.

Part 1: description of search term results from key word search of empirical literature

The majority (n=55) of the papers were regarding abortion law and abortion care availability, with violence

Table 3 Resources reviewed

	Articles
Phase I	Empirical, n=83 Conceptual, n=39
Phase 2	Recommended by expert advisors, n=69
Total phase I+phase II	N=191

against women (n=10), female genital cutting/mutilation (n=5), maternal health (n=3), general SRH (n=3), Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ+) rights (n=2), banning Traditional Birth Attendants (TBAs) (n=2), child marriage (n=2) and women's rights (n=1) coming next.

Most of these articles explore the gaps between law and practice. However, many articles discuss multiple constructs represented in figure 1. For example, some studies assess why implementation did not fully reflect the current law and how these failures lead to the formation of new claims demanding improved service provision.

The abortion articles focus largely on strategies for bringing the law more in line with human rights obligations and public health guidance and implementation of the law, including the legal advocacy process contributing to the passage of a new law,^{27–29} the extent to which the law is realised or circumvented, reasons for this and/or how to improve implementation^{30–62} and whether the law seemingly led to the desired social outcomes.^{63–67} Other abortion-related articles probe more specific reasons for lack of implementation, namely lack of knowledge among key stakeholders or ideological opposition among community members or providers^{47 61 68–78} and/or law or practice related to conscientious objection.^{79–81}

Each of the five articles regarding Female Genital Cutting/Mutilation (FGC/M) focuses on the implementation of the law, including whether it is implemented and why it is not fully implemented.^{24 82–85} Similarly, the child marriage articles discuss the extent to which laws prohibiting child marriage have the desired effect⁸⁶ and the reasons for failure to implement the law.⁸⁷ The LGBTQ+ rights articles describe the rationale and impact of legal strategies¹⁶ and the gap between constitutional protections and reality.⁸⁸ The three articles related to maternal health focus squarely on the application of a legal strategy, the lessons learnt and the impact.^{89–91} Similar to the other issue areas, the articles regarding SRH broadly explore lack of knowledge about rights and entitlements among community members⁹² and gaps in implementation,⁹³ with one paper exploring the role of codified customary and religious law in undermining implementation of statutory laws and policies regarding SRH.⁹⁴ We also identified an article describing the efforts of Non-Governmental Organizations (NGOs) to use litigation to criminalise certain SRH services.⁹⁵

We maintained a separate TBA category because these articles were about the use of criminal law to stop a behaviour, in contrast to the other maternal health papers, which addressed entitlements enshrined in law. Similar to the other articles regarding the use of criminal law to change SRH-related behaviour, the two TBA articles explored the extent of implementation and barriers to better implementation.^{96 97}

We grouped articles using the terms gender-based violence (GBV), Intimate Partner Violence (IPV), sexual assault and domestic violence under the broader category of Violence Against Women (VAW). These articles were

somewhat more heterogenous than the articles regarding other aspects of SRH, as they examined whether a new law affected the prevalence of IPV,⁹⁸ access to justice for survivors,^{10 99–101} a civil society effort to influence the law¹⁰² and the relationship among politics, state capacity and access to justice.^{103–106}

The articles related to all regions of the world, namely the Americas (n=18), Asia (n=17), the Middle East and North Africa (n=3) and sub-Saharan Africa (n=44). Certain countries were especially well represented, including Colombia (n=8), Ethiopia (n=10), India (n=6) and South Africa (n=11). These countries have abortion laws that are comparatively less restrictive and/or that have been changed in the last decade, and many of the articles examined the extent to which legal abortions were available in these countries. Finally, it is important to note that certain journals were well represented among the papers identified for inclusion, namely the *International Journal of Gynecology and Obstetrics* (n=10), *Reproductive Health Matters* (now *Sexual and Reproductive Health Matters*) (n=10) and *Reproductive Health* (n=8). The remainder of the articles spanned a diverse set of global health, development and law journals.

