

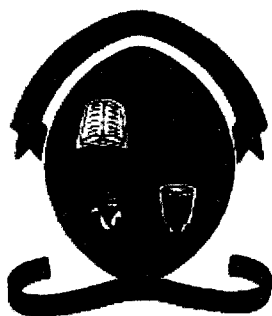
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**ANTI-DISCRIMINATION LEGISLATION IN
DEMOCRATIC SOCIETIES; HIV/AIDS, A NOVEL
TEST CASE**

Kaumbu Mwondela

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University of Zambia.
Lusaka,
November, 2003.



**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

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***ANTI-DISCRIMINATION LEGISLATION IN
DEMOCRATIC SOCIETIES; HIV/AIDS, A
NOVEL TEST CASE***

By

KAUMBU MWONDELA

***Being a dissertation submitted in partial fulfilment of the
requirements for a Bachelors of Laws (LL.B) Degree at
the University of Zambia.***

School of Law
University of Zambia
Lusaka,
November 2003.

DEDICATIONS

This dissertation is dedicated to the memory of my beloved late grandfather Willie Robert Mwendela (1921-2002). *Kaka*, you were and still are my inspiration, my yard stick and my mentor. *Kalunga ami lame Chikuma kuma. Vulye Vulye Mwane.*

ACKNOWLEDGEMENTS

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My Father in Heaven, you've done it yet again! I never get used to what you do. Thank you.

Now to the only God our Saviour, to Jesus Christ our Lord, Be Glory and Majesty, Dominion and Authority Forever. Amen.

Kaumbu Mwondela.

ABSTRACT

The advent of the Human Immuno Deficiency Virus-HIV and Acquired Immuno-Deficiency Syndrome- AIDS, has posed serious challenges to modern societies, threatening to undermine decades of social and economic gains. Not only does the pandemic have a clinical impact i.e. high mortality (200 deaths per day in Zambia attributed to HIV related illnesses), but furthermore, affects the enjoyment of freedoms and liberties that underpin society's democratic construct. Stigma and discrimination of people on the basis of perceived or actual HIV status, has resulted in denial of enjoyment of various rights ranging from the right to life, right through to such rights as to marry and found a family, with everything in between. Furthermore, they have been found to increase vulnerability to the pandemic and to undermine prevention and treatment efforts. With many policy responses being shaped by the all too familiar and often misconceived debate about public health versus individual rights, the delineation of legal rights and duties has been a necessary part of the policy debate. Moreover, the ongoing reports of serious and unjustified encroachments on the civil liberties of people with HIV have established beyond doubt that the law has a central role to play in HIV and AIDS policy. Anti-discrimination clauses in Constitutions and other legal codes are tools that must be utilised to combat HIV related discrimination. Historically, such clauses have made it unlawful to discriminate, thereby providing relief to victims of discrimination, but also, more proactively, engendered a respect for the rights of individuals. There is thus, a need to engage with such clauses so as to address the novel situation of HIV/AIDS.

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1. *Chileshe v ZCCM* [1995-1997]ZR148(SC)
2. *Edith Zewelani Nawakwi (Female) V The Attorney-General*[1990 – 1992] ZR 112 (HC)
3. *Longwe v Intercontinental Hotels*
4. *Zambia Publishing Company v A. Zaloumis and K. Mathis* [1978]ZR10(SC)
5. *Whitehead v The People*[1968]ZR9(HC)
6. *Hoffmann v South African Airways*(2001)(1)SA(CC)
7. *Pharmaceutical Manufacturers Association of South Africa and 41 others v The President of the Republic of South Africa and others*, Case No. 4183/98.
8. *Jansen van Vuuren and another NNO v Kruger*, 1993(4) SA 842(A).
9. *C v Minister of Correctional Services*, 1996(4) SA 292.
10. *S v Cloete*, 1995(1) SACR 367(W).
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13. *Bragdon v Abbott* 524 US. 624 (1998).
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1. The Constitution, CAP 1 of the Laws of Zambia.
2. Penal Code, CAP 87 of the Laws of Zambia.
3. Penal Code of 1965
4. Industrial and Labour Relations Act, CAP of the Laws of Zambia
5. Electoral Act, CAP 13 of the Laws of Zambia
6. Employment Equity Act No.55 of 1998, SA.
7. Promotion of Equality and Prevention of Unfair Discrimination Act No.116 of 1990, SA.
8. Industrial and Labour Relations Act CAP 269 of the Laws of Zambia.
9. Judicature Administration Act CAP 24 of the Laws of Zambia.
10. Local Courts Act, CAP 29 of the Laws of Zambia .
11. Subordinate Courts Act, CAP 28 of the Laws of Zambia.
12. Criminal Procedure Code Act, CAP 88 of the Laws of Zambia.
13. High Court Act, CAP 24.
14. Supreme Court, Act CAP 25.
15. Human Rights Commission Act, CAP 48 of the Laws of Zambia.
16. Commission for Investigations Act, CAP 39 of the Laws of Zambia.
17. National HIV/AIDS/STI/TB Council Act, No.10 of 2002.
18. Constitution of the Republic of South Africa.
19. Labour Relations Act No. 66 of 1995, SA.

20. Medical Schemes Act No. 131 of 1998, SA.
21. The Constitution of the Republic of Namibian
15. Labour Act, No. 6 of 1992, Nm.
16. Americans with Disabilities Act of 1990.
17. Rehabilitation Act of 1973, USA.
22. Disability Discrimination Act, 1992, Australia.

ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CJ	Chief Justice
HIV	Human Immuno Deficiency Virus
HRW	Human Rights Watch
IPU	Inter-Parliamentary Union
IRA	Industrial and Labour Relations Act
IRC	Industrial Relations Court
NGO	Non Governmental Organisation
PHRC	Permanent Human Rights Commission
PWA	People Living With HIV or AIDS
SADC	Southern African Development Community
STD	Sexually Transmitted Disease
STI	Sexually Transmitted Infection
TB	Tuberculosis
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNGASS	United Nations General Assembly
VSU	Victim Support Unit
WLSA	Women and Law in Southern Africa Trust
ZARAN	Zambia AIDSLaw Research and Advocacy Network

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INTRODUCTION

The advent of the Human Immuno Deficiency Virus-HIV and Acquired Immuno-Deficiency Syndrome- AIDS has prompted a re-thinking of traditional public health approaches to epidemics. It has become trite that protecting the human rights of both infected and affected people is a necessary element of the response to the epidemic. There is increasing recognition that public health often provides an added and compelling justification for safeguarding human rights, despite the respect, protection and fulfilment which they merit in their own right. Regarding HIV/AIDS, an environment in which human rights are respected has demonstrated that vulnerability is reduced, those infected with and affected by HIV/AIDS live a life of dignity without discrimination and the personal and societal impact of HIV infection is mitigated.

RESEARCH OBJECTIVES

The **general objective** of the paper is to inform the enactment/formulation and strengthening of anti-discrimination legislation, with a view to reducing the incidence and mitigating the impact of discrimination on the basis of perceived or actual HIV status in Zambia.

The **specific objectives** of the research include:

- (a) To discuss discrimination as a phenomenon that has existed in legal history
- (b) To analyse the legal and human rights dimensions of discrimination, vis-à-vis HIV/AIDS.

- (c) To identify, analyse and evaluate institutions that enforce anti-discrimination law and policy, and their effectiveness
- (d) To analyse the responses of other Countries regarding anti-discrimination legislation and policy vis-à-vis, HIV/AIDS.
- (e) To make recommendations to inform the enactment/formulation and strengthening of anti-discrimination legislation.

RESEARCH QUESTIONS

1. Does discrimination in general, and of people with HIV in particular, adversely affect a democratic society?
2. Does the law have a role to play in mitigating the impact of HIV/AIDS?
3. What should be done to enhance protection and promotion of individual rights in the face of HIV/AIDS?

METHODOLOGY

The theoretical approach that informed this research was based on a human rights framework as it is enunciated in the International Guidelines on HIV/AIDS and Human Rights. The essay subscribes to Friedmann's¹ position that the principle legal values of a modern democracy may be summarised as being, firstly, the legal rights of the individual, secondly, equality before the law, thirdly, control of government by the people and lastly, the rule of law. Equality before the law entails equal protection under law. It is therefore in keeping with the tenets of democracy to ensure equitable treatment of all persons, particularly so of PWA in the context of the HIV/AIDS pandemic.

¹ Friedmann W. Legal Theory, 5th Ed, (2002).

Literature review was conducted in the University of Zambia library as well as in the School of Law, yielding two informative reports i.e. obligatory essays of previous students of the School of Law. These are listed below.

Furthermore, reports of Non-Governmental Organisations addressing HIV/AIDS were consulted e.g. Women and Law in Southern Africa, Zambia AIDSLaw Research and Advocacy Network, Afronet, Network of Zambian People Living with HIV/AIDS, the Policy Project, Legal Resources Foundation etc.

In addition, the Internet based research was conducted yielding, *inter alia*, International Standards as they are summarised in the International Guidelines on HIV/AIDS.

Finally, the Laws of Zambia, 1995 Edition (Revised), case law (both local and foreign), as well as policies of such bodies as the National HIV/AIDS/TB/STI Council and others, were consulted. Documents reviewed are in the Bibliography.

CHAPTER I

DISCRIMINATION IN ZAMBIAN LEGAL

HISTORY

"All human beings are born free and equal in dignity and rights. . . "
Universal Declaration of Human Rights (article 1)

1.0. INTRODUCTION

Equality is the cornerstone of every democratic society which aspires to social justice and human rights. In virtually all societies and spheres of activity, various categories of people are subject to inequalities in law and in fact. This situation is both caused and exacerbated by the existence of discrimination in the family, in the community, in the world of work, in social service provision, etc. While causes and consequences may vary from country to country, discrimination is widespread. It is perpetuated by several factors including ignorance, the survival of stereotypes and of traditional, cultural and religious practices and beliefs, etc¹.

1.1. Discrimination Defined

In general, discrimination refers to any form of distinction, exclusion or restriction affecting a person, usually, but not only, by virtue of inherent personal characteristics, irrespective of whether there is justification for these measures². It has to do with unwarranted victimisation, unjustifiable differentiation and unfairness. From a Legal perspective, discrimination takes into account the justification- vis-à-vis purpose,

¹ Fact Sheet No.22, *Discrimination against Women: The Convention and the Committee* . Also A.K. Jayasree, *Addressing stigmatization and discrimination of PLWHA in Kerala*, abstract [ThPeG8262] presented at World AIDS Conference (2002), Barcelona, Spain.

² UNAIDS, *Protocol for the Identification of discrimination against people living with HIV*, (2000), p4

proportionality and effect. Therefore, not all differential treatment is 'legal discrimination'. Differential treatment based on objective and reasonable criteria may be permissible. The Zambian Constitution for example, defines "discriminatory" as;

affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.³

The Constitution however, derogates from the right to non discrimination in Article 23(4.c and d). It says that the anti-discrimination clause shall not apply to matters with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law, or where the customary law of a particular race or tribe would be more appropriate, to the exclusion of any law. This means that even where the customary law in question is discriminatory, it is outside the ambit of the Constitutional provision. This state of affairs will be discussed to greater detail in Chapter IV of this dissertation. For now, suffice to say that this has fundamental implications, particularly for women and other vulnerable groups including People living with HIV or AIDS (PWA). The Constitution further permits derogation from rights based on inter alia, 'reasonable requirements' to do so.⁴ Moreover, in commenting about the anti-discrimination clause in the Industrial and Labour Relations Act (IRA)⁵, the Supreme Court made the following point.

³ CAP 1 of the Laws of Zambia, Art 23(3)

⁴ Art 25 provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Articles 13, 16, 17, 19, 20, 21, 22, 23 or 24 to the extent that it is shown that the law in question authorises the taking, during any period when the Republic is at war or when a declaration under Article 30 is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions if it is shown that the measures taken were, having due regard to the circumstances prevailing at the time, reasonably required for the purpose of dealing with the situation in question.

⁵ CAP 269 of the Laws of Zambia, s108.

The liability of the employer and the entitlement of the employee to a judgment in his or her favour must necessarily depend on the **absence of reasonable or just cause**, where despite any colourable excuse cited or contractual clause cited, the real, substantial, dominant, or operative reason is the discrimination on one of the grounds. The rule could not have been designed to benefit or to protect workers who are guilty of wrongdoing in fact which is sufficient to warrant the termination, penalty or disadvantage inflicted.⁶

1.2. Legal Framework

The legal framework within which human rights are protected and promoted in Zambia consists of both domestic and international standards. It is dualist in character, meaning that the international human rights standards embraced by Zambia are not *per se* self-executing at domestic level. They require actual domestication unless already pertaining in domestic or municipal law.

The human rights legal framework comprises the following instruments inter alia:

- i. United Nations(UN) and International Labour Organisation (ILO) instruments including the six main UN human rights instruments namely the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of Racial Discrimination (CERD), the Convention Against Torture (CAT), the Convention on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), as well as eight ILO fundamental rights and freedoms conventions.⁷

⁶ *Chileshe v ZCCM* [1995-1997]ZR148(SC)

⁷ As at the time of writing, Zambia had ratified the following ILO instruments: Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87); Right to Organize and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); the Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

- ii. Regional instruments, including the African Charter on Human and Peoples' Rights (ACHPR).⁸ In addition are various declarations and codes such as the Abuja Declaration⁹, the SADC Code on HIV/AIDS and the Workplace¹⁰, the United Nations General Assembly Special Session on HIV/AIDS¹¹ and more recently, the Maseru Declaration¹².
- iii. National codes, of which the Constitution of the Republic of Zambia is the main one. In addition are subordinate pieces of legislation known as Acts of Parliament or Statutes¹³.

Non-discrimination is recognised as a core human right, essential to ensuring human development, well being and dignity in both domestic and international standards. It is thus recognised in national law (Constitution, IRA), and International Human Rights Law. Regional instruments also recognise and prohibit discrimination.¹⁴ These prohibit discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, disability, fortune, birth, or other status.

Two of these grounds are examined in cursory fashion below, i.e. discrimination based on race and on sex or gender, with a view to demonstrating that the ethos underlying discrimination is the same irrespective of the purported grounds for its justification and is therefore undesirable for a State pursuing democratic ideals. It will therefore be shown that discrimination on grounds of sex/gender or race/colour, has been denounced

⁸ (Banjul Charter) adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

⁹ 27 April 2001

¹⁰ 1997.

¹¹ June 2001.

¹² July 2003

¹³ For example the Industrial and Labour Relations Act, CAP 269 of the Laws of Zambia which provides the law relating to trade unions, the Zambia Congress of Trade Unions, employers' associations, the Zambia Federation of Employers, recognition agreements and collective agreements, settlement of collective disputes, strikes, lockouts, essential services and the Tripartite Labour Consultative Council; the Industrial Relations Court and to provide for matters connected with or incidental to the foregoing..

¹⁴ UNAIDS *Protocol for the Identification of discrimination against people living with HIV*, (2000), p4

as being contrary to a life of dignity and the pursuit of democracy, and to this end, in some cases, has even been litigated upon.

1.3. DISCRIMINATION BASED ON GENDER

Women have, for centuries, been the victims of unequal and unfair treatment by their male counterparts and society in general. They have faced subordinated positions in the family, in politics, in commerce and the economy. The concept of equality means much more than treating all persons in the same way. Equal treatment of persons in unequal situations will operate to perpetuate rather than eradicate injustice. True equality can only emerge from efforts directed towards addressing and correcting these situational imbalances¹⁵. It is this broader view of equality which has become the underlying principle and the final goal in the struggle for recognition and acceptance of the human rights of women.

