

**HIV/AIDS AND THE LABOUR SECTOR: EXAMINING THE ROLE OF LAW IN
PROTECTING THE HIV POSITIVE WORKER IN KENYA**

by

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DECLARATION

I, OJIENDA TOM ODHIAMBO, the undersigned, do declare that the work herein is none other than my original work, both in style and substance, and that the same has never been presented in any Academic institution, or other institution at all.

DATED at the UNIVERSITY OF SOUTH AFRICA thisday of, 2010

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DEDICATION

To my wife, son and daughter

SUMMARY

Kenyan labour laws inadequately protect HIV positive worker. The Constitution of Kenya, 1963, does not prohibit stereotypical attitudes adverse to HIV positive workers and discrimination on the basis of health status. It does not provide for the right to employment, health and health care services, and fails to delimit privacy and dignity rights. Under the Industrial Property Act, 2001, the basis for Government exploitation of patent through compulsory licensing is whimsical and parallel importing is not envisaged. Employers unilaterally draft employment contracts notwithstanding their unequal power relations to employees. The HIV and AIDS Tribunal institutionalises discrimination against HIV positive workers on the basis of the ambiguous 'inherent job requirements.' Plausible international labour laws and practices have no place in Kenya unless they are domesticated.

This thesis interrogates the Kenyan labour laws and policies to identify their inefficiencies and suggest recommendations for reform. It commences with an analysis of the topical issues associated with the HIV positive worker. It then examines the extent of prevalence and ramifications of HIV/AIDS in Kenya. Subsequently, it studies the efforts made at the international and domestic arena in protecting the HIV positive worker. A comparative analysis is made of the laws protecting the HIV positive worker in a number of countries, namely, South Africa, United States of America and Australia.

The thesis draws conclusions and recommends measures on how best to protect the Kenyan HIV positive worker. The labour laws should be amended to prohibit discrimination on the basis of health status, provide for right to affordable medication and work, allow negotiation of employment contracts, list international laws that Kenya ratifies without reservation as a source of law and delimit the concept of 'inherent requirements of a job.' The public should be sensitised to embrace HIV positive workers. Once the new Constitution is enacted, it should list socio-economic rights as fundamental rights and reform the office of the ombudsman to deal with complaints against private employers.

KEY TERMS

Asymptomatic stage; compulsory licensing; domesticate; generations of rights; inherent requirements of a job; HIV/AIDS; HIV positive worker; labour sector; parallel importing; and stereotypical attitudes.

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CHAPTER 1

TOPICAL ISSUES

1.1 INTRODUCTION

Kenyan labour laws¹ do not adequately protect HIV positive workers. Notwithstanding the equality clause under the Constitution of Kenya,² HIV positive workers still receive differential treatment in a number of sectors of the society,

¹ The most important of these include the Constitution of Kenya (Chapter 0), Laws of Kenya; the Employment Act No. 11 of 2007; the Labour Relations Act No. 14 of 2007; The Labour Institutions Act No. 12 of 2007; the Occupational Health and Safety Act No. 15 of 2007; and the HIV and AIDS Prevention and Control Act No. 14 of 2006.

² Constitution of Kenya (Chapter 0), Laws of Kenya, s. 82 states: (1) Subject to subsections (4), (5) and (8), no law shall make any provision that is discriminatory either of itself or in its effect. (2) Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority. (3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex 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. (4) Subsection (1) shall not apply to any law so far as that law makes provision – (a) with respect to persons who are not citizens of Kenya; (b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; (c) for the application in the case of members of a particular race or tribe of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons; or (d) whereby persons of a description mentioned in subsection (3) may be subjected to a disability or restriction or may be accorded a privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society. (5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connection, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes. (6) Subsection (2) shall not apply to – (a) anything which is expressly or by necessary implication authorized to be done by a provision of law referred to in subsection (4); or (b) the giving or withholding of consent to a transaction in agricultural land by anybody or authority established by or under any law for the purpose of controlling transactions in agricultural land. (7) Subject to subsection (8), no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating houses, beer halls or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public. (8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of a description mentioned in, subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3). (9) Nothing in subsection (2) shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in a court that is vested in a person by or under this Constitution or any other law.

including the education sector, the agricultural sector, the health sector, the industrial sector and social services sector,³ principally on the basis of their health status. Closely held erroneous stereotypical attitudes against HIV positive workers have only exacerbated discrimination against and stigmatisation of HIV positive workers. Contrary to many assumptions, HIV is not transmitted through casual contact, sneezing, sharing of food or clothing.⁴ HIV is spread through sexual contact, transmission of infected blood from one person to another, or exchange of blood or body fluids between mother and baby during pregnancy, childbirth or breast feeding.⁵

Kenyan labour laws fail to adequately guarantee a number of rights that ought to be inviolable in respect of HIV positive workers. These include the rights to health care and health care services, privacy, dignity and employment. Section 74 of the Constitution of Kenya fails to define what constitutes dignity and to list instances when human dignity can be said to have been infringed.⁶ Section 76 of the Constitution which provides for the right to privacy is not only ambiguous as to what constitutes privacy,

³ Kenya National Aids Strategic Plan 2005/6-2009/10. *The Socio-Economic impact of HIV/AIDS*, p. 15. Available at <http://www.hdwg-Kenya.com/new/index.php>, accessed last on December 29, 2009.

⁴ Brink B. & Clausen L. (1987). "The Acquired Immune Deficiency Syndrome," in *Medical Affairs from the Association of South Africa*. As quoted by Albertyn S. & Rosengarten D. (1993). "HIV and AIDS: Some Critical Issues in Employment Law," in *South African Journal of Human Rights Law*. Available at <http://www.heinonline.id=93print=12ext=pdf>, accessed last on July 15, 2009. Blencher M. (1997). *Hope and Mortality: Psychodynamic approaches to AIDS and HIV*, (Hillsdale, New Jersey: Analytic Press), p. 45 states as follows about the misconceptions on the transmission of HIV/AIDS: "A number of misconceptions have arisen surrounding HIV/AIDS. Three of the most common are that AIDS can spread through casual contact, that sexual intercourse with a virgin will cure AIDS, and that HIV can infect only homosexual men and drug users. Other misconceptions are that any act of anal intercourse between gay men can lead to AIDS infection, and that open discussion of homosexuality and HIV in schools will lead to increased rates of homosexuality and AIDS."

⁵ See Brink B. & Clausen above. See also San Francisco AIDS Foundation (2006). *How AIDS is spread*, p. 12. Available at <http://www.sfaf.org/aid101/transmission.html>, accessed last on July 19, 2009. According to the author, direct contact of a mucous membrane or the blood stream with a bodily fluid containing HIV, such as blood, semen, vaginal fluid and breast milk can result into transmission of HIV.

⁶ Above, note 2, s. 74 states: "(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorized the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."

but also limits privacy rights of a person on the basis of ambiguous concepts such as public health and public interest.⁷

Not a single constitutional provision or other labour laws expressly recognise neither the rights of HIV positive workers to health care services nor to employment. This is in sharp contrast to other jurisdictions and to the provisions of international instruments, which expressly recognise the right to health care services⁸ and the right to employment⁹ as fundamental rights. Under section 58 of the Industrial Property Act, the Government of Kenya is enabled to facilitate access to Anti-retroviral drugs to HIV positive workers by way of compulsory licensing in the public interest.¹⁰ This provision is however inadequate since the Industrial Property Act neither defines “public interest” nor sets thresholds for what constitutes “public interest.” In addition, the

⁷ Above, note 2, s. 76 states: “(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit...”

⁸ See *Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) (5) SA 717; *Van Biljon and Others vs. Minister of Correctional Services and Others*, (1997) (4) SA 441 (C); Constitution of the Republic of South Africa, s. 27 which states:“(1) Everyone has the right to have access to- (a) health care services, including reproductive health care...(2) The State must take responsible legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights...”; and Universal Declaration of Human Rights, 1948, article 25 which states: “Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

⁹ See Universal Declaration of Human Rights, 1948, article which 23 states: “(1) everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; (2) everyone, without any discrimination, has the right to equal pay for equal work... (4) everyone has the right to form and join trade unions for the protection of his interests.”; International Covenant on Economic, Social and Cultural Rights, article 6 which states: “(1) The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right...”; and African Charter on Human and People’s Rights, article 15 which states: “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”

¹⁰ Industrial Property Act No. 3 of 2001, s. 58(5) empowers the Government to limit a patent, “...by the provisions on compulsory licences for reasons of public interest or based on interdependence of patents and by the provisions on State exploitation of patented inventions...”

Industrial Property Act, at section 58 (5) which deals with limitation of patent rights, fails to define the place of Trade Related Aspects of Intellectual Property Rights (TRIPS) in relation to the Act. The Act is also silent on parallel importation of anti-retroviral drugs for use by the HIV positive workers as an option for lowering the costs of the drugs.

Within the workplace, HIV positive workers have been dismissed from employment or re-deployed due to their health status in total disregard to their capacity to perform the work in issue.¹¹ This is notwithstanding the fact that HIV infection does not instantaneously render the HIV positive worker incapable of performing his/her work.¹²

Employment contracts are drafted by employers who therefore tilt the contract to favour their interest.¹³ Under section 9(2) of the Kenyan Employment Act:

“An employer who is a party to a written employment contract shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the worker in accordance with sub-section (3)”¹⁴

The effect of this is that the worker’s participation in the employment contract is reduced to mere signing of the contract.¹⁵ The Act assumes that the contract of employment is a voluntary one and no one can be forced, either directly or indirectly, to enter into it. Indeed, the employment contract is inhered of a power relationship between the employer and the worker. In the words of Davies and Freedland,

¹¹ Davies D. & Cheadle H. (1997). *Fundamental Rights in the Constitution- Commentary and Cases* (Kenwyn: Juta & Co. Publishers), p. 59.

¹² Above, note 4.

¹³ Basson A. et al (2002). *Essential Labour Law*, (South Africa: Labour Law Publications), p.16 defines contract of employment as an agreement in terms of which one person (the worker) works for another (the employer) in exchange for remuneration.

¹⁴ Employment Act No. 11 of 2007, s. 9(2).

¹⁵ Ibid, s 10 states: “(1) A written employment contract specified in section 9 shall state particulars of employment...”

“The relation between an employer and an isolated worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception, it is an act of submission. In its operation, it is a condition of subordination.”¹⁶

From the inception of the employment contract, the worker is in a much weaker position because he/she needs a job to afford the cost of living.¹⁷ According to Basson A. et al:

“Freedom of contract presumes that employers and workers or potential workers can negotiate a contract of employment to their mutual benefit. Most workers, however, do not have the bargaining power that their prospective employers enjoy. In such cases, the negotiations are normally of a cursory nature. Usually, the workers only have the choice of accepting or rejecting the terms offered by the employer. This is because the owners of “capital” almost invariably have greater bargaining power in relation to the persons they hire or intend to hire to do work. They can structure the employment relationship and dictate its content to suit their needs.”¹⁸

Kenya’s Employment Act fails to provide for negotiated employment contracts between the employers and their workers. This, coupled with the stereotypes against HIV positive workers, creates the possibility of discrimination by employers against workers.

As the discrimination of HIV positive workers persists, prevalence and ramifications of HIV in Kenya is on the rise. As at the year 2000, 700 people succumbed daily to

¹⁶ Davies P. & Freedland M. (eds.) (3rd edn.: 1983). *Kahn Freund’s Labour and the Law*, (London: Stevens & Sons), p.18.

¹⁷ Modern development however shows that this is not the case with all workers. According to Justice Didcott, economic development, industrial legislation, trade unionism, and other modern phenomena have so strengthened large categories of workers that their negotiating force is often equivalent or superior to that of their employers. See judgment in *Roffey vs. Caterrall, Edwards & Goudre (property) Ltd* 1977(4) SA 494 (N) at 499.

¹⁸ Above, note 13, p. 2.

HIV/AIDS related illnesses,¹⁹ and 200 people were infected with HIV daily.²⁰ As at 2007, an estimated 1.4 Million adults in Kenya were infected with HIV.²¹ HIV/AIDS poses a serious threat to the economy, communities, families and health care institutions. It impacts negatively on the education sector, the agricultural sector, the health sector, the industrial sector and social services sector. It negates the gains made in the various sectors as well as creates a large pool of children in need of urgent help, including orphans and child headed families.²²

In this thesis, therefore, I argue that the Kenyan legislative and policy framework on the protection of HIV positive workers is inadequate. The thesis analyses the Kenyan, South African, Australian and United States of American (USA) legal regime on the protection of the HIV positive worker. The choice of South Africa, Australia and the USA is informed by two factors. First, the jurisdictions have had their courts determine issues affecting the HIV positive worker at the workplace. Therefore, the jurisdictions have developed jurisprudence on HIV/AIDS. Also, HIV/AIDS being a global epidemic, this thesis is keen to expose the efforts made at various geographical regions in the world to curb the plight of HIV positive workers in the labour sector.

The thesis makes several proposals for the protection of the HIV positive workers. It proceeds on the basis that access to employment is a fundamental right, and that access to affordable Anti-retroviral drugs is a requirement in Kenya. It recommends a review

¹⁹ Government of Kenya (October 2000), *Kenya National HIV/AIDS strategic plan (NACC) 2000- 2005*, (Nairobi: Government Printers), p. 1.

²⁰ Kiarie W. & Muraah W. (1998). *HIV and AIDS: Facts that could change your LIFE*. Available at <http://www.kenyaaidsinstitute.org/aboutthevirus.html>, accessed last on December 29, 2009.

²¹ Government of Kenya (July 2008), *Kenya AIDS Indicator Survey, 2007*, (Nairobi: Government Printers), p. 1. The rate of infection was 7.4%.

²² Odhiambo D. (2001), *Evolution of Kenyan HIV/AIDS policy from 1984 To-date*, Paper prepared for Kenya Ethical and Legal Issues Network on HIV/AIDS (KELIN) workshop, Kenya School of Monetary studies 15th - 16th November, 2001. Whereas AIDS destroys young members of the population who are economically productive thus disrupting development, behaviour change, which is critical to the prevention and control of the spread of HIV/AIDS, take a long time to realise. This is mainly because issues related to sexuality are considered a taboo, private and intimate especially in the African set-up. Thus, public discussion of HIV/AIDS have for a long time attracted loathe, scorn and derision from the conventional members of the society.

of the anti-discrimination and confidentiality legislation within the labour sector in Kenya and proposes amendments to the Constitution of Kenya to protect HIV positive workers in the workplace. It recommends rigorous education and campaign to change the communal attitudes against HIV positive workers. This thesis recognises that international and regional instruments have better principles worth incorporating into the Kenyan legal framework to alleviate the plight of HIV positive workers. It recommends the following medium term measures for the protection of HIV positive workers within Kenya's labour sector:

- a) The amendment of the Constitution of Kenya, particularly sections 82(3) thereof on non-discrimination to expressly recognise non-discrimination on the basis of health status; section 74 thereof on right to dignity to provide that the right to dignity can only be waived with the written informed consent of the bearer of the right to dignity, and to the benefit of the bearer of the right; and the enactment of a new constitutional provision on limitation of fundamental rights and freedoms only when the limitation is reasonable, justifiable in an open and democratic society based on freedom and equality and the non derogation of the essential content of the right. Finally, a proposal is made to amend section 5(3) of the Employment Act to prohibit cultural practices that perpetrate discrimination of workers on the basis of their HIV positive status.

- b) The amendment of Section 58(5) of the Industrial Property Act on exploitation of a patented invention by the Government to allow for parallel importation of patented drugs alongside compulsory licensing and to define what constitutes public interest as a basis for exploiting a patented invention. There should also be the amendment of the HIV and Prevention and Control Act to oblige the Government, in partnership with employers, to provide basic health care and health care services to HIV positive workers freely.

- c) The amendment of section 9 of the Employment Act to provide for a participatory employment contracts, unlike the current situation where the employer unilaterally drafts the employment contract. Further, Parliament should amend section 2 of the Employment Act to extend the definition of a worker to include prospective workers.
- d) The amendment of section 3 of the Judicature Act to include international law that has been ratified as a source of law in Kenya.
- e) The amendment of section 31(2) of the HIV and AIDS Prevention and Control Act which creates the possibility of discrimination of the HIV positive worker on the basis of “inherent requirement of a job” in order to provide a clear definition of what constitutes the “inherent requirements of a job”.
- f) The dissemination of information by both the Government and private sector on non-discrimination of HIV positive worker within the labour sector through charts, staging of moot courts, adverts, music to all persons including persons with disabilities.

In the long term, this thesis recommends:

- i. The Government should facilitate enactment of a new Constitution for Kenya, which, among other provisions, should particularly and expressly list international law that is ratified by Kenya without reservation as a source of law in Kenya; Further, the same Constitution should prohibit discrimination of a person on the basis of HIV status and the medical testing without written consent of the worker. The Constitution should also provide for right to employment and the right to health care and health care services to Kenyan workers.

- ii. The Government should amend the HIV and AIDS Prevention and Control Act to redefine the structure and role of the HIV and AIDS Tribunal in order to comprehensively address the rights of the HIV positive worker.

1.2 PROBLEM STATEMENT

The Kenyan labour sector is characterised by inadequate infrastructure, reduced productivity, poor governance, corruption and poverty. At independence (1963), the poverty rate was 29%. This rate has gradually increased to 50% as of February 19, 2010.²³ The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) which are serious public health problems have socio-economic, employment and human rights implications in the labour sector. Prolonged staff illnesses, absenteeism, reduced productivity, worker benefits, occupational health and safety, production costs and the workplace morale all adversely affect the workplace.²⁴ Often, general employment opportunities, such as appointment, promotion, training and benefits are pegged on the HIV status of the worker.²⁵ The employers are reluctant to put in place policies that would alleviate the conditions of

²³ Central Intelligence Agency (2010). The World Fact Book. Available at

http://www.cia.gov/library/publications/the_word_fact_book.html, accessed last on May 24, 2010.

²⁴ Government of the Republic of South Africa, *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*, 1 December 2000, s. 1.2. See also UNAIDS, *Access to treatment in the private-sector workplace: The Provision of Antiretroviral therapy by three companies in South Africa*, UNAIDS Doc UNAIDS/05.11E, available at <http://www.unaids.org>, accessed last on 8 July, 2008; The author states in part: "The AIDS epidemic is having a major impact on enterprises- on employers, managers and workers- especially in countries with high HIV prevalence. There is a direct impact on companies' profitability and even survival. AIDS causes productivity to decline, increases business costs and has a negative impact on the wider economic climate in which companies operate."

²⁵ For instance, in *Joy Mining Machinery, A Division of Harnischfeger (South Africa) Property Limited vs. National Union of Trade Workers*, Case No. J158/02, the Applicant applied to the Labour Court of South Africa to compulsorily perform an HIV test on two of its workers who had declined to such a test, quoting section 7(2) of the Employment Equity Act No. 55 of 1998 (South Africa). The section states: "Testing of a worker to determine that worker's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act." Because the applicant's intention to conduct the HIV test on its workers was to justify the summary dismissal of those found to be HIV positive, but not to alleviate the conditions of such workers, the Labour Court declined to grant the application.

their HIV positive workers.²⁶ HIV infection, which reduces the production potential of the worker, undermines the employer-worker relationship and often leads to the dismissal of the HIV positive worker, notwithstanding that such consideration is iniquitous, illegal²⁷ and immoral.

Unfortunately, the stereotypes against HIV positive workers fail to take into account the fact that, unlike other conditions, people infected with HIV continue performing their social and employment functions fully and without risk to others in most aspects of life. As Alix R. puts it:

“Even a person with full blown AIDS may have long periods of relative health. In addition, although a “significant” percentage of people with HIV /AIDS suffer from dementia at some point during their illness, many remain as mentally alert as ever through the final stage...fluctuations in the manifestations of HIV/AIDS infection have an enormous impact on determination of whether an individual infected with HIV/AIDS retains his/her job...quite often they don’t.”²⁸

²⁶ In Kenya, there are in-effective employment security policies, where HIV Positive workers are no longer able to work. There are also ineffective involuntary infection control measures as well as ineffective worker empowerment policies. Further, there are ineffective employment policies guaranteeing the confidentiality of the workers’ HIV status and workers’ compensation policies recognising occupational transmission of HIV/AIDS. See Opot E. (Vol. 12: 2006), “Dilemma of a Surgeon in the Era of HIV/AIDS” *The East African Lawyer*, 5, who says as follows of possible occupational transmission of HIV/AIDS among surgeons: “...By nature of their work, surgeons are exposed to high risk. This is because they handle potentially infective materials such as blood, human tissue, needles and blades used on patients. All these factors combined, place the surgeons at a high risk of getting infected. The main routes of infection would be needle pricks, scalpel injuries, splashing of blood into the eyes, and prick injuries from broken bones.”

²⁷ See above, note 14 S. 5(3) (a) states: “No employer shall discriminate directly or indirectly, against a worker or prospective worker or harass a worker or prospective worker...on grounds of... HIV status” See also *Hoffman vs. SA Airways* (2000) 21 ILJ 2357 (CC), where the South African Constitutional Court ruled in categorical terms that an employer may not exclude HIV-positive applicants who are otherwise fit applicants, or exclude HIV-positive workers from promotion. Also, in *N. vs. Minister for Defence*, (2000) 21 ILJ 999 (LCN), the Namibian Labour Court struck down the Namibian Defence Force’s Policy of excluding recruits solely on the basis of HIV infection.

²⁸ Alix R. (1995). “HIV Positive, Employment Negative? HIV Discrimination among Healthcare Workers in the United States and France,” in *Comparative Labour Law & Policy Journal*, p. 41. Available at <http://www.lexisnexis.com>, accessed last on May 8, 2010.

As long as discrimination occurs, with no adequate legislative provisions as well as rapid and effective remedies against discrimination, individuals who are infected with HIV will be reluctant to come forward for testing, counselling and care. The fear of potential discrimination will undermine any country's efforts at fighting the HIV/AIDS epidemic and will leave HIV infected individuals isolated and alone. In fact, the widespread human rights breaches of HIV positive individuals have caused devastating consequences. Some people have committed suicide, a few have been murdered and many others have died sooner than they should have.²⁹ Careers have been jeopardised and families have been ruined.³⁰ Many people living with HIV/AIDS have been needlessly ravaged by unbearable pain, horrific disfigurement, financial calamity, and callous isolation.³¹ The most significant problems that HIV positive workers and HIV positive job applicants experience in Kenya include the following:

1.2.1 Discrimination at the workplace

The Constitution of Kenya is the supreme law in Kenya. Section 70 of the Constitution, which is a general provision on the enjoyment of the rights and freedoms under the bill of rights, outlaws pegging the enjoyment of the rights and freedoms on the basis of race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex. The Constitution of Kenya is however silent on non-discrimination on the basis of HIV status. This in effect provides a leeway for Parliament to enact laws that can discriminate against HIV positive workers.

²⁹ Altman D. (1986), *AIDS in the Mind of America: The Social, Political and Psychological Impact of a New Epidemic*, (London: Pluto Press), p.192.

³⁰ Jarvis R. et al (1996), *Aids Law in a Nutshell*, (Illinois: University of Illinois, College of Law Press), pp.2, 3. See also Cloven M. et al (Vol. 19:1986), "AIDS: Testing Democracy- Irrational Responses to the Public Health Crisis and the need for Privacy in Serological Testing," in *J. Marshall Law Review*, p. 835, who states as follows: "Employers have perceived those with anti-bodies to HTLV-III as being afflicted with AIDS, despite the erroneous nature of that perception..."

³¹ Sontag S. (1989), *Aids and its Metaphors*, (New York: Doubleday Publishers), p.62.

Non-discrimination of workers on the basis of HIV status is expressly envisaged under section 5(3) (a) of the Employment Act. The section states:

“(3) No employer shall discriminate directly or indirectly, against a worker or prospective worker or harass a worker or prospective worker— (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status...”

However, it is ironical that section 5(4) of the same Act allows discrimination in instances where the “inherent requirements of the job” so require. The Act does not identify jobs which cannot inherently be performed by HIV positive persons, and does not indicate the stage at which an HIV positive worker can be considered to be “physically incapacitated” beyond performance of whatever employment.

1.2.2 Breach of the Right to Privacy/Confidentiality

Confidentiality prohibits the repetition to others of knowledge about another person or entity. This duty may be social or legally enforceable and may apply to natural or artificial persons.³² Confidentiality may attach to information about any aspect of another’s life, past or present conduct, nature, or physical or psychological attributes.

For confidentiality to arise, there must therefore be a relationship between the subject to whom the knowledge pertains, and the bearer of the knowledge, of such a nature as to impute a duty on the latter not to repeat it, or to repeat it only in specified circumstances. In its very essence, confidentiality is thus not absolute. As a separate

³² See *Financial Mail (Pty) Ltd vs. Sage Holdings Ltd* (1993) (2) SA 151 (A), where a South African Court held that the concept of privacy, which is derived from the notion of confidentiality applies also to corporations.

juridical concept, the right to privacy received its foundational academic analysis scarcely more than a century ago.³³

Section 76 of the Constitution of Kenya does not expressly outlaw mandatory HIV testing at the workplace. Whereas the HIV Prevention and Control Act in section 13 thereof expressly prohibits mandatory HIV testing at the workplace, it is unclear when an HIV test is mandatory and when it is voluntary. For instance, it is unclear whether a person overwhelmed by poverty and concedes to pre-employment testing has voluntarily submitted to HIV testing. The HIV Prevention and Control Act in section 31(2) thereof, creates the HIV and AIDS Tribunal which has the power to permit an employer or prospective employer to subject a worker or a prospective worker to pre-employment HIV testing. This process undermines the worker's privacy.

In essence, the HIV Prevention and Control Act, 2006 contradicts itself by expressly prohibiting mandatory pre-employment testing, while permitting mandatory testing of a worker where the "inherent job requirements" are alleged by the employer, hence discriminating against HIV positive workers.

1.2.3 Violation of the Right to Dignity

The violation of the right to dignity arises where a person undertakes an action that is grossly humiliating or debasing to the recipient of that right and forces the recipient to

³³ See Warren S & Brandeis L. (Vol. 4: 1890) "The Right to Privacy" in *Harvard Law Review*, (United States of America: Harvard Law Review Association Publishers), pp. 193, 200. Two powerful ideas underpin the concept of privacy. The first is that every human being is intrinsically entitled to some personal autonomy. Autonomy means the right to make decisions about and for one-self. This does not entail any notion of a self unencumbered by society. It does, however, suggest that society must accord its subjects a protected field of decision making within which the individual is free from the intrusion of others. The second idea, derived from this, is the belief that respecting individual's autonomy and thus their privacy is "a necessary condition for human flourishing". See Cloven M. et al (Vol. 19:1986), "AIDS Testing, Irrational Responses to the Public Health Crisis and the need for Privacy in Serological Testing" in *J. Marshall Law Review*, pp. 821, 354.

act against his will and conscience, causing fear and anguish and forcing the recipient to commit or omit such act.³⁴ Ordinarily, inhuman and degrading treatment is similar to the breach of one's dignity.³⁵ While section 74 of the Constitution of Kenya prohibits the subjection of any person to torture or to inhuman and degrading treatment, it does not completely outlaw the violation of the right to dignity as it provides for violations in the public interest.