A few papers explicitly pose a research question similar to ours—regarding the extent to which a particular legal accountability effort yielded the desired impact. Using the Gloppen framing, Kaur finds that while public interest litigation regarding maternal health was successful in court in India, ‘success in the social sense is proving the most challenging to achieve’. At the time Kaur wrote her article, neither the central nor state governments had responded to a recent court decision by issuing instructions regarding women's access to maternity care benefits, also the government had not taken steps to address the broader knowledge and implementation challenges related to maternal health entitlements the court had identified.⁹⁰ In contrast, a study published in the grey literature regarding an Indian Supreme Court judgement related to government-run sterilisation camps found some improvements in terms of clinical quality and respect for patient rights following the issuance of guidelines issued by the Supreme Court.¹⁰⁷

Some papers assess whether or not the law itself is consequential. For example, a paper assessing to what extent the criminalisation of certain kinds of violence against women affected the prevalence of this violence found that assessing impact was challenging, as increased awareness may have led to higher reporting, such that rates of reported violence were difficult to interpret.⁹⁸ A paper analysing the association between legal grounds for abortion in national law and unsafe abortion in 160 countries found a ‘clear pattern’ with countries where abortion is permitted on broad indications having lower incidence of unsafe abortion and lower mortality from unsafe abortion,⁶⁴ a finding confirmed by Henderson *et al.*¹⁰⁸ On the other hand, Anton *et al*, Briozzo and Briozzo *et al* found that Uruguay may be an exception; the chief contributor to reduced unsafe abortion was the adoption

Table 4 Key findings regarding factors shaping the efficacy of legal accountability strategies for SRHR

Ways court or law decision formulated	<ul style="list-style-type: none"> ▶ Administrative or procedural hurdles enshrined in law can stymie the exercise of the right or access to justice ▶ Laws that lack specificity can be hard to enforce ▶ Laws that specifically address potential obstacles to implementation (such as fear of liability) can be easier to implement ▶ Conflict among laws can undermine implementation
Access to courts	<ul style="list-style-type: none"> ▶ Ease of access to the constitutional court is allowed for complainants can shape the realisation of access to justice ▶ The ability to submit amicus briefs or the solicitation of expert testimony shape the case law courts issue
Criminal law (refers to laws criminalising undesirable behaviour, for example, child marriage, and laws that provide remedy to people experiencing an SRHR violation, for example, gender-based violence)	<ul style="list-style-type: none"> ▶ Can create space to have social dialogue on important issues ▶ Criminal laws do not necessarily influence the environment that enables SRHR rights violations, particularly in contexts where people do not trust the judiciary, police or the government more broadly ▶ Marginalised populations may lack access to the remedies enshrined in criminal law ▶ Recourse to criminal law itself can engender further harm, as it is misapplied or abused in a way that reinforces social hierarchies
Cultural norms	<ul style="list-style-type: none"> ▶ Reflecting the distribution of power in society, affected people themselves often do not know what their rights are ▶ Embedded norms that favour the supremacy of men at the household and community levels limited access to justice for women experiencing SRHR violations, as well as the realisation of entitlements ▶ Patriarchal norms can shape the response provided by the health sector, the police and others actor charged with ensuring the implementation of SRHR laws ▶ Enshrining an element of SRH in law can create legitimacy that fosters social change
Politics	<ul style="list-style-type: none"> ▶ A public health frame helped to lessen the influence of politics as well as social and cultural norms ▶ In contexts where the judiciary is more independent, recourse to litigation may be less politicised than legislation
State capacity and resources	<ul style="list-style-type: none"> ▶ State capacity and resources are important drivers of the extent of implementation of both civil and criminal laws related to SRH
Litigation in response	<ul style="list-style-type: none"> ▶ Legal accompaniment can help to ensure the implementation of existing law ▶ Legal advocacy strategies can help to further refine case law, both to make it more expansive or to make it more limited

SRHR, sexual and reproductive health and rights.

of a harm reduction approach to abortion care, rather than the change in law that eventually followed the application of harm reduction.^{63 65 66} Similarly, a socio-ecological study on SRH outcomes in Nigeria found that states where customary and religious law were codified had poorer SRH outcomes, customary and religious law essentially watered down the salience of statutory law.⁹⁴ Three papers explored the concept of ‘alegality’, finding that safe abortion services were being provided in certain contexts with some level of government tolerance, irrespective of the fact that it was not permitted by law.^{35 53 59}

Part 2: article analysis

We identified seven key factors that shape the efficacy of legal accountability efforts. Table 4 provides an overview of the key issues identified in article analysis, which we go on to discuss in detail.