1.3.1. CEDAW

In 1979, the General Assembly adopted the CEDAW¹⁶. The Convention sets out, in legally binding form, internationally accepted principles on the rights of women which are applicable to all women in all fields. The basic legal norm of the Convention is *the prohibition of all forms of discrimination against women*. Sadly, despite the existence of this and other instruments, women still do not have equal rights with men. Discrimination against women continues to exist in every society. The convention defines discrimination as being

¹⁵ Fact Sheet No.22, Discrimination against Women: The Convention and the Committee

¹⁶ The CEDAW entered into force in Zambia on 20th July 1985

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁷

To combat gender-based discrimination, the Convention requires States parties to recognize the important economic and social contribution of women to the family and to society as a whole. It emphasizes that discrimination will hamper economic growth and prosperity. It also expressly recognizes the need for a change in attitudes, through education of both men and women to accept equality of rights and responsibilities and to overcome prejudices and practices based on stereotyped roles. Another important feature of the Convention is its explicit recognition of the goal of *actual*, in addition to *legal*, equality, and of the need for temporary special measures to achieve that goal.

The Convention calls for States to undertake specific measures to eliminate discrimination. These include, *inter alia*, legislative measures to eliminate discrimination against women in various areas of public and private life,¹⁸ to take in all fields, particularly in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women,¹⁹ to take steps towards the modifying of social and cultural patterns through, *inter alia*, education,²⁰ to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women,²¹ to take all appropriate measures to ensure to women, on equal terms with men and without

¹⁷ CEDAW Art. 1

¹⁸ *Ibid*, Art.2 generally.

¹⁹ *Ibid*, Art.3

²⁰ *Ibid*, Art.5

²¹ *Ibid*, Art.6

any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations,²² etc.

1.3.2. Jurisprudence

Zambian law recognises the evil of discrimination on the basis of sex and so specifically prohibits it both in the Constitution and in the IRA. An example of this is furnished by two cases, the first being that of *Edith Zewelani Nawakwi (Female) V The Attorney-General*²³. In this case, the petitioner, being the single parent of two boys, sought to have her children included in her passport. She was denied this without the consent of the putative father's consent. The petitioner challenged this as being discriminatory against women, relying on the provisions of Articles 13, 25 and 29 of the Republican Constitution of 1991. It was held that the practice of requiring the consent of the male parent meant that a mother of a child is not regarded by the Government to be an equal parent to a father. The judge found that this practice is discriminatory to mothers on no other basis than the fact that they are females. In a passionate judgement, it was said that

In my considered view it is not at all justified, from whatever angle the issue is looked at, for a father to treat himself or to be treated by the institutions of society to be more entitled to the affairs of his child/ren than the mother of that child or those children. The mother is as much an authority over the affairs of her child/ren as the father is. ...The realities of these times have brought about another dimension to this problem of child/ren parentage. This case now before this Court is one in point. Here the petitioner is both the father and mother of the two children. She is an unmarried mother. She is bringing up her two children without a husband. Now is it fair for this society to have to require of her to have been or to be married in order for certain things to be possible to be done

²² *Ibid*, Art.8

²³ [1990 – 1992] ZR 112 (HC)

for her children? The answer, in my considered view, is in the negative!...discrimination based on gender only has to be eliminated from our society. Men and women are partners and not only partners but equal partners in most human endeavours. They must thus be treated equally.²⁴

This was, undoubtedly, a landmark judgement in terms of the equality of the sexes in Zambia. It marked a monumental shift in equality relations between men and women, reflecting how Zambian society had moved away from the subordination of women to treating them as equal partners. This line of thought was followed in the case of *Longwe v Intercontinental Hotels*²⁵. Sara Longwe asked the Commissioner for Investigations to order the Intercontinental Hotel to stop discriminating against women. The Intercontinental Hotel had been enforcing a policy of refusing women entry unless they were accompanied by a male escort. Longwe had been stopped by a security guard who would not allow her to enter to pick her children up after they had attended a party at the hotel. The Commissioner did find that the hotel policy was discriminatory and forwarded a copy of its ruling to the National Hotels Board, but the policy wasn't changed. In 1992, Longwe was again prevented from entering the same hotel, when she and a group of women's activists tried to meet in the hotel's bar.

Longwe went to the High Court, as she realised the Commission's ruling had been completely ineffective. She argued that the hotel's policy violated her right to freedom from discrimination on the basis of sex in the Constitution of 1991²⁶. The court ruled in Longwe's favour, finding that her constitutional rights had been violated. It reiterated in its judgment the sentiments of *Edith Nawakwi*.

To summarise, International human rights law defines discrimination as acts which impair or nullify enjoyment of fundamental rights and liberties, affirms its evil as it hampers economic growth and prosperity, and encourages attitude change through

²⁴ *Ibid.*

²⁵ 1992/HP/765.

²⁶ Art 25.

education and other measures including legislation. National Law affirms this position by providing variously for women including protection from discrimination.

1.4. DISCRIMINATION BASED ON RACE

Mounting international concern over racial discrimination led the United Nations General Assembly, in 1963, to take the formal step of adopting the Declaration on the Elimination of All Forms of Racial Discrimination which makes four principal points:

- i. Any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous and has no justification in theory or practice;
- ii. Racial discrimination and more so, government policies based on racial superiority or hatred-violate fundamental human rights, endanger friendly relations among peoples, co-operation among nations, and international peace and security;
- iii. Racial discrimination harms not only those who are its objects but also those who practise it;
- iv. A world society free of racial segregation and discrimination, factors which create hatred and division, is a fundamental aim of the United Nations.²⁷

1.4.1. CERD

In 1965, the General Assembly provided the world community with a legal instrument by adopting the CERD. The Convention specifies the measures that States agree to undertake-once they have become parties by ratifying or acceding to it-to eliminate racial discrimination.

Under the Convention, States parties are pledged:

²⁷ For The Record2001\documentation\other\app1\ftsheets12

- To engage in no act or practice of racial discrimination against individuals, groups of persons or institutions, and to ensure that public authorities and institutions do likewise;
- Not to sponsor, defend or support racial discrimination by persons or organizations;
- To review government, national and local policies and to amend or repeal laws and regulations which create or perpetuate racial discrimination;
- To prohibit and put a stop to racial discrimination by persons, groups and organizations; and
- To encourage integrationist or multiracial organizations and movements and other means of eliminating barriers between races, as well as to discourage anything which tends to strengthen racial division.²⁸

The Convention came into force in 1969 after 27 States had ratified or acceded to it²⁹. At the end of 1990, the Convention had been ratified or acceded to by 128 States-more than three-quarters of the membership of the United Nations. It is the oldest and most widely ratified United Nations human rights convention.

The Convention requires legislation to make certain acts punishable and also calls for action in the fields of education, culture and information. Similarly, a State party does not fulfil its obligations under the Convention simply by condemning racial discrimination in the Constitution of the country.

1.4.2. Jurisprudence

Again, Zambia is in line with its international obligations and has in its National Constitution and labour legislation, provisions prohibiting racial discrimination.

²⁸ *Ibid.*

²⁹ It came into force in Zambia on 4th March 1972.

Zambia denounces racial discrimination in a very strong fashion. In *Zambia Publishing Company v A. Zaloumis and K. Mathis*³⁰, the learned Judge in delivering judgement on a defamation matter with racist overtones made this comment

The policy and philosophy of the Government and the people of Zambia is non-racial, and an allegation of racialism can have serious consequences for the person against whom it is made.

So profound is Zambia's abhorrence for racial discrimination and racialism that Zambia's Penal Code³¹ (PC) provides for a punishable offence to address the same.

Section 70 of the PC provides that;

Any person who utters any words or publishes any writing expressing or showing hatred, ridicule or contempt for any person or group of persons wholly or mainly because of his or their race, tribe, place of origin or colour is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding two years.

This section traces its origin to a comparable section 58F of the Penal Code of 1965 the relevant part speaking of "showing hatred for any person . . . wholly . . . because of his . . . colour". This was the subject of litigation in *Whitehead v The People*³² in which a 25 year old made racist remarks about not trusting people 'as black as President Kaunda' and later indecently assaulting a black lady. The learned judge said that the section created an offence of strict liability and therefore to be guilty of the impugned conduct was in and of itself reprehensible without proving any *mens rea*.

In the context of the labour laws, discrimination may result in remedies of damages or reinstatement in the case of unfair dismissal.³³

Furthermore, various pieces of legislation also enjoin people to refrain from racist actions. An example is the Electoral Act³⁴ which says

³⁰ [1978]ZR10(SC)

³¹ CAP 87 of the Laws of Zambia.

³² [1968]ZR9(HC)

³³ *Per* section 108 of the Industrial and Labour Relations Act.

(2) All media shall-

(a) report election news in an accurate manner and shall not make any abusive editorial comment or encourage racism, religious intolerance or hatred,

It therefore goes without saying, that discrimination has no place in Zambian society.

Much of the litigation on discrimination has taken place in the context of the workplace, i.e. under the auspices of labour legislation. Ngulube CJ (as he then was) in *Chileshe*³⁵ makes a point which summarises the essence and evil of discrimination. He does so in the immediate context of the IRA, but his words are of general application to the phenomenon of discrimination. He said

A point needs to be made - and stressed - regarding the discrimination cases: in effect, the **rule against discrimination** on at least one of the grounds listed in the statute **was clearly intended to guard against unwarranted victimization or inexcusable unfairness.**

It is submitted that this is the heart and soul of unfair discrimination, inequitable treatment without just cause or excuse.

1.5. SUMMARY

The chapter has attempted to sketch a picture of the incidence of discrimination in Zambia's legal history. Zambia has engaged and continues to grapple with inequitable treatment of persons based on differences, be they of sex or colour. As a demonstration of *animus* for non discriminatory policy, Zambia has ratified and acceded to various international human rights instruments, as well as provided comparable provisions in domestic law. Institutions such as the Courts and the Commissioner for Investigations have played roles in the enforcement of anti-discriminatory law and policy. It now remains to be seen whether this experience with discrimination can inform a National response to discrimination based on another ground, one which is not hitherto listed in

³⁴ CAP 13 of the Laws of Zambia, in the Subsidiary Legislation, section 17 and 18 -Electoral (Conduct) Regulations, section 8(2)(a)

³⁵ Ngulube *supra* note 6.

anti-discrimination clauses, but which threatens to overshadow all discrimination before it, discrimination on the basis of HIV status.

CHAPTER II

HIV/AIDS, DISCRIMINATION AND LAW

“Discrimination against those living with HIV/AIDS, or presumed to be infected, is a violation of human rights. All individuals have a right to equal respect and dignity, whatever their health status.” UNAIDS

2.0. BACKGROUND

Never in the history of mankind has there been a single and fundamental threat to dignity, to development and to life itself as with the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). The AIDS epidemic claimed globally more than 3 million lives in 2002 and an estimated 5 million people acquired HIV, the virus causing AIDS, in the same year, bringing to 42 million the global number of people living with the virus.³⁶ In Sub-Saharan Africa, 29.4 million adults and children are living with HIV/AIDS, with 3.5 million new infections occurring in 2002.³⁷ According to UNAIDS, the epidemic claimed the lives of an estimated 2.4 million Africans in the past year.³⁸

The worst of the epidemic clearly has not yet passed, but wherever the epidemic is spreading unchecked, it continues to rob countries of the resources and capacities on which human security and development depend. In some regions, HIV/AIDS, in combination with other crises, is driving ever-larger parts of nations towards destitution.³⁹ According to Zambia's Health Minister, HIV and AIDS have reached alarming levels in Zambia. It is estimated that 20% of people aged between 15 and 49

³⁶ AIDS epidemic update, (2002). P4

³⁷ *Ibid.* P16

³⁸ *Ibid.*

³⁹ *Ibid.*

are infected with HIV.⁴⁰ The pervasive and ramified impact of the epidemic has been as extensive as it has been brutal. In its wake, HIV/AIDS has left whole regions devastated, knocking off years of national development, overstressing health services that are already at breaking point, soaring maternal and child mortality, collapsing essential public services and educational systems, wiping out economic growth, deepening poverty and household food security, widening already existing inequalities for such populations as women, children, prisoners, etc. The management and resolution of this crisis is, perhaps, the defining issue for Zambia today. The success of interventions to address the pandemic however, hinge largely on appropriate Government action, including legislation and policy.

The proceeding chapter will discuss the nature of State obligations in view of a pandemic of this magnitude. The Zambian regulatory environment is examined with particular reference to Constitution of Zambia, as well as the IRA, to determine the degree to which rights, particularly to non-discrimination, are guaranteed. The chapter argues that human rights protection through law is a critical component of a successful response, and that a human rights based approach provides an effective framework for addressing the pandemic.

2.1. GOVERNMENT RESPONSIBILITIES IN DEMOCRATIC STATES

With the emergence of welfare States, Governments in democracies are essentially responsible to ensure the well being of the community. Early in the 20th century, Tobey noted that government is 'organised for the express purpose, *inter alia*, of conserving the public health and cannot divest itself of this important duty'.⁴¹ This is so because a political community stresses a shared bond among members and an organised society

⁴⁰ Brigadier-General Dr B. Chituwo, MP, *Draft National HIV/AIDS/STI/TB/ Policy*, (2002).

⁴¹ Tobey J.A. *Public Health and the Police power*. (1927), p126

safeguards the common goods, welfare and security, while members subordinate themselves to the welfare of the community as a whole.⁴² Public health goods can be secured only through collective action and not individual endeavour. Though individual effort may procure individual health, no single individual or groups of individuals can ensure the health of the community. This is only achievable through organised action on behalf of the public.⁴³ It is therefore the people, acting collectively through their elected representatives, who form Government and undertake to assure minimum standards of health. Elected officials are at least putatively committed to securing the public's health; and constituents are committed to bear the necessary burdens.⁴⁴ Consequently, the communal efforts of the body politic to protect and promote the populace's health represent a central tenet of democratic states.

In achieving this end, governments may place benefits or burdens on legally protected interests, e.g. the Public Health Act⁴⁵ empowers medical officers of health to inspect premises which they deem to have been in contact with infectious diseases, and even order the destruction of such premises.⁴⁶ Furthermore, the Minister of Health may, under this Act, issue regulations allowing for restrictions on rights of liberty of individuals, i.e. those infected with a notifiable illness may be quarantined.⁴⁷ Government is also authorised to require conformance with publicly established values and standards of conduct. It must insist, through force of law if necessary, that individuals and organisations do not place others at risk. Thus, private sexual acts by

⁴² Beauchamp D.E. *The Health of the Republic: Epidemics, Medicine and Moralism as challenges to Democracy*. (1988).

⁴³ Gostin L.O. *Public Health Law in a New Century; Law as a tool to Advance the Communities Health*, (2000), p2838.

⁴⁴ *Ibid*.

⁴⁵ CAP 295 of the Laws of Zambia.

⁴⁶ *Ibid*, s15 & s17.

⁴⁷ *Ibid*, s28.

consenting adults for money are criminalised under the Penal code.⁴⁸ Reconciling divergent interests about the desirability of coercion in any given situation is not a miniscule task, and may even require judicial resolution. This is so, because sometimes, fundamental rights of private actors may be at variance with what may be termed the 'public interest'. An appropriate governmental response to the threat of HIV/AIDS must, therefore, be one which balances individual interests and fundamental rights on one hand, with the common good, on the other. This is in keeping with the pursuit of democratic ideals.