1.2.4 Stereotypical cultural attitudes

The stigma that surrounds HIV positive workers in Kenya is evident through the cultural prejudices against the HIV positive workers. In the eyes of Kenyan society, HIV positive workers are immoral, reckless and highly infectious. Within the labour sector, the HIV positive workers are shunned not only by the employers, but also by fellow workers. Whereas the HIV Prevention and Control Act, 2006, in Part II advocates for dissemination of information about HIV and AIDS in learning institutions, workplaces and among communities, the Act does not expressly outlaw repugnant cultural orientations that are prejudicial against HIV positive workers. In effect, HIV positive workers have to contend with the perpetual stigmatisation and trauma associated with their health condition.

1.2.5 Lack of The Right to Work

³⁴ Lauterpatcht E. et al. (1997). *International Law Reports*. (Llandysul, Britain: Gorner Press), pp. 187, 188. According to the authors: "there is a consensus among international law publicists that utter disregard of the due process of the law such as discriminatory application of law or other intentional affliction of physical or mental suffering constitutes cruel, inhuman or degrading treatment."

³⁵ See *Marete vs. Attorney General* (1987) KLR 690 at 692, where the Kenyan High Court stated: "man's humanity to man makes countless thousands mourn. The founding fathers of this Nation, in the hopes of lessening the number of mourners, enacted section 74 of the Constitution, which reads "(1) No person shall be subject to torture or to inhuman or to inhuman or degrading punishment or other treatment.." The Constitution of the Republic is not a toothless bulldog nor is it a collection of pious platitudes...section 74 of the Constitution might have been enacted because this Nation was eager to uphold the dignity of the human person and to provide remedies against those who wield power."

The right to work refers to a cluster of provisions entailing many different components of rights and obligations.³⁶ In reference to Dr. Cewick,³⁷ the court suggested the following as components of the right to work:

- Employment – related rights;
- Employment – derivative rights;
- Equality of treatment and non-discrimination rights;
- Instrumental rights.

Normally, the “right to work” is understood in regard to employment in the service of and paid by others, as distinct from self-employment. As a matter of fact, it must be remembered that nowhere in the human rights system is there an express reference to a right to self-employment. The right must however, be understood to exist as part of the freedom of every individual and more particularly as a consequence of the freedom from forced labour.³⁸

Rights derived from employment include the right to just conditions of work (working hours, annual paid holiday and other rest periods), the right to safe and healthy working conditions, the right to a fair remuneration, the right to vocational guidance and training, the right of women and young people to protection within the workplace and the right to social security. The principles of equality of treatment and non-discrimination relate to both of these and indeed the whole set of social rights.³⁹

Instrumental rights include the freedom of association and the right to organize, the right to collective bargaining, the right to strike and the freedom of migration of workers. These rights are instrumental in the sense that they provide indispensable

³⁶ *South African Human Rights Commission vs. SABC & Another (SABTC)* 203.

³⁷ *Ibid.*

³⁸ Article 4 of the Universal Declaration of Human Rights, reproduced in section 73 of the Constitution of the Republic of Kenya.

³⁹ Above, note 35.

implements and set a favourable framework without which an unimpeded exercise of work related rights might be seriously affected.

In Kenya, the Bill of Rights does not consider the right to work as a constitutional right. The very constitution provides in its section 71 for the right to life, but does not prescribe the means of sustaining the very life. It is arguable that the right to work determines the enjoyment of the right to life.

Employers have taken advantage of this situation to deliberately treat HIV positive workers contemptuously as they know that they have no express constitutional obligation to protect the welfare of the workers. The most invoked principle of employment is the conventional freedom of contract, which has received codification under section 9(2) of the Employment Act notwithstanding the unequal bargaining powers between the employer and the worker or potential worker.⁴⁰ The effect of section 9(2) of the Employment Act is that the participation of the worker in the employment contract is limited to accepting the employment terms as set out by the employer unilaterally.

1.2.6 Lack of access to affordable Anti-retroviral drugs

The Constitution of Kenya does not provide for access to drugs by the sick Kenyan population as of right. Specifically, access to Anti-retroviral drugs is regulated by patent laws which essentially tilt towards the monopolisation of the distribution of these drugs by the inventors who also determine the prices of the drugs. More than half of Kenya's

⁴⁰ Above, note 14, s. 9(2) states: "(2) An employer who is a party to a written employment contract shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the worker in accordance with subsection (3);

(3) For the purpose of signifying his consent to a written employment contract a worker may—

(a) sign his name thereof, or

(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer."

population cannot afford basic healthcare and food security. Providing the right to life under section 71 of the Constitution is incomplete in the absence of an express acknowledgement of their right to affordable drugs.

Further, even the HIV Prevention and Control Act does not have a single provision on access to affordable Anti-retroviral drugs by HIV positive persons as of right. The Act therefore fails to deal with the dissemination of information on HIV/AIDS and control stigmatisation of HIV positive workers. Kenya has to fall back to the Industrial Property Act which at section 58(5) authorises the government to issue compulsory licences for patented goods and services. Anti-retroviral drugs are such patented goods. But even then, two problems still arise in reference to the Industrial Property Act. First, the Act is so general in permitting the government to exploit a patent for reasons of public interest that it is not clear what constitutes a public interest and whether access to affordable Anti-retroviral drugs is a matter of public interest. Secondly, limiting the power of the State to exploit a patent only by way of compulsory licensing does not take into account the developments in other jurisdictions which enhances the access to affordable Anti-retroviral drugs to their populations by providing for parallel importing. Whereas the processes of compulsory licensing and parallel importing have the effect of lowering the rates of Anti-retroviral drugs, parallel importing is a better approach as it does not directly exploit the patent unlike compulsory licensing. By importing Anti-retroviral drugs from jurisdictions that supply the drugs at cheaper rates, the government scuttles the monopoly of the supply of drugs within the state, thereby forcing the inventor to lower the prices of the Anti-retroviral drugs due to market competition.

1.3 JUSTIFICATION OF THE STUDY

The labour sector is one of the most important facets of Kenya's national economy. All the other sectors such as education sector, health sector and industrial sector, among others, require a constant flow of adequate and skilled labour to be sustained.

Therefore, HIV/AIDS, which significantly affects the labour flow of the country, is bound to have a spiral effect on all the sectors of the economy.

The devastating consequences that HIV/AIDS has on the labour force are without doubt a point of concern. The majority of those afflicted by the disease in Kenya are those aged between 15 and 39 years (the productive age) thereby impacting negatively on the economy.⁴¹ This justifies the need to review the existing labour laws that affect HIV positive workers taking into account socio-economic and cultural norms that would allow for the relevant considered exceptions to the rights where necessary. In this regard, the labour force in Kenya certainly needs to chart out guidelines backed by legal provisions that would define the roles of all the parties in labour relations. There is a need to regulate the employer – worker relationship within the context of HIV/AIDS, but without taking away or clogging the very rights that have been guaranteed or customarily observed.

Every year, overwhelming numbers of potential workers are unleashed into the Kenya's labour sector by various educational institutions.⁴² If no specific legislative provisions are made setting out the criteria which employers would use in recruitment, or if the employer is granted discretion in determining who to employ and who not to employ, there is the danger of significant skilled potential workers being locked out of the employment on the basis only that they are infected with HIV. This would be discriminatory, contrary to the Kenyan Constitution.⁴³ Yet, it is common ground that the HIV status of a worker does not of itself deprive him/her of the energy and ability to perform his/her duties arising from the employment contract save in exceptional circumstances where laying off on health grounds would be permissible. There is need

⁴¹ See Government of Kenya (July 2008). *Kenya AIDS Indicator Survey, 2007*, (Nairobi: Government Printers), p. 17. Available at http://www.aidskenya.org/public_site/.../KAIS_Preliminary_Report.pdf, accessed last on December 29, 2009.

⁴² Government of Kenya (December 2005), *Kenya HIV/AIDS Data Booklet*, (Nairobi: Government Printers), p. 12.

⁴³ Above, note 2, s. 82.

to map out a framework that will not only secure the right of employment of people living with HIV, but also to provide for rights and duties of both the employer and worker in a continuing employment relationship.

In view of the available legislative framework in Kenya, the issue of HIV/AIDS and the employment contract still remain of much concern. Skewed guidelines defining and regulating the rights and responsibilities of the HIV positive worker in the employment contract, benefits, and entitlements leave the employers to single-handedly determine employment contracts. The inevitable consequence is that workers' rights under such contracts are dependent wholly on the employers' discretion. In addition, employers are at liberty to formulate their own policies regarding HIV/AIDS at the workplace, as the existing labour laws do not qualify the freedom of contract in the employment relationship. Such policies have had no input from workers and in effect are tailored to fit the circumstances of the employer to the worker's disadvantage. A lot of room therefore still exists for the abuse of the rights of workers or prospective workers on the basis of their HIV status.

1.4 AIMS/OBJECTIVES OF THE STUDY

The thesis is premised on the notion that law should be utilised to aid in solving all the social ills. This notion is supported by an argument by Justice Kirby M. that only effective laws would be able to guarantee that HIV positive workers are not discriminated against in society, in hospitals and in workplaces.⁴⁴ Law must therefore

⁴⁴ Kirby M. (2004). "The never-ending Paradoxes HIV/AIDS and Human Rights", in *African Human Rights Law Journal*, p.164. Available at http://www.heinonline.org/HOL/PDF/handle_hein.journals/afrhurlj4&collection_journals&id_179&print_18_ext.pdf, accessed last on July 14, 2008, states as follows of law: "...sitting by the bed of friends who have become infected with HIV and denied a job because of their HIV positive status; watching their struggle and believing that the law could play an affirmative role, I continued my involvement in advocating for the review of the Law to make better provisions for the HIV positive workers. For me, it is an ethical and legal issue. People are dying. There are no drugs. There are no vaccines. There are no laws; at least effective laws to ensure that HIV Positive persons are not discriminated against in the society, in the hospitals and at the workplaces. Law has a positive role to play...There is a virus of a different kind, namely the virus of a "highly inefficient laws" (hil)." See also Kirby M. (1987). *The new AIDS virus-*

solve the problem of discrimination against workers and potential workers on the basis of their HIV status. Law must also solve the problem of ineffective judicial organs, cultural orientations and other forms of discrimination against HIV positive workers and those infected with AIDS. The implication of the principle of freedom of contract,⁴⁵ specifically on HIV positive worker, cannot be overstated. Thus, this thesis intends:

- (i) To study the law in Kenya relating to employment in as far as the rights of the worker are concerned.
- (ii) To study the legislative framework, attempts made by the government to protect the rights, outline the duties and responsibilities of employers and workers in the labour sector in so far as HIV/ AIDS is concerned.
- (iii) To study the inadequacies while making suggestions for reform of the Kenyan employment related legislative framework in dealing with issues presented by the incidence of HIV/ AIDS.
- (iv) To study the human rights issues involved in HIV/ AIDS pre-employment testing conditions, experiences and perceptions of employers, workers and any prospective employers in relation to HIV/ AIDS in the labour sector.
- (v) By way of comparative analysis, study the existing labour related laws in other jurisdictions, judicial developments and Jurisprudence with a view to recommending the incorporation into Kenyan legal system the best practices and approaches as pertain to HIV/ AIDS pandemic vis-à-vis the employer – worker relationship and the doctrine of freedom of contract.

Ineffective and unjust Laws, Paper presented at the International Symposium on AIDS, Paris, on 23 October 1987.

⁴⁵ Freedom of contract refers to the notion that an agreement is based on an equal economic power and therefore there is no need to protect one party to the contract above the other. See above, note 13, Basson A. et al (2002), *Essential Labour Law*, p.38.

1.5 CONCLUSION

The foregoing analysis demonstrates that HIV/AIDS is a catastrophe in Kenya. The myths surrounding its mode of transmission have institutionalised prejudice against persons living with HIV/AIDS. As this goes on unabated, the HIV positive worker in Kenya continues to be demonised. This has the collateral effect of hindering the HIV positive worker from coming out openly to submit to medication that would serve to prolong their life for fear of further discrimination by the society. As a democratic society, Kenya has an obligation to promote the enjoyment of the rights and freedoms under the Constitution equally and without discrimination on the basis of HIV/AIDS.

The problems that have promoted skewed protection of HIV positive workers within the labour sector arise out of the inefficient protection of the worker under Kenyan labour laws. Chapter 2 of this thesis examines the extent of prevalence and ramifications of HIV/AIDS in Kenya.

CHAPTER 2

MEANING, PREVALENCE AND RAMIFICATIONS OF HIV/AIDS IN KENYA

2.1 WHAT IS HIV/AIDS?

The acronyms HIV/AIDS refer to Human Immuno-deficiency Virus infection and the associated Acquired Immuno Deficiency Syndrome.⁴⁶ Macher, M. defines AIDS as a specific group of diseases or conditions that indicate a severe suppression of the human immune system as a result of the infection of the human body by HIV.⁴⁷

According to Blazer S., HIV is a virus that attacks the body's immune system and progressively inactivates the body's ability to fight infections by debilitating or impairing the immune system's cells.⁴⁸ Considering that HIV suppresses human immune system, HIV positive persons are prone to frequent and devastating infections.⁴⁹ However, many individuals do not develop symptoms at first HIV infection. Instead, some develop a flu-like illness within a few months after a vital exposure, which symptoms are often mistaken for symptoms of any other viral infection thereby raising little or no concern at all as the symptoms usually disappear

⁴⁶ Neidl B. (Vol. 73: 1999). "The Lesser of Two Evils: New York's New HIV and AIDS Partner Notification Law and Why the Right of Notification Must Yield to Public Health" in *St. John's Law Review*, (Michigan: St. John's Law Review Association), p. 23. According to the author: "...the term AIDS is an acronym for Acquired Immuno Deficiency Syndrome, a disease characterized by the gradual decrease of the body's immune system."

⁴⁷ Macher M. (1999). *HIV and AIDS: Medical Background*. (Washington: University of Washington Press), p.3.

⁴⁸ Blazer S. (Vol. 39: 1998). "But Names Will Never Hurt me: HIV Surveillance and Mandatory Testing", *Boston College Review*, (Boston: Boston College Law School Press), p. 1175. See also San Francisco AIDS Foundation (2006). *How AIDS is spread*. Available at <http://www.sfaf.org/aid101/transmission.html>, accessed last on July 19, 2009. The author states that HIV infection progressively reduces the effectiveness of the immune system and leaves the individual susceptible to opportunistic infection and tumours.

⁴⁹ Above, note 46.

within a week to a month.⁵⁰ Indeed, more severe symptoms may not develop for ten or more years after HIV exposure to the body. During this period, HIV multiplies, attacks, destroys and debilitates the body's immune system's cells thereby exposing the body's natural defence mechanism to more opportunistic infections⁵¹ as the system is rendered incapable of offering resistance to conditions that would not ordinarily pose serious danger to the healthy body's defence mechanism.

AIDS is the term clinically used to define and describe the later stages or more serious infections of someone who is HIV positive.⁵² According to the HIV/AIDS Surveillance Report, Number 4, AIDS is a specific group of diseases or conditions which are indicative of severe immune-suppression related to infection with HIV.⁵³ It is a clinical definition given to the onset of certain life threatening infections in persons whose immune systems have ceased to function properly.⁵⁴ The condition is "acquired" because it is not hereditary. The condition arises from HIV's attack on one type of white blood cell, the T-cell. This limits the body's immune system by not being able to build antibodies and the ability to fight infections.⁵⁵

⁵⁰ Above, note 46.

⁵¹ According to South African Law Commission (April: 1998), *Second Interim Report on Aspects of the Law Relating to HIV/AIDS: Pre-employment HIV testing*, p.4, opportunistic infections are the associated illnesses that a person infected with HIV virus suffers owing to the victim's reduced immune system. Once the human body is infected with the HIV virus, the body defences may continue to work for sometime and the person may remain well. But for the majority of cases, the immune system begins to break down and the person infected becomes prone to minor or major opportunistic infections from which death may result. Opportunistic infections include tuberculosis, *karposis sarcoma*, which is a rare form of cancer, pneumonia and *cytomegalovirus*, which cause blindness and serious brain and lung damage.

⁵² Ibid.

⁵³ Centre for Disease Control and Prevention (USA) (1994). *HIV/AIDS Surveillance Report*. Available at http://www.heinonline.org/HOL/PDF/handle_hein_journals, accessed last on 14 July 2008.

⁵⁴ The Foundation for AIDS Research (AmfAR) (1993). *Treatment Directory*, pp.135-137. Available at <http://www.amfar.org/page.aspx>, accessed last on May 8, 2010.

⁵⁵ According to Grief J. & Golden B. (1994). *AIDS care at home: A guide for caregivers, loved ones and people with AIDS*, (New York: John Wiley & Sons), p. 17, HIV attacks the immune system by infecting white blood cells otherwise known as CD4+ (T-Cells or helper cells). The most common examples white blood cells (CD4+) attacked by HIV viruses include *Regulatory T-Cells*, B-cells and *Cytostotic T-Cells*. These cells contribute in two ways to the body's immune defences: The *Regulatory T-Cells* work with B-cells (another type of white blood cell) to produce particular antibodies, while *Cytostotic T-Cells* directly attack body cells either already infected by viruses or malignant due to cancer. One of the *Regulatory T-Cells* called the *helper T-Cells*, aid in the activation of B-cells, T-cells and other disease fighting cells. HIV attaches to a

Primarily, HIV is spread through sexual contact, transmission of infected blood from one person to another, or exchange of body fluids between mother and baby during pregnancy, childbirth or breast feeding.⁵⁶ Sexual transmission occurs when there is contact between sexual secretions of one person with the rectal, genital or oral mucous membranes of another.⁵⁷ According to Epstein H., high rates of infection have been linked to a pattern of overlapping long term sexual relationships as this allows the virus to quickly spread to multiple partners who in turn infect their partners.⁵⁸ Transmission of HIV through exposure to blood-borne pathogens is particularly relevant to intravenous drug users,⁵⁹ haemophiliacs⁶⁰ and recipients of blood transfusion. Transmission of HIV from mother to child occurs in the uterus during the last weeks of

protein on the *helper T-Cells*, causing the *helper T-Cells* to die. This causes the number of uninfected CD4+ cells (T-Cells) to decline, the body experiences unprecedented increasing difficulties in fighting infections which in turn renders the body more vulnerable to other opportunistic infections that are capable of killing the infected persons because the body can no longer marshal and command its defences. As a consequence, HIV positive persons die not directly from HIV but from the effects of opportunistic infections.

⁵⁶ Albertyn S. & Rosengarten D. (1993). "HIV and AIDS: Some Critical Issues in Employment Law" in *South African Journal of Human Rights Law*. Available at <http://www.heinonline.id=93print=12ext=pdf>, accessed last on July 15, 2009. See also San Francisco AIDS Foundation (2006). "How AIDS is spread." Available at <http://www.sfaf.org/aid101/transmission.html>, accessed last on July 19, 2009. According to the author, direct contact of a mucous membrane or the blood stream with a bodily fluid containing HIV, such as blood, semen, vaginal fluid and breast milk can result into transmission of HIV.

⁵⁷ See *ibid*, Albertyn S. & Rosengarten D. According to the author, unprotected receptive sexual acts are riskier than anal intercourse, and the risk of transmitting HIV through unprotected anal intercourse is greater than the risk from vaginal intercourse or oral sex. See also Koenig M. et al. (2004). "Coerced first intercourse and reproductive health among adolescent women in Rakai, Uganda," in *International Family Planning Perspective*. Available at <http://www.ncbi.nlm.nih.gov/pubmed/15590381>, accessed last on July 19, 2009. According to the author, oral sex is not entirely safe as HIV can be transmitted through both oral and insertive sex. Other sexually transmitted infections (STI) increase the risk of HIV infection because they cause the disruption of the normal epithelial barrier by genital ulceration and by accumulation of HIV susceptible or HIV infected cells in semen and vaginal secretions.

⁵⁸ Epstein H. (2007). *The invisible cure: Africa, the West, and the fight against AIDS*. (New York: Farrar, Straus and Giroux), p. 11.

⁵⁹ Intravenous drug use refers to injection of recreational drugs such as heroin and cocaine amphetamines. See Strang J. et al. (2001). *Different forms of heroin and their relationship to cook-up techniques: data on and explanation of use of lemon and other acids in Substance Use and Misuse*. Available at <http://www.ncbi.nlm.nih.gov/pubmed/11419488>, accessed last on July 19, 2009.

⁶⁰ Haemophilia is a group of hereditary genetic disorders that impair the body's ability to control blood clotting or coagulation, which is used to stop bleeding when a blood vessel is broken. See Harper D. (November 2001). Online Etymology Dictionary.

Available at <http://www.etymonline.com/index.php>, accessed last on July 19, 2009.

pregnancy and at birth.⁶¹ Contrary to the erroneous assumption that HIV is highly infectious, casual contact, sneezing, sharing food or clothing do not spread HIV.⁶²

In the early stages of HIV infection, no immediate symptoms accompany the infection and the disease can only be detected by screening an individual's blood for HIV antibodies.⁶³ One can be HIV positive yet show no outward sign of infection.⁶⁴ This condition is commonly referred to as *asymptomatic HIV infection*. Researchers know neither the percentage of those with HIV infection that will develop "full blown" AIDS nor the length of time it takes before an HIV infection develops into AIDS.⁶⁵

For periods of one to two months following the infection, the virus is undetectable, and chances of transmission to another person are reduced. Research has shown that HIV cells may take up to six months to be generated in quantities large enough to appear in standard blood tests.⁶⁶ The transmission of HIV can only be through intimate sexual contact with an infected person; invasive exposure to contaminated blood or certain other bodily fluids; or through prenatal exposure (mother to child transmission).⁶⁷ On

⁶¹ Coovadia H. (2004). *Antiretroviral agents-how best to protect infants from HIV and save their mothers from AIDS*. Available at <http://www.ncbi.nlm.nih.gov/pubmed/15247337>, accessed last on July 19, 2009.

⁶² Brink B. & Clausen L. (1987). "The Acquired Immune Deficiency Syndrome," in *Medical Affairs from the Association of South Africa*. As quoted by Albertyn S. & Rosengarten D. (1993). "HIV and AIDS: Some Critical Issues in Employment Law," in *South African Journal of Human Rights Law*, (Johannesburg: University of Witwatersrand Press), p. 35. Available at <http://www.heinonline.id=93print=12ext=pdf>, accessed last on 15th July 2009. Blencher M. (1997) *Hope and Mortality: Psychodynamic approaches to AIDS and HIV*. Hillsdale, New Jersey: Analytic Press, states as follows of the misconceptions on the transmission of HIV/AIDS: "A number of misconceptions have arisen surrounding HIV/AIDS. Three of the most common are that AIDS can spread through casual contact, that sexual intercourse with a virgin will cure AIDS, and that HIV can infect only homosexual men and drug users. Other misconceptions are that any act of anal intercourse between gay men can lead to AIDS infection, and that open discussion of homosexuality and HIV in schools will lead to increased rates of homosexuality and AIDS."

⁶³ *Ibid.*

⁶⁴ See *Thomas vs. Atascadero* (1987) 662 F 376, 379, where in an expert testimony, the court heard that those with HIV and AIDS-infection can be classified into four groups, viz:

- i. Early acute, though transient, signs of the disease;
- ii. Asymptomatic infection;
- iii. Persistent swollen lymph-nodes; and
- iv. Presence of opportunistic disease and/or rare types of cancer.

⁶⁵ Above, note 61.

⁶⁶ Above, note 61.

⁶⁷ See expert evidence in *Chalk vs. United States District* (1988) 840 F.2d 701, 706. See also Macher M., above, note 46, p.1, who states as follows in regard to HIV transmission:

the contrary, there is no evidence that HIV/AIDS transmission occurs through casual workplace contact such as shaking hands, hugging, or even kissing on the cheek or lips. According to Mathiason & Berlin, out of an estimated health-care workforce of over five and a half million in the United States of America, only four health-care workers actually became infected with HIV/AIDS on the job.⁶⁸

HIV/AIDS epidemic has, according to both national and international sources become a global crisis.⁶⁹ In Kenya, AIDS is a tragedy of devastating proportions.⁷⁰ The epidemic spreads predominantly through sources generally considered inappropriate topics for public discussion- namely sex and drugs. As it was reported in the Nairobi Star, a local newspaper in Kenya:

“The primary route of HIV transmission in Kenya remains Casual Heterosexual Sex (CHS). While 16 per cent of new infections come through Casual Heterosexual Sex itself, another 24 per cent come when those infections are passed on to Casual Heterosexual

“HIV cannot be transmitted through casual contact. Rather, it is transmitted from one person to another through the exchange of blood, semen, vaginal fluids and breast milk. Saliva, tears, urine, and cerebral fluid contain very low concentrations of the active virus, and no transmission via these fluids has been documented. The concentration of the virus in the blood or other body fluids will determine the likelihood of HIV transmission. The higher the concentration, the greater the chance of transmission. As AIDS progresses, the level of HIV in the plasma increases, so a person with AIDS is more likely to transmit the virus than one who is merely HIV positive.” In an expert opinion, the court heard in *Thomas vs. Atascadero* (1987) 662 F 380 that in contrast to its devastating effects, HIV is fragile and killed by most ordinary disinfectants.

⁶⁸ See Garry G. Mathiason & Steven B. Berlin (1994). *Aids in the Healthcare, Business and Governmental Workplace*, pp.731-735.