Ways laws or court decision formulated

Many researchers explained that law is not a dichotomous variable; ‘law’ or ‘no law’ does not adequately capture the legal status of a behaviour or entitlement. The framing and phrasing of a particular law is beyond the scope of our review, as there is an entire body of literature on this topic that was not covered by our search terms. However, we describe relevant findings here, insofar as articles

relating to legal accountability describe how the language of a court decision or a law can facilitate or undermine implementation. First, several articles describe administrative or procedural hurdles enshrined in law that stymie the exercise of particular rights or access to justice or even violate human rights themselves, such as the need to obtain forensic ‘proof’ of rape, including forced virginity testing of the survivor.^{37 101 109}

In addition, some laws were described as lacking specificity, such that they are hard to enforce. For example, laws may not clarify which FGM/C practices are being criminalised⁸⁵ or what falls under the health or other exceptions for abortion.^{35 47 48 52 110} A well-known decision in Kenya found that, despite resource limitations, the government had a core obligation to provide access to the right to maternal health, but the decision failed to order concrete actions to realise these obligations, an omission that some observers felt ensured that the decision had limited impact.⁹¹ However, some constitutional scholars assert that courts should not be providing such specific direction, as policy-making and legislating are functions of other branches of government.¹¹¹ Regardless, with few exceptions, courts rarely impose positive duties on governments of the breadth and depth needed to address the social determinants of SRHR inequities, legislative action is required.

Some authors pointed out that laws may be so distant from reality that they are not enforceable and/or they do not actually support their stated aim. For example, one law criminalising FGM/C among minors assumes that women over age 18 years can consent to this procedure, ignoring the powerful and pervasive gender norms that structure social relations.⁸⁵

On the other hand, laws can be written in a way that supports implementation. For example, when it was liberalised, the Ethiopian abortion law stipulated that women's word was sufficient to prove rape, removing fear of liability from abortion providers.²⁷ Similarly, the South African Constitutional Court's decision mandating access to treatment to prevent HIV transmission from mother to child required that the government come up with a justifiable plan of action.¹¹²

Finally, laws exist in a broader legal ecology, as laws relate to one another. One law can undermine another. For example, vigorous enforcement of a law outlawing prenatal sex determination has undermined access to legal abortions.^{54 113} The laws do not actually conflict in this case, but the enforcement of one law is politically visible and beyond what is stipulated in law and policy, causing health providers to eschew the provision of abortion services so as to avoid clinical audits, fines and other costly outcomes associated with the implementation of the law outlawing prenatal sex determination.^{54 113} In some settings, personal status laws, which aim to enshrine cultural mores into law, contradict or undermine SRH-related laws. The laws themselves may not specify which law supersedes the other, and judiciaries may fail to provide clarity.^{114 115}

Access to courts

It is intuitive that the constitution, whether or not direct access to the Constitutional Court is allowed for complainants, and the way the court system functions shape the case law courts issue.¹¹⁶ The South African Constitution, for example, makes their Bill of Rights justiciable and grants the courts wide latitude to allow public interest and class action cases, as well as flexible remedial powers.¹¹⁷ Similarly, the constitutions of several countries in Latin America enshrine health rights and allow comparatively easier access to citizens who believe their rights have been violated.¹¹⁸

Authors describing the evolving legal status of various SRH services and family law in Nepal noted that the make-up of the Supreme Court and the way that the Court functions facilitated decision-making that was in line with evolving international SRH recommendations. The Court created space for input by civil society and the public health community by: mandating the establishment of expert commissions that provided reports to the Court and to the other branches of government, actively using briefs filed by amici ('friends of the court') and inviting expert testimony. This informed the Court's decision-making and engaged and exposed civil society

to the workings of the Court, facilitating more rapid uptake of the Court rulings.¹¹⁹