2.2. HIV/AIDS AND HUMAN RIGHTS

HIV/AIDS has prompted a re-thinking of traditional public health approaches to epidemics. It has become trite that protecting the human rights of both infected and affected people is a necessary element of the response to the epidemic.⁴⁹ There is increasing recognition that public health often provides an added and compelling justification for safeguarding human rights, despite the respect, protection and fulfilment which they merit in their own right. Regarding HIV/AIDS, an environment in which human rights are respected has demonstrated that vulnerability is reduced, those infected with and affected by HIV/AIDS live a life of dignity without discrimination and the personal and societal impact of HIV infection is alleviated.⁵⁰ Some arguments have been made regarding the contradictory nature of public health goals and human rights goals.⁵¹ It has, however, been shown that public health and

⁴⁸ CAP 87 of the Laws of Zambia, s140 criminalises prostitution and soliciting the services of the same. This is based on public policy considerations, including preservation of public morality as well as the control of the spread of venereal diseases.

⁴⁹ Detels, et al, *The Oxford Textbook on Public Health*, (2002).

⁵⁰ Office of the United Nations High Commissioner for Human Rights and UNAIDS *HIV/AIDS and Human Rights International Guidelines*, (1998), p

⁵¹ For instance, Kevin De Cock et al, *Shadow on the Continent: public health and HIV/AIDS in Africa in the 21st Century*, (2002), says that 'emphasis on human rights in HIV/AIDS prevention has reduced the

human rights share the common objective to promote and protect the rights and wellbeing of all individuals. From the human rights point of view, this is achieved by *promoting and protecting the rights and dignity of everyone, especially those who are discriminated against or whose rights are otherwise interfered with*. Similarly, public health objectives can best be accomplished by *promoting health for all, with special emphasis on the vulnerable to threats of physical, mental or social harm*.⁵² The two complement and mutually reinforce each other, particularly in the context of HIV/AIDS. This point is lucidly made in an article by Gruskin and Tarantola and a part is quoted in its entirety;

An example, drawn from the world of reproductive health, dramatically illustrates the point that denial of human rights, or worse still, their violation including systematic...discrimination, create an environment of increased risk to health, and make people vulnerable to the impact of discrimination on their health. 'This is particularly true, when discrimination is recognised, tolerated, acknowledged or even condoned by Governments, but also when it remains insidiously hidden or deliberately ignored behind an accepted status quo'.⁵³ [With regard to the reproductive health of women,] access to information, education and quality services is critical, as are services adequately targeted to respond to the needs of women of different ages from different communities. Underlying all of this is the impact that gender roles and gender discrimination have on both health status and service delivery. The relevance of human rights to this analysis becomes clear when considering the gaps and inequalities in services and structures in relation to the social roles that construct male and female identity. Equally important is how these factors play out at the policy and program level in terms of reproductive health research, policy, financing and service delivery. Traditional public health focussed on the need for information, education, contraception, access to quality services, etc. However,

importance of public health and social justice, which offer a framework for prevention efforts in Africa, that might be more relevant to people's daily lives and more likely to be effective'.

⁵² *Op cit*, p37

⁵³ Sullivan, D *The nature and scope of human rights obligations concerning women's right to health*, (1995).

even if these services are available, an individual woman has to decide when and how she is going to access these services. This implies that she has the ability to control and make decisions about her life.

In this example, considering the impact that violation or neglect of human rights has on health, highlights the societal context that would hinder or empower woman's ability to make and effectuate the free and informed choices necessary for her reproductive health. From a broader policy and program perspective, this insight reveals that linking the human rights framework to health implies recognising that individual health is largely influenced by one's environment. This means that integration of human rights in the design, implementation and evaluation of health policies and programs is necessary not only because of a government's human rights obligations, but also in purely pragmatic public health terms. Thus attention to the civil, political, economic, social and cultural factors that are relevant to a person's life, such as gender relations, racism...[or HIV status] and the way this combination of factors projects itself into who gets ill and what is done about it, is central to sound health and human rights practice.⁵⁴

The importance of the role that human rights should play in mitigating the epidemic was articulated by UNAIDS and the Inter-Parliamentary Union (IPU) in the following way:

A rights-based prevention approach recognises societal vulnerability to HIV/AIDS, not just individual risk behaviour. It also recognises vulnerability in different contexts of stigmatised or disempowered populations, such as women, children ... and sex workers. International human rights norms provide a coherent, normative framework for analysis of the HIV/AIDS problem. They also provide a legally binding foundation with procedural, institutional and other accountability mechanisms to address the societal basis of vulnerability and implement change.⁵⁵

⁵⁴ Gruskin S et al, *Health and Human Rights*, (2002), p25.

⁵⁵ UNAIDS & InterParliamentary Union *Handbook for Legislators on HIV/AIDS, Law and Human Rights: Action to combat HIV/AIDS in view of its devastating Human, Economic and Social Impact*, (1999) UNAIDS Best Practice Collection, p24.

2.2.1. Legal Frameworks and HIV/AIDS

The value of a comprehensive legal framework in containing the AIDS epidemic, as well as providing for the care and protection of People living with HIV/AIDS (PWA) as well as those affected by it, is generally acknowledged.⁵⁶ A legal framework that makes specific provision for the protection of PWAs, can assign penalties to perpetrators of human rights abuses of PWAs and guide society, institutions and individuals on how the epidemic and those infected and affected by it should be approached, is important. Equally important, is a robust legal framework that is sensitive to the needs of PWAs, can afford them dignity and respect-qualities that may have come under attack by discriminatory societal structures and attitudes. Such laws and policies can create greater awareness of violations of dignity and injustices and will have a critical impact on the spread of the epidemic.⁵⁷

UNAIDS suggests that an equitable policy and legal context with supportive laws, policies and practices is central to success.⁵⁸ The law is therefore an effective tool for constructing a progressive policy environment, as well as for countering human rights violations.

It is against this background that the UN General Assembly in a Special Session on HIV/AIDS adopted the Declaration of Commitment on HIV/AIDS which stated *inter alia*,

‘Stigma, silence, discrimination and denial, as well as lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and nations’ (Paragraph 13).

⁵⁶ Richter M. et al, *Review of HIV/AIDS Legislation in six Southern African countries*, (2002) p7.

⁵⁷ *Ibid.*

⁵⁸ UNAIDS, *World Aids Campaign 2002–2003, A Conceptual Framework and Basis For Action: HIV/AIDS Stigma And Discrimination*, (2002) p21.

‘By [the year] 2003, [nations should] ensure the development and implementation of multisectoral national strategies and financing plans for combating HIV/AIDS that address the epidemic in forthright terms; confront stigma, silence and denial; address gender and age-based dimensions of the epidemic; [and] eliminate discrimination and marginalization’ (Paragraph 37).

‘By [the year] 2003, [nations should] enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by, people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, *inter alia*, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic’ (Paragraph 58).

HIV/AIDS based discrimination thus emerges as one of the vital human rights issues raised, which requires *inter alia*, legislative action.

2.2.2. HIV/AIDS Discrimination and Law

Generally, the term discrimination refers to any form of distinction, exclusion or restriction affecting a person, brought about wholly or partly by an inherent personal characteristic. Adverse discrimination takes place when a distinction is made unfairly or unjustly.⁵⁹ Legally, the concept of discrimination takes account of the justification vis-à-vis purpose, proportionality and effects of any differential treatment. Therefore, differences based on reasonable and objective criteria may be permissible.⁶⁰

UNAIDS defines the concept of arbitrary discrimination as follows:

⁵⁹ Gruskin, et al, *supra* 53.

⁶⁰ Interference with most rights can be legitimately justified as necessary under narrowly defined circumstances. Limitations on rights are however viewed as serious issues in international human rights law, regardless of the apparent importance of the public good involved. When a Government limits the exercise or enjoyment of a right, this action must be taken only as a last resort and will only be considered legitimate if the ‘Siracusa Principles’ are followed, i.e. the

- The restriction is provided for and carried out in accordance with the law;
- It is in the interest of a legitimate objective of general interest;
- The restriction is strictly necessary in a democratic society to achieve the objective;
- The restriction is not imposed arbitrarily, i.e. in an unreasonable or otherwise discriminatory matter (UNESCO).

Any measure entailing an arbitrary distinction among persons depending on their confirmed or suspected HIV serostatus or state of health.⁶¹

Within the context of HIV/AIDS, prejudiced thoughts frequently lead to actions or inactions that are harmful or that deny a person services or entitlements. Such responses may prevent PLWA from receiving health care or may terminate or prevent employment based on their HIV status.⁶²

An example of such discrimination is provided by the seminal South African case of *Hoffmann v South African Airways*⁶³. Hoffmann applied for a job with South African Airways (SAA) as a cabin attendant. He contended that SAA had unfairly discriminated against him on the basis of his HIV positive status in rejecting his application for employment. The matter was first heard in the High Court where the Judge found for SAA, upholding their defence of promoting the safety and health of its passengers and its own competitive capacity. The case was brought to the Constitutional Court on appeal. The court found that Hoffmann had indeed been unfairly discriminated against, and that SAA violated his right to equality, dignity and fair labour practices. It set aside the decision of the High Court and further held that PLWA have been stigmatised and, as one of the most disadvantaged groups in society, deserve special protection by the law. The Court ordered SAA to make an offer of employment immediately to Mr. Hoffmann, and bear costs.

This landmark decision was enabled by South Africa's visionary Constitution with its extensive Bill of Rights, as well as such legislation as the Employment Equity Act⁶⁴.

The latter Act says that no person may unfairly discriminate against an employee or job applicant in any employment policy or practice on the basis of twenty listed grounds

⁶¹ UNAIDS, *Protocol for the identification of Discrimination against People Living with HIV*, (2000) p7.

⁶² Maluwa M. et al, *HIV and AIDS Related Stigma, Discrimination, and Human Rights: A Critical Overview*, (2002), p6.

⁶³ (2001)(1)SA(CC)

⁶⁴ No.55 of 1998.

unless it is an inherent requirement of the job. 'HIV status' is listed as one of the grounds upon which an employee may not be discriminated against.⁶⁵ The Act further prohibits unauthorised employment-related HIV testing. All such testing must take place only with permission of the Labour Court. Another important South African piece of legislation is the Promotion of Equality and Prevention of Unfair Discrimination Act.⁶⁶ The Act is intended to practically implement and give greater effect to the Equality Clause of South Africa's Constitution. The Act is also useful in ensuring that discrimination on the basis of HIV doesn't take place.

2.3. THE ZAMBIAN CONTEXT

In Zambia, the Constitution, CAP 1 of the Laws of Zambia, is the Supreme law as declared by Article 1(3), which reads,

This Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

Furthermore, Article 23 reads,

‘(1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.

(2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not

⁶⁵ Richter M, *supra* note 55 at 25.

⁶⁶ No.116 of 1990.

made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Another anti-discrimination clause is found in the Industrial and Labour Relations Act.⁶⁷ Section 108 makes termination of employment on discriminatory grounds, an unfair labour practice. It reads,

‘(1) No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status of the employee.

(2) Any employee who has reasonable cause to believe that the employees' services have been terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee has been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the Court’

The Constitution thus makes discrimination on the enumerated grounds unlawful. It does not however, recognize health status, let alone HIV status as one such ground for unlawful discrimination. Recent resolutions of the UN Commission on Human Rights, have unequivocally stated that “the term ‘or other status’ in non-discrimination provisions should be interpreted to cover health status, including HIV/AIDS,” and has confirmed that “discrimination on the basis of HIV/AIDS status, actual or presumed, is prohibited by existing human rights standards”⁶⁸. Similarly, the Industrial and Labour Relations Act frowns upon discrimination in the workplace and brands it an unfair labour practice. It falls short in addressing HIV cases in that the Act was restrictively

⁶⁷ CAP 269 of the Laws of Zambia.

⁶⁸ Commission on Human Rights, Resolutions 1999/49 and 2001/51

drafted without health status or a similar condition being in the contemplation of the drafters. It is submitted that these laws do not extend sufficient protection to the case of discrimination on the basis of HIV status. This means that an HIV positive individual may face discrimination on the basis of his status and not be able to seek recourse to the law. This is not only bad for the democratic order in which all ought to have the equal protection of the law, but also exacerbates the effects of the pandemic. UNAIDS say that,

Those most affected by HIV/AIDS are people who have unequal access to fundamental social and economic rights. The denial of basic rights limits peoples' options to defend their autonomy, develop viable livelihoods and protect themselves, leaving them more vulnerable to both HIV infection and the impact of the epidemic on their lives. Principles of non-discrimination, equality and participation are central to an effective HIV/AIDS strategy that integrates human rights.⁶⁹

There is therefore an urgent need to re-examine, inter alia, the above named laws and amend them so as to address the novel situation presented by HIV/AIDS. Furthermore, there is need to strengthen already existing anti-discrimination clauses as well as formulate/enact new ones where they are absent, which will address discrimination prospectively i.e. deterring its practice and retrospectively, by providing an effective legal remedy when it happens.

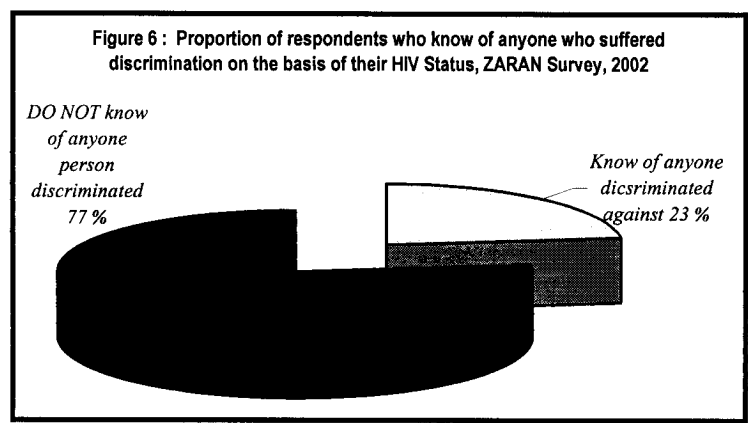
A search through Zambian case records reveals that there is no Jurisprudence developed through the Courts on HIV/AIDS and discrimination. This does not mean it is not happening. With an HIV prevalence of 20%, among the highest in the region,⁷⁰ and a high impact e.g. on business with high personnel turn over due to HIV/AIDS

⁶⁹ UNAIDS Report on the Global HIV/AIDS epidemic 2002.

⁷⁰ Zambia is ranked seventh in terms of HIV prevalence after Botswana, Zimbabwe, Swaziland, Lesotho, Namibia and South Africa according to the UN department of Social & Economic Affairs, *HIV/AIDS: Population Impact and Policies* (2001). The first four have the highest prevalence in the World!

related complications,⁷¹ it is not far fetched to surmise that there is an equally high incidence of HIV related discrimination cases if not higher.⁷² A ZARAN study, conducted in Lusaka and Chongwe, shows that of the total population interviewed, 23% reported knowledge of a person who had suffered discrimination based on HIV status.⁷³

This is illustrated in the figure below:



Furthermore, the study reveals that public opinion is that the policies of Government with regard to protection from discrimination are insufficient. Respondents who felt that the policies were inadequate mentioned that *inter alia*, the following should be provided for in these policies:

*Clear policies on HIV/AIDS with regard to discrimination*⁷⁴

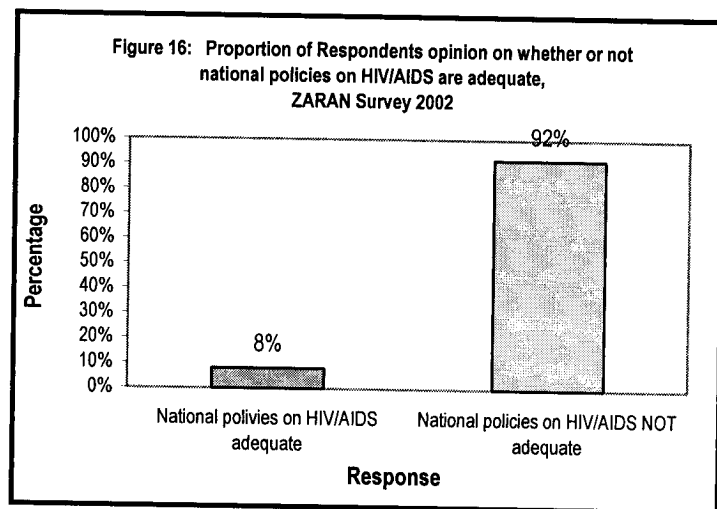
The figure below illustrates public perception of the adequacy of Government policies regarding, *inter alia*, discrimination on the basis of HIV status:

⁷¹ *Infra*, note 73, Tembo reports that in 1998, Zambia lost the equivalent of 66% of newly trained teachers to AIDS.