⁶⁹ See, for instance, Shilts R. (1987). “And the Band Played On: Politics, People and the AIDS Epidemic,” in *Health Education Research* (New York: Oxford University Press), p. 27 who states: “suddenly there were children with AIDS who wanted to go to school; labourers with AIDS who wanted to work; and researchers who wanted funding; and there was a threat to the nation’s public health that could no longer be ignored. Most significantly, there were the first glimmers of awareness that the future would always contain this strange new word”

⁷⁰ See Kenya National Aids Strategic Plan 2005/6-2009/10. Foreword by His Excellency the President, p. viii. Available at <http://www.hdwg-Kenya.com/new/index.php>, accessed last on August 3, 2009. The statement by His Excellency, the President of the Republic of Kenya is analogous to an analysis by Closes in Closen M. (1997). “The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV and AIDS cases and its adverse effects on Human Rights” in *Albania Law Review*, p. 897. According to the author, “The Acquired Immune Deficiency Syndrome (AIDS) epidemic of the early 1980s and its successor, the Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV and AIDS) epidemic of the latter 1980s and 1990s, has been more than a disease epidemic. It has spawned an epidemic of human rights abuses as well.”

partners. Couples (Steady Partner Heterosexual) with low risk behaviour where one partner still passes on the virus to the other account for another 10 per cent of new HIV infections annually. The surprising revelation of the UNAIDS data is that around 15 per cent of all HIV infections come directly or indirectly through Men having Sex with Men. Around 9 per cent of all new HIV infections in Kenya comes directly from MSM but to this must be added the around 2 per cent of the consequent infection of female partners of Kenyan gays (most of whom are married). In addition male sex in the prison population leads to another 4 per cent of infections annually. Research shows that many African men who have sex with men also have female sexual partners and do not necessarily identify themselves as gay. The rapid spread of HIV through the gay population is assisted by the high risk of anal intercourse. The UNAIDS data reveals that fishermen are another high risk group responsible for 17 per cent of all HIV infection in Kenya annually. The other high risk group is Kenyans who inject drugs who, with their partners, are responsible for 7% of infections. Sex workers are responsible for just 2 per cent of infections and truck drivers 3 per cent.”⁷¹

2.2 PREVALENCE OF HIV/AIDS

HIV/AIDS remains a crisis, attacking every region in the world. The epidemic is incomparably dynamic, camouflaging in character and exploiting new opportunities for

⁷¹ Mutuku J. Gay “Male Sex causes 15% of HIV in Kenya.” *Nairobi Star*, Tuesday, 2nd September 2008, p. 3. According to the reporter, “The regional breakdown shows some interesting elements. MSM incidence is higher in Nairobi (11%) and the Coast (13%) and lowest in Nyanza (6%) Casual Heterosexual Sex incidence is higher in Nairobi (22%) and Nyanza (27%) but lower at the Coast (13%). Intravenous drug use is highest in Nairobi (16%) and the Coast (17%) and lowest in Nyanza (4%). Only a quarter of Kenyans over 15 years know their HIV status.” This report on the spread of HIV in Kenya is analogous to Judge Kirby’s analysis in Kirby M (2004). “The never-ending Paradoxes HIV/AIDS and Human Rights”, in *African Human Rights Law Journal*, p.164. Available at <http://www.heinonline.org/HOL/PDF/.pdf>, accessed last on August 3, 2009. According to the author, “From the start, HIV/AIDS has not been like any other epidemic. The numbers of people infected were immediately far too numerous to warrant the traditional approach of quarantine. Furthermore, the long period of latency of the virus and the limited modes of transmission made such an approach disproportionate. The absence of a rapid cure and the failure to develop speedily a safe and effective vaccine has meant that HIV/AIDS is not susceptible to the usual medical or public health responses, used in the past in challenges of this kind. Moreover, the principal modes of transmission-penetrative sexual activity and injecting drug use (commonly involving stigmatised groups in the community: sex workers, men who have sex with men, and drug users), together with high initial levels of mortality and widespread community fear have made HIV/AIDS a most troublesome problem.”

transmission.⁷² According to Kimble M., HIV/AIDS is a global problem touching virtually every corner and every country around the world.⁷³ As at 2007, 33.2 million people lived with HIV worldwide and AIDS had killed 2.1 million people worldwide, 330,000 of whom were children.⁷⁴ More than half of the world population infected with HIV is found in sub-Saharan Africa,⁷⁵ thereby impeding economic growth⁷⁶ and human capital.⁷⁷ This sub-part therefore focuses on examining HIV/AIDS as a global crisis, and particularly the prevalence of the infection in Kenya.

2.2.1 HIV/AIDS as a global crisis

For close to three decades, the HIV/AIDS crisis has developed into “an unprecedented human catastrophe”.⁷⁸ Within this short span of time, the global number of people who have been, or are, directly affected by this pandemic is close to one hundred million.⁷⁹ Specifically, more than sixty million people have contracted HIV at some point over the last twenty five years.⁸⁰ More than twenty five million people have died as a result of AIDS-related illness during this time and approximately forty million are currently

⁷² See Global Business Coalition on HIV/AIDS, Tuberculosis and Malaria. *HIV/AIDS, Law and Human Rights: A Handbook for Russian Legislators*. Available at http://www.gbcimpact.org/its_node/0/0/report/962, accessed last on 15th July 2009.

⁷³ Kimble M. (1998). “Political Will in the Response to the AIDS Pandemic,” in *U.S. Department of State Dispatch*. Available at <<http://www.heinoline...id=179print=3ext=pdf>>, accessed last on 15th July 2009.

⁷⁴ UNAIDS, WHO (December, 2007). *2007 AIDS epidemic update*. Available at http://www.data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en_pdf, accessed last on July 19 2009.

⁷⁵ Ibid. Sub Saharan Africa is a geographical term used to describe the area of the African continent which lies south of the Sahara desert, or those African countries which are fully or partially located south of the Sahara. It contrasts with North Africa, which is considered as a part of the Arab World. See Arab League Online: League of Arab States. Available at <http://www.arableagueonline.org/las/index.jsp>, accessed last on July 19, 2009.

⁷⁶ Economic growth is the increase in activity in an economy, usually measured as the rate of change of gross domestic product.

⁷⁷ Human capital is the stock of skills and knowledge embodied in the ability to perform labour so as to produce economic value; it is the skills and knowledge gained by a worker through education and experience. See Sullivan A. & Sheffrin S. (2003). *Economics: Principles in action*. Upper Saddle River, New Jersey: Pearson Prentice Hall, p. 5.

⁷⁸ See United Nations General Assembly Resolution 60/262, U.N. Doc. A/RES/60/262 (June 2, 2006), p. 2.

⁷⁹ Ibid.

⁸⁰ Ibid.

living with HIV/AIDS globally.⁸¹ HIV/AIDS has become the leading cause of death worldwide for adults aged fifteen to forty-nine, with three million deaths in 2003 alone.⁸² The HIV/AIDS pandemic has also ravaged the lives of many children.⁸³ According to the 2007 United Nations Agency for International Development (UNAID) report, 33.2 million people were infected with HIV and 2.1 million people had already succumbed to AIDS as at 2006.⁸⁴

Moreover, the communities, gender and age groups and location of persons affected by HIV/AIDS have changed over the last twenty five years.⁸⁵ In deed women now represent 50 percent of people living with HIV/AIDS worldwide and nearly 60 percent of people living with HIV/AIDS in Africa.⁸⁶ In addition, new infections are occurring in much younger age groups than ever before as “half of all new HIV infections occur among children and young people under the age of 25 years”.⁸⁷ Developing nations have become the epicentres of the evolving pandemic and statistics estimate that more than ninety five percent of all people living with HIV/AIDS live in developing nations.⁸⁸ Sub-Saharan Africa has also become the part of the world with the largest number, and highest concentration, of people living with, and dying from HIV/AIDS. According to the United Nations, the HIV/AIDS pandemic:

⁸¹ See Empelen P. (2005), *What is the Impact of HIV on families?* p. 9. Available at <http://www.euro.who.int/Documents/E87762.pdf>, accessed last on August 16, 2008.

⁸² Ibid.

⁸³ Ibid. According to World Health Organisation Report, as at 2004, fifteen million children had been orphaned by HIV/AIDS and millions more made vulnerable by the death or illness of a parent, guardian or caretaker.

⁸⁴ Above, note 77.

⁸⁵ Jefferson D. (May 2006). “How AIDS Changed America,” in *Newsweek*, p. 13, available at <http://www.msnbc.msn.com/id/12663345/site/newsweek/>, accessed last on August 16, 2008.

⁸⁶ World Health Organisation (2007). *Women and HIV/AIDS*, available at http://www.who.int/gender/hiv_aids/en/, accessed last on August 16, 2008. Even though the populations of women and men living with HIV and AIDS worldwide are approximately equal, women are more vulnerable to HIV and AIDS infection and its impact due to gender inequalities and various biological factors.

⁸⁷ United Nations General Assembly Resolution 60/262, U.N. Doc. A/RES/60/262, 2006.

⁸⁸ Ibid.

“...Constitutes a global emergency and poses one of the most formidable challenges to the development, progress and stability of our respective societies and the World at large, and requires an exceptional and comprehensive global response...”⁸⁹

2.2.2 Prevalence of HIV/AIDS in Kenya

HIV was first diagnosed in Kenya in 1984.⁹⁰ As at the year 2000, an estimated 2.8 million people out of a population of 30 million in Kenya were living with HIV/AIDS.⁹¹ Annually, 200,000 new cases were reportedly registered in Kenya.⁹² An estimated number of 700 people succumbed daily to HIV/AIDS related illnesses.⁹³ The morbidity (infection rate) was placed at about 200 people per day while more than one million children have been orphaned by AIDS related deaths and the death rates per day was estimated to be 6.75 percent of those infected who also live in rural areas. The majority of those affected were young people aged between 15 – 39 years.⁹⁴ The prevalence of HIV in Kenya can be compared to the latest data available on HIV in Kenya as at the date of this thesis as follows.

⁸⁹ Ibid.

⁹⁰ Kiarie W. & Muraah W. (1998). *HIV and AIDS: Facts that could change your LIFE*. Available at <http://www.kenyaaidsinstitute.org/aboutthevirus.html>, accessed last on August 3, 2009. The author states: “In the early and mid - 1980’s, HIV/AIDS was largely unknown in Kenya. It was a disease that affected “others”. Initially it was viewed as a disease of homosexuals, and American homosexuals at that! Then it became a disease of Ugandans, when stories of slim (the name given to AIDS in Uganda supposedly because of weight loss among its sufferers) began to hit the local press. It was not until September 1984, that the medical community was to officially learn of the first reported case of AIDS in Kenya, through an article published in the East African Medical Journal. The gravity of the issue was in contrast with the simple title: “Acquired Immuno-deficiency Syndrome in Africa”. The African was a 34 year-old Ugandan journalist operating from Nairobi. The article ended prophetically - “This case is reported to alert medical practitioners to the possibility of AIDS occurring in Africans and to emphasise the point that no race may be exempted from this highly lethal syndrome”. AIDS had arrived in Kenya and from there, spread like a bush fire!”

⁹¹ Africa Forum (2006). *The Dual Epidemics of HIV/AIDS and Food Insecurity: HIV/AIDS History Barner*. Available at http://www.projectconcern.net/forum/documents/HIV/AIDS_History_Barner-Participant_Notes.pdf, accessed last on 3rd August 2009.

⁹² Ibid.

⁹³ Government of Kenya (October 2000), *Kenya National HIV/AIDS strategic plan (NACC) 2000- 2005*, p. 1.

⁹⁴ Ibid.

According to research conducted by the Kenya AIDS Indicator Survey⁹⁵ in the year 2007, there was a reported decline in the rate of HIV infection in Kenya. The survey indicates that as at that time, only 1.4 Million adults in Kenya were infected with HIV.⁹⁶ The survey further presented women as disproportionately infected with HIV⁹⁷ compared to men, and young women between ages 15 and 34. It is also apparent from the survey that the women of this age group were more vulnerable to HIV infection as opposed to their male counterparts.

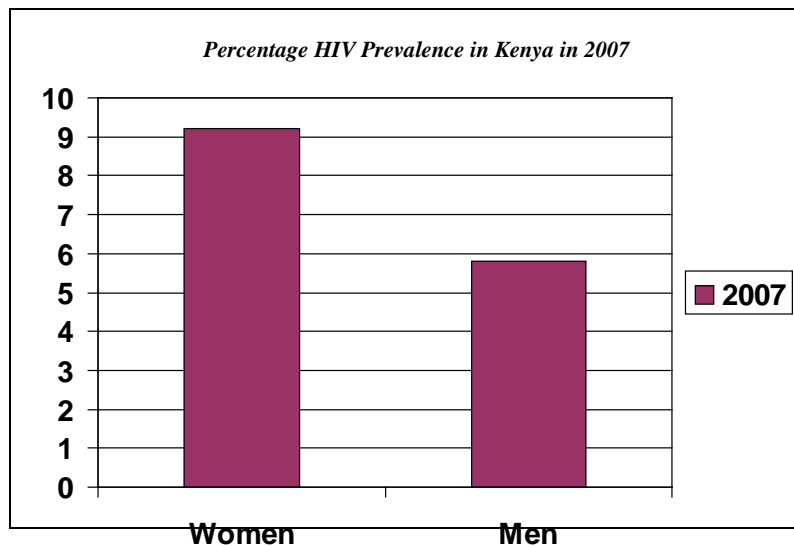
The Kenya AIDS indicator survey, 2007, is the latest on the prevalence of HIV/AIDS in Kenya and was undertaken by the National AIDS Control Council, which is the body mandated by the government of Kenya to undertake studies and make policy recommendations on the mode of control of the infection in Kenya. The outcome of the survey is illustrated in the graphs below.

⁹⁵ The Kenya Aids Indicator Survey (KAIS) was conducted by the Government of Kenya and development partners. The objective of KAIS was to carry out the very first population-based survey of the HIV epidemic place in Kenya since the 2003 Kenya Demographic and Health Survey of (2003 KDHS). The survey was implemented by the National AIDS/STD Control Program (NAS COP) of the Ministry of Health. Other key organizations involved in the survey were National AIDS Control Council (NACC); Kenya National Bureau of Statistics (KNBS); National Public Health Laboratory Services (NPHLS); Kenya Medical Research Institute (KEMRI); National Coordinating Agency for Population and Development (NCA PD); U.S. Centers for Disease Control and Prevention (CDC); United States Agency for International Development (USAID), and United Nations (UN). Publication of the report was supported by the U.S. President's Emergency Plan for AIDS Relief (PEPFAR) through the United States Centers for Disease Control and Prevention (CDC) and the United States Agency for International Development (USAID). The findings and conclusions in this supplement are those of the authors and do not necessarily reflect the views of the donor. See Government of Kenya (July, 2008). *Kenya AIDS Indicator Survey, 2007*, (Nairobi: Government Printers), p. 17.

⁹⁶ Government of Kenya (July 2008). *Kenya AIDS Indicator Survey, 2007*, (Nairobi: Government Printers), p. 1. The rate of infection was 7.4 %.

⁹⁷ The infection rate among women stands at 8.7%, while that of men stands at 5.6%.

Figure 1: Percentage HIV Prevalence⁹⁸ in Kenya in 2007



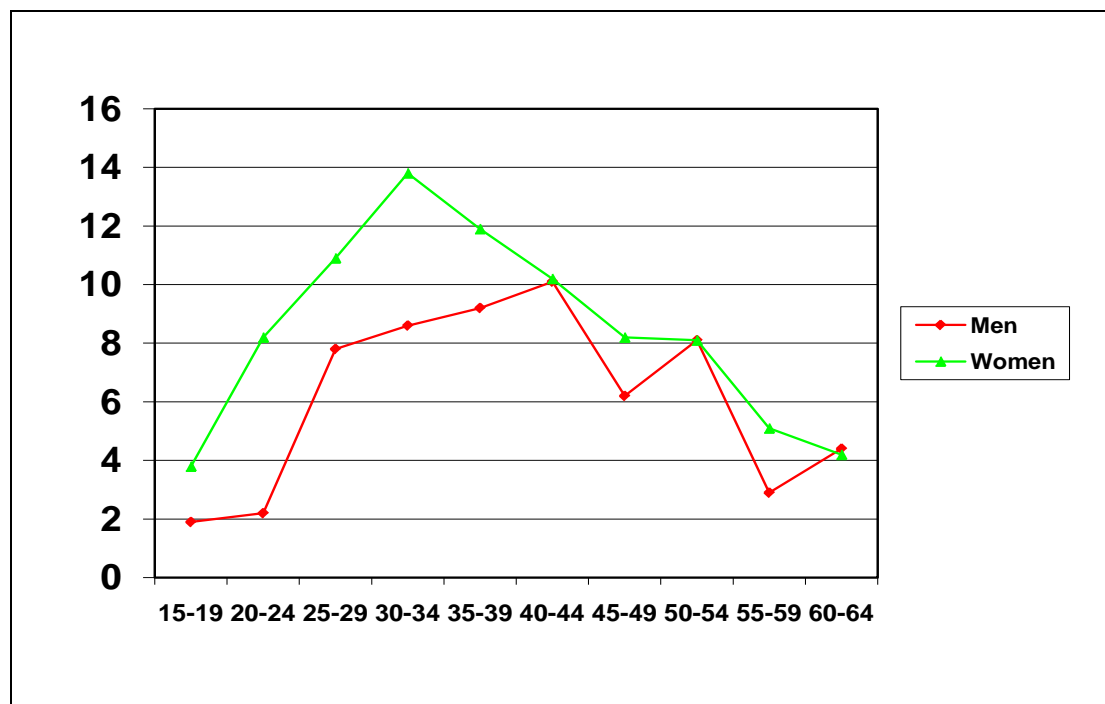
Source: Government of Kenya, Kenya AIDS Indicator Survey, 2007, available at http://www.aidskenya.org/public_site/.../KAIS_Preliminary_Report.pdf. The higher HIV infection rate among women as compared to men can be explained by the vulnerability of women to the infection than men. For instance, women have limited or no control over sexual and gender based violence such as rape and forced marriages which are a recipe for HIV infection.

HIV/AIDS in Kenya occurs in all age groups and in both sexes. There are however, some differences in prevalence across the life span of the age groups and the sexes. Among the youth aged between 15-24 years, women are 4 times more likely to be infected than men. A higher proportion of Kenyans aged between 30-34 years are currently infected with HIV than any other age category. The burden of infections is statistically higher among females than males until age 35 after which the ratio of males to female infections is 1 to 1.

⁹⁸ Above, note 40, p. 12. HIV prevalence is a measure of the total burden of HIV/AIDS, including new and old infections. The prevalence of HIV/AIDS can increase and decrease based on several factors, including rate of new infections, the mortality from a disease and the length of time people are able to fight a disease based on available treatments.

Figure 2: Percentage HIV Prevalence in Kenya by Age and Sex as at 2007.

Percentage HIV Prevalence in Kenya by Age and Sex as at 2007



Source: Government of Kenya, Kenya AIDS Indicator Survey, 2007, available at http://www.aidskenya.org/public_site/.../KAIS_Preliminary_Report.pdf. The higher HIV infection rate among women is explained by their vulnerability to the infection as compared to men. Between ages 20 to 45, both men and women are most sexually active and this explains the rise in HIV infection rate in such age group.

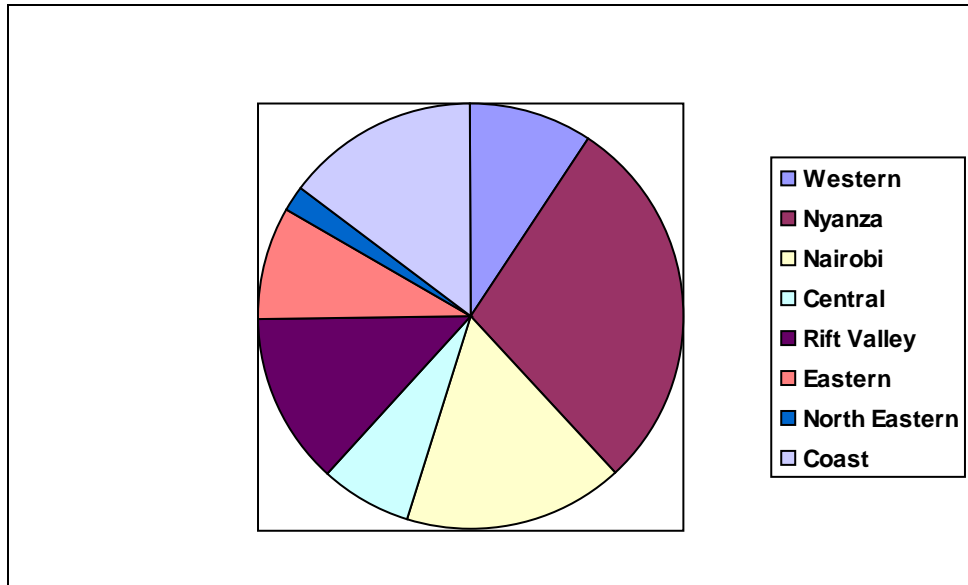
The distribution of HIV varies greatly across the eight administrative provinces in Kenya.⁹⁹ Prevalence of the HIV infection is highest in the Nyanza Province at 15.3 percent, more than double the national prevalence estimate,¹⁰⁰ and lowest in the North

⁹⁹ Kenya is divided into eight regions known as provinces. The provinces include Nyanza, Western, Rift Valley, Nairobi, Central, North Eastern, Coast, and Eastern provinces. See *Kenya AIDS Indicator Survey, 2007*, above, note 40.

¹⁰⁰ The high prevalence of HIV/AIDS in Nyanza province can be attributed to the prevalent regressive cultural practices that advocate for wife inheritance. See Oketch Owiti (2009). *HIV in Kenya*. Available at <http://www.kenya-advisor.com/hiv-hiv-in-kenya.html> accessed last on August 3, 2009. According to the author, "the tradition of wife inheritance in Nyanza province of Kenya has also played a role in the spread of HIV. If a married man dies, a family member of the deceased man will take his wife into his

Eastern Province at 1.0 percent. Other Provinces with rates similar to or higher than the national level are Nairobi, Coast and Rift Valley Provinces.

Figure 3: Percentage HIV Prevalence in Kenya by Province, 2007.



Source: Government of Kenya, Kenya AIDS Indicator Survey, 2007, available at http://www.aidskenya.org/public_site/.../KAIS_Preliminary_Report.pdf. The level of community awareness on ramifications is lowest in Nyanza province, where still, cultural practices such as wife inheritance are a commonplace. This explains the highest HIV infection rate in the region. The strict Islamic doctrines practiced in North Eastern province have helped lower the rate of HIV infection in the region.

2.3 RAMIFICATIONS OF HIV/AIDS IN KENYA

The impact of HIV/AIDS in Kenya transcends every sector of the economy. The epidemic directly affects trade, travel, peacekeeping commitments, life expectancy, poverty levels, and inequality of citizens. Alive to these realities, the Kenyan

own family, typically as a second wife. This way she is taken care of. Tradition said the man could not have sex with his inherited wife. But the inheritors began to neglect that tradition. With many men dying of AIDS, after infecting their wives, the wives now pass the HIV virus further through the inheritors.”

Government considers HIV/AIDS a national disaster.¹⁰¹ At the time the Kenyan Government declared HIV/AIDS a national disaster, daily deaths for HIV/AIDS related infections were alarming.¹⁰² The rate of infection with HIV continued unabated¹⁰³ and HIV/AIDS was seen to be a serious threat to the economy, communities, families and health care institutions. Indeed AIDS was already impacting negatively on the education and agricultural sector, negating the gains made as well as creating a large pool of children in need of urgent help, including orphans and child headed families.¹⁰⁴ As a crisis, HIV/AIDS has not only negatively impacted on various

¹⁰¹ See Government of Kenya (2002), *HIV/AIDS and Sexually Transmitted Infection in Kenya: Behavioural Surveillance Survey*, (Nairobi: Government Printers), p. 16. When addressing members of parliament in Mombasa at that time, former Kenyan President Daniel Toroitich Arap Moi declared HIV/AIDS a national disaster in the following words: "AIDS is not just a serious threat to our social and economic development; it is a real threat to our very existence. AIDS has reduced many families to the status of beggars. No family remains untouched by the suffering and death caused by AIDS and the solution lies with each and everyone of us" More recently, the sitting Kenyan President stated as follows of HIV/AIDS: "HIV/AIDS continues to be a major challenge to our socio-economic development. Since the first case was discovered in 1984, it is estimated that over 1.5 million people have died due to AIDS-related illnesses, resulting into 1.8 million children left as orphans. It is also estimated that 1.4 million people are living with the HIV today. However, there is hope, as we have noted a decline in the HIV prevalence which reached a peak of 14 percent in 2000, and which has fallen to 7 percent in 2004, due to successful multi-sectoral responses including the fact that HIV/AIDS has now become everybody's concern. The scale up in condom uptake, voluntary counselling and testing services, antiretroviral therapy, and increased co-ordination among stakeholders is expected to result into a further reduction in HIV prevalence. Despite this progress, enormous challenges remain. The rate of new infections is unacceptably high particularly among vulnerable groups including; young girls, individuals in HIV discordant relationships, commercial sex workers and their clients, migrant workers and injecting drug users. Equally critical is the availability of affordable treatment for those in need of antiretroviral therapy. Other challenges include the negative socio-economic impact that HIV/AIDS inflicts on society as evidenced by the cumulative number of orphans and other vulnerable children, widows and the elderly as well as high levels of poverty and unemployment in the country." See Kenya National Aids Strategic Plan 2005/6-2009/10. Foreword by His Excellency the President, p. viii. Available at <http://www.hdwg-Kenya.com/new/index.php>, accessed last on August 3, 2009.

¹⁰² Ibid. 200 people were dying from HIV/AIDS related illness daily in Kenya.

¹⁰³ Ibid. More than 2.8 million people were already infected in Kenya and likely to die within ten years.

¹⁰⁴ Odhiambo D. (2001), *Evolution of Kenyan HIV/AIDS policy from 1984 To-date*, Paper prepared for Kenya Ethical and Legal Issues Network on HIV/AIDS (KELIN) workshop, Kenya School of Monetary studies 15th - 16th November, 2001. Whereas AIDS destroys young members of the population who are economically productive thus disrupting development, behaviour change, which is critical to the prevention and control of the spread of HIV/AIDS, take along time to realise. This is mainly because issues related to sexuality are considered a taboo, private and intimate especially in the African set-up. Thus, public discussion of HIV/AIDS have for a long time attracted loathe, scorn and derision from the conventional members of the society. This situation is comparable to an observation of Justice Michael Kirby when he first published an essay on HIV and AIDS as follows: "After I had published on the subject of the legal responses to HIV, some of my judicial colleagues at that time, in the Court of Appeal,

sectors of the Kenyan economy.¹⁰⁵ but has also proved to be a uniquely corrosive threat to poverty reduction efforts.¹⁰⁶

2.3.1 Education sector

HIV/AIDS epidemic affects the education sector in at least three ways:

- (i) Supply of experienced teachers is greatly reduced by HIV/AIDS related illness and deaths.
- (ii) Children are forced out of school to remain at home and care for the sick family members and to work in the field; and
- (iii) Children are forced to drop out of school due to the inability to pay school fees due to reduced household income as a result of HIV/AIDS deaths.¹⁰⁷

expressed dismay that a judge was venturing into the forbidden territory of an epidemic connected with prostitutes, homosexuals, injecting drug users, sex venues, anal intercourse and other previously unmentionable topics...”

¹⁰⁵ Mumma, C. (2001). *Comparative Law on HIV/AIDS Policy from 1984 To-date*, Paper presented at KELIN workshop, Kenya School of Monetary studies, on 15th - 16th November, 2001. See also Ojienda T. (Vol. 12: 2006). “Legal and Ethical Issues Surrounding HIV and AIDS: Recommending viable Policy and Legislative Interventions” in *The East African Lawyer*, (Nairobi: Law Africa), p. 19, where I have argued thus: “The HIV/AIDS pandemic has precipitated a crisis with far reaching consequences. It has ravaged and continues to ravage all the vital sectors of East African society with a ravenous ferocity unequalled by no other epidemic in the history of the region. There is information that the number of victims is still rising and the social, economic and development consequences of the same are yet to be felt in the fullest scale. That is, unless something is done to counter the effect of the epidemic.”