Criminal law

Violence against women, the banning of TBAs and child marriage and abortion are often addressed in criminal law. With the exception of abortion, all of the articles on these topics assessed the social impact of criminal law. Some authors concluded that criminal law was necessary, but not sufficient, arguing that designating a behaviour as criminal created an enabling environment for subsequent activities to stop a practice. For example, Shell-Duncan *et al* and Nabaneh and Muula found that while the act of criminalisation itself may not be the most effective way to stop FGM, it creates an environment where stopping FGM is possible,^{24 83} while Partners for Law and Development, after reviewing case studies on application of the child marriage law, concluded that 'the true value of law lies in opening possibilities of negotiation and dialogue'.¹²⁰ When complemented by social services, education, training of law enforcement and awareness raising, among other activities, criminal law can effectively function as both a preventive mechanism and a route for survivors to access justice.^{83 85}

At the same time, researchers also note that criminal law does not necessarily influence the environment that enables SRHR rights violations, particularly in contexts where people do not trust the judiciary, police or the government more broadly or where there is a lack of complementary strategies to address deeply embedded hierarchies and norms and to provide support to victims and survivors.¹⁰⁰ In the case of FGM/C, some argue that criminalisation can drive behaviour underground, engendering further public health harm as families avoid seeking needed medical care.^{24 82 85} Articles relating to VAW in particular describe how poor access to justice, lack of policies to address the drivers of violence and the normalisation of violence mean that criminal law can be immaterial for those who experience gender-based violence. For example, anthropological research revealed how efforts to educate women about their rights did not address the gendered labour dynamics that made women and their families dependent on a male breadwinner.¹²¹ Moreover, survivors and their families may not wish to send their own family members to the criminal justice system.¹²² Some countries' policies or national strategies to address violence against women identify the healthcare system as a key entry point for access to justice for people who have experienced violence in the home, but the health system too may lack the capacity to provide confidential, compassionate care and referral.¹²³ Finally, humanitarian environments, particularly conflict and postconflict settings, can present extraordinary legal, administrative, logistical and cultural challenges for people seeking justice, as well as for the establishment of mechanisms to bring justice to affected communities.^{124 125}

Though we found little on people with disabilities in the peer-reviewed literature, materials suggested by the expert advisors detailed how people with disabilities, particularly women, face significant obstacles in accessing the judicial system, as well as in obtaining the desired result from the judicial system. Though most countries do not collect disaggregated data, 'invisibilising' the problem, women with disabilities are generally disproportionately affected by gender-based violence, which can be pervasive and normalised.^{126–128} In addition to barriers people with physical disabilities face in actually presenting at and interacting in police stations and courtrooms, advocates have described lack of knowledge and widespread stigma surrounding disability among judges and advocates, such that some judges do not consider women with disabilities to be credible reporters regarding abuse they have experienced; lack of awareness or financial resources among affected women; perceptions in communities and the judicial system that women with disabilities cannot be violated as they are diminished women; lack of support for sign language interpretation and other alternative communication strategies and lack of availability of adequate medical and forensic services.^{127 129 130}

Finally, it is important to note that criminalised populations, such as commercial sex workers, injecting drug users, undocumented migrants and others, may lack recourse to the remedies provided in law *de jure* or *de facto*,^{131 132} as they are criminalised themselves.¹⁴

Some critiques aver that not only can criminal law have no or mixed impact on the behaviours it seeks to prohibit but also recourse to criminal law itself can engender further harm. First, criminal law can be misapplied or abused, such that it reinforces social hierarchies.¹³³ For example, NGO researchers have found that child marriage laws may be invoked by parents who object to consensual relationships that their children are in, while situations where children are forced into unwanted unions are not brought to the police.¹³⁴ Relatedly, higher status families can be protected from laws relating to child marriage and violence against women by virtue of social connections, political power and financial resources, while lower status families are charged.^{120 135} Criminalisation also contributes to the growth of carceral systems and their attendant harms, often at the same time as the state withdraws from providing other needed services.¹³⁶

In sum, there were differences among the studies in findings, but broadly speaking, they share the conclusion that criminal law is not sufficient and that in some contexts, it may induce further harm. This is not a novel finding. Scholars assessing the role of rape and other criminal laws note that exclusive focus on criminal law 'oversimplify(ies) the problem and the solution'.¹⁰⁶

Cultural norms

The extent to which various laws are enforced is shaped by social and cultural norms and the distribution of power in a society.¹⁴ Many articles noted or described the ways

that cultural norms, particularly patriarchy, undercut the social impact of legal accountability efforts.