⁷² Tembo F. *Business Responses to HIV/AIDS: A Challenge for Workplace Programmes in Zambia*, (2003).

⁷³ ZARAN, *HIV/AIDS in Zambia: Law, Policy and Practice*, (2003), p24.

⁷⁴ *Ibid.*



The implication is that people have little confidence that there is any protection from discrimination from the formal structures, which theme will be explored in greater detail in chapter iii.

2.4. SUMMARY

It is essential to adequately respond to HIV/AIDS-related stigma and discrimination. Paradoxically, the protection of the human rights of persons at risk is the most effective way of arresting or slowing the spread of the virus. Legal protection for people living with HIV and AIDS is a powerful way of redressing, and thereby mitigating, the unequal power relations, the social inequality and the exclusion that lie at the heart of HIV/AIDS-related stigmatization and discrimination. Such protection should be promoted, together with appropriate reporting and enforcement mechanisms. Zambia must look for effective and just laws, which contribute to slowing the spread of AIDS. It must seek to learn from the experience of others, whilst recognising the unique character of each legal jurisdiction. One of the most effective laws we can offer to combat the spread of HIV which causes AIDS is the protection of persons living with AIDS, and those about them, from discrimination.

CHAPTER III

INSTITUTIONS ENFORCING ANTI-

DISCRIMINATION CODES

*'Our legal system is far from being adequate. We need a much broader approach not just restricted to criminal aspects. We could do with a Charter on HIV/AIDS as a supporting framework to the legislation currently prevailing.'*⁷⁵

Mrs. Justice L. Chibesakunda.

3.0. INTRODUCTION

This chapter discusses institutions that have something to do with the administration of justice, particularly those that have something to do with law and policy. It adopts the categorisation of institutions created under the governmental law for the purpose of adjudication or to contribute to adjudication as 'formal structures'.⁷⁶ These structures include all the Courts, from the Local Courts to the Supreme Court, as well as institutions like the Permanent Human Rights Commission and the Commission for Investigations (the Ombudsman). Also examined, is the recently constituted National HIV/AIDS/STI/TB Council. The chapter acknowledges that these formal structures are not the first port of call for most Zambians (least of all for PWAs). They may in fact be the last resort.⁷⁷ They are, however, an integral part of the Zambian justice delivery system and response to the pandemic, and so must be part and parcel of the enforcers of anti-discrimination law and policy.

⁷⁵ Said at *The ZARAN's Judges Workshop on HIV/AIDS, Law and Human Rights* held on Saturday, June 21, 2003 at Intercontinental Hotel, Lusaka.

⁷⁶ See WLSA *Women and Justice, Myth or reality in Zambia* p25-27 (1999).

⁷⁷ *Ibid*, at 27.

Legal protection for people living with HIV and AIDS is a powerful way of redressing, and thereby mitigating, the unequal power relations, the social inequality and the exclusion that lie at the heart of HIV/AIDS-related stigmatization and discrimination. Such protection should be promoted, together with appropriate reporting and enforcement mechanisms. Thus, the importance of examining the formal structures and evaluating the role they have, hitherto, played (and indeed could play) in the protection and promotion of human rights vis-à-vis HIV/AIDS.

3.1. THE JUDICIARY

The Zambian judiciary consists of the Supreme Court, High Court, Industrial Relations Court, Subordinate Court, Local Courts and such lower courts as may be prescribed by an Act of Parliament.⁷⁸ Article 91(2) requires the Judges, members, magistrates and justices, as the case may be, of the above mentioned courts to be independent, impartial and subject only to the Constitution and the law and to conduct themselves in accordance with a code of conduct promulgated by Parliament. Furthermore, the Constitution provides that the Judicature shall be autonomous and shall be administered in accordance with the provisions of an Act of Parliament,⁷⁹ the Judicature Administration Act.⁸⁰

3.1.1. Local Courts

The Local Courts Act⁸¹ governs the administration and jurisdiction of the local courts, which are the bottom of the judicial hierarchy. The court handles both civil and criminal matters. In terms of volume of business, they handle most of the civil cases and are found in most parts of the Country including villages. They are the most accessible courts because of proximity to population centres, low costs and simple

⁷⁸ The Constitution of Zambia, Art.91(1).

⁷⁹ *Ibid.*, Art 91(3)

⁸⁰ CAP 24 of the Laws of Zambia.

⁸¹ CAP 29 of the Laws of Zambia..

procedures.⁸² They handle mainly matters regarding the administration of customary law. This poses a problem in relation to anti-discrimination legislation. The proviso in Article 23(4.c and d) says that the anti-discrimination clause shall not apply to matters with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law, or where the customary law of a particular race or tribe would be more appropriate, to the exclusion of any law. This means that even where the customary law in question is discriminatory (particularly against women and other vulnerable groups including PWA) it is outside the ambit of the Constitutional provision. Thus, despite the guarantees for non-discrimination in the Constitution, customary law and practice place, for instance, women in subordinate positions. These discriminatory practices increase women's and girls' vulnerability to HIV, as the U.N. *Common Country Assessment for 2000* noted:

In Zambia, some of the factors contributing to [the spread of AIDS] are imbedded in customary laws and practices, especially in relation to divorce, adultery, child marriages and defilement.

It is no wonder then, that discriminatory practices continue to be enforced.⁸³ This position is a definite cause of concern.

3.1.2. Subordinate Courts

The principal pieces of legislation bearing on Subordinate Courts are the Subordinate Courts Act⁸⁴ and the Criminal Procedure Code Act.⁸⁵ The courts have both civil and criminal jurisdiction within the limits of the district for which each court is constituted. The justices of subordinate courts are magistrates. The bulk of criminal matters are

⁸² WLSA *supra*, note 77 at 59.

⁸³ AFRONET, *Zambia Human Rights Report 2000*, p62.

⁸⁴ CAP 28 of the Laws of Zambia.

⁸⁵ CAP 88 of the Laws of Zambia.

handled by subordinate courts.⁸⁶ The courts may observe and enforce African customary law provided it is not 'repugnant to justice, equity or good conscience, or incompatible with any written law'.⁸⁷

3.1.3. High Court

The Constitution confers unlimited and original jurisdiction to hear and determine civil and criminal proceedings on the High Court.⁸⁸ It is a superior court of record, with jurisdiction except in matters in which the Industrial Relations Court has exclusive jurisdiction. Article 28 of the Constitution provides that redress for violations of Articles 11 to 26 (the fundamental Rights) shall be sought from the High Court. It further provides that Subordinate Courts may refer matters hinging on part III to the High Court unless they are found to be frivolous or vexatious.⁸⁹ The High Court is thus a very important structure in terms of the administration and enforcement of anti-discrimination legislation and policy. It has had opportunity to adjudicate on Article 23, though as will be discussed later, this has not involved matters to do with discrimination based on HIV status.

3.1.4. Industrial Relations Court

The Industrial Relations Court (IRC) is a creature of the Constitution.⁹⁰ In terms of hierarchy, the IRC is at par with the High Court.⁹¹ The provisions pertaining to its composition, powers, functions and proceedings are elaborated in the Industrial and Labour Relations Act.⁹² The Act confers on the IRC original jurisdiction in all labour related matters.⁹³ Furthermore, the IRC has jurisdiction, *inter alia*, generally to inquire

⁸⁶ Afronet *supra*, note 84 at 52.

⁸⁷ CAP 28, s16.

⁸⁸ Art 94.

⁸⁹ Art 28(2.(a)).

⁹⁰ Art. 91(1)(c).

⁹¹ So, the qualifications for its personnel are as those of High Court justices [section 86(2)]. Furthermore appeals from the IRC lie to the Supreme Court *per* section 97 of the IRA.

⁹² CAP 269. Part XI deals with the IRC.

⁹³ *Ibid*, section 85(1).

into and adjudicate upon any matter affecting the collective rights, obligations and privileges of employees, employers and their representative organisations or any matter relating to industrial relations.⁹⁴ Regarding practice and procedure, the IRC is simpler and more flexible than the other courts. The main object of the IRC is to do substantive justice and so it is not bound by rules of evidence in civil and criminal proceedings.

A WLSA study reports that most of the cases heard by the IRC are brought under section 108 of the Act.⁹⁵ This means that the court has had opportunity to engage extensively the anti-discrimination clause that prohibits termination of employee services on discriminatory grounds. A successful claim under section 108 leads to a grant of damages or compensation for loss of employment, or an order for re-employment or re-instatement in accordance with the gravity of each case, or both.⁹⁶ As is the case for Article 23, section 108 has never been invoked to cover discrimination based on HIV status.

3.1.5. Supreme Court

The Supreme Court is at the top of the judicial hierarchy in Zambia. It is created by article 29 of the Constitution and has jurisdiction to hear and determine appeals in civil and criminal matters as provided in the Supreme Court Act.⁹⁷ The Supreme Court is strategically positioned particularly regarding law reform. Whereas Parliament in Zambia is the supreme law making organ and the role of the courts is to interpret and give effect to the law as it is passed down from Parliament, the judiciary is enjoined to uphold the constitution. Thus, any law which is contrary to the constitution, upon declaration by the courts, would be struck out as being unconstitutional and thus, null

⁹⁴ *Ibid*, section 85(2)(c).

⁹⁵ WLSA *supra* note 77 at 120.

⁹⁶ IRA, section 108(3).

⁹⁷ CAP 25.

and void to the extent of the inconsistency.⁹⁸ In the event that provisions of statutes do not sufficiently address a particular situation, perhaps because the circumstances were not contemplated by the legislature, the court may purposively interpret the statute so as to extend the benefit of the statute e.g. section 108 of the Industrial and Labour Relations Act, to discrimination based on HIV status in the workplace. This is an example of what some have described as ‘judicial activism’.⁹⁹ Such a determination, particularly by the Supreme Court, would be law and would be followed in subsequent cases according to the doctrine of *stare decisis*.

3.2. THE PERMANENT HUMAN RIGHTS COMMISSION

The Permanent Human Rights Commission (PHRC) is another Constitutional body.¹⁰⁰ Further details regarding the PHRC are provided under the Human Rights Commission Act.¹⁰¹ The Commission’s functions are listed as being to investigate human rights violations; investigate any maladministration of justice; propose effective measures to prevent human rights abuse; visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems; establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights; do all such things as are incidental or conducive to the attainment of the functions of the Commission.¹⁰² The Commission consists of not more than seven commissioners

⁹⁸ Per Article 1(3) of the Constitution. See also the case of *Mulundika And 7 Others v The People* [1995 – 1997] ZR 20 (SC)

⁹⁹ C. Anyangwe, *Parliamentary and Constitutional Democracy*, 31 ZAMBIA LAW JOURNAL 108 (1999). The author here suggests that this kind of ‘judicial legislation’ is sometimes necessary, in view of the great pace of social changes which bring with them new social and economic conditions and demands for recognition of novel claims.

¹⁰⁰ The Constitution, Article 125

¹⁰¹ CAP 48 of the Laws of Zambia.

¹⁰² *Ibid*, section 9.

including the Chairman and his Deputy.¹⁰³ The commissioners are supposed to head various working thematic committees including the gender, children's rights, torture, social and cultural rights, economic and political committees. The work role of these committees is to protect and promote human rights in Zambia.¹⁰⁴ The reality on the ground at present, however, is that there are no Commissioners within the PHRC, and consequently, no Committees. There has been some discussion to scrap off the Committees altogether.¹⁰⁵

National Human Rights institutions are, generally administrative in nature, i.e. they are neither judicial nor law making. As a rule, these institutions have on-going advisory authority with respect to human rights at the National and/or international level.¹⁰⁶ The Commission's powers may be summarised as being investigative,¹⁰⁷ as well as making recommendations to relevant persons or authorities.¹⁰⁸ The Act also provides that a failure to inform the Commission of actions taken to redress the human rights violation after having received recommendations amounts to an offence punishable by a fine of K1.8 million kwacha (as at the time of writing) or a three year maximum prison term, or both.¹⁰⁹ The Commission receives complaints from the general public and if it is deemed to be a human rights issue, the case is taken up. The Commission is thus a key player in the protection and promotion of human rights as they relate to HIV and AIDS.

¹⁰³ *Ibid*, section 5(1).

¹⁰⁴ WLSA *supra* note 77.

¹⁰⁵ Interview with Dr A. Chanda, President of Foundation for Democratic Process (FODEP), 23rd November 2003.

¹⁰⁶ PERMANENT HUMAN RIGHTS COMMISSION, NATIONAL PLAN OF ACTION FOR HUMAN RIGHTS 1999-2009.

¹⁰⁷ CAP 48, section 10 generally.

¹⁰⁸ *Ibid*, section 13(1)

¹⁰⁹ *Ibid*, section 13(3)

3.3. COMMISSION FOR INVESTIGATIONS (OMBUDSMAN)

The Commission for Investigations is an institution created by the Commission for Investigations Act.¹¹⁰ It comprises the Investigator General and three commissioners. The Commission is set up for the purpose of investigating maladministration among public officers excluding the President. It deals with complaints of abuse of power such as arbitrary decisions, omissions, improper uses of discretionary powers, decisions made with bad or malicious motives or those influenced by irrelevant considerations, unnecessary or unexplained delays, obviously wrong decisions, misapplication and misinterpretation of laws, etc.¹¹¹ The Commission is either directed by the President to so investigate or may proceed upon a complaint from any body,¹¹² in any case in which it considers that an allegation of maladministration or abuse of office or authority by any such person ought to be investigated.¹¹³ The Commission has powers to investigate and to require anybody to co-operate with the investigations, subject to orders of imprisonment in default.¹¹⁴ The Commission submits reports of all its investigations to the President¹¹⁵ and in some cases, to Parliament.¹¹⁶ According to the Investigator General, the President accepts most of the Commission's recommendations.¹¹⁷ The Commission could be useful in ensuring that public officers are not the perpetrators of discriminatory practices. The case of *Sara Longwe*¹¹⁸ illustrates the Commission's historical engagement with discrimination based on sex. Unfortunately, in that case, the Commission's report was not met with change by the Hotel.

¹¹⁰ CAP 39 of the Laws of Zambia.

¹¹¹ Chanda A, *Transparency International Zambia, National Integrity Systems Country Study Report Zambia 2002*, p35.

¹¹² *Op cit*, section 9.

¹¹³ *Ibid*, section 8.

¹¹⁴ *Ibid*, section 13(3). Also, s19 provides for offences against the Commission.

¹¹⁵ *Ibid*, section 20

¹¹⁶ *Ibid*, section 21(3)

¹¹⁷ Chanda A. *supra* note 112, at 37, reports that few cases are in fact reported to the President. Instead, the Commission uses quiet diplomacy to persuade erring officers to mend their ways. Most officers co-operate with the Commission but not all do. See *infra* note 119.