¹⁰⁶ See Kenya National Aids Strategic Plan 2005/6-2009/10. The Socio-Economic impact of HIV/AIDS, p. 15. Available at <http://www.hdwg-Kenya.com/new/index.php>, accessed last on August 3, 2009. According to the strategic plan: “It is widely accepted that HIV/AIDS has major economic and social impact on individuals, families, communities and on society as a whole. In Kenya, as in other countries in sub-Saharan Africa, AIDS threatens personal and national well-being by negatively affecting health, lifespan, and productive capacity of the individual; and critically, by severely constraining the accumulation of human capital, and its transfer between generations. Research across many severely affected, low income countries clearly demonstrates that HIV/AIDS is the most serious impediment to economic growth and development in such countries; there is no reason to expect Kenya to be an exception. Poverty reduction, driven by economic growth, is the central objective of Kenya’s Economic Recovery Strategy (ERS). The impact of HIV/AIDS on economic growth and development, coupled with the direct impact of increased mortality and morbidity on the lives of the poor, makes HIV/AIDS a uniquely corrosive threat to poverty reduction efforts.”

¹⁰⁷ Government of Kenya (November 2002), *Mainstreaming Gender into Kenya National HIV/AIDS Strategic Plan 2000-2005*. See also Kenya National Aids Strategic Plan 2005/6-2009/10. The Socio-Economic impacts of HIV/AIDS, (Nairobi: Government Printers), p. 16. Available at <http://www.hdwg-Kenya.com/new/index.php>, accessed last on August 3, 2009, where it is stated thus: “educational services suffer as teachers are lost to AIDS and children drop out of school as parents die and household incomes fall. The health service loses trained staff and has to cope with the increasing burden of HIV-related infections.”

The education sector is particularly crucial in the sense that it has the potential to influence behaviour formation and behaviour change among the youth that happen to be the most susceptible to HIV infection. The sector has the infrastructure and human resources, which can be used as a vehicle to promote preventive behaviour and create enabling environments for creating HIV/AIDS awareness.

2.3.2 Agricultural sector

Agriculture is the primary economic sector of Kenya and several other African countries. In Kenya, it engages about 80 percent to the labour force and accounting for 25% of the gross domestic product. The impact of the HIV/AIDS on the agricultural sector threatens food security in the entire country; fertile land for families hard hit by HIV/AIDS remains idle due to shortage of agricultural labour. Morbidity and mortality in the agricultural sector do lead to loss of skills and experience,¹⁰⁸ increased recruitment and family costs, terminal benefits or pension funds for the dead, funeral costs and man power planning.

2.3.3 Health sector

The health sector is central to the successful responses to the HIV/AIDS epidemic, since overall development of a country is dependent on the health of its people. The impact of HIV/AIDS on the health sector is in two main ways:

- (i) It increases the number of people seeking health services.
- (ii) It increases the overall cost of health care in the country.

¹⁰⁸ Above, note 105. According to the Kenya National Aids Strategic Plan 2005/6-2009/10: "the productivity of the agriculture sector, upon which the majority of Kenyans rely for their livelihood, is undermined by negative impacts on the supply of labour, crop production, agricultural extension services, loss of knowledge and skills and at a personal level the trauma associated with death. Consequences include reduced household and community food security and decline in the nutritional and health status of smallholders and their families. Commercial agriculture, a major source of employment and foreign earnings, is detrimentally affected by increasing health costs as well as protracted morbidity and mortality of key workers."

With the increase in the number of persons infected with HIV, there is a corresponding decline in the quality of health services because care facilities are strained to accommodate the victims. The cumulative effect of HIV/AIDS is its impact on national resources. That is, total annual health care treatment costs increase astronomically, as productivity goes down. As one scholar observes:

“The impact of these health costs can directly affect economic growth and development in a variety of ways. For example, if health care is financed from national savings, the result is likely to be decreased investment for economic growth and social development. Even that portion that is financed by substituting for other consumption expenditures reduces the welfare that would have derived from the alternative consumption. Costs of this magnitude in the health sector also create difficult resource allocation decisions in determining government budgets and public finance.”¹⁰⁹

2.3.4 Industrial sector

The impact of HIV/AIDS in the industrial sector is seen in the frequency of absenteeism due to prolonged illness and death leading to loss of skilled manpower and resultant enormous burial expenses. In addition, the impact of HIV/AIDS on the population may cripple effective demand for manufactured products, thus rendering the industrial sectors vulnerable. Invariably, companies are therefore likely to suffer an increase in labour costs and a reduction in production profits unless effective prevention and management strategies are implemented in the workplace.¹¹⁰ According to Lumumba P.,

“In the employment sector, the employers are increasingly concerned about the likely impact of HIV/AIDS on their establishments. HIV/AIDS poses a direct financial risk to commercial enterprises and institutions in terms of costs of health care and other benefits, beyond engendering an indirect risk to production and productivity...These costs cannot be reduced by charging the commercial enterprises” benefits structure as most

¹⁰⁹ Leighton C. (1996). *The Direct and Indirect Costs of HIV/AIDS*, (Lund: University of Lund Press), p. 83.

¹¹⁰ Government of Kenya (June 1997), *Sessional paper No.4 of 1997 on HIV/AIDS in Kenya*.

HIV/AIDS related costs in the workplace are associated with absenteeism and health care expenditures.”¹¹¹

2.3.5 Socio-economic sector

The socio-economic impact of HIV/AIDS is felt both in individual household units and the greater society. Within the family, when HIV/AIDS related illnesses arise, employed household members are forced to take time off to be nursed or to nurse sick members. According to the Kenya National Aids Strategic Plan, 2005/6 - 2009/10:

“The direct cost and social problems associated with caring for increasing numbers of orphans, coupled with existing high poverty levels place severe burdens on family and societal structures.”¹¹²

Family income is threatened and savings are reduced to pay for medical expenses. Surviving family members face a diminution in family income, particularly upon the demise of the primary income earner.¹¹³ Infected adults occasionally break away from the family upon learning of their diagnosis.¹¹⁴ This may also result in the reduction in family income. As parents become ill and die, households are restructured, with increasing numbers of children left to care for themselves or to be cared for by the ageing grandparents or other relatives.¹¹⁵

2.3.6 The Social Services Sector

HIV/AIDS has brought to the spotlight many social, legal, economic and other issues with which society was not previously concerned. HIV/AIDS has increased demands on social services faster than before. Social services have however been affected by the

¹¹¹ Lumumba P. (2001). *Constitutional Basis for HIV/AIDS*, Paper presented at the National Conference held at Safari Park Hotel on 5-9 December, 2001.

¹¹² Kenya National Aids Strategic Plan 2005/6-2009/10, above, note 105, p. 16.

¹¹³ Forsythe S. (1996). “AIDS in Kenya: Socio-Economic Impact and Policy Implications,” in *Family Health International*, (Arlington, VA), pp. 27-28.

¹¹⁴ See Brink B. & Clausen L., above, note 61, p. 36.

¹¹⁵ Monique C. (1993). “Socio-economic impact of AIDS: household resources and beyond,” Research Proposal, p. 16.

epidemic, as skilled manpower is lost from the workforce.¹¹⁶ In Kenya, like in many other Sub-Saharan African Countries, the survivors severally affected by HIV/AIDS are dependants left without economic support.¹¹⁷ It is thus estimated that over one million children are already orphaned by HIV/AIDS pandemic in Kenya and the number is on the increase. The increase in the number of orphans resulting from HIV/AIDS pandemic has already overwhelmed the traditional system of adoption.¹¹⁸ At the same time, elderly persons who lose adult children face potential hardship and the prospect of raising their orphaned grandchildren.

In addition orphans in their early teens are already heading households while others have taken to the streets as a survival tactic/strategy which in turn exposes them to the hazards of HIV/AIDS. AIDS also results into repeated bereavement in quick successions within family and community set-ups. The traumatic effect on families and communities linger for a long time requiring long term psychological support. At the same time, the number of people presenting themselves for HIV tests and counselling is expected to increase while counselling centres are few.

Perhaps, the most difficult, demoralising and dehumanizing aspect of bearing to live with HIV/AIDS is the potential of family rejection. The fear, ignorance, lack of open dialogue about HIV/AIDS and how to involve all society, including families and communities in the search for solutions has placed tremendous pressure on the family.

2.4 CONCLUSION

¹¹⁶ Ibid.

¹¹⁷ Above, note 105, p. 16 states: "In addition to the direct effects of HIV/AIDS on production and social services, there is a growing realisation that HIV/AIDS may undermine the long-term revenue base of the economy, and so reduce Government's capacity to provide the infrastructure and social services essential for long-term economic growth. Studies in countries severely affected by HIV/AIDS suggest that the impact of HIV/AIDS on public finances is large and growing. This provides an additional argument, particularly relevant for the Ministries of Finance and Planning, for greater investment in an expanded response across all sectors."

¹¹⁸ Government of Kenya (November 2002). *Mainstreaming Gender into Kenya National HIV/AIDS Strategic Plan 2000-2005*, (Nairobi: Government Printers), p. 14.

This chapter has conceptualised HIV/AIDS and analysed its prevalence and ramifications in Kenya. The chapter has demonstrated that AIDS is an advanced stage of HIV infection. The world over, HIV/AIDS presents a human catastrophe. In Kenya, HIV/AIDS is prevalent and this has had negative impacts on various sectors of the economy, such as education, agriculture, industry and health sectors. Persons infected with HIV have therefore been stigmatised and even embarrassed from accepting their HIV status to their detriment. The society generally, and employers in particular have considered such persons as immoral and not worth associating with.

Whereas, at an advanced stage, AIDS reduces the work potential of the HIV positive worker, research has shown that it takes many years before the worker becomes incapable of performing his/her job. However, the belief among many employers in Kenya is that the moment a worker gets infected with HIV, he/she becomes unproductive. It is for this reason that the subsequent chapter analyses the efforts that have been made at the international level in an attempt to protect the HIV positive worker.

CHAPTER 3

INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF THE HIV POSITIVE WORKER

3.1 INTRODUCTION

Human Rights are conditions and expectations to which every person, by virtue of his or her existence as a human being is entitled.¹¹⁹ They are a system of socially regulated conditions that every human being automatically acquires at birth without discrimination.¹²⁰ Human rights have been around for a long time – too long, to be still be viewed with scepticism and to have their value and necessity questioned.¹²¹ According to Janusz Symonides;

“Human rights have frequently been qualified as the “common heritage” or as the common language of humanity. Indeed, they do not belong to domestic jurisdiction of states and are internationally protected. Today, they create a body of universal standards and values at the service of human dignity, equality and non-discrimination, and human freedoms.”¹²²

¹¹⁹ Deardorff A. (2006). *Terms of Trade : Glossary of International Economics*. (Michigan: University of Michigan Publishers). Available at <http://www.worldscibooks.com/economics/5985.html>, accessed last on 26th July 2009.

¹²⁰ Ibid.

¹²¹ Kisson C. et al (2002). *Aids Review*, (New York: Manhattan Publishing Company), p.15.

¹²² Janusz S. (2004). *Human Rights: Concepts and Standards*, (UNESCO Publishing/Ashgate), p. 38. The author states in part: “As a matter of fact, much of substantive international human rights law, namely the nature and contents of these rights, has its conceptual source in the principles of domestic constitutional law embodied in the fundamental laws of various countries. Their historical and philosophical origins, can in turn, be traced back to such great milestones of human freedoms as the American Declaration of Independence and the French Declaration of the Rights of Man and of the citizen, among others. These instruments and the national constitutions which inspired them greatly influenced the contents of much of modern international human rights law. One cannot, for example, read Article 1 of the Universal Declaration of Human rights, “All human beings are born free and equal in dignity and rights”, without recognizing the debt this formulation owes to the American and French Declarations and to the idea of human freedom they articulate...”

In nature and origin, human rights can be traced to the religious,¹²³ philosophical¹²⁴ and legal developments¹²⁵ throughout human history. The ideals from the foregoing sources have to-date been codified into documents in terms of constitutions or treaties. For a long time, the concept of human rights did not attract much of an obligation under both national and international law. Natural persons were deemed to be alien under international law as international law essentially governed relations between states.¹²⁶ By its very definition, international law governed relations between states.¹²⁷

¹²³ Religion is an ideological standpoint encompassing a set of beliefs and practices, often with a supernatural quality. See Clifford G. (1973). *Religion as a Cultural System*. (Indiana: Indiana University Press), p. 23. In history, Muhammad (Islamic Prophet) preached against social evils of his time and advocated for the need to preserve social security, prohibit slavery, preserve the rights of women and minorities. See Muhammad W. & Serjeant B. (1964). "The Constitution of Medina," in *Islamic Quarterly*. (London: University of London Press), p. 4. In 622, Muhammad drafted the *Charter of Medina* in which a formal agreement was reached to end inter-tribal wars in Medina that was among the Muslims, Jews and Pagans. Muhammad advocated for the Islamic government in Medina to provide food and clothing to captives without discrimination. See Ahmad I. (2002). *The Rise and Fall of Islamic Science: The Calender as a Case Study*. (Al Akhawayn University Press), p. 19.

¹²⁴ According to natural law theorists such as Thomas Aquinas, John Locke, Thomas Hobbes and Hugo Grotius, human rights are founded on moral, religious or biological order, but independent of transitory human laws and traditions. See Miller P. (2001). *Thomistic Natural Law as Darwinian Natural Right*. Al Akhawayn University Press, p.1. Socialists, such as Jean Jacques Rousseau argue that the most fundamental fiduciary relationship in any society is that which exists between the community and the state, its agencies and officials; that the state contracts to protect the rights and freedoms of the community.

¹²⁵ In 1215, an English Charter called *Magna Carta* was drafted, purposefully to solve the disagreements amongst Pope Innocent III, King John and the English Barons about the rights of the King. See Larned J. & Smith D. (1923). *The new Larned History for ready reference, reading and research*. (Oxford: Oxford University Press), p. 1103. *Magna Carta* required the King to renounce certain rights, respect certain legal procedures and accept that his will could be bound by the law. Among the rights in the *Magna Carta* was the right to due process and the writ of habeas corpus. *Magna Carta* influenced many modern Constitutions and Bill of Rights.

¹²⁶ The traditional definition was expanded somewhat after the First World War, when it came to be recognized that some newly created inter governmental organizations could, in some limited circumstances, also enjoy rights under international law and, to that extent, be subjects of International law.

¹²⁷ According to Professor J. G. Starke, International law refers to: "...that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, ..." As quoted by Bonnici A. (1993). *The Aim of Public International Law*, (Routledge: Steven & Francis), p. 43. Available at <<http://www.mifsudbonnici.com/lexnet/article.html>, accessed last on 30th July 2009. The Montevideo Convention on Rights and Duties of States (Signed on 26th December 1933) provides that a state will be considered a person under international law only if it has a permanent population; has a defined territory; has an effective government; and it has capacity to enter into relations with other states.

Individuals had no *locus standi*¹²⁸ to rely on international law in any forum, as a sharp contrast existed between the state and human being who composed it,¹²⁹ and alleged violations of individual rights could only be defended by the state.¹³⁰

Over time, international law has recognised individuals as having capacity to approach its institutions. According to Kelsen, international law and state law both bind individuals, but the former does so by operating through a concept of the state, while the latter does it directly.¹³¹ In *Danzig Railway Officials Case*, the Court held that a treaty could in certain circumstances confer rights directly to individuals, provided it was the

¹²⁸ Locus standi in international law refers to the capacity to possess international rights and duties. See O'Brien J. (2006). *International Law*, (London: Cavendish Publishers), p. 12.

¹²⁹ Bonnici A. (1993). *The Aim of Public International Law*, (Routledge: Steven & Francis), p. 43. Above, note. The author states: "As regards the position of the individual in international law, one will note that in classical international law the individual enjoyed no *locus standi*. There was a contrast too sharply drawn between the state and the human beings who compose it. Rousseau, for example, treated states and men as things of a different nature between which no true relation could be fixed and consequently he affirmed that "a state can only have for enemies other states, and not men. It was the state itself which was concerned with regulating the individuality of man and, before an individual could bring about a claim against a state, it was imperative that he or she convince his or her state to forward the case." Kisson C. et al, above, note 120, argues that the non-observance of human rights under international law extended to national legislations. States considered human rights as "inconvenience", relating to someone else's view of how the world should work; an unwarranted and unjustifiable interference with their sovereignty, traditions, religion and culture; or that they were too expensive and too much of a luxury. According to the author, "Many States thought that if they kept talking loud enough, the world would get tired of waiting for rights and the voices calling for these rights would be drowned out."

¹³⁰ For instance, the Revised Statement of the Foreign Relations Law of the United States, issued in 1986 by the American Law Institute, describes international law as dealing with: "the conduct of states and of international organisations, and with their relations inter se, as well as some of their relations with persons, whether natural or personal." The supposition about the nature of international law had a number of consequences as far as individual human beings were concerned. First, it was for the State of the individual's nationality to protect him or her from acts by other States, which violated international law. Individuals therefore depended on the States of their nationality to vindicate these rights on the international plane, because private persons had no standing to do so themselves. They also had no standing to compel their States to espouse these claims. Second, because only a State whose nationality the individual possessed could be considered aggrieved, stateless persons enjoyed no protection at all under international law. Third, since individuals had no rights under international law and enjoyed only such protection, as the State of their nationality was willing to extend to them, they had no recourse on the international plane against abuses committed against them by their own governments. Finally, because the treatment by States of their own nationals was not a matter to which international law applied, the entire subject was deemed to fall within the domestic jurisdiction of each State, barring other States from interceding or intervening on their behalf.

¹³¹ Kelsen H. (1926). *Les rapports de système entre le droit internet et le droit international public*. As quoted by O'Brien J. (2006). *International Law*, (London: Cavendish Publishers), p. 153.

intention of the parties.¹³² More recently, the Nuremberg Tribunal emphatically stated as follows of the obligations of individuals under international law:

*“Crimes under international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can provisions of international law be enforced.”*¹³³

As such, individuals are subject of international law and hence have rights and obligations under that law.¹³⁴ States can therefore no longer invoke the doctrine of state sovereignty or even lack of *locus standi* under international law to perpetuate violation of human rights under international law.¹³⁵

Part one of this Chapter examines the obligation of states in the protection of economic, social and cultural rights. This part looks into both the behaviour of states in protection of the foregoing rights in relation to civil and political rights, and attempts to explain the causation of the discriminatory approach in protection of the economic, social and cultural rights. Part two examines select international instruments that either expressly or implicitly make reference to HIV/AIDS in the labour sector. This part evaluates the extent to which international instruments have been enforced by State Parties. Part three of this chapter analyses the relevant regional instruments that have advocated for the rights of HIV Positive workers. This part appreciates the fact that in terms of implementation, regional instruments are more expeditious owing to their geographical application and the assumption that the regional instruments are more “representative”

¹³² *Advisory Opinion on the Jurisdiction of the Courts of Danzig* (1982) PCIJ, Ser. B. No. 15.

¹³³ Official Record, Vol. 1 Official Documents, p. 223.

¹³⁴ Janusz S., above, note 121, p.32 argues that most of these International Law doctrines and Treaty arguments followed in the wake of the First World War when the traditional definition was expanded.

¹³⁵ Brink B. & Clausen L., note 61, p. 38. According to the authors, one of the early exceptions to the general rule recognized by traditional international law was the doctrine of humanitarian intervention. Under the doctrine of humanitarian intervention, the use of force by one or more States to stop the maltreatment by a State of its own nationals was deemed to be lawful when that conduct was so brutal and large scale as to shock the conscience of mankind. Contemporary arguments about the rights of international organization or groups of state to use force, if necessary, to put an end to massive violations of human rights continue to be justified from time to time by reference to this doctrine.

of the ideals of the State Parties as compared to international instruments. Part four of this chapter assesses the application of international and regional instruments in Kenya. This part appreciates the trend that Kenyan courts have taken from an earlier position where the courts flatly refused to apply international instruments that had been ratified by Kenya without reservation on the argument that the instruments had not been domesticated, to a change of judicial jurisprudence where courts consider ratification without reservation as an unequivocal indication by Kenya to be bound by the international instruments in its domestic affairs. This chapter ends by giving a summary of the extent to which international instruments have advocated for non-discrimination; privacy rights; right to work; and access to drugs by HIV positive workers.

3.2 STATE OBLIGATION IN THE ENJOYMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

In order to understand the substance of rights, it is essential to explore the corresponding obligations of States. The Universal Declaration of Human Rights envisaged that every person throughout the world should enjoy all rights.¹³⁶ The rights must be absorbed into the legal, administrative and political culture of nations, first by recognizing that they are achievable ideals and then by implementation in national law and administration through relevant political and social reforms. Global institutions had to be set up to monitor the implementation of human rights world wide and to bring about co-operation in the fields of economic, social and cultural matters to establish conditions for their full enjoyment throughout the world.¹³⁷ While the passing of international instruments (Conventions and Declarations) create obligations for states under international law, the main task however is to ensure that the rights contained therein are incorporated into the national (municipal) law and administrative practice.

¹³⁶ Universal Declaration of Human Rights, UDHR, articles 1 & 2.

¹³⁷ The Universal Declaration was initially an expression of ideals to be achieved. The process of transforming these ideals into "hard law" at the international level started with the adoption of the two international covenants adopted in 1966 (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) followed by numerous specific conventions.

This transformation, whether into constitutions or into statutory law, can be fully achieved only when it goes hand – in – hand with the evolution of a human rights culture where individuals as well as politicians, administrators and security forces know and accept, not only their own rights, but also their duties flowing from the rights of other members of the community on a basis of equality.

Under international law, obligations for human rights are primarily held by states. When states seek to implement these obligations in national law, they are also required to impose duties on persons subject to their jurisdiction.¹³⁸ The duties of individuals are in most cases not contained in international instruments; they are underlying necessities, but left to the States for adoption through national legislation. Nor are the obligations of States spelled out in great detail in the main human rights instruments. They are indeed gradually clarified through additional specific instruments, and through the practice of monitoring bodies.

The wordings of article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹³⁹ varies from the wording of article 2(1) of the International Covenant on Civil and Political Rights (ICCPR).¹⁴⁰ The issue for examination then is whether the difference in wording of the international instruments is synonymous to

¹³⁸ Such duties include the requirement to respect the rights of other persons, such as the duty to respect the property of others, which is imposed through criminal law provisions on theft and other measures. Duties have also to be imposed on all individuals to contribute to the common welfare including taxation.

¹³⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27. Article 2(1) states: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

¹⁴⁰ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Article 2(1) states: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

difference in obligation of states in the protection of Economic, Social and Cultural Rights on one hand, and Civil and Political Rights on the other hand. The Committee on Economic, Social and Cultural Rights sharply criticised any distinction in state obligation in the following words:

“While great emphasis has sometimes been placed on the difference between the formulation in this provision [art. 2(1) ICESCR] and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognised that there are also similarities. In particular, while the Covenant provides for a progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.”¹⁴¹

The Committee on ICESCR was therefore emphatic that ICESCR imposes obligations which States must comply with immediately, regardless of their development.¹⁴² The argument that there are different layers of human rights which impose varying obligation among States¹⁴³ is open to question.

For a long time, the prevalent view has been that all economic, social and cultural rights must be provided by the State, and that they are costly and lead to an overgrown state apparatus. This view is the consequence of a narrow understanding of the nature of economic, social and cultural rights and in turn of the corresponding state obligations. Given their relevance to development policies, an analysis of economic, social and cultural rights is necessary in the context of the AIDS pandemic vis-à-vis employment relationships. The availability of resources refers, not only to those that are controlled by or filtered through the State or other public bodies, but also to the social resources which can be mobilized by the widest possible participation in development, as necessary for the realization of the rights recognized in the covenant.

¹⁴¹ General Comment No. 3, para. 1.

¹⁴² See also Limburg Principle No. 22.

¹⁴³ Craven M. (1998). *The International Covenant on Economic, Social and Cultural Rights*. (London: Cavendish Publishers), p. 147.

Therefore, a realistic understanding of State obligations must take into account, as laid down in Article 2 of the Declaration of the Right to Development, that the individual is the active subject of all economic and social development.¹⁴⁴ Most human beings naturally strive to take care of their own livelihood by their own efforts and resources individually or in association with others, by entering into paid employment contracts, et cetera. The use of his or her resources, however, requires that the persons have resources, which can be used. All these are seriously affected by HIV/AIDS that naturally increase the cost of living for the victim due to increased spending on medication, nutrition albeit at reduced or no earning since the victim if in employment risks losing the job on testing HIV positive. Equally, the victim's saving capacity is greatly affected by increased cost of living so that such a person is left with little or no money at all for investment.¹⁴⁵ The individuals' ability to offer any productive and sustainable labour is also greatly reduced as HIV/AIDS characteristically weakens the body structures, thus rendering the individual helpless by confining him/her to bed awaiting eventual death. As a consequence, a nation's development is interfered with as the most able bodied persons are the ones who also succumb to death in the face of HIV/AIDS. The decline in the labour sector reduces a nation's tax base and increases demand for services.

Thus, States must at the primary level, respect the resources owned by the individual, his or her freedom to find a job and the freedom to take the necessary actions and use the necessary resources -alone or in association with others - to satisfy his or her own needs. It is in this regard that collective or group rights become important. The

¹⁴⁴ UDHR, above, note 135, article 2 states: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

¹⁴⁵ UNAIDS (1990). *Action to Combat HIV/AIDS in view of its devastating Human, Economic and Social impact*, (UNAIDS Publishers), p.24. Available at <http://www.unaids.org>, accessed last on August 11, 2009.

safeguarding of rights of the vulnerable groups of the population including those infected or affected by HIV/AIDS is important just like the rest of the population.¹⁴⁶ The enjoyment of the rights to work, and earn a decent living must be guaranteed to all individuals within a State without any distinction as to HIV status, as this would amount to discrimination.¹⁴⁷ Consequently, as part of the obligation to respect the rights to acquire resources, the State should take steps to recognize and legislate the work rights of HIV positive workers who are still able to perform their work. By so doing, the State will be assisting them in making use of their own resources and therefore enable them secure pay for work done. This will lessen the burden that would have otherwise rested on the few fortunate members of their families to take care of them and their dependants.

At a secondary level, State obligations are meant to protect the freedom of action and the use of resources against other, more assertive or aggressive subjects in the context of HIV/AIDS, more powerful economic interests, such as protection against summary dismissal of an HIV positive worker based on his/her HIV status, against unethical behaviour in contractual relations for pre-employment HIV testing and mass screening for HIV/AIDS in cases of continuing employment of workers.¹⁴⁸ This protective function of the state is the most important aspect of state obligations also with regard to economic, social and cultural rights, and it is synonymous with the role of the state as protector of civil and political rights. A state's role in respect to socio-economic and cultural rights is expressed mostly in pieces of legislation.¹⁴⁹ However, legislation of this

¹⁴⁶ Palmer C. & Mickelson L. (Vol. 28: 2002). "Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic" in *William Mitchell Law Review*, p. 455.