In part reflecting the distribution of power in society, affected people themselves often do not know what their rights are. As a result, their lives may be unchanged by recent case or statutory law and they may not seek access to justice in cases of violations. Women, particularly poor, minority and otherwise historically oppressed groups of women, may not think of themselves as rights holders.¹³⁷ If they do know their rights, they may face social censure for seeking remedies for violence from the judicial system, as this act is perceived as making a private, family matter public.¹¹⁵

Studies found that embedded norms that favour the supremacy of men at the household and community levels limited access to justice for GBV survivors,^{10 101 138–140} as well as compliance and enforcement of laws outlawing FGM/C^{54 83–85} and child marriage⁸⁷ and promoting SRH more broadly.^{52 93 141} In some contexts, survivors may be actively discouraged from claiming their rights, such as family members and religious leaders stopping women from reporting domestic violence or even intervening with medical and judicial actors to stop cases from proceeding.¹³⁸

Patriarchal norms also shape the response provided by the health sector, the police and others actors charged with ensuring implementation as norms permeate professional culture and bureaucratic routines.^{10 33 60 85 106 142} For example, police can exercise significant discretion in deciding what constitutes domestic violence and thus, in issuing protection orders and making arrests.¹²⁷ In some contexts, police have reportedly been dismissive and/or violent, and if women do manage to make it to court, the court does not inform them of the decision taken.⁹⁹ Specialised police to enforce VAW laws do not necessarily overcome these norms and can be further plagued by their inability to reach all areas of the country, leaving people without access in hard to reach areas.¹⁰⁰

The judiciary can also make it challenging for survivors to seek justice. Authors describe that the judiciary can reflect and perpetuate gender norms and biases present in society at large, affecting their decision-making. For example, Lankenau described judges routinely asking women to produce medical certificates to 'prove' rape, though these certificates were not required by law.¹⁴³ Similarly, judges may think that violence in the home and other harmful practices are social problems that should not be addressed by the judiciary.¹³⁷ As a consequence, some judges prioritise men's property interests over women's safety and thus refrain from ordering abusive men to leave the home or to provide financial support to their wives/partners.¹⁴² In these examples and others, judges stereotype claimants, potentially leading them to misinterpret or to misapply the law.¹⁴⁴ Gendered hierarchies of power also shape who is on the judiciary, with women and other historically oppressed groups typically not proportionately represented in high courts, if they are represented at all.¹³⁷

We identified two papers that focused on social and cultural norms besides gender norms as such. Both papers emphasised the importance of directly eliciting and engaging existing norms when trying to create a legal accountability strategy, whether those norms relate to the Islamic religious position¹⁴⁵ or to customary courts.¹⁴⁰ This strategy can include ensuring the engagement of those affected by a law, such as consulting with TBAs about what laws and programmes might ensure that TBAs are referring women to medical care when required.^{83 97}

Finally, we identified one paper that explicitly sought to assess whether laws were associated with changes in cultural norms; the authors found that improvements in the laws governing child marriage were associated with greater disapproval of intimate partner violence.¹⁴⁶ Economists Aldashev *et al* propose a mechanism for these kinds of change; in situations where formal law and cultural practice conflict, marginalised groups may have the option of recourse to the judiciary. The law acts as a ‘magnet’, pulling the custom in a direction that is more favourable to marginalised groups.¹³

In contrast to the argument that the impact of litigation is undercut by the persistence of sociocultural norms, some papers argue that enshrining an element of SRH in law can create legitimacy that fosters social change, such as decisions resulting from public interest litigation related to LGBTQ+ rights in Chile and to women with HIV in Namibia.^{6 16} Naming something in law makes it visible, and for LGBTQ+ people, women with HIV, sex workers and other marginalised groups, it communicates that they are human beings and thus rights bearers,^{6 16} paving the way for further litigation and engagement with the legislative branch to establish their rights.⁶