¹¹⁸ See Chapter 1, p8.

3.4. NATIONAL HIV/AIDS/TB/STI COUNCIL

The Council is a body corporate established by the National HIV/AIDS/STI/TB Council Act.¹¹⁹ The functions of the council are to co-ordinate and support the development, monitoring and evaluation of the multi-sectoral national response for the prevention and combating of the spread of HIV, AIDS, STIs and TB, in order to reduce the personal, social and economic impacts of the same.¹²⁰ In particular, the Council is expected, *inter alia*, to support the development and co-ordination of policies, plans and strategies for the prevention and combating of *inter alia*, HIV/AIDS, for health and other institutions concerned addressing the same, advise government on policies, strategies and plans to prevent and combat the pandemic and to support interventions addressing the pandemic through resource mobilisation, etc.¹²¹ The Council is made up of appointees of the Minister of Health including permanent secretaries, NGO representatives including the Network of Zambian people Living with HIV/AIDS, representatives of the medical fraternity, the Attorney General, etc.¹²² The Act further provides for the establishment of a secretariat charged with the responsibility of implementing Council decisions. Among the specific functions of the Secretariat are the development of strategies for appropriate interventions targeted at the most vulnerable populations, and development of guidelines for securing the human rights of HIV and AIDS affected persons.¹²³

¹¹⁹ No.10 of 2002

¹²⁰ National HIV/AIDS/STI/TB Council Act, section 4(1).

¹²¹ *Ibid*, section 4(2).

¹²² *Ibid*, section 5.

¹²³ *Ibid*, section 12(2.d and h).

As maybe observed from the creating statute, the Council has only been in existence legally for a short time.¹²⁴

3.5. VICTIM SUPPORT UNIT (VSU) OF THE POLICE FORCE

The VSU is an important player as it interacts with people who face abuse directly. It has no record of any complaints of discrimination based on HIV status. Most of the cases have to do with gender violence. The idea for a VSU dates to 1994 with a police reform program initiated by women's NGOs. The VSU began its work in 1997 and now has officers at virtually every police station in the country.¹²⁵ The unit is tasked with handling cases of physical or sexual abuse, including child abuse, violence against women, property grabbing, and victimization of the elderly. Although the VSU has intervened effectively in some cases, the potential impact of the VSU has been undermined by a fundamental shortage of resources, equipment, and training. For example, the VSU has only two vehicles for the whole country, which they received from the Danish Embassy in 2000, although the unit is trying to secure transportation for all provinces. There are currently 100 women officers in the VSU, and one woman officer is supposed to be assigned to each police post. The VSU contends that this is a difficult task to fulfil because many women refuse to be assigned to police stations in remote areas.

According to the VSU in Lusaka, ninety-seven cases were reported to them in 1997; 1,954 in 1998; 2,232 in 1999; 3,845 in 2000; and 7,815 in 2001. Increasingly, counsellors, social workers, peer educators and others are telling girls to report cases of abuse to the VSU or are themselves reporting cases of abuse. The VSU staff has increased from twelve officers in 1996 to 230 in 2002, with sixty more expected by the

¹²⁴ Prior to the enactment of The National HIV/AIDS/STI/TB Council Act, the Council existed for over two years without legal basis.

¹²⁵ Human Rights Watch, *SUFFERING IN SILENCE-The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia* (2002), p76.

end of the same year.¹²⁶ Although this increase in the reporting of cases may reflect growing confidence in the VSU over and above the apparent increase in the prevalence of abuse cases, the record of the VSU is still disappointing. It is possible that many more people would turn to the VSU were it not for a fundamental mistrust of the police by the population.

It now remains to be seen how efficacious these formal structures have been at directing and enforcing anti-discrimination legislation and policy.

3.6. EFFICACY IN ADDRESSING HIV/AIDS

From the outset, it is important to note that there are no cases on record that have gone through the court system to do with discrimination on the basis of HIV/AIDS STATUS. Thus, to quote the Chief Justice, ‘our jurisprudence has not yet been provoked by HIV/AIDS’.¹²⁷ This means that the courts have hitherto not done anything to apply anti-discrimination legislation to the pandemic. The same holds true for the PHRC as for the Commission for Investigations. This state of affairs may be attributed to several factors. Some of them have to do with the inaccessibility of the justice delivery system, particularly to the most vulnerable groups including women, children and the poor.¹²⁸ These barriers include long distances to the structures particularly for rural areas, prohibitive costs, poor infrastructure, in some cases, no legal representation, complicated procedures etc.¹²⁹ Other reasons are perhaps more subtle and peculiar to the nature of the pandemic. HIV/AIDS carries with it so much stigma, attributable to society’s perception of the low moral standing of people who get infected, ignorance, the absence of a cure etc. Consequently, in addressing HIV/AIDS, there is a greater

¹²⁶ *Ibid.*

¹²⁷ ZARAN *supra* note 76, in the Speech presented by His Lordship, the Chief Justice, Mr. Justice Sakala.

¹²⁸ WLSA *supra* note 77 at 155 and 157

¹²⁹ *Ibid.*

need than with other life threatening conditions to assure rights of privacy and to maintain confidentiality. Paradoxically, the protection of the human rights of persons at risk is the most effective way of arresting or slowing the spread of the virus.¹³⁰ The above enumerated formal structures are generally designed to hear matters in public.¹³¹ This may be one of the factors that discourage victims of discrimination from coming forward to seek redress. Regarding the courts, there is also the fact that there is no provision for litigants to proceed with pseudonyms. This means that the individuals would be on record as being HIV positive and this may further discourage them. Another restraint may be the apparent lack of a remedy, given the way the anti-discrimination clauses are restrictively couched vis-à-vis HIV/AIDS.¹³²

Most of the matters that have come before the court system that have had something to do with HIV/AIDS have been with regard to sexual violence against women and children. The following case studies are illustrative;

- A study reports a case in which a husband continuously forced his wife to have sex with him in spite of her ill health occasioned by an STD that he had passed on to her. The matter could not proceed for litigation because marital rape is not recognised under Zambian law.¹³³
- In another case, a 48 year old man lured a little girl called Mutinta in to watching television and later defiled her. She contracted an STD and at the time

¹³⁰ The Honourable Justice Michael Kirby AC CMG, *LAW DISCRIMINATION AND HUMAN RIGHTS* (1995).

¹³¹ The Commission for Investigations, on the other hand, operates *in camera*. It has been critiqued for so doing, but it is submitted that this might be one of its most attractive features for addressing HIV related abuses.

¹³² This point was highly discussed at the ZARAN Judge's workshop on HIV/AIDS (*Supra* note 76). In the course of discussion, the following sentiments were passed; 'Is there a way of protecting someone who has been discriminated against given the lacuna in our law regarding non-discrimination on the basis of HIV status?' (**Chief Justice**) To which **Justice Mambilima** responded, 'It would require taking judicial activism to the highest level'.

¹³³ WLSA, *Gender Violence-The Invisible Struggle* (2001), p53.

of reporting, was waiting to undergo reconstructive surgery occasioned by the attack.¹³⁴

- Another case involved a policeman who ‘arrested’ a 15 year old girl with her friends, alleging that they had a case to answer. He led them to the police station, locked up the girl and forced her to have sexual intercourse with him.¹³⁵
- In 2002, a group of Zambian women’s organizations published an NGO commentary on the government’s official report to the U.N. on the implementation of CEDAW. The NGO report underscores the vulnerability of girls to violence and HIV, and the state’s failure to protect them: The media carries almost daily reports of children being raped or defiled by adults often within the home because of mythical hopes of getting cured of AIDS or avoiding HIV infection by having sex with virgins. The following headlines illustrate: ‘Man 23 in court for defiling girl 7’, ‘HIV+ man gets 30 months for defiling girl 13’, ‘Grandfather 64 gets 2 years for defiling girl 5’. The result is that children are getting infected and dying and the courts are passing light sentences on the perpetrators.¹³⁶

It is submitted that while these cases are indeed disturbing, and while the criminal law must play its role in bringing perpetrators to justice, it is precisely in the light of reports such as these that law and its institutions must rise to the occasion and protect PWA. The Post Newspaper carried a story headed ‘*HIV Positive people go round infecting others*’. In this story, a contributor was calling for stiff laws to punish PWA. Winstone Zulu, Zambia’s most prominent openly HIV positive individual had this to say in response:

¹³⁴ *Ibid*, p59.

¹³⁵ *Ibid*.

¹³⁶ Human Rights Watch, *SUFFERING IN SILENCE-The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia* (2002), p70

It is a crime to wilfully transmit any disease. Measures to stop the spread of HIV should produce the desired results. Making a law that specifically targets wilfully transmission of HIV can only affect very few people who know their HIV status (only 6% of Zambians at the moment). A law that would make those that go for a test to be seen as potential criminals would only drive the epidemic underground. Attractive as it may seem, this kind of law would work in reverse.¹³⁷

The question that begs an answer is whether criminal laws and prosecutions represent sound policy responses to the pandemic, or whether any legal or policy response to HIV/AIDS should not only be pragmatic in pursuit of public health but should also conform to international human rights norms, particularly the principles of non-discrimination and due process.¹³⁸ It is, therefore, submitted that law and policy that de-stigmatises PWA and addresses discrimination should be favoured.

The formal institutions must, therefore, re-evaluate their systems to enhance their comparative advantage in addressing the pandemic. For example, the case involving impropriety by the police officer could be appropriately handled by the Commission for Investigations. The police officer is a public officer and he abused his authority. This falls within the ambit of the Commission. The Courts, with the option of 'judicial activism', can also rise to the occasion and denounce such practices as violence against women and children. The point was appropriately articulated by the Chief Justice when he said, 'as a bench, we must be ready to accord justice to HIV-Positive persons fairly and objectively when they bring claims based on discrimination because of their status'.¹³⁹

¹³⁷ Winstone Zulu in *The Post* Newspaper of September 2003.

¹³⁸ UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, (2002)

¹³⁹ Sakala E (CJ), *supra* note 1.

3.7. SUMMARY

The chapter sought to identify the institutions that have a bearing on anti-discrimination law and policy, and to evaluate their efficacy in the light of the HIV/AIDS pandemic. It is clear that there are several formal structures that potentially could play an important role in administering and enforcing the culture of non discrimination which is much needed to concretely address the pandemic, there are fundamental impediments to their effectiveness. Other than inherent systemic barriers such as procedure, there are also problems of being under resourced such that the institutions are already straining under their present loads. This means that the prospect of addressing HIV/AIDS as well would not be enthusiastically approached. There is therefore a need to revisit these structures and overhaul them so as to position them to appropriately respond to the pandemic. It now remains to pick a leaf from the experience of others who have employed law and policy to combat HIV/AIDS.

CHAPTER IV

BEST PRACTICE EXAMPLES

'By 2003, [nations should] enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by, people living with HIV/AIDS and members of vulnerable groups.'

UNGASS DECLARATION, Paragraph 58.

4.0. INTRODUCTION

The UN International Guidelines on HIV/AIDS and Human Rights enjoin States to enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, that, *inter alia*, emphasise education and conciliation and provide for speedy and effective administrative and civil remedies.¹⁴⁰ Governments are responsible and accountable for directly violating rights, as well as for ensuring that individuals are able to fully realise their rights.¹⁴¹ State obligations may be summarised as being to *respect*, *protect*, and *fulfil* human rights.¹⁴²

In relation to HIV/AIDS related discrimination, the obligation to respect requires states to ensure that their laws, policies and practices do not directly or indirectly discriminate

¹⁴⁰ UN, *International Guidelines on HIV/AIDS and Human Rights*, (1998), Guideline 5, p15.

¹⁴¹ Maluwa M. et al, *HIV and AIDS Related Stigma, Discrimination, and Human Rights: A Critical Overview*, (2002), p9.

¹⁴² UN Committee on Economic Social and Cultural Rights, General Comment No. 14 (2000).

based on HIV or AIDS status.¹⁴³ The obligation to protect requires states to take measures that prevent HIV/AIDS related discrimination by third parties, and the obligation to fulfil requires states to adopt appropriate legislative, budgetary, judicial, promotional, and other measures that address HIV/AIDS related discrimination and that compensate those who suffer such discrimination.¹⁴⁴

A number of countries, in responding to the pandemic, have taken steps, both policy and legislative, which reflect an appreciation of the fact that HIV/AIDS, being a human rights issue, draws attention to states legal obligations. This chapter draws from the experiences of the Southern African region in addressing HIV/AIDS through law, as well as the experiences of other jurisdictions such as United States of America and the Australia.

4.1. SOUTHERN AFRICA

4.1.1. South Africa.

4.1.1.1. *Legislation and Policies.*

South Africa, with among the world's highest HIV prevalence and infection figures¹⁴⁵ provides perhaps the best example of legislative and policy responses to HIV/AIDS related stigma and discrimination. Its progressive Constitution contains an extensive Bill of Rights which, *inter alia*, guarantees equal protection and benefit of the law, while not denying the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.¹⁴⁶ The Constitution further recognises the Right to Equality and outlaws unfair discrimination based on enumerated grounds.¹⁴⁷

¹⁴³ Maluwa M. *supra* note 2.

¹⁴⁴ *Ibid.*

¹⁴⁵ Prevalence is 20.1% (UNAIDS, 2002).

¹⁴⁶ Constitution of the Republic of South Africa, s30(3).

¹⁴⁷ *Ibid.*, s9(3). These grounds do not include 'health' or 'other' status, but instead have 'disability', which, it has been suggested, includes HIV status (*Infra*, p3.) See also Richter M, 2002, p27.

In expanding the equality provision, South Africa has the Promotion of Equality and Prevention of Unfair Discrimination Act.¹⁴⁸ The Act is intended to practically implement and give greater effect to the Equality Clause of South Africa's Constitution. Section 6 of this Act prohibits unfair discrimination on the ground of disability (which may include an interpretation of HIV and AIDS, though it is not expressly so defined in the Act). The Act is useful in ensuring that discrimination on the basis of HIV doesn't take place.

Another important South African piece of legislation is the Employment Equity Act¹⁴⁹. This Act says that no person may unfairly discriminate against an employee or job applicant in any employment policy or practice on the basis of twenty listed grounds unless it is an inherent requirement of the job. 'HIV status' is listed as one of the grounds upon which an employee may not be discriminated against.¹⁵⁰ The Act further prohibits unauthorised employment-related HIV testing. All such testing must take place only with permission of the South African Labour Court. Furthermore, The Act makes provision for the issuing of a 'Code of Good Practice on Key Aspects of HIV/AIDS and Employment'.¹⁵¹ This Code was launched on the 1st of December 2000 and provides for requirements for HIV testing, elements of confidentiality, a safe working environment, employee benefits, grievance procedures and other issues relating to HIV/AIDS and the workplace.¹⁵² ¹⁵³ The Code defines 'Direct Discrimination' as being 'exclusion, preference etc. made on the basis of direct reference to HIV status', while 'Indirect Discrimination' is defined as 'When a "neutral" practice or policy impacts more negatively on a particular group'. The code

¹⁴⁸ No.116 of 1990.

¹⁴⁹ (No.55 of 1998).

¹⁵⁰ Richter M. et al, *Review of HIV/AIDS Legislation in six Southern African countries*. p27 (2002).

¹⁵¹ *Op cit*, section 54(1)

¹⁵² *Op cit*, p26.