¹⁴⁷ The Universal Declaration of Human Rights Articles 1 & 2 entitles all human beings to equal enjoyment of basic human rights with equal dignity and not based on any discriminatory practices.

¹⁴⁸ Blazer S. (Vol. 39: 1998). "But Names Will Never Hurt me: HIV Surveillance and Mandatory Testing," in *Journal of Boston College Review*, p. 1175.

¹⁴⁹ See for instance HIV and AIDS Prevention and Control Act, 2006. Section 4 obligates the Government to conduct public information on HIV and AIDS; s. 5 advocates for integration of HIV and AIDS study in education curricula. Further, Part I and II of the Employment Act, 2007 obligates the Minister for Labour, Labour offices and the Industrial Court to guarantee equal opportunity in the enjoyment of employment opportunities.

kind must, be contextual, and it must be based on the specific requirements of the country concerned.¹⁵⁰

At the tertiary level, the State has the obligation to facilitate opportunities by which the rights listed can be enjoyed. For example, with regard to the right to food, the state shall under Article 20 of the International Covenant on Economic, Social and Cultural Rights, take steps to improve measures of production, conservation and distribution of food by making full use of technical and scientific knowledge and by developing or reforming agrarian systems.¹⁵¹

At the fourth and final level, the state has the obligation to fulfil the rights of everyone under economic, social and cultural rights. This obligation could at its simplest consist of the direct provisions of basic needs, such as food or resources. This could also occur where many young able bodied persons are dismissed from employment on testing HIV positive thereby becoming jobless. This leaves the old who are physically and economically disadvantaged to take care of the those whose relatives have succumbed to AIDS.

It is apparent that human rights are important considerations of the well being of an organized society. The society however is pressed with various forces of development, which in most cases see transgression of basic human rights economically as well as socially. Incidentally, the appearance of HIV/AIDS has led to several claims of human rights violations at the workplace resulting in cases of discrimination, stigmatization

¹⁵⁰ To take an example; legislation providing that the relationship between an employer and worker is contractual and that the terms of the employment contract is wholly done by the employer for the worker to only signify consent by signing, the emergence of HIV/AIDS pandemic has seen the dawn of a new era, where a States involvement in regulating the implementation of employment contracts is needed than before so that the vulnerable groups (HIV/AIDS victims – women and children for instance) are guaranteed the mechanism of subsistence.

¹⁵¹ Global Governance Watch (2009). *The International Covenant on Economic, Social and Cultural Rights*. Available at http://www.globalgovernancewatch.org/human_rights/the-international-covenant-on-economic-social-and-cultural-rights, accessed last on July 31, 2009.

and eventual untimely death. Therefore, it may be right to say that a merely policy based approach as opposed to human rights based approach may not be wholly effective in dealing with this state of affairs.

3.3 INTERNATIONAL INSTRUMENTS

Human rights are a set of universal entitlements that individuals enjoy without discrimination. They are inherent to human beings and are proclaimed and protected by international law.¹⁵² Human rights have major relevance for shaping appropriate responses to the HIV epidemic and other global health challenges, including offering system-wide public health responses and identifying deficiencies in public health research agenda. The emergence and magnitude of HIV/AIDS has raised serious legal and human rights questions and concerns even at the international level. Numerous attempts have been made at international level to hold the epidemic in check, but due to the complicated nature of HIV/AIDS and related factors, it has shown no signs of abating. Indeed, its scale and impact has continued to grow, which indicates a clear need for concerted and urgent action. The international community has been somewhat slow in reaction, perhaps even more than some individual states. But this is not unexpected as the development of international law, even by treaty, has always been much slower and tedious as compared to State laws. This is notwithstanding the fact that international instruments provide a comprehensive framework for addressing the plight of HIV positive workers.¹⁵³ The following international instruments dealing with HIV/AIDS in the workplace are worth analysing.

3.3.1 The Charter of the United Nations

The idea that the United Nations should become the international protector of the rights of the individual grew out of the experience of the Second World War and the

¹⁵² Schneider H. & Fassin D. (2009). *Denial and defiance: A socio-political analysis of AIDS in South Africa*. Available at <http://www.scielop.org/scieloOrg/php/similar.php?text>, accessed last on July 30, 2009.

¹⁵³ Patterson D. & London L. (2002). "International Law, Human Rights and HIV/AIDS" in *Bulletin of the World Health Organisation*. (WHO Publishers), p. 37.

horrendous violations of human rights committed in the Holocaust.¹⁵⁴ On 26th June 1945, the Charter United Nations was signed at the United Nations Conference on International Organisations in San Francisco, California, United States of America.¹⁵⁵ Since its entry into force, the Charter of the United Nations has been amended three times.¹⁵⁶

Kenya, South Africa, United States of America and Australia have ratified the Charter of the United Nations.¹⁵⁷ As a constituting instrument of the United Nations, the Charter of the United Nations sets out the rights and obligations of Member States, and

¹⁵⁴ See Buergetal T. (2000). *International Human Rights in a Historical Perspective*, (Routledge: Taylor & Francis Group), pp. 15-27.

¹⁵⁵ Kant I (1982). *The Charter of the United Nations*. Available at <http://www.filepedia.org/the-charter-of-the-united-nations>, accessed last on July 31, 2009. According to the author, 50 of the 51 original member countries signed the Charter of the United Nations on June 26, 1945. Poland, the other original member country, was not represented at the United Nations Conference on International Organisations and it therefore signed the Charter later. The Treaty entered into force on 24th October 1945 after it was ratified by the five founding members, that is, the Republic of China, France, the Soviet Union, the United Kingdom, and the United States of America as well by a majority of other signatories.

¹⁵⁶ According to Bruno J. (Vol. E.98.I.20: 2008). *Basic Facts about the United Nations*. (United Nations Publications), pp. 5-9, the Charter of the United Nations has been amended three times since its entry into force. This has been in accordance with the procedure provided for under Article 108 on adoption by a vote of two-thirds of the members of the General Assembly and ratification by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council. The first amendment occurred on December 17, 1963, when the General Assembly adopted, by a vote of 96 to 11, with 4 abstentions, amendments to Articles 23 and 27 thereby expanding the number of elected members of the Security Council from 6 to 10 and modifying the voting majorities accordingly. The General Assembly also amended article 61 of the Charter, thereby expanding the membership of the Economic and Social Council from 18 to 27 members. These first amendments entered into force on August 31, 1965. On December 20, 1965, the General Assembly unanimously adopted a further amendment to Article 109 modifying the majority required in the Security Council for the convening of a review conference, as a consequence of the previous amendment to Articles 23 and 27. This second amendment entered into force on June 12, 1968. On December 20, 1973, the General Assembly adopted, by a vote of 105 to 2, with 15 abstentions, a further amendment to Article 61, thereby bringing the number of members of the Economic and Social Council to 54. The amendment entered into force on September 24, 1973.

¹⁵⁷ See United Nations Treaty Collection. Charter of the United Nations and the Statute of the International Court of Justice: Charter of the United Nations. Status as at July 30, 2009. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=1-1&chapter=1&lang=en, accessed last on July 31, 2009. According to the source, Australia ratified the Charter on 1st November 1945; South Africa ratified the Charter on November 7, 1945; United States of America ratified the Charter on August 8, 1945; and Kenya ratified the Charter on December 16, 1963. See also United Nations Member States, available at <http://www.un.org/en/members/index.shtml>, accessed last on July 31, 2009.

establishes the United Nations organs and procedures.¹⁵⁸ The Charter codifies the major principles of international relations, from sovereign equality of States to the prohibition of the use of force in international relations.¹⁵⁹

In its article 1(3), the Charter recognizes that one of the purposes of the United Nations is to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. This provision is fortified by Article 55 (c) of the Charter, which provides as follows:

“With a view to the creation of conditions of stability and well being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) Higher standards of living, full employment and conditions of economic and social progress and development;*
- (b) Solutions of international economic, social, health and related problems; and international cultural and educational co-operation; and*
- (c) Universal respect for and fundamental freedoms for all without distinction as to race, sex, language or religion...”*

Article 56 imposes the same obligations on member States by providing that:

“...all member states pledge themselves to take joint and separate action in co-operation with the organizations for the achievement of the purposes set forth in Article 55.”

¹⁵⁸ Bruno J. (Vol. E.98.I.20: 2008). *Basic Facts about the United Nations*. United Nations Publications, p.3.

¹⁵⁹ For instance, the Charter opens with a Preamble, and includes chapters on United Nations Purposes and Principles, Membership, Organs, Pacific Settlement of Disputes, Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression, International Economic Cooperation, and Non-Self-Governing Territories.

These provisions do not establish an immediate obligation to guarantee or observe human rights, nor do they define what is meant by “human rights and fundamental freedoms.”¹⁶⁰ Despite this vagueness, the human rights provisions of the Charter have two important consequences:

Firstly, the Charter internationalizes the concept of human rights. This does not mean that, as soon as the Charter entered into force, all human rights issues were *ipso facto*¹⁶¹ matters removed from the domestic jurisdiction of States. It means instead that states assume some international obligations relating to human rights, and that as far as these obligations are concerned, the states cannot claim that human rights as such are domestic in character.¹⁶²

Secondly, the obligation of the Member States of the United Nations to cooperate with the organization in the promotion of human rights provide the United Nations with the requisite legal authority to undertake a massive effort to define and codify these rights.¹⁶³

The success of the United Nations’ effort is reflected in the adoption of the International Bill of Rights¹⁶⁴ and in the vast number of international and human rights instruments

¹⁶⁰ Buergental T., above, note 153, p. 82. According to the author, they imposed the much vaguer obligation to promote... “universal respect for, and observance of, human rights” and to take “joint and separate action in co-operation with the organization to achieve this purpose.”

¹⁶¹ *Ipsa facto* means “by the fact of itself”. It is used when something is so obvious that it needs no elaboration or further explanation. See Find a lawyer (2009). Glossary: *ipso facto*. Available at <http://www.nolo.com/definition.cfm/Term/11406EBC-E5E7-4C87-BAA818C9FOD4B115/alpha/1/>, accessed last on July 31, 2009.

¹⁶² Above, note 159.

¹⁶³ The foundation of this codification effort was laid by the proclamation in 1948 of the Universal Declaration of Human Rights.

¹⁶⁴ Universal Declaration of Human Rights adopted by the General Assembly (GA) Resolution 217A (III), December 10, 1948, 3(1) UN GAOR, UN Doc A/811, 71. See also, Devereux A. (2006). *Australia and the birth of the International Bill of Human Rights, 1946-1966*. (Australia: The Federation Press), p. 47. According to the author, on 10th December 1948, at the meeting of the General Assembly in Paris, Dr. HV Evatt, then President of the United Nations General Assembly and the Australian Minister for External Affairs presided over the official adoption of the Universal Declaration of Human Rights (UDHR). Dr. Evatt, with unbridled enthusiasm, welcomed the Declaration as a step forward in a great evolutionary process.

in existence today.¹⁶⁵ The entry into force of each new treaty in this field has further internationalised the subject of human rights.¹⁶⁶ Put differently, the dividing line between domestic and international human rights issues is no more. This means that all human rights are to be recognized universally, become indivisible, independent and inter related. The international community is obliged to treat human rights globally in a fair and equal manner, on the same plane and with the same emphasis. It is therefore the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.¹⁶⁷

The Charter of the United Nations equally imposes obligations among Member States to establish specialised agencies with international responsibilities in economic, social, cultural, educational and health matters as recommended by the United Nations.¹⁶⁸

He stated: "This is the first occasion in which the organised community of nations have made a declaration of human rights and fundamental freedoms. The document is backed by the authority of the body of opinion of the United Nations as a whole and millions of people, men, women and children all over the world, would turn to it for help, guidance and inspiration." The event was greeted with a standing ovation from delegation present and the delegates took the opportunity to express their eager anticipation of the development of a binding human rights treaty, a covenant to be backed by strong enforcement mechanisms. See also UNGA, 183rd Plenary Meeting, 10th December 1948, p. 934, as quoted by Harper N. & Sissons D. (1980). *Australia and the United Nations*, (New York: Manhattan Publishing Company), p. 255.

¹⁶⁵ See, for instance, Devereux A. (2006), *ibid*, who argues that following the adoption of the International Bill of Rights on 10th December 1948, the international community again gathered to discuss international human rights instruments. After 18 years of negotiation, the Third Committee of the General Assembly was adopting the final text of the twin covenants on human rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR) (opened for signature on December 16, 1966, entered into force on 23rd March 1976) and the International Covenant on Civil and Political Rights (ICCPR) (opened for signature on December 16, 1966, entered into force on March 3, 1976).

¹⁶⁶ It also endowed the individuals to whom these treaties apply with international legal rights. Thus, in the words of Buergental T., Above, note 153, p. 77, the State practice spawned by the vast network of human rights treaties continue to create a growing body of customary international law on the subject. Hence, a definition of international law, which do not today recognise the individual as the direct beneficiary of international human rights law and to that extent, a subject of international law, would be blind to the current legal and political realities.

¹⁶⁷ See paragraph 5 Vienna Declaration and Programme of Action, 1993 adopted at the world conference on Human Rights held in Vienna in June 1993. Also UN-Secretary General Report of the World Conference on Human Rights, UNDOC. Alconf. 157/24, 1993.

¹⁶⁸ Charter of the United Nations, article 57 states: "(1) The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63. (2) Such agencies

Under article 62 of the Charter, the Economic and Social Council is empowered to recommend policy measures to specialised agencies on economic, social, cultural, health and related matters, and to recommend mechanisms for promoting, respecting, observing human rights and fundamental freedoms for all.¹⁶⁹

This apparent recognition of the universal character of human rights and the rejection of cultural relativism, which traditionally sought to justify the violation of human rights by reference to some special religious or cultural imperatives, lays the foundation of global efforts to improve the human rights situations of all human beings. Whereas the Charter does not expressly mention HIV/AIDS within its provisions, its interpretation shows universality and provides a framework of the protection and inviolability of the human rights.

3.3.2 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is the basic international pronouncement of the inalienable and inviolable rights of all members of the human family. The Declaration was proclaimed in a resolution of the General Assembly on 10 December 1948 as the "common standard of achievement for all peoples and all nations"¹⁷⁰ in respect for human rights. It lists numerous rights - civil, political, economic, social and cultural - to which people everywhere are entitled. The Declaration was adopted as a non-binding United Nations General Assembly

thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies."

¹⁶⁹ Ibid, art. 62 states:" (1) The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly to the Members of the United Nations, and to the specialized agencies concerned. (2) It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all." According to Morsink J., Economic and Social Council has in the past utilized the power under article 62 of the Charter of the United Nations when it recommended on 10th December 1948 that the Third General Assembly of the United Nations adopts and proclaim Universal Declaration of Human Rights. See Morsink J. (1998). *The Universal Declaration of Human Rights*. (London: Cavendish publishers), p. 3.

¹⁷⁰ United Nations Association in Canada (2009). *Questions and answers about the Universal Declaration of Human Rights*. Available at <http://www.unac.org/rights/question.html>, accessed last on 31st July 2009.

resolution.¹⁷¹ Kenya, South Africa, United States of America and Australia have all ratified the Declaration.

As the preamble indicates, the Declaration was designed, to provide a common standard of achievement for all peoples and all nations. Following this historic act, the Assembly calls upon every individual and every organ of society, to keep the Declaration and to promote respect for the rights and freedoms contained in the Declaration and by progressive measures, national and international, to secure their universal and effective recognition and observance. This obligation is to exist both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.¹⁷²

¹⁷¹ Adopted and proclaimed by General Assembly Resolution 217A (III) of 10 December, 1948. The adoption of the Declaration was necessitated by the atrocities of World War II. When the atrocities committed by the Nazi Germany became apparent after World War II, it became unanimously understood among world nations that the Charter of the United Nations had fallen short of defining the fundamental human rights it referenced. There was therefore need for a Declaration to amplify the provisions of the Charter of the United Nations. See Paul W. (1981). *The International Bill of Human Rights*, (University of Pennsylvania Press), p. 89. The Declaration was adopted on 10th December 1948 by a vote of 48 in favour and 0 against, with 8 abstentions, including all Soviet Bloc States- Byelorussia, Czechoslovakia, Poland, Ukraine, USSR- Yugoslavia, South Africa and Saudi Arabia. See United Nations Association in Canada (2009). Questions and answers about the Universal Declaration of Human Rights. Available at <http://www.unac.org/rights/question.html>, accessed last on July 31, 2009.

¹⁷² Morsink J. (1998). *The Universal Declaration of Human Rights*, (London: Cavendish publishers), pp. 12-13. The author states: "The Universal Declaration begins with a preamble consisting of seven paragraphs followed by a statement "proclaiming" the Declaration. Each paragraph of the preamble sets out a reason for the adoption of the Declaration. The first paragraph asserts that the recognition of human dignity of all people is the foundation of justice and peace in the world. The second paragraph observes that disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind and that the four freedoms: freedom of speech, belief, freedom from want, and freedom from fear - which is "proclaimed as the highest aspiration" of the people. The third paragraph states that so that people are not compelled to rebellion against tyranny, human rights should be protected by rule of law. The fourth paragraph relates human rights to the development of friendly relations between nations. The fifth paragraph links the Declaration back to the United Nations Charter which reaffirms faith in fundamental human rights and dignity and worth of the human person. The sixth paragraph notes that all members of the United Nations have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms. The seventh paragraph observes that "a common understanding" of rights and freedoms is of "the greatest importance" for the full realization of that pledge.

The Declaration other than giving meaning to the phrase “human rights and fundamental freedoms” referred to in the Charter,¹⁷³ came to be accepted as a normative instrument in its own right which, together with the Charter, spells out the human rights obligations incumbent upon all United Nations Member States.¹⁷⁴

The moral foundation of international human rights is found in Article 1 of the Universal Declaration (UDHR), which enacts thus:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

At the time when the Universal Declaration was adopted, the rights were not universally enjoyed, or even universally recognised. The Declaration, however, contributes significantly to the development of human rights. It entrenches both civil and political rights, as well as social and economic rights.¹⁷⁵

In as far as entitlement to Universal Human Rights is concerned, the Declaration provides:

“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political jurisdictional or international status of the country or territory to which a person

¹⁷³ Charter of the United Nations 14 October, 1945.

¹⁷⁴ For the different theories which explain the normative status of the Universal Declaration. See Sohn L. (Vol. 32: 1982), “The New International Law: Protection of the rights of individuals rather than states,” in *American University Law Review*, pp. 16-17. See also Simma B. (Vol 12: 1992), “The source of human rights law: custom jus cogens and general principles” in *Australian year book of International Law*, p. 82 as quoted by Buergental T., Above, note 153, p. 72.

¹⁷⁵ University of Pretoria (2002), *AIDS Review*, (Pretoria: University of Pretoria Press), p.25. The rights were however, expressed in the language of aspirations or ideals and were therefore, not legally binding on states. The impact of the Declaration nevertheless on the development of human rights has been immense.

belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”¹⁷⁶

The foundation of this provision is the prohibition of discrimination in as far as enjoyment of human rights is concerned. The Universal Declaration of Human Rights guarantees unqualified enjoyment of the rights contained therein and no one is to limit another’s enjoyment (access) of those rights on any ground.

In the context of the rights of the HIV positive worker, the following provisions of the Declaration are important:

3.3.2.1 *Privacy*

The right to privacy¹⁷⁷ is both a fundamental right and a right guaranteed under the UDHR.¹⁷⁸ Article 12 of the Declaration in providing for the right to privacy states:

“No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

The relevance of this provision in so far as the HIV positive worker is concerned is its restriction/prohibition of arbitrary interference with a person’s privacy. It is important in cases where workers are forced by employers for continued employment to undergo

¹⁷⁶ *Ibid.* The rights were however, expressed in the language of aspirations or ideals and were therefore, not legally binding on states. The impact of the Declaration nevertheless on the development of human rights has been immense.

¹⁷⁷ See Bizannes E. (2009). *Define Privacy: What does it mean to you?* Available at <http://www.eliasbizannes.com>, accessed last on July 31, 2009. The author defines privacy as “an individual’s right to determine what information they would like others to know about themselves; which people are permitted to know that information; and the ability to determine when those people can access that information”.

¹⁷⁸ *In the Matter of Raja Gopala* (1997) ISC 26, 27, the Indian Supreme Court observed that a citizen has a right to safeguard the privacy of his own, his family, marriage procreation, motherhood, child-bearing and education among other matters, because the right to privacy is implicit in the right to life and liberty.

routine screening for HIV. Also, for persons seeking employment, employers usually force such persons to undergo screening for HIV. Evidently, such a requirement is against the grain of the Universal Declaration of Human Rights.

3.3.2.2 *Social Security*

Social security refers to a number of related programmes, including retirement, disability, dependents and survivors' benefits, which provide workers and their families with some monthly income when their normal flow of income shrinks because of retirement, disability or death.¹⁷⁹ Article 22 of the Declaration provides that everyone as a member of society has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality. Arguably, "the right to social security" may include being in stable gainful employment for economic empowerment. This provision is fortified by articles 23 and 25. Article 23 provides that:

- "(1) everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment;*
- (2) everyone, without any discrimination, has the right to equal pay for equal work;*
- (3).....*
- (4) everyone has the right to form and join trade unions for the protection of his interests."*

Article 25 on the other hand provides that:

"Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of

¹⁷⁹Find a Lawyer (2009). *Glossary: Social Security*. Available at <http://www.nolo.com/definition.cfm>, accessed last on July 31, 2009.

unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

The foregoing articles of the Charter are instrumental in preserving the social security of the HIV positive worker.

3.3.2.3 *Violation Remedy*

Remedy refers to the means by which a right is enforced or by which the violation of a right is prevented or compensated; it is the means employed to enforce a right or redress an injury.¹⁸⁰ Where rights of an individual under the Declaration or under a national constitution have been violated, article 8 of the Declaration entitles such an individual to an effective remedy by competent national tribunals for acts leading to the violation of the rights of the individual.¹⁸¹ This is a very important provision since most or all of the rights as spelt out under the Universal Declaration of Human Rights are contained in constitutions of most countries.¹⁸²

3.3.2.4 *Right to work*

The right to work is the concept to the effect that people are entitled to work, and may not be prevented from doing so.¹⁸³ In its article 23(1), the Declaration entitles a person to voluntary choice of work, favourable working conditions and protects every person against unemployment.¹⁸⁴ Therefore, in the context of the rights of the HIV positive worker, this provision may be invoked to deal with cases of dismissal whenever a worker tests HIV positive, or where in cases of pre-employment testing, a prospective

¹⁸⁰ Tolley E. (2009). *Tolley's Employment Handbook*, (United Kingdom: Lexis Nexis Butterworths), p. 42.

¹⁸¹ Universal Declaration of Human Rights, 1948, article 8 states: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

¹⁸² Though differing reference is made to it, in most constitutions, it is referred to as Fundamental Rights and Freedoms (Kenya); Bill of Rights (South Africa).

¹⁸³ Wikipedia. The Right to Work. Available at http://en.wikipedia.org/wiki/Right_to_work, accessed last on July 31, 2009.

¹⁸⁴ UDHR, above, note 163, article 23(1) states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

worker is denied employment on the basis of his/her HIV status. Persons affected by such decisions should be clothed with adequate safeguards under the respective national constitutions and pieces of legislation regulating the industrial/labour relations between employer and worker.

3.3.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted and opened for signature, ratification and accession by the United Nations General Assembly resolution 2200 A (XXI) of December 16, 1966.¹⁸⁵ This followed almost 20 years of drafting debates. The Covenant finally gained the force of law a decade later, entering into force on January 3, 1976. It contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights relating to work in just and favourable conditions, to social protection, to an adequate standard of living, to the highest attainable standards of physical and mental health, to education, and to enjoyment of the benefits of cultural freedom and scientific progress.¹⁸⁶ Kenya, South Africa, Australia and United States of America have ratified the Covenant.¹⁸⁷

Under Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), State parties have undertaken legally binding obligations to take steps, to the maximum of the available resources, to achieve progressively the full realization of economic and social rights in the Covenant.¹⁸⁸ The Covenant is an international treaty

¹⁸⁵ Global Governance Watch (2009). *The International Covenant on Economic, Social and Cultural Rights*. Available at http://www.globalgovernancewatch.org/human_rights/the-international-covenant-on-economic-social-and-cultural-rights, accessed last on July 31, 2009.

¹⁸⁶ Ibid.

¹⁸⁷ Kenya ratified the Covenant on 1st May 1972; South Africa on 3rd October 1994; United States of America on 5th October 1977; and Australia on 10th September 1978. See United Nations Treaty Collection (2009), *International Covenant on Economic, Social and Cultural Rights*, 1966. Available at <http://treaties.un.org/pages/ViewDetails.aspx>, accessed last on August 11, 2009.

¹⁸⁸ The meaning of the obligations has been examined by a group of experts who adopted the Limburg Principles (see UN document E/CN.4/1987/17). These were adopted by a group of scholars and experts in Maastricht from 2 to 6 June 1986 to consider the nature and scope of the obligations of States parties to

and must (in accordance with the Vienna Convention on the Law of Treaties, 1969) be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the relevant practice.¹⁸⁹ The Committee on Economic, Social and Cultural Rights (CESCR), as a body of independent experts, monitors implementation of the International Covenant on Economic, Social and Cultural Rights by State parties.¹⁹⁰ The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant.¹⁹¹ The Committee is designed to develop a constructive dialogue with States parties, and seeks to determine through a variety of means whether or not the norms contained in the Covenant are being adequately applied in States parties. It looks at how the implementation and enforcement of the Covenant could be improved so that all people who are entitled to the rights enshrined in the Covenant can actually enjoy them in full. Drawing on the legal and practical expertise of its members, the Committee also seeks to assist governments in fulfilling their obligations under the Covenant by issuing specific legislative, policy and other suggestions and

the international covenant on Economic, Social and Cultural rights. Though not legally binding themselves, they provide the best guidance to the understanding of the obligations flowing from the ratification of that Covenant by a state party.

¹⁸⁹ *Vienna Convention on the Law of Treaties*, 1969, art 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given in terms of the treaty in their context and in the light of its object and purpose."

¹⁹⁰ Office of the United Nations High Commissioner for Human Rights (2009). *Committee on Economic, Social and Cultural Rights: Monitoring the Economic, Social and Cultural Rights*. Available at <http://www2.ohchr.org/english/bodies/cescr/>, accessed last on 1st August 2009.