Politics

Social and cultural norms play a key role in shaping the context for legal accountability efforts, as do politics at the global, national and community levels. Political processes and competition can reflect and influence social and cultural norms. For example, a paper assessing the trajectory of a law regarding VAW found that the original intent for passing a new law was partly political—to elevate the government’s legitimacy on the world stage.¹⁰⁴ A few years later, political leaders’ strategy changed and they were more concerned with maintaining a strong alliance with conservative religious actors than international legitimacy, so they weakened the law.¹⁰⁴ Similarly, implementation of laws may vary subnationally, as local politicians react to national level court decisions through the lens of their own political ambitions.¹⁴⁷

Many papers concluded that a public health frame helped to lessen the influence of politics as well as social and cultural norms. Strategies that emphasised the morbidity, mortality and other undesirable outcomes associated with VAW, FGM/C and unsafe abortion illuminated a clear pathway for legal accountability.^{27 28 37 57 61 148} On the other hand, some authors pointed out that a narrow public health framing could weaken commitment

to the broader social determinants of SRH, such as gender equity and human rights.¹⁴⁹

Moreover, in contexts where the judiciary is more independent, recourse to litigation may be less politicised than legislation, such that advocates turn to the courts as the option that is more insulated from the short-term vagaries of politics.^{150 151} Even here, though, advocates need to consider political concerns when developing strategic cases, such as how judges and the public will interpret the case.¹⁶

In addition to politics, several papers addressed what they described as political will in ensuring the implementation of case and statutory law. Political will was shaped by particular individuals in leadership positions,⁶⁰ as well as the government’s desire to meet public health objectives^{37 61 62} and international treaty commitments.²⁸ Domestic political will may be less durable when significant support for the implementation of law or access to justice comes from external sources, particularly when external actors maintain procedural oversight.^{40 93 103} In extreme cases, external support for access to justice for SRH violations may crowd out domestic political will for other human rights and rule of law concerns, undermining the integrity of the judicial system as a whole.¹⁰³

State capacity and resources

Norms and politics moderate the relationship between law and social outcomes. In addition, limited state capacity and resources were cited by the majority of the articles as an important driver of poor implementation of both civil and criminal laws related to SRH, though state capacity was the central concern in few articles. Articles described the ways that low capacity undermined the ‘roll out’ or the causal chain from law to practice, such as lack of guidance for operations or collaboration^{82 101} and health systems challenges outside of the remit of a given law, such as poor roads, poor coverage of health services, lack of social services and rude treatment by healthcare providers.^{58 82 96 145}

State capacity to deliver high-quality SRH services is determined in part by the capacity and accessibility of the health system overall. Several studies concluded that SRH entitlements were more available in contexts where law and policy also provided for free services, for non-discrimination in the delivery of care, and where health facilities were relatively more accessible.^{47 96 97} In brief, they note that entitlements and prohibitions on undesirable social practices are less meaningful when the state and its services and remedies are functionally not accessible to citizens.

Litigation in response

As suggested by figure 1, claims making can be an ongoing, iterative process. We identified two key approaches in the literature: (1) legal accompaniment to ensure the implementation of existing law and, (2) legal advocacy strategies to further refine case law, to make it more expansive or to make it more limited.

First, some NGOs provide ‘legal accompaniment’ or legal empowerment strategies to help individuals to obtain services to which they are legally entitled. Community paralegals, lawyers and others accompany people through administrative processes to obtain services or to contest the denial of services.^{29 60} In addition to helping individuals to access SRH services, the groups providing these services can aggregate and analyse their case data to better understand the key drivers of gaps between the law and on the ground reality.^{29 60}

Civil society may also pursue further public interest litigation with lower courts when individuals are unable to access entitlements. For example, advocates in Colombia litigated when the public or private sectors failed to provide abortions that were permitted by law and when state actors were failing to respect women’s right to information about SRH services.^{29 42} Civil society organisations in Colombia, Nepal and South Africa developed a ‘long game’ vision, deploying cause lawyering to develop a robust body of higher court case law on gender equity, LGBT rights and SRH services.^{29 47 119 152} This strategy can also be used to establish limits on entitlements. Religiously oriented NGOs in some countries have pursued litigation in higher courts to oppose legislation or court decisions relating to the provision of abortion and SRH services to adolescents.^{81 95}