¹⁵³ *Ibid*, Richter notes that this Act is not applicable to members of the South African National Defence Force, National Intelligence Agency and the Security Service.

further says that one of the most effective ways of reducing and managing the impact of HIV/AIDS in the workplace is through the implementation of an HIV/AIDS policy.

In addition is the Labour Relations Act,¹⁵⁴ which regulates relations between employers and employees, governs issues such as the right to join trade unions, the right to strike, etc, and protects employees from unfair labour practices and unfair dismissals. The latter have been interpreted to include protection for PWA from being unfairly dismissed and unfairly treated.¹⁵⁵ The Act also provides for a 'Code of good conduct' which enjoins employers to only terminate the employment for reasons of incapacity (e.g. where an HIV positive individual is incapacitated by an AIDS related illness) after fair procedures are followed to ensure 'every available effort' was made to accommodate the worker.¹⁵⁶

A further piece of legislation with a bearing on HIV related discrimination is the Medical Schemes Act.¹⁵⁷ The Act regulates the various medical aid schemes in South Africa and provides for the minimum benefits that they must offer to their members. This Act is intended to ensure that nobody (including PWAs) is excluded from such schemes, provided they are able to pay their contributions. The Act provides that a medical aid scheme may not be registered if it discriminates directly or indirectly against any person on the basis of their health status. Furthermore, all schemes must offer a minimum level of benefits to employees with HIV/AIDS (referred to as the Prescribed Minimum Benefits, which provides for the compulsory cover of medical and surgical management for opportunistic infections or localised malignancies).¹⁵⁸

¹⁵⁴ No. 66 of 1995.

¹⁵⁵ Richter *supra* note 149.

¹⁵⁶ *Ibid.*

¹⁵⁷ No. 131 of 1998.

¹⁵⁸ *Op cit.*

4.1.1.2. Jurisprudence

South Africa has developed a body of jurisprudence on HIV/AIDS. It has had several matters heard before its courts, including the high media profile case the *Pharmaceutical Manufacturers Association of South Africa and 41 others v The President of the Republic of South Africa and others*.¹⁵⁹ This and other cases have helped shape HIV/AIDS law, policy and practice in South Africa, as well as increased people's awareness and knowledge concerning the pandemic.

- In *Jansen van Vuuren and another NNO v Kruger*,¹⁶⁰ the then highest court in South Africa, ruled in favour of a patient's right to the confidentiality of his HIV status. The patient's doctor had, without the informed consent of his client, disclosed the client's status to two other practitioners over a game of golf. The court upheld the public health rationale in protecting the patient's rights to confidentiality as it declared that the 'public interest' did not warrant the disclosure of his HIV status.
- In *C v Minister of Correctional Services*,¹⁶¹ 'C' was not provided with pre-or post-test counselling when he was given an HIV test, and was allowed little time to decide whether or not to have an HIV test. 'C' sued the Minister for violating his right to privacy. The court ruled in 'C's' favour, saying that because of the absence of pre-and post- test counselling, and want of time to decide, 'C' had not given informed consent to the test.
- In *S v Cloete*,¹⁶² A prisoner's medical condition (HIV status), allowed for early release from prison and placing under correctional supervision. The judge ruled

¹⁵⁹ Case No. 4183/98. This case is discussed in H. Mwakyemba and G.M. Kanja, *Implications of the Trips Agreement on the Access to Cheaper Pharmaceutical Drugs by Developing Countries: Case Study of South Africa v. The Pharmaceutical Companies*, 34 ZAMBIA LAW JOURNAL 130-145(2002)

¹⁶⁰ 1993(4) SA 842(A).

¹⁶¹ 1996(4) SA 292.

¹⁶² 1995(1) SACR 367(W).

that his condition had changed such that to continue serving the term would have been far harsher a sentence for him than for others serving a similar sentence.

- Another case is the landmark *Hoffmann v South African Airways*¹⁶³. Hoffmann applied for a job with South African Airways (SAA) as a cabin attendant. He contended that SAA had unfairly discriminated against him on the basis of his HIV positive status in rejecting his application for employment. The matter was first heard in the High Court where the Judge found for SAA, upholding their defence of promoting the safety and health of its passengers and its own competitive capacity. The case was brought to the Constitutional Court on appeal. The court found that Hoffmann had indeed been unfairly discriminated against, and that SAA violated his right to equality, dignity and fair labour practices. It set aside the decision of the High Court and further held that PLWA have been stigmatised and, as one of the most disadvantaged groups in society, deserve special protection by the law. The Court ordered SAA to make an offer of employment immediately to Mr. Hoffmann, and bear costs.

This sample of the South African experience reveals that, in so far as law and policy frameworks are concerned, South Africa is a definite trail blazer and must be emulated.

4.1.2. Namibia

Namibia also furnishes a positive example regarding jurisprudence developed in the Courts. In *Haindongo Nghidipohamba Nanditume And Minister Of Defence*,¹⁶⁴ the Namibian Labour Court ordered the Namibian Defence Force (NDF) to recruit an HIV positive applicant and further ordered that that no person may be excluded from enlistment into the NDF solely on the basis of such person's HIV status where such

¹⁶³ 2001(1)SA(CC)

¹⁶⁴ LC 24/98, p12.

person is otherwise fit and healthy unless such person's CD4 Count is below 200 and viral load is above 100,000.

This judgment came against a background of legislation not very dissimilar from that of Zambia. The Namibian Constitution also contains a Bill of Rights. Articles 8, 10 and 13 are particularly relevant to this discourse. Article 8(1) provides that the '*dignity of all persons shall be inviolable*'. Article 10 ensures equality and freedom from discrimination and provides:

(1) all persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status

The above article doesn't make specific reference to discrimination on the basis of HIV/AIDS. However, the Namibian Supreme Court has held that in giving effect to the protection of fundamental rights and freedoms enshrined by the Bill of Rights (chapter 3), a 'right giving' and 'purposive' approach is to be followed and that the provisions of the Constitution are to be

broadly, liberally and purposively interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the values bonding its people and in disciplining its Government.¹⁶⁵

It has been submitted that on this basis, the Namibian Courts would have little trouble in finding discrimination on the basis of HIV status alone unconstitutional.¹⁶⁶

Namibia also has a National Policy on HIV/AIDS.¹⁶⁷ The policy emphasises education and individual responsibility and outlaws discrimination as well as the implementation

¹⁶⁵ *Government of the Republic of Namibia and another v Cultura and another* 1994(1) SA 407 (NmSC), 418 F-J.

¹⁶⁶ Clayton Figueira M. *Discussion Paper, Current Legislation, Policies and Practices in Namibia in Relation to HIV Prevention to HIV Prevention and Testing* at 3, presented to the Policy Seminar: Elements of an HIV/AIDS Policy for a Defense Force, Windhoek, Namibia: 12-15 February 2001.

of coercive control measures.¹⁶⁸ Furthermore, the Namibian Labour Minister has promulgated guidelines in terms of the Labour Act,¹⁶⁹ for the implementation of the National Code on HIV/AIDS and Employment, which are binding on all employers and employees in applying the Labour Act in respect of HIV/AIDS in employment.¹⁷⁰ The guidelines, read together with section 107 of the Labour Act, outlaw discrimination on the basis of HIV in employment and employment practices.¹⁷¹ Figueira reports that the Namibian Government is working on a revised National Policy on HIV/AIDS, Confidentiality, Notification, Reporting and Surveillance.¹⁷²

Namibia also has a Charter on HIV/AIDS and Human Rights in which principles of non discrimination are elaborated. It does not have the force of law but is useful as an awareness tool.

4.1.3. Others

A study reviewing legislation on HIV/AIDS in six southern African countries including Botswana, Lesotho, Mozambique, South Africa and Zimbabwe, has revealed that there are few countries with any provisions in their laws that deal with HIV/AIDS.¹⁷³ Where provisions do exist, they have to do mainly with criminalisation of certain sexual behaviours, including what is termed 'wilful transmission'. This appears to be consistently the first response from the legal sector to the epidemic, and in many cases, falling short of the tenets laid down in international standards.¹⁷⁴ Furthermore, there is no case law in most countries.

¹⁶⁷ Adopted by the Namibian Cabinet in June 1992.

¹⁶⁸ In particular, paragraph 4 highlights these issues.

¹⁶⁹ No. 6 of 1992.

¹⁷⁰ Namibian Government Notice 78 of 1998 published in Government Gazette No. 1835 of 3 April 1998.

¹⁷¹ Paragraph 6.2.1. See also paragraphs 6.5., 6.6.3., 6.3.2., 6.7.1., 6.8.1., 6.8.3.

¹⁷² Clayton Figueira M. *supra* note 165 at 6.

¹⁷³ Richter M. *supra*, note 149, generally.

¹⁷⁴ An example of such standard may be found in Guideline 4 of the International Guidelines on HIV/AIDS and Human Rights.

4.2. INTERNATIONAL EXAMPLES

4.2.1. The United States of America (USA)

From the USA, comes the example of the Americans with Disabilities Act¹⁷⁵ (ADA). The case of *Bragdon v Abbott*¹⁷⁶ gave the American Supreme Court opportunity to interpret the ADA as it applies to HIV infection and to rule that Congress intended HIV infection to be included as a disability under the law. In this case, Abbott, who was HIV positive, was refused treatment by Bragdon, a private dentist at his office, even though he offered to treat her at a hospital. Abbott refused and filed a suit under the ADA. The trial Court found that HIV status was a disability, which was confirmed by the US Supreme Court in appeal. It was held that a health care professional could refuse treatment only in the case of significant risk, but what constituted such risks would depend on the objective medical and scientific data available and not on his perception of risk. Thus, America has utilised both the medical and social model of disability in the ADA definition. Disability (or as the ADA puts it, 'being regarded as having an impairment') doesn't rely on the factual presence of a disability, but rather than on the social consequences of being regarded as having a disability.¹⁷⁷

4.2.2. Australia

Interestingly, Australia adopts a similar approach to anti-discrimination for PWA. The Disability Discrimination Act¹⁷⁸ (DDA) is the operative disability legislation in Australia. It was enacted to

make unlawful discrimination on the basis of disability in the areas of employment, education, access to premises, the provision of goods, services and

¹⁷⁵ 1990. It was passed to expand the reach of the Rehabilitation Act of 1973 and outlaw discrimination based on disability.

¹⁷⁶ 524 US. 624 (1998)

¹⁷⁷ Forman L. *An Examination of the Methods for Protection Proposed for HIV/AIDS in the Equality Legislation*, (1998), p17.

¹⁷⁸ 1992.

facilities, accommodation, the disposal of land, the activities of clubs, sport, the administration of the Commonwealth laws and programs and in requests for certain information. Harassment on the grounds of disability is also made unlawful.¹⁷⁹

This was applied to HIV in the case of *Commonwealth of Australia v the Human Rights and Equal Opportunity Commission and X*.¹⁸⁰ In this case, the Federal Court of Australia found that the exclusion of a recruit with HIV from the military service constituted discrimination on the basis of disability. The Court accepted that there might be some instances when a person with HIV could be restricted from specific employment positions, but that in the present case the prerequisite was discriminatory. The court held that ‘there is no need or occasion to allow employers to implement policies of discrimination against persons with disabilities in the name of occupational and workplace safety’.¹⁸¹

4.3. Framing Protection against Discrimination...To list or not to list?

The options explored in the American and Australian examples above, in terms of anti-discrimination, have been along the lines of including HIV in definitions of disability. Another option available to states is to either include the ground of ‘HIV status’ in the general anti-discrimination clauses, or to include the ground of ‘other status’ instead. The inclusion of HIV status as a separate ground is largely motivated by the value of providing explicit protection in equality legislation to PWA.¹⁸² The potential empowerment and deterrent value of the explicit protection is the compelling strength of this approach.

¹⁷⁹ *Op cit*, note 176.

¹⁸⁰ No Qg 115 of 1995, 1996 Aust. Fed Ct(Lexis 859).

¹⁸¹ *Ibid*.

¹⁸² Forman L. *supra* note 176.

However, there are arguments against this approach. It is suggested that this approach may lead to what has been termed as 'AIDS exceptionalism'.¹⁸³ It has been argued that exceptional treatment of HIV could further stigmatise the condition. It is suggested that the public health response to HIV should be similar to comparable diseases and that the impression that HIV is receiving special treatment may create a backlash against those affected.¹⁸⁴ A response to this argument was eloquently articulated by the South African Law Commission as follows:

In principle, HIV and AIDS should be treated no differently from other life threatening diseases. To realise that principle however, special measures may be warranted. The scale of the epidemic is singular, and no other disease will exact a comparable toll in illness and death. Given this scale, it is argued that the epidemic requires special measures. In addition, no other disease appears to face the extent of stigma and discrimination that confront people with HIV and AIDS. If people with other conditions were unfairly being denied access ...specific legislative measures might be argued to be necessary in these cases as well.¹⁸⁵

The other option is to include a more generic ground of 'other status' into anti-discrimination clauses. The United Nations Commission on Human Rights, in its resolutions, has declared that the term 'or other status' in various international human rights instruments should be interpreted to cover health status, including HIV/AIDS.¹⁸⁶ This is the option advocated for by the author. In disproving the first option, it is submitted that it is undesirable to make HIV status and disability mutually exclusive as potential avenues for protection of PWA. It is further suggested that disability carries

¹⁸³ *Ibid*, p23.

¹⁸⁴ *Ibid*.

¹⁸⁵ *Ibid*, p24.

¹⁸⁶ United Nations Commission on Human Rights, resolutions 1999/49, 2001/51, 2002/47

with it its own stigma and so combining the two statuses in conferring protection would be doubly difficult, particularly in serving the educational and attitude changing objective of the anti-discrimination legislation.

It is submitted that the 'other status' option can easily be interpreted by the courts to include HIV/AIDS, given the authoritative background of international human rights law as presented above. The ground, would still however, leave room to the courts to extend the ambit of the protection of the ground to situations other than HIV and AIDS. We thus respectfully disagree with the South African Law Commission when it says that 'no other disease will exact a comparable toll in illness and death.'¹⁸⁷ At the close of the 19th century, the single threat to the western world and way of life was the plague. It too claimed its toll of life, and then was perceived as the 'disease to end all diseases'. We now know different! Yesterday, it was the plague, today, its HIV and AIDS. Tomorrow, it may be a different threat to a life of dignity. It is suggested that the courts may be more quickly responsive to societal changes and could more easily translate these into judicial policy through interpretation and judicial activism.¹⁸⁸

4.4. SUMMARY

The chapter has endeavoured to illustrate how other jurisdictions have engaged with law to address HIV related stigma and discrimination. It has been shown that the interventions have included deliberate legislative and policy pronouncements, as well as bold and sometimes, revolutionary judgments from the Bench. By and large, it has been demonstrated that a human rights framework has provided for other countries, access to existing procedural, institutional and other monitoring mechanisms that have not only enforced the rights of PWA, but are also useful to counteract and redress discriminatory action. Zambia would do well to glean from these experiences.

¹⁸⁷ Forman *supra*, note 176.

¹⁸⁸ See Chapter III, p6 as well as note 25.

CHAPTER V

CONCLUSION

5.0. SUMMARY

The challenge of HIV and AIDS policy continues to be the need to address not only what might be called the "HIV-specific" issues, such as HIV education programmes, treatment and research, etc, but also the underlying social, cultural and economic factors that deprive individuals of the power to protect themselves against HIV infection.¹⁸⁹ Put in this context, the task is a mammoth one and lends a near sense of paralysis to HIV/AIDS interventions. The changes required are deep-seated and clearly far transcend the law and the legal system. It takes more than just law to address discrimination because it stems from values and value judgments. As one openly HIV positive heroine once said,

HIV/AIDS is not (just) a challenge to our resources or capabilities, but it is a challenge to our values.¹⁹⁰

Moreover, legal remedies, which apply in the event of unjustified discrimination, must also be recognised as dealing only with the symptoms of the problem and not with the cause which lies with community prejudice and lack of sensitivity to the rights and needs of people with HIV.