¹⁹¹ The Committee on Economic, Social and Cultural Rights is a body of human rights experts tasked with monitoring the implementation of the Covenant. It consists of 18 independent human rights experts, elected for four-year terms, with half of the members elected every two years. See UN OHCHR (2008), *ECOSOC Resolution 1985/17*. Unlike other human rights bodies, the Committee was not established by the Treaty it oversees. Rather, it was established by the Economic and Social Council, following the failure of two previous monitoring bodies. See also UN OHCHR (1991). *The Committee on Economic, Social and Cultural Rights*, Fact Sheet No. 16. Article 21 of the Covenant states: "The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant."

recommendations such that economic, social and cultural rights are more effectively secured.

Under articles 16 and 17 of the Covenant, State parties undertake to submit periodic reports to the Secretary General of the United Nations within two years of the entry into force of the Covenant for a particular State party, and thereafter once every five years - outlining the legislative, judicial, policy and other measures which they have taken to ensure the enjoyment of the rights contained in the Covenant.¹⁹² State parties are also requested to provide detailed data on the degree to which the rights are implemented and areas where particular difficulties have been faced in this respect.

The Secretary General furnishes the Economic and Social Council with the report, which it transmits to the Committee on Economic, Social and Cultural Rights for analysis. Upon completion by the Committee of its analysis of reports and the appearance by States parties, the Committee concludes its consideration of State parties reports by issuing "concluding observations," which constitute the decision of the Committee regarding the status of the Covenant in a given State party. On a number of occasions, the Committee has concluded that violations of the Covenant have taken place,¹⁹³ and subsequently urged State parties to desist from any further infringements of the rights in question.¹⁹⁴

¹⁹² International Covenant on Economic, Social and Cultural Rights, 1966, art 17 states: "(1) The State Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the State Parties and the specialized agencies concerned. (2) Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant. (3) Where relevant information has previously been furnished to the United Nations or to any specialized agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

¹⁹³ Asbjorn E. (2002), *Economic and Social rights in Human Rights: Concepts and Standards*, (Martinus Nijhoff Publishers), p. 46.

¹⁹⁴ Global Governance Watch (2009). *The International Covenant on Economic, Social and Cultural Rights*. Available at http://www.globalgovernancewatch.org/human_rights/the-international-covenant-on-economic-social-and-cultural-rights, accessed last on July 31, 2009. See also Office of the United Nations High Commissioner for Human Rights (2009). *Committee on Economic, Social and Cultural Rights:*

Socio-economic rights depend on the availability of resources and are hence seen as incremental rights.¹⁹⁵ The obligation for the achievement of these rights is thus progressive. The obligation of progressive achievement does not only refer to an increase in resources but also to an increasingly effective use of the resources available, which must be optimally prioritized to fulfil the rights listed in the ICESCR.¹⁹⁶ State parties are obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all. It is essential to ensure equitable and effective use and access to the available resources.¹⁹⁷

Article 6 of the ICESCR guarantees the right to work. More precisely, the article guarantees the right of every person to gain his living by work that he freely chooses or accepts,¹⁹⁸ with particular reference to freedom from compulsion in the choice of employment. It guarantees against arbitrary discrimination regarding access to employment, protects against arbitrary termination of employment and protects against unemployment.¹⁹⁹

Monitoring the Economic, Social and Cultural Rights. Available at <http://www2.ohchr.org/english/bodies/cescr/>, accessed last on August 1, 2009.

¹⁹⁵ Incremental rights are additional rights. In this context, they refer to category of rights which are not independently recognised per se, and which can be lumped together with other perceived higher category of rights.

¹⁹⁶ In the context of HIV/AIDS, this would entail economic empowerment to enable the HIV positive workers meet their daily needs of medication, proper and reliable diet, so as not to burden the healthy but economically handicapped persons.

¹⁹⁷ Available resources include not only the resources found within a state, but also those available from the international community through international co-operation and assistance.

¹⁹⁸ International Covenant on Economic, Social and Cultural Rights (ICESR), 1966, Art 6 states: "(1) The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right;

(2) The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

¹⁹⁹ Ibid, Art 7 states: "The State Parties to the Present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) remuneration which provides all workers, as a minimum a decent living for themselves and their families in accordance with the provisions of the present Covenant; equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence"

The Covenant lays a good basis for the protection of HIV positive workers in the employment sector. The provisions on non-discrimination ensure that HIV status is not used as a basis for denying HIV positive workers or prospective workers' access to an employment opportunity. The freedom to choose an employment opportunity envisages the requirement to incorporate the views of a worker in determining the terms of employment. Thus, an employment opportunity is not an absolute preserve of the employer to the exclusion of the worker. The State's obligation to protect against unemployment envisages the requirement to ensure that HIV positive workers remain in continuous employment and are not unfairly dismissed from any employment. Where HIV positive workers have been dismissed, declared redundant, unfairly transferred, or otherwise denied employment, this Covenant can be invoked.²⁰⁰

3.3.4 *International Labour Organisation Conventions*

The ILO was established as an agency of the League of Nations following the Treaty of Versailles, which ended World War I. Post war reconstruction and the protection of labour unions occupied the attention of many nations during and immediately after World War I. In Great Britain, the Whitley Commission, a sub-committee of the Reconstruction Commission, recommended in its July 1918 Final Report that "Industrial Councils" be established throughout the world.²⁰¹ The British Labour Party issued its own reconstruction programme in the document titled Labour and New Social Order.²⁰² In February 1918, the third Inter-Allied Labour and Socialist Conference, representing delegates from Great Britain, France, Belgium and Italy, issued its report advocating for an international labour rights body. In December 1918, the American Federation of Labour issued its own distinctively political report, which called for the achievement of numerous incremental improvements via the collective bargaining process.²⁰³ The competition continued until 1919 until, during a meeting in Berne, the

²⁰⁰ For an in-depth analysis on the criteria for application of international law in Kenya, see chapter four of the thesis.

²⁰¹ Leopold H & Giulio S. (1992). *Strikes, Social Conflict and the First World War: An International Perspective*, (Milan: Fondazione Publishers), p. 15.

²⁰² Shapiro S. (1976). "The Passage of Power: Labour and the New Social Order" in *Proceedings of the American Philosophical Society*, pp. 56-73.

²⁰³ Foner S. (1987). "History of the Labour Movement in the United States" in *Labour and the World War*. (New York: International Publishers), p. 17.

International Federation of Trade Unions was established. On 29th October 1919, the International Labour Conference was held in Washington DC, in which six International Labour Conventions, which dealt with hours of work in industry, unemployment, maternity protection, night work for women, minimum age and night work for young persons in industry were adopted. French Socialist, Albert Thomas, became the first Director General of the International Labour Organisation.²⁰⁴

The International Labour Organization (ILO) is the United Nations agency that brings together governments, employers and workers of its member states in common action to promote decent work throughout the world.²⁰⁵ In exercise of its mandate, the International Labour Organisation has passed and adopted various legally binding conventions dealing with people living with HIV/AIDS. Kenya, South Africa, United States of America and Australia are Member States of the International Labour Organisation.²⁰⁶ As members of the ILO, therefore, the States are bound by the ILO Conventions. Kenya has ratified all the following listed ILO Conventions, thus through the doctrine of *pacta sunt servanda*, Kenya is bound to adhere to their provisions.

3.3.4.1 ILO Code of Practice on HIV/AIDS and the World of Work²⁰⁷

The ILO Code of Practice on HIV/AIDS and the World of Work is a key document for preventing the spread of the epidemic, mitigating its impact on workers and their families and providing social protection to help cope with the disease. It covers key

²⁰⁴ Ibid.

²⁰⁵ International Labour Organisation (ILO) (2009). *About ILO*. Available at <http://www.ilo.org/index.htm>, accessed last on August 1, 2009.

²⁰⁶ See International Labour Organisation (ILO) (2009). *ILOLEX: Database of International Labour Standards*. Available at <http://www.ilo.org/ilolex/english/mstates.htm>, accessed last on August 11, 2009. Kenya has been a member of the ILO since 13th January 1964; South Africa, from 1919 to 1966, and since 26th May 1994; United States of America, from 1934 to 1977, and since February 18, 1980; and Australia, since June 28, 1919.

²⁰⁷ ILO Code of Practice on HIV/AIDS and the World of Work, 2001, ILO-AIDS-Code-2001-05-0165-1-EN.doc/v6. The code is the product of collaboration between the ILO and its tripartite constituents, as well as cooperation with its international partners. It provides invaluable practical guidance to policy-makers, employers' and workers' organizations and other social partners for formulating and implementing appropriate workplace policy, prevention and care programmes, and for establishing strategies to address workers in the informal sector.

principles, such as the recognition of HIV/AIDS as a workplace issue, non-discrimination in employment, gender equality, screening and confidentiality, social dialogue, prevention, care and support, as the basis for addressing the epidemic in the workplace.²⁰⁸ Article 1 of the Code sets out the objectives of the Code to include:

“a) Prevention of HIV/AIDS;

b) Management and mitigation of the impact of HIV/AIDS in the world of work;

c) Care and support of workers infected and affected by HIV/AIDS;

d) Elimination of stigma and discrimination on the basis of real or perceived HIV status.”²⁰⁹

To guarantee the application of the provisions of the Code in the national arena, the Code obliges countries to incorporate the provisions of the Code in not only the national laws, but also in workplace agreements as well as workplace policies and plans for action. This provision will impact on the conventional freedom of contract in employment, which has been used by employers to impose policy measures that are discriminatory both in nature and effect against HIV positive workers. The code succinctly requires that workplace policies should be made by the process of:

“...dialogue, consultations, negotiations and all forms of cooperation between governments, employers and workers and their representatives, occupational health personnel, specialists in HIV/AIDS issues, and all relevant stakeholders (which may include community-based and non-governmental organizations (NGOs)).”²¹⁰

Article 4 of the Code specifically recognises HIV/AIDS as a workplace issue²¹¹ and prohibits discrimination at the workplace on the basis of real or perceived HIV status.

Paragraph 2 states:

²⁰⁸ Ibid.

²⁰⁹ Ibid Art. 1.

²¹⁰ Ibid, Art 2 (b).

²¹¹ Ibid, Art. 4(1) states: “HIV/AIDS is a workplace issue, and should be treated like any other serious illness/condition in the workplace. This is necessary not only because it affects the workforce, but also

“In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.”

Further, the Code abolishes screening for job applicants without making provisions such as the so called “inherent requirements of a job” like in many national legislations, which literally enables employers to violate the worker’s right to dignity. In its phraseology for worker confidentiality, the Code succinctly states:

“There is no justification for asking job applicants or workers to disclose HIV-related personal information. Nor should co-workers be obliged to reveal such personal information about fellow workers. Access to personal data relating to a worker’s HIV status should be bound by the rules of confidentiality consistent with the ILO’s code of practice on the protection of workers personal data, 1997.”²¹²

The term “disability” includes infection with HIV.²¹³ What has been the subject of contest is at what stage an HIV positive worker becomes disabled. Well, some scholars have argued that from the moment a person is tested HIV positive, he/she becomes disabled because his/her “important life activity” is impaired.²¹⁴ Others have argued

because the workplace, being part of the local community, has a role to play in the wider struggles to limit the spread and effects of the epidemic.”

²¹² Ibid, Art 4(7)

²¹³ Mayer C. (1999). “HIV as a disability under the Americans with Disability Act: Unanswered Questions after *Bragdon vs. Abbott*” in *Journal of Law and Health*, (Pennsylvania: University of Pennsylvania Press), p. 23.

²¹⁴ See for instance, Supreme Court decision in *Bragdon v. Abbott* (1998) 524 U.S. at 638 that: “HIV . . . causes immediate abnormalities in a person’s blood, and the infected person’s white cell count continues to drop throughout the course of the disease, even during the intermediate stage when its attack is concentrated in the lymph nodes. Thus, HIV infection must be regarded as a physiological disorder with an immediate, constant, and detrimental effect on the hemic and lymphatic systems...that the concept of “asymptomatic stage” is a misnomer for clinical features persist throughout, including lymphadenopathy, dermatological disorders, oral lesions, and bacterial infections.”

that from the moment the HIV positive worker becomes asymptomatic, he/she becomes disabled.²¹⁵ The Code defines persons with disability as those:

“...individuals whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognized physical or mental impairment”

Three important things are evident from the ILO Code of Practice on HIV/AIDS and the Place of Work’s definition of “disability”, namely:

- a) That the imputation of “disability” upon a worker is a matter to be considered on case-to-case basis and should not be generalized;
- b) That notwithstanding the infection of a worker with a disease, such worker may still be competent to perform a job in question;
- c) That the determination of the inability of a worker to perform a particular employment opportunity is a preserve of a scientific proof and should not be based on stereotypes and prejudice.

The definition is significant in eradicating the prejudice that employers have had against HIV positive workers or job applicants, notwithstanding the ability of the workers to perform the job in question. No doubt, the ILO Code of Practice on HIV/AIDS and the Place of Work is a key instrument that accords commendable and very specific protection to the HIV positive worker in the workplace.

3.3.4.2 ILO Termination of Employment Convention, No 158, 1982 (Entered into force, 23 September 1985)

This Convention contains a number of legal provisions geared towards prevention of unfair termination of employment. This will also apply to prevent dismissal of workers infected with HIV/AIDS. Article 4 prohibits termination of a worker’s employment

²¹⁵ *Sutton vs. United Airlines Inc.* (1999) 527 U.S. 471.

devoid of a valid reason.²¹⁶ In no uncertain terms, Article 6 provides that temporary absence from work because of illness or injury does not constitute a valid reason for termination. Where a worker's services are to be terminated, Article 11 of the convention requires that the worker be given a reasonable period of notice and compensation in lieu thereof.²¹⁷

By the Convention eliminating temporary illnesses as a ground for termination of employment, it envisages protection of HIV positive workers from termination of their employment on the basis of their health status. It is a fact that there are instances when a HIV positive person may be overwhelmed by the disease and be absent from work. However, as many scholars have argued, they still maintain their mental clarity, and hence capacity to perform their work.

3.3.4.3 ILO Discrimination (Employment and Occupation) Convention²¹⁸

The Convention prohibits and defines discrimination in a manner wide enough to cover discrimination against HIV positive persons in employment and labour issues.²¹⁹ Article 2 obliges member states to pursue national policies that promote equality in respect of employment opportunities and which eliminate discrimination in the

²¹⁶ ILO Termination of Employment Convention (Convention 158), 1982 (Entered into force, 23 September 1985), Art 4 states: "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, or establishment of service."

²¹⁷ Ibid Art 11 states: "A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."

²¹⁸ No. 111 of 1958 (Entered into force on June 15, 1960).

²¹⁹ ILO Discrimination (Employment and Occupation) Convention, No. 111, 1958 (Entered into force, 15 June 1960), Art 1 states: "For the purposes of this Convention, the term discrimination includes:

- a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof"

employment sector.²²⁰ The states are then to follow up the implementation of the policy by the employer and to repeal any statutory provisions and administrative instructions inconsistent with the policy.²²¹

This Convention, particularly article 3 thereof, forms a good basis for a state to prohibit cultural practices that perpetuate discrimination of HIV positive workers at the workplaces. Its general definition of discriminatory practices under Article 1(b) nets within its purview discrimination on the basis of HIV status at the workplace.

3.3.4.4 ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention²²²

The definition of “disabled person” under article 1(1) of the Convention includes an HIV positive worker.²²³ Each Member State has an obligation to formulate, implement and periodically review a national policy on vocational rehabilitation and employment of disabled persons.²²⁴ The policy should envisage as its core premise, the principle of equality in employment. Article 4 states as follows in this regard:

“The said policy shall be based on the principle of equal opportunity between disabled workers and workers generally. Equality of opportunity and treatment for disabled men and women workers shall be respected. Special positive measures aimed at effective equality of opportunity and treatment between disabled workers and other workers shall not be regarded as discriminating against other workers”²²⁵

²²⁰ Ibid, art 2 states: “Each member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof”

²²¹ Ibid, Art. 3.

²²² No. 159, 1983 (Entered into force, 20 June 1985).

²²³ Ibid, Art 1(1) defines disabled person as follows: “For the purpose of this Convention, the term “disabled person” means an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment”

²²⁴ Ibid, Art 2.

²²⁵ Ibid, Art. 4.

To incorporate the interests of the disabled workers in the national policy, there is need for consultation between the representatives of disabled workers in the implementation of the policy. These are good provisions for eradicating discrimination of HIV positive workers at the workplace. The affirmative action²²⁶ envisaged under article 4 of the Convention can be interpreted to mean that even in instances where a HIV positive worker is overwhelmed by the disease and is forced to miss work for some few days, he/she should not be punished by the employer for being sick by way of summary dismissal, or severance of his/her wages or salaries. Treating HIV/AIDS as a disability also has a psychological effect of attracting the empathy of the society towards such infected persons, rather than viewing the disease as an omen.

3.3.4.5 ILO Collective Bargaining Convention²²⁷

One of the major factors that facilitate discrimination of HIV positive workers at the workplace is imbalanced bargaining power. Terms of employment are imposed upon the worker by the employer, with the worker having only an option of accepting the terms of employment or quitting. The Collective Bargaining Convention calls upon State Parties to promulgate national policies that encourage free negotiations and collective bargaining between employers and workers.²²⁸ The glaring loophole with the Convention is that it does not envisage the interests of HIV positive prospective workers who still are virtually subject to the unfettered discretion of capitalist employers. A mechanism should have been put in place to give such a prospective

²²⁶ Affirmative action refer to programs and regulations that attempt to compensate for discriminatory practices that have in the past denied fair consideration to members of minority or a given groups in terms of distribution of opportunities. In the context of article 4 of the ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention, affirmative action is envisaged when the article advocates for special positive measures that ensure effective distribution of opportunity between the disabled and persons without disability.

²²⁷ No. 154, 1981 (Entered into force, August 11, 1983).

²²⁸ Ibid, Art. 2 states: "For the purposes of this Convention, the term "Collective Bargaining" extends to all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other hand, for a) determining working conditions and terms of employment; and/or b) regulating relations between employers and workers; and/or c) regulating relations between employers or their organisations and a workers' organisation or workers' organisations."

employee an opportunity to give an opinion on the terms of employment without the risk of losing the job.

3.3.4.6 ILO Code of Practice on the Protection of Workers' Personal Data, 1996

This is a voluntary and a non-binding document that is intended to provide guidance in the development of legislation, regulations, collective agreements, work rules, policies and practical measures in the workplace.²²⁹ Principally, personal data of workers should not be collected except in conformity with national legislation, medical confidentiality and the general principles of occupational safety and only as needed.²³⁰ National labour laws should be reviewed to give effect to international conventions and ILO standards on labour and HIV/AIDS.

In effect, the ILO Code ensures that privacy rights of workers are not waived. Its definition of a worker extends to cover a prospective worker. This Code, therefore, presupposes that workers have privacy rights which should be respected by the employers.

3.3.4.7 ILO and WHO Joint Statement from the Consultation on AIDS and the Workplace²³¹.

The statement unequivocally reiterates that whereas HIV infected persons may develop AIDS or other HIV related conditions, they remain mentally active and economically productive. Further, that in the majority of occupations and occupational settings, work does not involve acquiring or transmitting HIV between workers, from worker to client, or from client to worker. Thus, as its policy principles, the joint statement advocates for

²²⁹ ILO Code of Practice on the Protection of Workers' Personal Data, 1996, Clause 2. See also clause 3.4 which is to the effect that a worker, for the purposes of the Code includes a former worker and a job applicant.

²³⁰ Ibid, clause 5.

²³¹ June 1988

non discrimination of HIV infected workers at the workplace and elimination of such acts that outrage upon the personal dignity and privacy of the HIV positive workers.²³²

The joint statement is timely in not only eradication of discrimination of HIV positive workers at the workplace, but also in protecting the dignity of the workers by prohibiting pre-employment HIV testing on the basis that it infringes the privacy of the worker or the prospective worker.

3.3.5 International Guidelines on HIV/AIDS and Human Rights²³³

This instrument adopts an approach that an effective response to HIV/AIDS must involve the protection of human rights. It promulgated a 12-point international guideline that adequately provides for issues relating to HIV/AIDS and discrimination, as well as HIV/AIDS in the workplace. It specifically requires that laws, regulations and collective agreements be enacted to guarantee an individual's right in the workplace. Guideline 5 provides that the:

“State should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and AIDS and people with disabilities from discrimination in both the public and the private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasise education and conciliation, and provide for speedy and effective administrative and civil remedies.”²³⁴

²³² ILO and WHO Joint Statement from the Consultation on AIDS and the Workplace, June 1988, Part III states: “In the Avoidance of discrimination in relation to HIV-infected people and people with AIDS, the World Health Assembly urges Member States 1) to foster a spirit of understanding and compassion for HIV infected people and people with AIDS; 2) to protect the human rights and dignity of HIV-infected people and people with AIDS...and to avoid discriminatory action against, and stigmatization of them in the provision of services, employment and travel; and 3) to ensure the confidentiality of HIV testing and to promote the availability of confidential counselling and other support services.”

²³³ 1997.

²³⁴ *International Guidelines on HIV/AIDS and Human Rights*, 1997, Guideline 5.

The Guideline therefore lays a basis for national legislation on non-discrimination of HIV positive workers in the labour sector. It broadens the definition of “disability” to cover persons living with HIV/AIDS.

3.3.6 *United Nations Declaration of Commitment on HIV/AIDS*²³⁵

In 2001, the United Nations made an initial commitment to the fight against HIV and AIDS.²³⁶ The General Assembly passed a resolution, known as the Declaration of Commitment on HIV/AIDS. The Declaration listed many ways in which member states could fulfil their commitments to join this worldwide fight.²³⁷ According to the Declaration, efforts towards fighting HIV/AIDS should include eliciting active participation of civil society, the business community, and the private sector to develop and implement both action and financing plans, constructively confront stigmas and eliminate discrimination, address the effects of gender and age, and strengthen health, education and legal system capacity to safeguard “the right to the highest attainable standard of physical and mental health”.²³⁸ The Declaration stated that prevention is of the utmost importance, while care, support and treatment are also crucial aspects of an effective response to the HIV and AIDS crisis.²³⁹ The prevention methods should include programs that account for local circumstances as well as cultural values geared towards decreasing high-risk behaviour by educating about and encouraging safer sex practices and increasing the availability of male and female condoms and sterile needles. Efforts should also be made towards early diagnosis and effective treatment to help prevent an infected individual from further spreading the virus.²⁴⁰ Under article 53, the Declaration calls for prevention efforts to:

“...ensure that at least 90 percent (by 2005), and by 2010 at least 95 percent of young men and women aged 15 to 24 years have access to the information, education, including

²³⁵ 2001.

²³⁶ United Nations General Assembly Resolution S-26/2, U.N. Doc. A/RES/S-26/2, 27 June 2001.

²³⁷ Ibid, arts. 37-103.

²³⁸ Ibid, art. 37.

²³⁹ Ibid, art. 17.

²⁴⁰ Ibid, art. 53.

peer education and youth specific HIV education, and services necessary to develop the life skills required to reduce their vulnerability to HIV infection...”

The Declaration also specifies the priority that must be given to the most vulnerable population, including women and children, especially children who have been orphaned by HIV/AIDS.²⁴¹ In a nutshell, the Declaration advocates that the member states should enact, strengthen and enforce as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV/AIDS and to ensure their full enjoyment of all human rights and fundamental freedoms. In particular, the member States should ensure that persons living with HIV/AIDS access employment and legal protection, while respecting their privacy and confidentiality. To ensure participatory formulation of policies on HIV/AIDS at the workplace, the Declaration requires state parties to consult with employers’ and workers’ representatives while formulating the policies.

The Declaration therefore lays a basis for national legislation on non-discrimination of HIV positive workers in the workplace. It faults the discretion of the employers in formulating policies that regulate the status of HIV positive workers, by advocating for consultation with the representatives of the workers. Further, it unequivocally reiterates the need to safeguard the privacy and dignity of HIV positive workers and this ensures that archaic employer practices such as compulsory pre-employment testing are outlawed.

3.3.7 United Nations Political Declaration on HIV/AIDS²⁴²

The United Nations renewed its commitment to the worldwide struggle against HIV/AIDS vide the United Nations Political Declaration on HIV/AIDS, 2006,²⁴³ which

²⁴¹ Ibid, arts. 62-67.

²⁴² 2006.

²⁴³ Hereinafter, the Political Declaration.

was passed at a High-Level Meeting on AIDS in New York on 2 June, 2006.²⁴⁴ The High Level Meeting on HIV/AIDS took place after a two day technical review of the progress that had been made in implementing the Declaration of 2001.²⁴⁵ The Meeting was to consider recommendations on how to reach the targets of the Declaration of 2001 and renew the commitment of the United Nations and the importance of the Declaration. Attendees at the meeting included national delegations led by heads of State and governments, organisations and individuals involved in HIV/AIDS programming efforts, world business leaders, HIV/AIDS researchers, people living with HIV/AIDS, and HIV/AIDS advocates from the entertainment industry.²⁴⁶

The Political Declaration updated statistics, recognised the efforts that many member states have already made, encouraged states to renew their commitments, and reiterated the goals of the United Nation's Global strategy.²⁴⁷ Further, the United Nations emphasised its commitment to implementing policies that would help prevent the spread of HIV/AIDS in youth populations and to ensure a HIV/AIDS-free future generation. The Declaration also states the importance of harm reduction strategies, especially in the realm of drug use.²⁴⁸ It elaborates the gender aspects of HIV/AIDS and the need for efforts to eliminate gender inequalities and discrimination based on gender in order to empower women to protect themselves from HIV infection in an environment free from coercion, abuse, and violence.²⁴⁹ Finally, the Declaration makes a number of commitments to efforts that the United Nations believes will play a unique role in the fight against HIV/AIDS, including the commitment to overcoming legal,

²⁴⁴ See United Nations General Assembly Resolution S-26/2, U.N. Doc A/RES/60/262, 2 June 2006.

²⁴⁵ See UNAIDS, *High Level Meeting: Questions and Answers*, available at http://data.unaids.org/pub/InformationNote/2006/200605_HLM_QA_en.pdf, accessed last on 17 August 2008.

²⁴⁶ Ibid.

²⁴⁷ United Nations General Assembly Resolution S-26/2, U.N. Doc A/RES/60/262, June 2, 2006.

²⁴⁸ Ibid, art. 22.

²⁴⁹ Ibid, art. 30.

regulatory or other barriers that block access to effective HIV prevention, treatment, care and support, medicines, commodities and services.²⁵⁰

3.4 Limitations of international human rights instruments in addressing the HIV/AIDS pandemic

3.4.1 *Lack of clearly defined rights*

Many of the rights within the international human rights framework are not clearly defined. Consequently, their specific content and meaning is left to the determination of individual States.²⁵¹ This leads to debate as to whether rights are universal in their content and meaning or whether they are culturally relative.²⁵²

3.4.2 *Inadequate monitoring and compliance mechanisms*

The second limitation arises from the fact that monitoring compliance with the obligations created under the international human rights framework (mainly through reporting by governments) has not been taken as seriously as it ought to have been so as to give desired results. The practice under international law is that once a state ratifies an international human rights treaty, it incurs an obligation to implement the provisions of that treaty into its domestic framework. States are then required to periodically

²⁵⁰ Ibid, art. 24.