Finally, court systems themselves may proactively react to an earlier decision, such as the Chief Justice of the Delhi High Court taking what is called a *suo moto* (on its own motion) decision to seek accountability for the maternal death of a homeless woman in New Delhi following the Shanti Devi decision, which found that the government had failed to fulfil Devi’s rights to maternity entitlements.⁹⁰

Ways forward

Several articles proposed specific approaches to assess the potential impact of legal accountability strategies, namely strategic litigation, or to lessen the gap between case or statutory law and practice.

Women’s Link Worldwide created a checklist for strategic litigation that assesses the existing rights framework, the independence and knowledge of the judiciary, the human rights and litigation capacity of civil society and the existence of a network that can build on the opportunities created by litigation.¹⁵³ Donors and others have articulated broad considerations for assessing whether or not strategic litigation may contribute to a desired goal, as well as for considering the likelihood of risks, such as the potential for violence towards the litigants, incarceration of the litigants if their case is unsuccessful, stigma, disappointment, hostility from people and institutions that are opposed and retraumatisation of survivors.^{7 8 137 154 155}

Some practical resources look at particular countries or regions, such as India and sub-Saharan Africa.^{137 156 157} In contrast to the peer-reviewed articles, some of the practical guidance addresses the more proximal impacts of legal accountability strategies, such as empowerment

of violence survivors and increased community trust in the judiciary; these practical resources also advocate for victim-centred approaches to strategic litigation.⁷

Moving from winning cases to implementing case law, Women’s Link Worldwide created mapping exercises wherein they mapped barriers to implementation of court decisions, including many of the factors the empirical papers included in our review identified as barriers, such as lack of knowledge regarding the law, gratuitous requests for additional documents/requirements by service providers and widespread stigma.⁵⁵ In legal systems where the thresholds to bringing suit are low, those whose rights are violated can bring suit, contributing to widespread judicialisation, eventually fostering implementation of an existing law.⁵ For example, a 2008 decision by the Constitutional Court in Colombia combined 22 individual cases regarding state failure to ensure the fulfilment of the right to health and required that the government take specific actions in specific timeframes, including making major structural changes to benefit plans.¹¹¹

Several papers focused on the provision of implementation support for new case or statutory law, such as the creation of national committees to guide implementation, training, changes in clinical protocols, task-shifting among providers, awareness raising within communities and health providers and NGO support to facilities.^{34 37 38 42 51 60–62} A comparative case study of the implementation of abortion services in six countries aimed to inform practice-based guidance by systematically describing the health sector’s role in operationalising abortion laws.³⁷ Researchers in Zambia used an implementation science approach to evaluate the implementation of medical abortion, with a focus on health worker capacity, supporting pharmacists as prescribers and community mobilisation. The researchers used pre and post questionnaires to assess changes in knowledge and attitudes and, more importantly, they tracked the number of facilities providing services and the number of people receiving services.⁴¹

Structuralist social scientists study how opportunity structures affect the likelihood of success.^{22 158} They not only include some of the factors in the Women’s Link Worldwide checklist but also ‘zoom out’ to consider broader issues, such as the likelihood of achieving success in the courts as opposed to the likelihood of success in the political arena and the costs and risks associated with each strategy.^{158 159} Reutersward *et al* applied some of this thinking to reproductive health, suggesting that strategists should not see the state as a unitary actor, but examine the opportunities provided by particular institutions, agencies and discourses, including the constitutional court and other elements of the judiciary,²⁸ an approach that many NGOs and advocates take.^{160 161}

DISCUSSION

Almost every article included in the review stated that legal accountability strategies are most effective when they

are part of a broader effort to effect change, no article disagreed with this point. Other elements of a comprehensive effort to change structures that give rise to SRHR failures include media advocacy, social mobilisation, legal education, political accountability and electoral politics and formal communication with governmental and international bodies, with legal accountability strategies operating in synergy with other strategies.^{6 112 162 163}

Comprehensive (ie, not siloed) strategies can in turn shape some of the factors that influence the trajectory of legal accountability efforts, such as cultural norms, rights knowledge among stakeholders and policy.