Laws that protect individual rights and interests must, to be effective, incorporate a proscriptive element that imposes certain penalties for non-compliance, but they are not essentially proscriptive in their thrust. Equal opportunity legislation, for example, may prohibit certain conduct on the part of employers, landlords and others that is held to

¹⁸⁹ Hamblin J. *The Role Of The Law In HIV And AIDS Policy* (1992), p5.

¹⁹⁰ Emma Tuaehepa of Namibia quoted in ZARAN NEWS, December 2002-January 2003, p4.

amount to unlawful discrimination, but the philosophy underpinning the legislation is that of protecting individuals against discrimination. The objective of the legislation is positive rather than negative: to engender respect for individuals and to promote human rights rather than merely to impose a prohibition on, for example, commercial sex work. It could be conceded that the distinction is one of emphasis rather than degree, but there is nonetheless an important conceptual shift between, on the one hand, regarding the role of the law as that of enforcing legal prohibitions and, on the other hand, viewing it as a mechanism for promoting and protecting individual rights. The distinction between the proscriptive and the protective roles of the law is important because it assists in determining whether active legal intervention is an appropriate policy response. While proscriptive and coercive laws may be counterproductive if they discourage the voluntary participation by people at risk of HIV in measures to reduce HIV transmission, protective laws may help to enlist the support and cooperation of these people in prevention strategies.¹⁹¹

Whereas the proscriptive and the protective models of legal intervention focus on the conduct of individuals or on the adjustment of rights and obligations as between individuals, the third model envisages a legal response to HIV/AIDS that will operate on a broader and more far-reaching level. This is the model which suggests that the law can play a proactive role not merely in mediating rights and obligations as between individuals but also in seeking to change underlying values and patterns of social interaction that create vulnerability to the threat of HIV infection.¹⁹² The people who remain most vulnerable to the pandemic are those who are denied the means of protecting themselves against the risks of HIV because of economic need or powerlessness to control the basis upon which their sexual relationships take place.

¹⁹¹ *Op cit.*

¹⁹² *Ibid.*

This may occur, for example, because a person's sexual activity is directed by his or her need for economic support, because preventive measures, such as condoms, are not accessible¹⁹³ and affordable, or because poor health care (in particular, inadequate treatment of sexually transmitted diseases) increases transmission risks. For women, it may occur because their sexual relationships with men are determined by cultural values which are beyond their control¹⁹⁴ and which are often compounded by lack of economic independence.

The following is a summary of the findings of this study:

- HIV/AIDS poses a threat to life, to dignity and to democratic principles of equality. Not only does the pandemic have a clinical impact i.e. high mortality (200 deaths per day in Zambia attributed to HIV related illnesses), but furthermore, affects the enjoyment of freedoms and liberties that underpin society's democratic construct.
- Stigma and discrimination of people on the basis of perceived or actual HIV status has resulted in denial of enjoyment of various rights and increases vulnerability to the pandemic.
- International human rights norms provide a coherent, normative framework for analysis of the HIV/AIDS problem. They also provide a legally binding foundation with procedural, institutional and other accountability mechanisms to address the societal basis of vulnerability and implement change.
- Zambia's anti-discrimination clauses and policies are insufficient to address HIV and AIDS related discrimination. They need to address discrimination

¹⁹³ e.g. in prison.

¹⁹⁴ In Zambia, the cultural practices may even be beyond the reach of the Constitution as discussed in chapter iii.

prospectively, i.e. deterring its practice and retrospectively, by providing an effective legal remedy when it happens.

- It is clear that there are several formal structures that potentially could play an important role in administering and enforcing the culture of non discrimination which is much needed to concretely address the pandemic. There are, however, fundamental impediments to their effectiveness which cause them not to be the first port of call for most Zambians (least of all for PWAs). These include complicated and lengthy procedures; prohibitively high costs; geographical location i.e. far from where most people are; apparent absence of an effective remedy vis-à-vis HIV related discrimination; lack of guarantees regarding confidentiality; there are also problems of being under resourced (both human and financial) such that the institutions are already straining under their present loads; lack of knowledge on the human rights dimensions of the pandemic as well as the role of law among the formal structure personnel.
- A number of countries, in responding to the pandemic, have taken steps, through legislation, policy and judgments that protect and promote the rights of PWA. These have contributed to enhanced protection of PWA and are reducing discrimination.
- Most sub-Saharan countries do not have provisions that engender a rights based response to HIV/AIDS. Where some provisions do exist, they have to do mainly with criminalisation of certain sexual behaviours, including what is termed 'wilful transmission'. This appears to be consistently the first response from the legal sector to the epidemic, and in many cases, falls short of the tenets laid down in international standards. This approach, if not appropriately handled, may simply fuel stigma and discrimination and may actively impede prevention

efforts by alienating these people who are at risk of HIV by making it less likely that they will cooperate in prevention measures.

- There are options available for the couching of anti-discrimination legislation. These options comprise the extension of Disability legislation to cover HIV/AIDS within the definition of disability, thereby extending the benefits of the protection of the statute. Another option is the inclusion of 'HIV status' among the enumerated grounds within the definition of discrimination in both the Constitution and the Industrial and Labour Relations Act. Lastly, is the inclusion of a category referred to as 'other status' in the Constitutional and Labour definitions of discrimination.

5.1. Recommendations

To secure the protection, promotion and fulfilment of human rights for all, as well as to record success in addressing HIV and AIDS, the following are recommended:

5.1.1. Legislative changes

- i. Article 23(3) of the Constitution of the Republic of Zambia should be amended to include ‘other status’ as one of the listed grounds.
- ii. That article 23(3)(d) be repealed *in toto*.
- iii. That section 108 of the Industrial and Labour Relations Act be amended to include ‘other status’ as one of the listed grounds.
- iv. That the Industrial and Labour Relations Act provide that all workplaces adopt workplace policies that, *inter alia*, outlaw HIV related discrimination in labour matters, as well as provide sanctions within internal disciplinary procedures

5.1.2. Policy changes

- i. That relevant Ministers e.g. Health, Labour, Legal Affairs, etc, pass statutory instruments, orders, etc, as the case may be, requiring non discriminatory policy and practice in the respective sectors regarding HIV/AIDS.
- ii. That the National HIV/AIDS Policy includes express provisions outlawing direct and indirect discriminatory action.

5.1.3. Training and Advocacy

- i. That training sessions for members of the Judiciary, the Zambia Police Service, particularly, but not only, the Victim Support Unit, the PHRC and

the Commission for Investigations, on HIV/AIDS, human rights, gender and law be given priority. This could be done in collaboration between co-operating partners, the School of Law and NGOs such as ZARAN.

- ii. That public awareness campaigns be undertaken to empower ordinary people to challenge discrimination as well as to hold Government to account regarding the implementation of the myriads of international declarations, including the UNGASS Declaration. Again, this could best be carried out in collaboration, between co-operating partners, advocacy and membership organisations including the Network of Zambian People Living with HIV/AIDS.
- iii. That structures be created that can monitor Government's implementation of its international obligations. For example the PHRC could lead a team comprising members of civil society to regularly audit government action regarding compliance with the International Guidelines on HIV/AIDS and Human Rights.
- iv. There is need for increased Para-legal capacity to assist PWA claim their rights. This implies a training requirement. Partnership between the School of Law and ZARAN has already taken a step in this direction.¹⁹⁵ It should be enhanced and built upon. The creation of a Legal Aid Clinic in the School could achieve the purpose of keeping a regular cohort of paralegals, as well as providing the service to the community.
- v. That financial and other support be given for the taking up of public interest litigation e.g. Zambia's first HIV related discrimination case so that local jurisprudence could be provoked to address the pandemic. Law related

¹⁹⁵ In May 2002, ZARAN held a para-legal training workshop which involved a senior member of the School of Law, Dr M. Munalula. Another training workshop held in October 2003, also involved Dr Munalula of the School of Law.

NGOs such as the Legal Resources Foundation, National Legal Aid Clinic for Women, WLSA, ZARAN, etc should be supported to take on such cases.

5.1.4. Additional changes

- i. Encouragement of Alternative Dispute Resolution (ADR). This is so given the huge backlog of cases in the Courts,¹⁹⁶ and the attractions that ADR offers including comparatively lower costs, privacy, confidentiality, speedy resolution to problems and the fact that solutions may be tailored to specific situations. A further appeal of ADR is that parties to a dispute are encouraged to resolve the dispute amicably and so on going or prior relationships can be preserved.¹⁹⁷
- ii. That there be increased production of information education communication (IEC) materials including simplified and translated texts and commentaries on protective laws and policies including international human rights standards. This is directed at Government Printers, who could collaborate with other Government departments, as well as NGOs, to simplify, translate to local languages and distribute to the public through schools, health centres etc.
- iii. The National HIV/AIDS/STI/TB Council should take a lead in advocating to Government for laws and policies that are based on an appreciation for human rights. To this end, the Council should itself be the target of capacity building vis-à-vis appreciating rights based approaches to the pandemic.
- iv. Finally, Government and Co-operating partners should commit adequate funds to the response to HIV/AIDS. This, however, must not simply go to prevention efforts, e.g. condom distribution, but a substantial amount must

¹⁹⁶ See *Justice Ngulube Bans Courts from making Routine Adjournments*, The Post, 6 Jan. 2000, at 6.

¹⁹⁷ See Young A.P. *Alternative Dispute Resolution and its Place in the Zambia Judicial System*, 32 ZAMBIA LAW JOURNAL 79-84 (2000).

assist an overhaul of the regulatory framework within which HIV/AIDS is addressed in Zambia.

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**UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

DIRECTED RESEARCH PROPOSAL

NAME: KAUMBU MWONDELA

COMPUTER #: 96021161

SUPERVISOR: DR A. CHANDA

TITLE: ANTI-DISCRIMINATION

LEGISLATION IN DEMOCRATIC SOCIETIES;

HIV/AIDS, A NOVEL TEST CASE

OBLIGATORY ESSAY PROPOSAL

TITLE: ANTI-DISCRIMINATION LEGISLATION IN DEMOCRATIC SOCIETIES; HIV/AIDS, A NOVEL TEST CASE

1. INTRODUCTION:

An analysis of the legal values of modern democratic societies reveals that the main forces that have influenced thought have been the liberal idea of individual rights protecting the individual and the democratic idea proper proclaiming the equality of rights. Gradual extension of this idea of equality from the political to social and economic fields has added the problems of social security and economic planning. The principle legal values of a modern democracy may be summarised as being, firstly, the legal rights of the individual, secondly, equality before the law, thirdly, control of government by the people and lastly, the rule of law. Implementation and harmonisation of these principles has been and continues to be the main problem of democracy.¹

The advent of the Human Immuno Deficiency Virus-HIV and Acquired Immuno-Deficiency Syndrome- AIDS, has posed serious challenges to modern societies, threatening to undermine decades of social and economic gains. Not only does the pandemic have a clinical impact i.e. high mortality (200 deaths per day in Zambia attributed to HIV related illnesses), but furthermore, affects the enjoyment of freedoms and liberties that underpin society's democratic construct. Stigma and discrimination of people on the basis of perceived or actual HIV status has resulted in denial of enjoyment of various rights ranging from the right to life, right through to

¹ Friedmann W. Legal Theory, 5th Ed, (2002).

such rights as to marry and found a family. Much has been written about legal rights and duties in the AIDS epidemic and the importance of an appropriate legal response. With many policy responses being shaped by the all too familiar and often misconceived debate about public health versus individual rights, the delineation of legal rights and duties has been a necessary part of the policy debate. Moreover, the ongoing reports of serious and unjustified encroachments on the civil liberties of people with HIV have established beyond doubt that the law has a central role to play in HIV and AIDS policy.

Anti-discrimination clauses in Constitutions and other legal codes are not a new phenomenon. In Zambia, they date back to the Independence Constitution, which sought to emphasise the equality of all human kind, irrespective of race, colour, sex, tribe etc. This was against the backdrop of colonialism, with its attendant racial discrimination. The anti-discrimination clause therefore, made it unlawful to discriminate, thereby providing relief to victims of discrimination, but also, more proactively, engendered a respect for the rights of individuals. It now remains to be seen what role law has in responding to the pandemic in Zambia, and furthermore, that a failure by law to guarantee respect, protection, promotion and fulfilment of human rights and equality for all, is a betrayal of the democratic order that the Zambian society purports to espouse.

2. PROBLEM STATEMENT

As mentioned in the introduction, the tenets of a democratic society include recognition of individual rights as well as the equality of rights. Discrimination, therefore, has no place in such a society. There is thus need for positive law to ensure that it denounces unfair treatment and promotes equality. In Zambia, the Constitution,

APPENDIX I

CAP 1 of the Laws of Zambia, is the Supreme law as declared by Article 1(3), which reads,

‘This Constitution is the supreme law of Zambia and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.’

Furthermore, Article 23 reads,

‘(1) Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.

(2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(3) In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Another anti-discrimination clause is found in the Industrial and Labour Relations Act, CAP 269 of the Laws of Zambia. Section 108 makes termination of employment on discriminatory grounds, an unfair labour practice. It reads,

‘(1) No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status,

religion, political opinion or affiliation, tribal extraction or social status of the employee.

- (2) Any employee who has reasonable cause to believe that the employees' services have been terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee has been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the Court'

It is submitted that these laws do not extend sufficient protection to the case of discrimination on the basis of HIV status. This means that an HIV positive individual may face discrimination on the basis of his status and not be able to seek recourse to the law. This is not only bad for the democratic order in which all ought to have the equal protection of the law, but also exacerbates the effects of the pandemic.

UNAIDS say 'those most affected by HIV/AIDS are people who have unequal access to fundamental social and economic rights. The denial of basic rights limits peoples' options to defend their autonomy, develop viable livelihoods and protect themselves, leaving them more vulnerable to both HIV infection and the impact of the epidemic on their lives. Principles of non-discrimination, equality and participation are central to an effective HIV/AIDS strategy that integrates human rights.'² There is therefore an urgent need to re-examine, inter alia, the above named laws and amend them so as to address the novel situation presented by HIV/AIDS.

² UNAIDS Report on the Global HIV/AIDS epidemic 2002.

3. JUSTIFICATION

The research is necessary and relevant for a few reasons. Firstly, it is intended to contribute to thought regarding the strengthening of the democratic order in Zambia using the agency of law. Secondly, it is an attempt to respond to the new 'ism' that is discrimination of people with HIV on the basis solely of their HIV status and thereby halt and possibly reverse the injustice. Furthermore, In June 2001, the General Assembly of the United Nations (UN), met in a Special Session, which adopted a Declaration of Commitment to address and possibly reverse the spread of the pandemic by 2015. In that Declaration, all States, acting as Governments pledged, *inter alia*, to, "by 2003, enact or strengthen anti-discrimination and human rights protections for people living with HIV/AIDS and for vulnerable groups."³ Zambia, therefore has obligations at the international arena, to enact/strengthen anti-discrimination clauses such as the ones discussed in this essay, thus is this research very important.

4. RESEARCH OBJECTIVES

The **general objective** of the paper is to inform the enactment/formulation and strengthening of anti-discrimination legislation, with a view to reducing the incidence and mitigating the impact of discrimination on the basis of perceived or actual HIV status in Zambia.