²⁵¹ Generally, the rights based approach is not necessarily in dispute. The challenge is contextualising those rights and building consensus on the content and limitations of the rights. Many States have for a long time remained sceptical about the value of the exercise of interpreting these rights. Many states have a right where international rights are left open to national interpretations; this opens the possibility for arbitrariness on the basis of cultural, religious and historical factors, social and political structure, wealth, domestic legal regimes, notions of morality, public order, public welfare, public interests et cetera. See University of Pretoria (2002), *AIDS Review*, p.19.

²⁵² The debate manifests itself in a number of ways. For instance it is argued, that there are different core concepts for health law and ethics for the Western World and for Africa. This stems from the emphasis on individual rights in the West, in contrast to Africa's emphasis on communal rights. Thus the interpretation of human rights as they may relate to the HIV/AIDS pandemic from a Western perspective, includes:

- The right to personal autonomy as reflected in the doctrine of informed consent.
- The right to personal privacy, as reflected in the doctrine of confidentiality.
- The right to access information necessary to protect the individuals and communities as reflected in the doctrine of freedom of information; and
- The right to be treated with dignity and respect, as reflected in the doctrine of anti-discrimination.

report to committees (which are treaty monitoring bodies made up of experts) on their efforts to implement the provisions of that particular treaty into their domestic frameworks (domestication).²⁵³ The relevant committee then makes recommendations to the reporting state based on the reports before it, on measures to enhance state implementation and delivery on the provisions. However, many countries that do ratify these instruments fail to submit reports regarding their compliance.

3.4.3 *Inadequate enforcement mechanisms*

The third limitation to the international human rights framework in the fight against HIV/AIDS is that the mechanisms to enforce the rights at the international level are very limited.²⁵⁴ The problem of limitation extends to the courts.²⁵⁵ The procedural requirements of the international tribunals are often lengthy and cumbersome for individual petitioners. Moreover, access to the international and regional tribunals is based on a principle that requires the applicants to have exhausted domestic remedies

²⁵³ For instance, under article 16(1) of the International Covenant on Economic, Social and Cultural Rights, States Parties undertake to submit in conformity with the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized in the Covenant. Also, in the preamble of the Universal Declaration of Human Rights, Member States pledge themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms in their States of jurisdiction.

²⁵⁴ When a nation ratifies a treaty, it undertakes both negative obligations, that is, to refrain from actions that violate human rights, and positive obligations to take affirmative actions to guarantee that human rights are protected. In order to ensure that governments are fulfilling both negative and positive obligations, the United Nations system includes a variety of enforcement mechanisms. Enforcement mechanisms are usually categorized by the type of UN body that receives communications or carries out the monitoring process. The broad categories of enforcement mechanisms include charter-based mechanisms; and mechanisms contained in UN specialized agencies, such as the International Labour Organization or the World Health Organization. Each of these bodies monitors either a specific human rights issue or particular treaties. See The Advocates for Human Rights (2009). Stop Discrimination against People living with HIV/AIDS. Available at http://www.stopvaw.org/Enforcement_Mechanisms_In_The_United_Nations.html, accessed last on August 1, 2009. However, even with the enforcement mechanisms in place, the International Community does not have an international Executive or Legislature or Court that would out-rightly expedite enforcement of international law. It therefore becomes elusive to punish States that do not enforce international standards within their areas of jurisdiction.

²⁵⁵ The international and regional courts such as the International Court of Justice, the European Court of Human Rights and International Criminal Court are all in some measure, dependent upon states accepting their jurisdiction to adjudicate a matter before it. Even where a court is able to deliver a verdict, there is really no international enforcement team to enforce such judgments. Again, the most severe punishment a recalcitrant state can be subjected to is international sanction.

prior to placing the matter before court.²⁵⁶ While these procedural requirements are lengthy and costly, they do offer some measure of protection of human rights for individuals against erring state parties.

Generally, the expectation for the most part, is that the rights embodied in the treaties and charters will be incorporated into domestic legal frameworks and that the most effective enforcement will take place at the national level.²⁵⁷ The challenge however is that no guarantee exists that all states will ratify the instruments and do so without reservations. This is because the mere act of ratification is by itself no guarantee that a state will domesticate those rights into its legal regime, or accept to be bound by them.

3.5 REGIONAL FRAMEWORK FOR THE PROTECTION OF HIV POSITIVE WORKER

Regional instruments cover a relatively smaller geographical region, and are therefore perceived to be more responsive to the needs of the region.²⁵⁸ They are less likely to face resistance in enforcement by the State parties concerned. The important regional instruments on HIV/AIDS to which Kenya is a party include:

²⁵⁶ Ranjan C. (2004). *Local Remedies in International Law*, (University of Cambridge Publishers), p. 24.

²⁵⁷ The process of incorporating international legal framework into a national legislation is referred to as domestication. See Adede A. (2001). *Domestication of International Obligations*. Available at <http://www.commonli.org/ke/other/KECKRC/2001/14.html>, accessed last on 1st August 2009. The author states: "By focusing on the question of domestic application of treaties, the framers of the topic have rightly put aside the issue of application of treaties to States internationally, since that issue has been well settled by the 1969 Vienna Convention on the Law of Treaties. That Convention, let us observe briefly, inter alia, established the means by which a State may express its consent to be bound by a treaty, which thereby becomes applicable to it at the international plane, by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. Thus, limiting itself to the choices of means by which a State may accept international obligations arising from treaties, the Convention does not address the question of how States may then bring about the domestic implementation of the treaties, which they have made applicable to them internationally. The Convention rightly leaves this question to be settled by each State, in accordance with its legal system. Thus, "domestication" of treaties is a matter of national law and is not governed by international law."

²⁵⁸ Seck J. (2008). *Strengthening the role of regional organisations in treaty implementation*, (UNIDIR Publication), p. 1.

3.5.1 African Charter on Human and People's Rights²⁵⁹

After the 1963 summit where African leaders signed the Charter of the Organisation of African Unity, they were invited to study the possibility of adopting an African Convention on Human Rights to give full effect to both the Charter of the UN and the Universal Declaration of Human Rights. The long process lasted until 1981 with the adoption of the African Charter on Human and Peoples' Rights. The African Charter came into force in 1986.²⁶⁰ The Charter grants the same protection to civil and political rights as is found in other regional and international instruments, except with respect to freedom from slavery, the freedom from forced or compulsory labour, the prohibition of the death penalty, the right to marriage and equality during marriage and the right to privacy which have less protection. Furthermore, the charter amalgamates duties and rights. It stipulates rights of both individuals and peoples.²⁶¹ Kenya and South Africa are parties to the Charter.²⁶²

Much like other regional human rights instruments, the African Charter on Human and People's Rights does not specifically address issues of HIV/AIDS. This is not surprising, recalling that the African Charter was drafted and adopted well before HIV/AIDS became a real issue of concern. Nevertheless, the right to non-discrimination,²⁶³ inviolability of the right to life which can be interpreted to include the

²⁵⁹ Adopted in 1981, entered into force on October 21, 1986.

²⁶⁰ See Mediterranean Academy of Diplomatic Studies (2009). *African Charter on Human & People's Rights*. Available at http://www.diplomacy.edu/africancharter/acharter_intro.asp, accessed last on August 1, 2009. According to the author, the uniqueness of the charter lays in the originality of its normative content. The charter has unusual features, in the sense that it covers economic, social and cultural rights as well as civil and political rights, which actually distinguishes it from both the European and the American Conventions which follow a more traditional methodology. Furthermore, the African Charter covers third generation rights, and gives due importance to the assumption that a person has duties as well as rights in the community.

²⁶¹ African Charter on Human & People's Rights, 1981.

²⁶² Heyns C. & Killander S. (3rd Edn.: 2007). *Compendium of Key Human Rights Documents of the African Union: Chart of Ratifications of African Union Treaties*, p. 335. Kenya ratified the African Charter on Human and Peoples Rights on January 23, 1992, while South Africa ratified the Charter on July 9, 1996.

²⁶³ African Charter on Human and People's Rights, above, note 251, art. 2.

right to sources of livelihood,²⁶⁴ right to dignity,²⁶⁵ and the right to free association lay a formidable framework for the elimination of discrimination against HIV positive workers in the workplace. In particular, article 15 provides:

“Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”

The right to dignity envisages the right not to be subjected to outrages against the person of the HIV positive worker. This would also be able to cover the prohibition of pre-employment testing. The right to work under satisfactory conditions incorporates the right of the HIV positive worker to be consulted before determining the terms and conditions of employment. The right to free association can arguably be explained to include the right of a HIV positive prospective worker to join a legal association that advocates for his/her interests with a prospective employer.

3.5.2 *Grand Bay (Mauritius) Declaration and Plan of Action*²⁶⁶

This Declaration was adopted by the African Union Council of Ministers meeting in Grand Bay, Mauritius. From the late 1990s, the Organisation of African Unity (as it then was) saw human rights as part of its mandates. In this regard, OAU organised a series of conferences for ambassadors and ministers specifically on human rights.²⁶⁷ In their resulting recommendations, states committed themselves to “ensure that the recommendations contained in the Grand Bay (Mauritius) Declaration and Plan of Action are reflected in all the relevant programmes of the OAU, and to put in place the

²⁶⁴ Ibid, art. 4.

²⁶⁵ Ibid, art. 5.

²⁶⁶ Adopted at the First OAU Ministerial Conference on Human Rights in Africa, meeting from 12th to 16th April, 1999 in Grand Bay, Mauritius.

²⁶⁷ See Resolution on the Ministerial Conference on Human Rights in Africa, CM/Res. 1673 (LXIV), preamble. The OAU Ministerial Conference on Human Rights was held in April 1999 in Grand Bay, Mauritius. See also Introductory Note to the Report of the Secretary General, Sixty Ninth Ordinary Session of the Council of Ministers, Addis Ababa, Ethiopia, between 19th to 23rd March 1999, paras 296-8.

necessary mechanisms for appropriate follow-up action on the implementation of the Declaration and Plan of Action.²⁶⁸

Thus, the Declaration underscores the basic necessity of addressing and observing the rights of HIV positive persons. It affirms the universality, indivisibility and interdependence of human rights and urges governments to give parity to economic, social and cultural rights as well as civil and political rights.²⁶⁹ In article 7, the Declaration acknowledges that the rights of people living with HIV/AIDS have not been observed in Africa, and urges state parties to ensure respect for the rights.²⁷⁰ Further, the conference recognised that the core values on which human rights are founded include respect for the sanctity of life and human dignity, tolerance for differences and fairness.²⁷¹

This Declaration, without doubt, lays a basis for legislating on non-discrimination of HIV positive workers at the workplace. The provisions on respect for life, dignity and parity are intricate in alleviating the legal status of HIV positive workers.

3.5.3 *The Dakar Declaration*

This document outlines ten cardinal legal and ethical principles worth observing in the fight against HIV/AIDS. The Document recognises that the fundamental value of respect for human rights, life and human dignity provides the foundation on which all is built. Principle number five states:

²⁶⁸ Decision on the Report of the Secretary General on the Ministerial Conference on Human Rights Doc. CM/2123 (LXX). See also Murray R. (2004). *Human Rights in Africa: From the OAU to the African Union*. (Cambridge University Press), p. 27.

²⁶⁹ *Grand Bay (Mauritius) Declaration and Plan of Action*, 1999, Art. 1.

²⁷⁰ *Ibid*, art 7 states: "The Conference notes that the rights of people with disability and people living with HIV, in particular, women and children, are not always observed and urges all African States to work towards ensuring the full respect of these rights."

²⁷¹ *Ibid*, art 5.

“Every person directly affected by the epidemic should remain an integral part of his or her community, with the right of equal access to work, with freedom of movement and association, alongside counselling, care and treatment, justice and equality”²⁷²

Principle number six provides for confidentiality and privacy, while principle number ten prohibits mandatory testing. Thus, the Dakar Declaration represents one of the greatest endeavours, at a continental informal level, to concretise these principles inevitable for the eradication of discrimination of HIV positive workers within the labour sector.

3.5.4 Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases²⁷³

In this Declaration, the African leaders affirmed their acknowledgement that HIV/AIDS is an emergency in the continent and pledged to place the response to HIV/AIDS at the forefront as the highest priority issue in their respective national development plans. Principally, the leaders committed themselves to mobilise resources from within Africa and beyond, and to enact appropriate legislation and international trade regulations that would ensure availability of drugs at affordable prices to HIV positive persons.²⁷⁴

If the tone of the Declaration is anything to go by, all signatories are under obligation to guarantee sources of livelihood to HIV positive persons and this can be facilitated by expressly providing for employment rights of HIV positive persons.

²⁷² Dakar Declaration, 1994, Principle five.

²⁷³ See also Maputo Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases, 2003.

²⁷⁴ Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases, 2001, arts. 28-31.

3.5.5 *The Treaty for the Establishment of the East African Community, 1999*

The Treaty for the Establishment of the East African Community was signed on 30 November 1999 in Arusha, Tanzania. It was the culmination of nearly three years of thoroughgoing negotiations and a consultative process among the East African people in their quest to reconstruct the system of co-operation that had prevailed in the region in the 1960's and 1970's before the collapse of the former East African Community in 1977. The Treaty entered into force on 7 July 2000 following its ratification by the East African partner States, Kenya, Uganda and Tanzania, and later, Rwanda and Burundi.

The Treaty sets out a bold vision for the eventual unification of the East African Community partner states. It outlines a comprehensive system of co-operation among the partner States in trade, investment and industrial development;²⁷⁵ monetary and fiscal policy;²⁷⁶ infrastructure and services;²⁷⁷ human resources, science and technology;²⁷⁸ free movement of factors of production;²⁷⁹ agriculture and food

²⁷⁵ The Treaty of the Establishment of the East African Community, 1999 ISBN 9987-666-01-9, art. 79 states: "In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take such steps in the field of industrial development that will: (a) promote self-sustaining and balanced industrial growth; (b) improve the competitiveness of the industrial sector so as to enhance the expansion of trade in industrial goods within the Community and the export of industrial goods from the Partner States in order to achieve the structural transformation of the economy that would foster the overall socio-economic development in the Partner States; and (c) encourage the development of indigenous entrepreneurs." See also Article 80 of the Treaty which identifies East African Industrial Development Strategy; linkages among industries within the Community; food and agro industries; rationalization of investment within the Community as priority areas.

²⁷⁶ Article 83 of the Treaty urges the Partner States to adopt policy measures in accordance with an agreed macro-economic policy framework. More specifically, the Partner States undertake to (a) remove all exchange restrictions on imports and exports within the Community; (b) maintain free market determined exchange rates and enhance the levels of their international reserves; (c) adjust their fiscal policies and net domestic credit to the government to ensure monetary stability and the achievement of sustained economic growth; (d) liberalise their financial sectors by freeing and deregulating interest rates with a view to achieving positive real interest rates in order to promote savings for investment within the Community and to enhance competition and efficiency in their financial systems; and (e) harmonise their tax policies with a view to removing tax distortions in order to bring about a more efficient allocation of resources within the Community.

²⁷⁷ Ibid, Chapter Fifteen.

²⁷⁸ Ibid, Chapter Sixteen.

²⁷⁹ Ibid, Chapter Seventeen

security;²⁸⁰ environment and natural resource management;²⁸¹ tourism and wildlife management.²⁸²

In its article 118, the Treaty demonstrates the East African Community States willingness to take joint actions to prevent and control HIV/AIDS; to develop drug policies that enhance procurement of affordable drugs; and to promote research on traditional medicines.²⁸³

The provisions of the Treaty lay a good basis for advocating for affordable Anti-retroviral drugs in the region. It is arguable that “a common drug policy” that includes “good procurement practices” envisaged in article 118 (c) of the Treaty involves promotion of compulsory licensing and parallel importing, considering that the member States are faced with a common problem- poverty. Thus, access to affordable Anti-retroviral drugs is a common objective of the states.

However, the application of the Treaty in the domestic arena is subject to the requirement of domestication. Article 8(2) of the Treaty states in part:

“Each partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular...”

²⁸⁰ Ibid, Chapter Eighteen.

²⁸¹ Ibid, Chapter Nineteen.

²⁸² Ibid, Chapter Twenty.

²⁸³ Ibid, art. 8 states: “With respect to co-operation in health activities, the partner states undertake to: a) take joint action towards the prevention and control of communicable and non-communicable diseases and to control pandemics and epidemics of communicable and vector-borne diseases such as HIV/AIDS and to co-operate in facilitating mass immunization and other public health community campaigns; c) develop a common drug policy which would include establishing quality control capacities and good procurement practices; d) harmonise drug registration procedures as to achieve good control of pharmaceutical standards without impeding or obstructing the movement of pharmaceutical products within the community; f) co-operate in promoting research and the development of traditional, alternate or herbal medicines”

- a) *to confer upon the Community the legal capacity and personality required for the performance of its functions; and*
- b) *to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this treaty, the force of law within its territory...*²⁸⁴

Article 8(3) of the Treaty also requires each member State to designate a ministry of the East African Community.²⁸⁵

3.5.6 East African Community Regional Integrated Multisectoral HIV/AIDS Strategic Plan 2007-2012

Finalised in 2007, the Regional Integrated Multisectoral HIV/AIDS Strategic Plan provides an overview of the response to HIV/AIDS by East African Community Member States. It defines key actions and activities to be undertaken for a comprehensive and multisectoral response to HIV/AIDS in the East African Community (EAC). Its second strategic objective aims at developing guidelines for mainstreaming HIV/AIDS in all EAC sectors and institutions, including the labour sector.²⁸⁶ Strategic objective seven provides measures to operationalise the EAC²⁸⁷ workplace policy on HIV/AIDS framework and guidelines. Principally, the Plan seeks to promote and protect the rights and the dignity of HIV positive workers. It provides for an elimination of stigma and discrimination based on real or perceived HIV status

²⁸⁴ Ibid, Art 8(2)

²⁸⁵ Ibid, art. 8(3) states: "Each partner State shall: a) designate a Ministry with which the Secretary General may communicate in connection with any matter arising out of the implementation or the application of this Treaty, and shall notify the Secretary General of that designation..."

²⁸⁶ East African Community Regional Integrated Multisectoral HIV and AIDS Strategic Plan 2007-2012, 2007, Paragraph 3.5.2 "HIV and AIDS responses should be mainstreamed through all EAC sectors through:

- Developing guidelines for mainstreaming of HIV and AIDS in all EAC sectors and institutions;
- Facilitating through strengthened capacity, the mainstreaming of HIV and AIDS, gender, human rights and the GIPA principle within EAC sectors and program areas such as education, agriculture, transport, tourism, gender, labour and culture, defence, high mobility population groups, among others...."

²⁸⁷ EAC refers to the East African Community.

and the promotion of equity in an environment free of sexual harassment or coercion at the workplace.

The Strategic Plan therefore comprehensively provides for guidelines for the eradication of discrimination against HIV positive workers in the workplace. Being a regional agreement among relatively “few” states as compared to other international instruments, it is arguable that the input of Kenya in formulating the Plan was significant, hence its provisions may not be considered to be “alien” to the domestic circumstances.

3.6 APPLICATION OF INTERNATIONAL INSTRUMENTS IN KENYA

Kenya subscribes to and has ratified without reservation various international instruments, conventions and declarations that protect and promote human rights generally, and HIV positive workers in particular. However the fact that Kenya has ratified the national instruments does not make these international instruments automatically applicable in its legal system. Suffice to say that the courts cannot directly enforce or apply these instruments unless they are incorporated into the municipal law. Section 3 of the Judicature Act²⁸⁸ spells out the laws that are applicable in Kenya. Customary international law and international agreements are not included.²⁸⁹ This statutory provision is definitive, restrictive and exhaustive therefore makes uncertain the application of international law within the municipal courts.

The problem is further compounded by the provision of section 3 of the Kenyan Constitution, which provides that the Constitution shall be the supreme law of the land and shall prevail; and that any other law that is inconsistent with it shall be void to that

²⁸⁸ Judicature Act (Cap 8) Laws of Kenya.

²⁸⁹ Ibid, s. 3, provides for the sources of Kenyan Laws that guides the jurisdiction of the courts. Such laws in hierarchy are: The Constitution, Acts of Parliament of the United Kingdom, common law, doctrines of equity and the Statutes of General Application in force in England on the 12th August in 1897 and African Customary Laws.

extent.²⁹⁰ Any other law here includes international law. This provision presents problems on the application of international law by the courts because they must pay due regard to the constitutional provision *vis-à-vis* the international provision.²⁹¹

Generally, international law becomes binding on states upon ratification and deposit of instruments thereof. However, their application at the municipal level may depend on the constitutional system of a particular state. This therefore presents difficulties for courts in applying international law to support and strengthen their decisions where the municipal laws are discriminatory whereas a more liberal approach could be found in using the international laws so ratified such as Convention on Elimination of All Forms of Discrimination Against Women, 1979, hereinafter, CEDAW. Examples of Kenyan cases that have been decided have involved women property rights, which are better protected under already ratified international instruments due to their better provisions on women property rights as compared to Kenyan domestic legislations.

In the case of *Okunda vs. Republic*²⁹², an issue arose as to whether a party could effectively invoke a treaty that Kenya had ratified before Kenyan courts as a source of Kenyan law. The Court of Appeal of Kenya held that:

“...the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having

²⁹⁰ Constitution of Kenya (Chapter 0), Laws of Kenya (as amended to 2008), s.3 states: “This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void, provided that the provisions of this section as to consistency with this Constitution shall not apply in respect of an Act made pursuant to section 15A (3).”

²⁹¹ An interpretation of section 3 of the Constitution of the Republic of Kenya that notwithstanding that a convention is relevant to the Kenyan scenario, it shall only be applicable if an enabling statute has been enacted by the Kenyan Parliament.

²⁹² *Okunda vs. Republic* (1970) EALR 38. In this case, the Attorney General of Kenya brought a prosecution against two persons under the Official Secrets Act, 1968 of the then East African Community without the consent of the counsel of the Community as was provided for under the Community legislation which Kenya had ratified.

been made part of the municipal law of Kenya, are in conflict with the constitution, then, to the extent of such conflict such provisions are void”

This is the first case in Kenya to give an insight as to the applicability of international rights norms within the Kenyan domestic courts. It has also been used as a point of reference as to what should guide the courts in exercise of their jurisdiction on matters that come before them for deliberation with similar issues of application of international law. Premised on this decision, the Kenyan Courts have often declined to apply international law like CEDAW to inform decisions relating to women.

In the case of *Virginia Edith Wambui Otieno v. Joash Ochieng Ougo and Omolo Siranga*²⁹³, popularly known as the S.M Otieno case, a widow sought to rely on the provisions of CEDAW, particularly Article 2(f) of CEDAW, which mandates State Parties to take legislative measures to modify and abolish laws customs and practices, which discriminate against women. This would have made the customary law that was in question then to be in conformity with the international rights norms and to provide for equal treatment of both spouses within the family. The Court held that Wambui by marrying her late husband was subjected to and affected by the Luo customs and inheritance of her late husband’s estate was to be considered in that context. Had the court been sensitive to the provisions of CEDAW, they may have come up with a different decision. In fact, at the end of the judgment, the three judge bench acknowledged that there was some inconsistency on the issue of burials and intimated that parliament needed to legislate separately to enable the courts to deal with burial disputes expeditiously.

²⁹³ *Virginia Edith Wambui Otieno vs. Joash Ochieng Ougo and Omolo Siranga* (2002) eKLR. In this case, Wambui, a member of the Kikuyu tribe, was married to S.M. Otieno, a lawyer from the Luo community. When the husband died, an issue arose as to where his remains were to be buried. The deceased’s brother and his clan went to court for determination of this issue based on Luo customary law. There ensued a protracted court battle between the clan and the widow. The deceased’s brother and the clan were finally given the right to bury the deceased based on the Luo customary laws against the wishes of his widow.

In the case of *Shaka Zulu Assegai vs. the Attorney General of Kenya*²⁹⁴, the issue was whether a wife could confer citizenship to her husband on the basis of non-discrimination clause under Article 9 of CEDAW²⁹⁵ that Kenya had ratified without reservation. The court dismissed his case on the basis that he had no *locus standi* and that it was against the provisions of the constitution for Kenyan women married to non-Kenyan citizens to confer citizenship on their spouses or children. The court argued that in Kenya, being a patrilineal society, children and wives take up the nationality of their fathers and therefore the converse was not legally acceptable. At the time the decision was made, the Constitution was silent on the issue of discrimination on the basis of sex.²⁹⁶

The Court did not consider the international instruments to resolve the case as it squarely bordered on discrimination based on sex, which it could have used to challenge the Kenyan constitutional provisions on conferment of citizenship. This would have helped create harmony in inconsistency of the laws and get a level ground for both male and females.

²⁹⁴ *Shaka Zulu Assegai vs. The Attorney General of Kenya* (1990) KLR 59. In this case, the petitioner was a black American who married a Kenyan of Kikuyu origin. He filed a constitutional reference against the Attorney General seeking Kenyan citizenship by virtue of the fact that he was married to a Kenyan woman.

²⁹⁵ Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, Article 9 states: "State Parties shall grant women equal rights with men to acquire, change, or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband...."

²⁹⁶ In 1997, Section 82 of the Kenya Constitution was amended by the Inter Party Parliamentary Group to reflect that there shall be no discrimination on the basis sex, which had been left out in the earlier provision.

In the case of *Mary Kinyanjui vs. Ezekiel Kinyanjui*²⁹⁷, the petitioner sought to rely on articles 2, and 16 of CEDAW to get a share of her husband's estate. Article 2 of CEDAW obligates state parties to embody in their national constitutions and legislations if not incorporated and ensure through law and other appropriate measures to actualize the principle of equality. Article 16 provides for equality of spouses within marriage. It mandates state parties to ensure that both spouses have the same rights and responsibilities during marriage and its dissolution; rights in respect of ownership of property, acquisition, management, administration and disposition of property whether free of charge or for valuable consideration. The respondent's counsel was attempting to use these provisions to persuade the court not to be guided by customs, which appeared punitive, as it did not recognize that women could own anything. The court was further implored that if it was not persuaded by CEDAW, then the English Married Women's Property Act, 1882,²⁹⁸ which has been often used by the courts, must guide it. This Act recognizes a woman's non-financial contribution (such as taking care of the children, giving birth, domestic chores which are not valorised yet play a significant role in supplementing the employed husband) to accumulation of property where she is not on paid employment. Counsel for the husband had opposed the production of copies of CEDAW to court as being irrelevant and not amenable to the prevailing conditions in Kenya and declined to address the court on them. That objection was overruled and the court took the copies of CEDAW as part of the court record. However the presiding Judge did not make any reference to the Conventions in his judgment to strengthen his decision although he awarded the petitioner equal shares of the

²⁹⁷ *Mary Kinyanjui vs. Ezekiel Kinyanjui* (2006) eKLR. In this case, Mary Kinyanjui, the petitioner, who had been legally separated from her husband, faced difficulties in getting her shares of property from the husband. The husband attempted to forcefully evict her from the family land she occupied from early seventies in favour of his second wife. The property was registered in her husband's name and therefore the petitioner sued her husband for division of matrimonial property. She also sought a declaration that the property, though registered in her husband's name, it could be construed that he held such title on his own behalf and in trust for his wife Mary. The land in question was bought during the subsistence of marriage between Mary and her husband in the mid 1960's and the second wife had played no role in its acquisition as she only appeared much later in their life. An issue then arose as to whether under Kikuyu customary law, property could be divided to a wife during her husband's lifetime.