At the same time, while recognising its limits, none of the authors discounted the justification for legal accountability, with many explaining that reliance on the judiciary may be necessary to effect change and that the act of claiming rights can empower, nurture collective identity and change social expectations about certain groups' 'right to have rights'.¹⁰

However, even when legal accountability efforts are successful by traditional metrics, legal avenues for change can be imperfect tools for justice, with factors such as barriers to accessing the courts, the extent to which courts adopt a programmatic approach in their decision-making and to what extent the case at issue was intended to have a collective impact, shaping the distribution of benefits stemming from legal accountability.¹⁶⁴

Court decisions are often framed in narrow public health and legal terms that do not comprehensively address the social determinants of SRH or of poor SRH healthcare quality, access and policy. Some authors apply an intersectionality or reproductive justice lens to examine the impact of this limited frame, finding that the 'acquisition' or 'expansion' of rights through new case law can oversimplify complex power relations and more powerful members of a given group, such as wealthier women, might be the primary beneficiaries of these new rights.^{10 54 139} Focusing on one experience of injustice, such as IPV, fails to capture the multidimensional exclusion many people experience.^{105 139}

Further applying the reproductive justice lens, some authors explicitly stated that rights and entitlements in SRH can be better realised when these and other basic rights are delivered by a robust, affordable public sector.⁴⁴ Justiciable rights can contribute to the institutionalisation of such a robust public sector, but litigation of these rights is not sufficient to ensure access.¹⁶⁵

We identified several key gaps in the literature. First, our search yielded very little on the SRHR of men and non-binary people, as well as on legal accountability strategies that tried to engage these groups. Second, we found little on the interplay among the legislature, the executive and the Courts, though this dynamic could be important to understand law-making and implementation. Finally, as noted, none of the articles identified in our initial search focused on people with disabilities.

Our review has several limitations. First, by their nature, scoping reviews require simplification, as articles are

distilled to rows and columns in an extraction tool. We used coding to try to maintain nuanced elements of each article, but the process of synthesising inevitably results in information and insights being lost. We recognise that that this simplification is unfortunate given our conclusion that context is key to shaping the trajectory of legal accountability efforts. Second, our search strategy yielded tens of papers exploring the link between law and practice. As explained, we included these articles because the link between law and practice is germane to our research question regarding the efficacy of legal accountability strategies. That being said, it is possible that a different search strategy (not focused on legal accountability) would have yielded additional articles on the relationship between law and practice. Third, we did not seek articles regarding the use of international human rights mechanisms, as this area is comparatively better researched than the use of national and subnational law. However, in some cases, there could be a dialectic between international human rights law and domestic law and court decisions, such that our exclusion of this area limited our analysis. Moreover, because our review included heterogeneous literature, we have some studies analysing primary data and some papers based on secondary data. The inclusion of both could magnify biases, as certain experiences and cases are 'counted' multiple times. To hedge against such bias, we separated our findings into two sections, so that section 1 describes only primary data. Finally, this paper is about SRHR, but does not consider broader domains that may be determinants of SRHR, such as, exposure to pollution or the freedom of association rights of stigmatised groups, such as sex workers.

CONCLUSION

Assumptions about the role of law are often central to agenda setting within SRHR at the global and national levels. Legal accountability encompasses strategies that are used to ensure implementation of existing law to provide remedies and redress and reform of law to make it consistent with other legislation or international standards. This scoping review creates an important basis for future research by synthesising existing research and thematic findings regarding legal accountability for SRHR. Because we consulted heterogeneous literature, the paper should be accessible and usable to both the global health and the human rights community, laying the groundwork for interdisciplinary collaborations. Our findings make it clear that legal accountability can be effective as part of a broader, long-term strategy, with due attention to context. It is crucial that our efforts to learn more about legal accountability accommodate these questions of long-term strategy and context.

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