The **specific objectives** of the research include:

- (a) To discuss discrimination as a phenomenon that has existed in legal history
- (b) To analyse the legal and human rights dimensions of discrimination, vis-à-vis HIV/AIDS.

³ UNGASS Declaration of Commitment, Article 58.

- (c) To identify, analyse and evaluate institutions that enforce anti-discrimination law and policy, and their effectiveness
- (d) To analyse the responses of other Countries regarding anti-discrimination legislation and policy vis-à-vis, HIV/AIDS.
- (e) To make recommendations to inform the enactment/formulation and strengthening of anti-discrimination legislation

RESEARCH QUESTIONS

1. Does discrimination in general, and of people with HIV in particular, adversely affect a democratic society?
2. Does the law have a role to play in mitigating the impact of HIV/AIDS?
3. What should be done to enhance protection and promotion of individual rights in the face of HIV/AIDS?

METHODOLOGY

Research done in the University of Zambia library as well as in the School of Law, yielded two informative reports i.e. obligatory essays of previous students of the School of Law. These are listed below.

Furthermore, reports of Non-Governmental Organisations addressing HIV/AIDS will also be informative e.g. Women and Law in Southern Africa, Zambia AIDSLaw Research and Advocacy Network, Afronet, Network of Zambian People Living With HIV/AIDS, the Policy Project, Legal Resources Foundation etc.

APPENDIX I

In addition, the Internet also has invaluable information for this research, including inter alia, International Standards as they are summarised in the International Guidelines on HIV/AIDS.

Finally, the Laws of Zambia, 1995 Edition (Revised), case law (both local and foreign), as well as policies of such bodies as the National HIV/AIDS/TB/STI Council and others, will be consulted. Documents reviewed so far include:

- ‘The Legal Dimensions of AIDS’, Pamela Sibanda, UNZA, 1996. In this document, the author dwelt on three areas in which she sought to establish a relation between law and HIV/AIDS i.e. domestic relations, immigration and employment law. The subject of discrimination was discussed, though discrimination was not defined, nor was the legal basis for it’s prohibition adequately discussed. Furthermore, impugned provisions in Zambian law were not followed by concrete recommendations. While appreciating that law has a role to play in addressing the pandemic,
- ‘An Overview of the Legal Issues of HIV/AIDS’ Mwambo Mutale, UNZA, 2000. In this study, the author
- ‘HIV/AIDS and Human Rights: Analysis of Zambia’s Human Rights Policy and Legal Environment’, Matrine B. Chuulu, et al, Lusaka 2000.
- ‘HIV/AIDS, Law, Policy and Practice in Zambia (Unpublished)’, Zambia AIDSLaw Research and Advocacy Network, 2003.
- ‘Handbook for Legislators on HIV/AIDS, Law and Human Rights’ UNAIDS, 1999.
- ‘Report on the global HIV/AIDS epidemic’ UNAIDS, 2002.
- ‘AIDS epidemic update’ UNAIDS, December 2002.

DESIGN OF ESSAY

The paper is intended to have five (5) chapters, to be broken down as follows:

(a) Chapter I: Discrimination in legal history

- Define discrimination
- Cite incidences of discrimination on the basis of other grounds e.g. race and sex.

(b) Chapter II: HIV/AIDS, Discrimination and Law

- Back ground on HIV/AIDS pandemic in Southern Africa and Zambia.
- Legal/human rights dimensions of HIV/AIDS discrimination and impact.

(c) Chapter III: Institutions Enforcing anti-discrimination codes

- Courts i.e. High Court and Supreme Court
- Industrial Relations Court.
- Ombudsman
- Permanent Human Rights Commission etc
- These and other institutions would be 'audited' to evaluate their efficacy in enforcing anti-discrimination law/policy.

(d) Chapter IV: Best Practice Examples

-Examples will be given of initiatives in other Countries e.g. South Africa, Namibia, Canada, USA etc

(e) Chapter V: Conclusions and Recommendations

-Show that there has been greater success where legislation and policy have been positive rather than negative: to engender respect for individuals and to promote human rights rather than merely to impose a prohibition on acts such as discrimination on the basis of HIV status. Law should thus be a mechanism for promoting and protecting individual rights

It is hoped that this would be the general progression of the essay.

APPENDIX II

International Convention on the Elimination of All Forms of Racial Discrimination

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion, Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State, Convinced that the existence of racial barriers is repugnant to the ideals of any human society, Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and Cultural Organization in 1960, Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end, Have agreed as follows:

PART I

Article I

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead

to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4 States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

- (vi) The right to inherit;
- (vii) The right to freedom of thought, conscience and religion;
- (viii) The right to freedom of opinion and expression;
- (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
 - (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnic groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.

3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.

4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be nominees who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5.

(a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee;

(b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.

6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties. (amendment (see General Assembly resolution 47/111 of 16 December 1992);

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention:

- (a) within one year after the entry into force of the Convention for the State concerned; and
- (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.

2. The Committee shall report annually, through the Secretary General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

- 1. The Committee shall adopt its own rules of procedure.
- 2. The Committee shall elect its officers for a term of two years.
- 3. The secretariat of the Committee shall be provided by the Secretary General of the United Nations.
- 4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.

4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.

5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1. (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention;

(b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure. 4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.

5. The secretariat provided in accordance with article 10, paragraph 3, of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.

APPENDIX II

8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.

2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.

3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.

3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.

5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.

6. (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications;

(b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

7. (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged;

(b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.

8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.

9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph 1 of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14 December

1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2.

(a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies;

(b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in subparagraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.

4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention. 2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.

2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.

2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.

3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars:

- (a) Signatures, ratifications and accessions under articles 17 and 18;
- (b) The date of entry into force of this Convention under article 19;
- (c) Communications and declarations received under articles 14, 20 and 23;
- (d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The States Parties to the present Convention,

Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of man and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal right of men and women to enjoy all economic, social, cultural, civil and political rights, Considering the international conventions concluded under the auspices of the United Nations and the specialized agencies promoting equality of rights of men and women, Noting also the resolutions, declarations and recommendations adopted by the United Nations and the specialized agencies promoting equality of rights of men and women,

Concerned, however, that despite these various instruments extensive discrimination against women continues to exist,

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity,

Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs, Convinced that the establishment of the new international economic order based on equity and justice will contribute significantly towards the promotion of equality between men and women,

Emphasizing that the eradication of apartheid, of all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women,

Affirming that the strengthening of international peace and security, relaxation of international tension, mutual co-operation among all States irrespective of their social and economic systems, general and complete disarmament, and in particular nuclear disarmament under strict and effective international control, the affirmation of the principles of justice, equality and mutual benefit in relations among countries and the realization of the right of peoples under alien and colonial domination and foreign occupation to self-determination and independence, as well as respect for national sovereignty and territorial integrity, will promote social progress and development and as a consequence will contribute to the attainment of full equality between men and women,

APPENDIX III

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields,

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

PART I

Article 1. For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2. States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
- (g) To repeal all national penal provisions which constitute discrimination against women.

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Article 3. States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 4.

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

Article 5. States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

Article 6. States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

PART II

Article 7. States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

PART III

Article 10. States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all

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- categories in rural as well as in urban areas; this equality shall be ensured in preschool, general, technical, professional and higher technical education, as well as in all types of vocational training;
- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education;
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.
- Article 11. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:
- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.
2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:
- (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

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- (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;
- (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;
- (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

Article 13. States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;
- (c) The right to participate in recreational activities, sports and all aspects of cultural life.

PART IV

Article 15. 1. States Parties shall accord to women equality with men before the law.

2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

Article 16. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;

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- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
 - (c) The same rights and responsibilities during marriage and at its dissolution;
 - (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
 - (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
 - (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
 - (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
 - (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

APPENDIX IV

DECLARATION OF COMMITMENT OF THE U.N. GENERAL ASSEMBLY SPECIAL SESSION ON HIV/AIDS, JUNE 2001

1. We, heads of State and Government and representatives of States and Governments, assembled at the United Nations, from 25 to 27 June 2001, for the twenty-sixth special session of the General Assembly, convened in accordance with resolution 55/13 of 3 November 2000, as a matter of urgency, to review and address the problem of HIV/AIDS in all its aspects, as well as to secure a global commitment to enhancing coordination and intensification of national, regional and international efforts to combat it in a comprehensive manner;
2. Deeply concerned that the global HIV/AIDS epidemic, through its devastating scale and impact, constitutes a global emergency and one of the most formidable challenges to human life and dignity, as well as to the effective enjoyment of human rights, which undermines social and economic development throughout the world and affects all levels of society – national, community, family and individual; . . .
4. Noting with grave concern that all people, rich and poor, without distinction as to age, gender or race, are affected by the HIV/AIDS epidemic, further noting that people in developing countries are the most affected and that women, young adults and children, in particular girls, are the most vulnerable; . . .
8. Noting with grave concern that Africa, in particular sub-Saharan Africa, is currently the worst-affected region, where HIV/AIDS is considered a state of emergency which threatens development, social cohesion, political stability, food security and life expectancy and imposes a devastating economic burden, and that the dramatic situation on the continent needs urgent and exceptional national, regional and international action; . . .
11. Recognizing that poverty, underdevelopment and illiteracy are among the principal contributing factors to the spread of HIV/AIDS, and noting with grave concern that HIV/AIDS is compounding poverty and is now reversing or impeding development in many countries and should therefore be addressed in an integrated manner; . . .
13. Noting further that stigma, silence, discrimination and denial, as well as a lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and nations and must also be addressed;
14. Stressing that gender equality and the empowerment of women are fundamental elements in the reduction of the vulnerability of women and girls to HIV/AIDS;
15. Recognizing that access to medication in the context of pandemics such as HIV/AIDS is one of the fundamental elements to achieve progressively the full realization of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;
16. Recognizing that the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and that it reduces vulnerability to HIV/AIDS and prevents stigma and related

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discrimination against people living with or at risk of HIV/AIDS; . . .

36. Solemnly declare our commitment to address the HIV/AIDS crisis by taking action as follows, taking into account the diverse situations and circumstances in different regions and countries throughout the world; [and undertake the following]

37. By 2003, ensure the development and implementation of multisectoral national strategies and financing plans for combating HIV/AIDS that address the epidemic in forthright terms; confront stigma, silence and denial; address gender and age-based dimensions of the epidemic; eliminate discrimination and marginalization; involve partnerships with civil society and the business sector and the full participation of people living with HIV/AIDS, those in vulnerable groups and people mostly at risk, particularly women and young people; are resourced to the extent possible from national budgets without excluding other sources, inter alia, international cooperation; fully promote and protect all human rights and fundamental freedoms, including the right to the highest attainable standard of physical and mental health; integrate a gender perspective; address risk, vulnerability, prevention, care, treatment and support and reduction of the impact of the epidemic; and strengthen health, education and legal system capacity; . . .

47. By 2003, establish time-bound national targets to achieve the internationally agreed global prevention goal to reduce by 2005 HIV prevalence among young men and women aged 15 to 24 in the most affected countries by 25 per cent and by 25 per cent globally by 2010, and intensify efforts to achieve these targets as well as to challenge gender stereotypes and attitudes, and gender inequalities in relation to HIV/AIDS, encouraging the active involvement of men and boys;

48. By 2003, establish national prevention targets, recognizing and addressing factors leading to the spread of the epidemic and increasing people's vulnerability, to reduce HIV incidence for those identifiable groups, within particular local contexts, which currently have high or increasing rates of HIV infection, or which available public health information indicates are at the highest risk of new infection; . . .

53. By 2005, ensure that at least 90 per cent, and by 2010 at least 95 per cent of young men and women aged 15 to 24 have access to the information, education, including peer education and youth-specific HIV education, and services necessary to develop the life skills required to reduce their vulnerability to HIV infection, in full partnership with young persons, parents, families, educators and health-care providers; . . .

HIV/AIDS and human rights

Realization of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS

Respect for the rights of people living with HIV/AIDS drives an effective response

58. By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure

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their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic;

59. By 2005, bearing in mind the context and character of the epidemic and that, globally, women and girls are disproportionately affected by HIV/AIDS, develop and accelerate the implementation of national strategies that promote the advancement of women and women's full enjoyment of all human rights; promote shared responsibility of men and women to ensure safe sex; and empower women to have control over and decide freely and responsibly on matters related to their sexuality to increase their ability to protect themselves from HIV infection;

60. By 2005, implement measures to increase capacities of women and adolescent girls to protect themselves from the risk of HIV infection, principally through the provision of health care and health services, including for sexual and reproductive health, and through prevention education that promotes gender equality within a culturally and gender-sensitive framework;

61. By 2005, ensure development and accelerated implementation of national strategies for women's empowerment, the promotion and protection of women's full enjoyment of all human rights and reduction of their vulnerability to HIV/AIDS through the elimination of all forms of discrimination, as well as all forms of violence against women and girls, including harmful traditional and customary practices, abuse, rape and other forms of sexual violence, battering and trafficking in women and girls

Reducing vulnerability

The vulnerable must be given priority in the response

Empowering women is essential for reducing vulnerability

62. By 2003, in order to complement prevention programmes that address activities which place individuals at risk of HIV infection, such as risky and unsafe sexual behaviour and injecting drug use, have in place in all countries strategies, policies and programmes that identify and begin to address those factors that make individuals particularly vulnerable to HIV infection, including underdevelopment, economic insecurity, poverty, lack of empowerment of women, lack of education, social exclusion, illiteracy, discrimination, lack of information and/or commodities for self-protection, and all types of sexual exploitation of women, girls and boys, including for commercial reasons. Such strategies, policies and programmes should address the gender dimension of the epidemic, specify the action that will be taken to address vulnerability and set targets for achievement;

63. By 2003, develop and/or strengthen strategies, policies and programmes which recognize the importance of the family in reducing vulnerability, inter alia, in educating and guiding children and take account of cultural, religious and ethical factors, to reduce the vulnerability of children and young people by ensuring access of both girls and boys to primary and secondary education, including HIV/AIDS in curricula for adolescents; ensuring safe and secure environments, especially for young girls; expanding good-quality, youth friendly

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information and sexual health education and counselling services; strengthening reproductive and sexual health programmes; and involving families and young people in planning, implementing and evaluating HIV/AIDS prevention and care programmes, to the extent possible;

64. By 2003, develop and/or strengthen national strategies, policies and programmes, supported by regional and international initiatives, as appropriate, through a participatory approach, to promote and protect the health of those identifiable groups which currently have high or increasing rates of HIV infection or which public health information indicates are at greatest risk of and most vulnerable to new infection as indicated by such factors as the local history of the epidemic, poverty, sexual practices, drug-using behaviour, livelihood, institutional location, disrupted social structures and population movements, forced or otherwise;

Children orphaned and made vulnerable by HIV/AIDS

Children orphaned and affected by HIV/AIDS need special assistance

65. By 2003, develop and by 2005 implement national policies and strategies to build and strengthen governmental, family and community capacities to provide a supportive environment for orphans and girls and boys infected and affected by HIV/AIDS, including by providing appropriate counselling and psychosocial support, ensuring their enrolment in school and access to shelter, good nutrition and health and social services on an equal basis with other children; and protect orphans and vulnerable children from all forms of abuse, violence, exploitation, discrimination, trafficking and loss of inheritance;

66. Ensure non-discrimination and full and equal enjoyment of all human rights through the promotion of an active and visible policy of de-stigmatization of children orphaned and made vulnerable by HIV/AIDS;

67. Urge the international community, particularly donor countries, civil society, as well as the private sector, to complement effectively national programmes to support programmes for children orphaned or made vulnerable by HIV/AIDS in affected regions and in countries at high risk and to direct special assistance to sub-Saharan Africa; . . .