²⁹⁸ The English Married Women's Property Act, 1882 is applicable in Kenya as statute of general application obtaining in England by 1897 by virtue of the reception clause.

matrimonial property with the husband based on the provisions of the English Married Women Property Act.²⁹⁹ In this case, the outcome anticipated by the convention was achieved but its application was avoided.

Evidently, most Kenyan courts have made no effort to interpret the jurisdiction clause in a way that enables the application of international law in Kenya even without domestication.³⁰⁰

In the absence of concerted efforts by the legislature and executive to change laws to be gender responsive and reflect the acceptable international standards, it is only the judiciary that can make the municipal laws to be in conformity with the treaties. There is now a new trend in the region that is being embraced by the municipal courts to give

²⁹⁹ Ibid.

³⁰⁰ Certain courts have in themselves shown a bias in applying international law that has not been domesticated in Kenya. Certain judges have even the personality of the applicants who purport to seek reliance on international law to espouse their claim. For instance, in the case of *Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge* (2006) eKLR, women were castigated for going to Beijing to look for ideology. This castigation reflected the prevailing ideology at the time. In this case a High Court judge declined to award the respondent Wanjiru her share of matrimonial property by considering extraneous matters that were purely based on discrimination. This was more than ten years after the ratification of CEDAW and various colloquia organized by the Commonwealth Secretariat legal division, for judiciary to embrace judicial activism in their courts to protect women's rights where the conventions have been ratified but not yet domesticated. The presiding judge revealed his open bias against women in general and censured women for going to Beijing. In his judgement he said: "Many a married woman goes out to work. She has a profession. She has a high career. She is in big business. She travels to Beijing in search of ideologies and a basis for rebellion against her own culture. Like anyone else, she owns her own property separately, jointly or in common with anyone. Her business interest, her property and whatever is hers is everywhere in Kenya and abroad, in the rural, urban and outlying districts. In Nairobi alone her property and businesses, swell through Lavington, Muthaiga, Kileleshwa, Kenyatta Avenue, swirls in Eastlands, with confluents from everywhere. Perhaps apart from procreation and occasional cooking, a number of important wifely duties obligations and responsibilities are increasingly being placed on the shoulders of the servants, machines, kindergartens and other paid minders. Often the husband pays for all these and more..." The fact that this Judge focused on women going to Beijing in search of ideology was an indication, that he was aware of the global trend then on the issues of human rights of women and the activities surrounding their protection. But it would appear his traditional thinking and attitude of the place of women clouded his judgment and he could not see how women could rebel against their own culture based on foreign ideas such as those espoused in Beijing Platform of Action³⁰⁰. Perhaps, one can conclude that the woman did not get a fair hearing of her matter from the court and that a fair hearing could not have been possible given the judge's view. Clearly, his bias oppressed or contravened article 15(1) of CEDAW, which mandates state parties to accord to women equality with men before the law and article 16 that embodies equality of spouses within marriage and at its dissolution.

international law meaning and effect, within the domestic arena through other measures.³⁰¹

Certain Kenyan judges have, however, been creative in interpreting the jurisdiction clause as to permit the application of international law that Kenya has ratified without reservations. In the case of *Mburu Chuchu vs. Nungari Muiruri and two others*³⁰², High Court Judge, Honourable Justice Waki made elaborate references to CEDAW in his judgment in favour of a woman who had been disinherited by the brothers as follows:

“That the existing view may well test the conscience of modern day activists who would justifiably plead that the custom is discriminatory to women and contrary to international instruments assented to by this country, prohibiting discrimination on the basis of sex. I allude to the United Nations Convention on the Elimination of All Forms

³⁰¹ A good illustration can be seen in the Bangalore Principles of 1988, brought into being by the Commonwealth Jurists and Chief Justices in India through a judicial colloquium. This colloquium provides a blueprint for judicial creativity and or innovations; it also outlines vital duties of independent judiciary in interpreting and applying national constitutions and law in light of universal human rights. Articles 7 & 8 of Bangalore Principles provides that where national law is clear and inconsistent with the international obligations of the concerned state in common law countries, the court is obliged to give effect to national law. In such cases, the court should draw inconsistency to the attention of the appropriate countries, since the supremacy of national law in no way mitigates a breach of an international legal obligation which is undertaken by a country. Thus advocates for judicial activism to remove ambiguity or uncertainty in national constitution and laws. The Bangalore Principles have been amplified and reinforced through the Harare Declaration of 1991 and Victoria Falls Declaration of 1994. Thus, the commonwealth jurisdictions have realized that international treaties have a role to play in the interpretation of domestic legislation. Regionally courts have now begun to apply international conventions to support their decisions to protect human rights of women. This can be seen in the regional cases such as *Unity Dow v. Attorney General of Botswana*, (1992) L.R.C 623, popularly known as the citizenship case. See also *Sarah Longwe vs. Intercontinental Hotel Zambia*, (1993) 4 L.R. C 221 where the High court of Zambia, held that the hotels policy of excluding entry to unaccompanied females violated Longwe’s rights. The judges invoked the provisions of CEDAW and ACHPR Charter to support their decisions. In Tanzania, the courts have also invoked and applied international conventions. In *Ephraim v. Pastory* (1990) 87 TLR, 106, the High Court in Tanzania invoked provisions of CEDAW, and the African Charter on Human and People’s Rights, to declare *ultra vires* the customary practice of Bahaya people which excluded women from inheriting estates of their deceased parents. The judge construed that customary law to be discriminatory and contrary to Article 13(4) of the Tanzania Bill of Rights. This is a clear indication of the willingness of the judges to give effect to international law within the domestic laws in resolving issues that come before them which cannot be resolved by relying solely on local legislation. Kenya has not been left behind in the new trend and has also begun to move in line with the new global or regional wave. Exceptionally however, international law has only been applied as a result of the creativity and boldness of the presiding judicial officers in interpreting the national law in conformity with international law ratified without reservations.

³⁰² *Mburu Chuchu vs. Nungari Muiruri and two others* (2002) eKLR.

of Discrimination Against Women (CEDAW), which Kenya ratified on the 9/3/1984... Perhaps it is time serious thought is given to implementing Article 5 of CEDAW which again this country has undertaken to do but has taken no steps to do so. Our hopes are that the current Constitutional Review Process...will examine the issue squarely. For now I can only bemoan the binding precedents of the Court of Appeal of entitlement to land to unmarried women as determined by customs."

The judge in arriving at this decision invoked the provisions of CEDAW without the counsel representing the parties making reference to the instruments in their submissions. This is a clear sign of positive progress in attitudinal change and perception of women's human rights by a section of the judicial staff. While the judge gave a pronouncement, which favoured the woman, he recognized the hurdle that this approach may still face; he was optimistic that if the constitution were amended to entrench the equality principle without distinction, women's rights would be greatly enhanced.

The position was emphasized by Justice Waki J.A. (of the Kenya Court of Appeal) in the recent case of *Mary Rono VS. Jane Rono and William Rono*³⁰³, where the Court of Appeal made elaborate reference to international law and used CEDAW and the African

³⁰³ *Mary Rono vs. Jane Rono and William Rono* (2004) eKLR. This case was initially filed in the Kenyan High Court and the dispute involved distribution of assets of the estate of a deceased father. The High Court awarded the daughters of the deceased less shares in the estate of their deceased father, basing her argument that even though the daughters were entitled to inherit part of the estate, they were bound to get married and giving them equal shares could give them unfair advantage over other family members. The court then proceeded to give the sons larger shares at the expense of the daughters. The High Court held: "The situation prevailing here is rather peculiar though not uncommon in that one house has sons while another has only daughters. Statute Law recognizes both sexes to be legible for inheritance. I also note that it is on record that the deceased treated his children equally. It follows that all daughters will get equal shares and all the sons will get equal shares. However due to the fact that daughters have an option to marry, the daughters will not get equal shares to boys. As for the widows if they were to get equal shares then the second widow will be disadvantaged, as she does not have sons. Her share should be slightly more than that of the first widow whose sons will have bigger shares than daughters of the second house". The court awarded the five daughters five (5) acres of land each and the three sons were given thirty (30) acres each. In her decision the female judge considered both customary and statutory laws on succession. The daughters were dissatisfied with the judgment on various other grounds and moved to the Court of Appeal to challenge the same on the basis of discrimination.

Charter on Human and People's Rights in resolving the dispute that was brought before them on distribution of estate to daughters as the distribution was not recognised under customary laws. The Court recognized that Kenya subscribes to, and has ratified international instruments such as Universal Declaration of Human Rights (UDHR), International Convention on Economic, Social and Cultural Rights (ICESCR), CEDAW and ACHPR, and went on to argue that such ratification is a clear sign that Kenya has the intention of being bound by these provisions within the global context even if it has not domesticated them.³⁰⁴

The above cases clearly show a marked departure from previous trends where courts paid no attention to international instruments, and if continued will enhance greatly the position of international law. Through the doctrine of *stare decisis*, the cases advocating for the application of international law that Kenya has ratified without reservation will

³⁰⁴ The Court of Appeal stated: "Is international law relevant for consideration in this matter? As a member of the international community, Kenya subscribes to international customary laws and has ratified various international treaties and covenants... In 1984 it also ratified, without reservation, the Convention on the Elimination of All Forms of Discrimination Against Women and also Banjul Charter (1992) without reservations. ...It is in the context of these international laws that the 1997 amendment to the section 82 of the Constitution to outlaw discrimination on sex becomes understandable. The country was moving in tandem with the emerging global culture, particularly on gender issues I have referred at some length to international law provisions to underscore the view I take in this matter that the central issue relating to the discrimination, which this appeal raises, cannot be fully addressed by reference to domestic legislation alone. The relevant international laws, which Kenya has ratified, will also inform my decision." Another recent decision direct on the point is High Court Succession Cause No. 464 of 1998 at Nakuru where Justice Muga Apondi observed that "Kenya is also a signatory to United Nations Conventions that prohibits discrimination against women and children. Specifically, Kenya has ratified the United Nations Convention on the Elimination of All Forms of Discrimination Against Women that was passed in 1979 by the General Assembly. The principles enunciated in those conventions are universally accepted and should be considered and applied in our jurisprudence. Having stated the above, I hereby accept and concur with the "girls" who are the female beneficiaries that the estate should be divided equally between all the beneficiaries..." Also, In *The estate of Njoroge Machokire* (2004) eKLR, Jane Watiri moved the court to declare that she was equally entitled to a share of the estate of her late father which her brothers has denied her a claim on the basis of customs which do not allow daughters to inherit as they had potentials of getting married elsewhere. The presiding Magistrate decided the case in her favour and awarded her equal shares with the brothers. She invoked the provisions of CEDAW Article 15(1)-(3) and Article 18(3) of ACHPR which provide for legal equality between men and women to declare the said customs as discriminatory and therefore a violation of section 82(1) which prohibits discrimination on the basis of sex.

contribute as authorities used at all levels of the courts to invoke the application of International instruments in the domestic arena.

3.7 CONCLUSION: SUMMARY OF RIGHTS OF HIV POSITIVE WORKERS IN THE WORKPLACE UNDER INTERNATIONAL LAW

3.7.1 The Right to Privacy/Confidentiality

The right to confidentiality derives from three related reasons. Each reflects or stems from a greater understanding of the link between public health and human rights. The other aspects of this right include:

- i. Respect for intrinsic personhood of those who are infected with HIV: The respect for the personhood of HIV positive persons entails the fact that their individual human rights should not be violated. In Kenya, calls not to stigmatise and isolate people on the ground of a health crisis have reservedly been heeded by the legal framework.
- ii. Attempts to contain HIV require respect for Human Rights. There should be respect for human dignity and effective public health planning to ensure a just and non-discriminatory response to AIDS.³⁰⁵ Thus, recognition of and respect for individual human rights should not impede prevention and containment of HIV, but should actually enhance it.
- iii. Historical track of HIV and AIDS. Importance of confidentiality in relation to HIV and AIDS can be appreciated from the history of the epidemic. According to the late Jonathan Mann, there have existed “very intense, emotional and personal” discovery³⁰⁶ in the course of the 1980s of empirical and theoretical connections between human rights abuses and vulnerability to HIV and AIDS.

³⁰⁵ See also Kirby M. (Vol. 9:1993). “AIDS and the Law” in *South African Journal of Human Rights*, p. 1.

³⁰⁶ Gostin L. (1997). *Human Rights and Public Health in the AIDS Pandemic*, p.167.

Each society where HIV positive persons are marginalised, stigmatised and discriminated has always seen the highest risk of HIV infection.³⁰⁷

These considerations constitute the core of the most important international human rights policy responses to HIV/AIDS that the epidemic has yet produced,³⁰⁸ the *International Guidelines on HIV/AIDS and Human Rights*.³⁰⁹ The guidelines contain 12 policy directives which reflect the drafter's recognition that protection of human rights is essential to safeguard human dignity in the context of HIV and AIDS, but also to ensure an effective, right-based response to the epidemic. The Guidelines assert that public health interests do not conflict with human rights.³¹⁰ Guideline 5 enjoins States to enact or strengthen anti-discrimination and other protective laws, including those that ensure privacy and confidentiality.³¹¹ International consensus therefore strongly points to the importance of respecting privacy and confidentiality as basic values in containing HIV/AIDS.

3.7.2 The Right to Work

The right to work and related rights were first addressed in Article 23 of the Universal Declaration of Human Rights.³¹² Article 24 on the other hand provides for the right of everyone to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. These rights were further developed in Article 6 and 7 of the International Covenant on Economic, Social and cultural rights. Article 6 deals with the right to work and under Article 7, states parties recognize the right of everyone to the enjoyment of just and favourable conditions.

³⁰⁷ Mann J. and Tarantola D. (1996), *AIDS in the World II: Global Dimensions, Social Roots and Responses/ The Global AIDS Policy Coalition*, p.464.

³⁰⁸ O'Malley J. (1996), *Tolerance and Discrimination*, p.466.

³⁰⁹ See United Nations, *Report of the Secretary General on the 2nd International Consultation on HIV/AIDS and Human Rights*, 20 July 1997, E/CN4/1997/37.

³¹⁰ See Introduction to the Guidelines.

³¹¹ Ibid, Page 5 as published.

³¹² Right to work, equal pay for equal work, and just and favourable remuneration, supplemented, if necessary by other means of social protection, see for example, Article 22 & 23 of the UDHR.

Under Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),³¹³ state parties are required to 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 and in particular the right to work as an inalienable right of all human beings, the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; 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; 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 eventuality of the quality of work.³¹⁴

When states recognize the right to work under Article 6 of the International Covenant on Economic, Social and Cultural Rights, this should be construed to include the right of every person to gain his livelihood by work, which he freely chooses or accepts. Thus, the steps the states have taken to achieve the full realization of the right to work shall include technical and vocational guidance and training programs, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental, political and economic freedoms to the individual.³¹⁵ In the context of HIV/AIDS therefore, the state should ensure through legislation, administrative and judicial reforms that the rights of HIV positive workers are not affected by the status of those persons as long as they have the capacity to perform their obligations under the employment contracts. The

³¹³ Convention on the Elimination of All Forms of Discrimination Against Women, 1979, UN documents.

³¹⁴ CEDAW was adopted as part of a global attempt to fight worldwide social, cultural and economic discrimination against women, including the disadvantage conferred by stereotypical gender roles. Again, it creates an obligation on states to eliminate violations of women's rights irrespective of who the perpetrator may be. In light of the fact that women are among the group whose position and treatment in society makes them most vulnerable to HIV/AIDS pandemic, the convention is a very important instrument for the protection of the rights of women in the work place.

³¹⁵ International Covenant on Economic, Social and Cultural Rights, Article 6(2).

states should also ensure that possible administrative measures such as making arrangements to ensure that persons who become infected while in employment are not retired or rendered redundant merely on the basis of their health status but are given options to retire subject to the payment of full benefits or are given the option of continuing to work in relatively less strenuous capacities to enable them continue meeting their daily needs – food, medication, shelter et cetera so as to avoid dependency.

Likewise, as provided for under the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), States should ensure that persons with claims arising from infringement, breach and or violations of their rights in contractual (employment) relationships in the context of HIV/AIDS pandemic have the necessary recourse in law to enable them pursue their rights.

3.7.3 Access to Anti-retroviral drugs as a human right

Access to affordable Anti-retroviral drugs is a human right and a component of other internationally guaranteed human rights, such as the rights to health, life, development, and enjoying the benefits of scientific progress. In 1946, WHO declared the right to health a fundamental human right.³¹⁶ Subsequently, the Universal Declaration enshrined the right to health as a fundamental human right, and the ICESCR later obligated signatory states to respect, protect and fulfil the right to health.³¹⁷ The Universal declaration guarantees all persons:

“...the right to a standard of living adequate for the health and the well being of himself and of his family, including...medical care.”³¹⁸

³¹⁶ Torres M. (2002), “The Human Right to Health, National Courts, and Access to HIV Treatment: A Case study from Venezuela” in *Chicago Journal of International Law* p. 105. See also WHO Constitution, (1948) PmbI, 62 Stat 2679, 14 U.N.T.S.

³¹⁷ ICESCR, Art 12(1); UDHR, Art 25(1).

³¹⁸ UDHR, Art 25(1).

Article 12 of the ICESCR obligates state parties to:

“...recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”³¹⁹

Whereas the contours of the right to health are ill-defined in international law, international law specifically encompasses the right to affordable drugs. If the right to health is guaranteed under the International instruments, then the right means facilitating that very health, of which affordable health is the nerve centre. Further, the Universal Declaration recognises that,

“...everyone has the right to...medical care.”³²⁰

Additionally, the ICESCR requires States to assure to all medical service and medical attention in the event of sickness and to take steps towards the treatment of the epidemic diseases.³²¹ Thus, access to medicines is an essential part of access to health.

Several developments suggest that the right of access to medical treatment may be a component of the right to health.³²² For example, the U.N. Committee that supervises the implementation of the ICESCR has interpreted the right to health guaranteed in the ICESCR to include the rights to treatment of epidemic diseases, access to affordable health services, and the provision of essential drugs.³²³ In its General Comment 14, the committee further specifies that the States’ duties to protect the right to health include:

“...the duties...to adopt legislation or to take other measures ensuring equal access to health related information and services...”³²⁴

³¹⁹ ICESCR, Art 12(1).

³²⁰ UDHR, art 25(1).

³²¹ ICESCR, art 12(2) c-d.

³²² Gathii J., Above, note 519, p.736, argues that there have been significant developments that have already laid a rights framework to facilitate access to essential medicines.

³²³ ESCOR Committee on Economic, Social and Cultural Rights, *The Right to the Highest Attainable Standard of Health*, U.N. (CESCR General Comment 14), 22nd Sess. Paras 16, 12(b), 17, UN Doc. E/C.12/2000/4 (2000).

³²⁴ Ibid, Comment 14.

The Committee's interpretations are not legally binding, but they may be said to have considerable legal weight. Thus, it is arguable that State parties to the ICESCR have a binding obligation to protect and promote the right to health by guaranteeing affordable health care, including drugs.³²⁵

Moreover, the U.N. Commission on Human Rights passed a resolution acknowledging that access to HIV/AIDS medication is,

*"...one fundamental element for achieving progressively the full realisation of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."*³²⁶

The resolution further calls on States to adopt policies to ensure the availability of HIV/AIDS medication.³²⁷ Moreover, the U.N. revised its guidelines to States on HIV/AIDS and human rights to reflect new standards in HIV treatment and evolving international law on the right to health.³²⁸ Guideline 6 specifically asserts that States should take measures necessary to ensure for all persons the availability and accessibility of HIV/AIDS treatment, including anti-retroviral and other safe and effective medicines.³²⁹

Essentially, therefore, access to affordable Anti-retroviral drugs is no less a right than right to life. The failure to afford HIV drugs only translates to failure to enjoy the right to life. Quite obvious, is that even the affordable Anti-retroviral drugs go for a

³²⁵ See also Cochrane B. (2001), "Lack of Access to Anti-retroviral drugs in Developing Countries: Is there a violation of the International Human Right to Health" in *Human Rights Brief*, p.14.

³²⁶ *Access to Medication in the Context of Pandemics such as HIV/AIDS*, Human Rights Commission Resolution 2001/33, U.N. ESCOR, 57th Sess, Supp. No. 3, 71st meeting, at 169, Para 1, U.N. Doc. E/CN.4/2001/167 (2001).

³²⁷ *Ibid*, Para 2.

³²⁸ Office of the United Nations High Commissioner for Human Rights & Joint United Nations Programme on HIV/AIDS, HIV/AIDS and Human Rights (2002), *International Guidelines*, Third International Consultation on HIV/AIDS and Human Rights at 5. Available at <http://www.unaids.org/humanrights/>, accessed last on 29 August 2008.

³²⁹ *Ibid*, p. 13.

consideration and the consideration can only be earned in an employment situation. This therefore forms the thrust of my argument, that an employer, by declining to guarantee an employment opportunity to a HIV positive worker or job applicant, in essence, the employer takes away, with impunity, the capacity of the worker or the job applicant to enjoy his/her right to afford Anti-retroviral drugs. This argument therefore showcases the need to impose an obligation upon employers not to discriminate against HIV positive workers and job applicants, in an attempt to facilitate the worker's affordability of Anti-retroviral drugs.

CHAPTER 4

KENYA'S LEGAL FRAMEWORK FOR THE PROTECTION OF THE HIV POSITIVE WORKER

4.1 INTRODUCTION

Kenyan laws and policies on HIV/AIDS in the labour sector are found in the Constitution, statutes, subsidiary legislation and administrative guidelines. The Constitution is the supreme law in Kenya and provides the framework from which other laws and policies derive their validity. The statutes dealing with the rights of HIV positive workers in the labour sector include the HIV and AIDS Prevention and Control Act, 2006;³³⁰ the Public Health Act;³³¹ the Employment Act, 2007;³³² the Labour Relations Act, 2007;³³³ and the Industrial Property Act, 2001.³³⁴

The provisions of the Constitution and legislation do not however offer sufficient protection to HIV positive workers within the labour sector. This is because while the Constitution of Kenya lacks express provisions on HIV/AIDS within the labour sector, its protection of HIV positive workers can only be by a liberal interpretation of its provisions. Secondly, the statutes create institutions that do not offer absolute protection to HIV positive workers.³³⁵ While the statutes codify the principle of freedom of contract, they fail to offer protection to HIV positive workers who are often left to the whims of service contracts unilaterally drawn by employers.³³⁶ Statutory provisions on non-discrimination of HIV positive workers exclude certain categories of workers, thereby exposing such excluded workers to discrimination on the basis of their HIV status.³³⁷ Yet, these provisions do not term as discrimination, actions taken by way of affirmative action, or actions taken for purposes of public interest, which are not

³³⁰ HIV and AIDS Prevention and Control Act, 2006.

³³¹ Public Health Act (Cap 242), Laws of Kenya.

³³² The Employment Act No. 11 of 2007.

³³³ Labour Relations Act No. 14 of 2007.

³³⁴ Industrial Property Act, 2001.

³³⁵ HIV and AIDS Prevention and Control Act, above, note 329, s. 25.

³³⁶ *Ibid*, s. 9(2).

³³⁷ *Ibid*, s. 3(2).

defined by the Employment Act.³³⁸ This lack of definition forms the basis for discrimination of HIV positive workers and exposes them to discretionary decisions of employers. This chapter examines Kenya's legal framework for the protection of the HIV positive worker.

4.2.1 Constitution of Kenya

In Kenya, the Constitution is the supreme law, validating all other laws³³⁹ and lays the basis for the protection of fundamental rights and freedoms for persons in Kenya.³⁴⁰

³³⁸ Ibid, s. 5(4).

³³⁹ Constitution of Kenya (Chapter 0), Laws of Kenya, s. 3 states: "This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void." Section 47 of the Constitution confers upon Parliament the power to amend the Constitution. The section states: "(1) Subject to this section, Parliament may alter this Constitution. (2) A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (excluding the *ex officio* members). (3) If, on the taking of a vote for the purposes of subsection (2), the Bill is supported by a majority of the members of the Assembly voting but not by the number of votes required by that subsection, and the Bill is not opposed by thirty-five per cent of all the members of the Assembly or more, then, subject to such limitations and conditions as may be prescribed by the standing orders of the Assembly, a further vote may be taken. (4) When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly." The power of Parliament under section 47 to amend the Constitution was described by the High Court of Kenya in *Njoya & 6 Others v. Attorney General & 3 Others* (2004) 1 KLR, p. 294 to mean changing the Constitution without abrogating the Constitution. The Court stated: "Amendment of the Constitution necessarily contemplates that the Constitution has not been abrogated but only changes have been made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change. As a result of the amendment, the old Constitution cannot be destroyed or done away with; it is retained though in the amended form. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into a dictatorship or a hereditary monarchy nor would it be permissible to abolish Parliament." The argument by the Kenyan High Court may be compared with the Indian decision of Reddy J. in *Kesavananda vs. State of Kerala* (1973) AIR SC 1461, where the judge stated: "...although the power of amendment is wide, it is not wide enough to include the power of totally abrogating or emasculating or damaging any of the fundamental rights or the essential elements in the basic structure of the Constitution or of destroying the identity of the Constitution. Within these limits, Parliament can amend every article of the Constitution."

³⁴⁰ Ibid, Chapter V.

Commenting on the supremacy of the Kenyan Constitution, the High Court of Kenya in the case of *Crispus Karanja Njogu v. Attorney General*³⁴¹ stated as follows:

*"We hold that due to its supremacy over all other written laws, when one interprets an Act of Parliament in the backdrop of the Constitution, the duty of the court is to see whether that Act meets the values embodied in the Constitution."*³⁴²

In *Njoya & 6 Others vs. Attorney General & 3 Others*³⁴³ affirmed the supremacy of the Constitution of Kenya, terming it a living document with soul and consciousness. The court stated:

"The Constitution is not an Act of Parliament. It is the supreme law of the land. It is a living instrument with a soul and a consciousness. It embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or

³⁴¹ *Crispus Karanja Njogu vs. Attorney General* (2000) KLR 37.

³⁴² *Ibid.* While commenting on the criteria for interpreting a Constitution as distinguished from an ordinary Act of Parliament, the High Court of Kenya stated: "We do not accept that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. It exists separately in our statutes. It is supreme. It is our considered view that, Constitutional provisions ought to be interpreted broadly or liberally, and not in a pedantic way, i.e. restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution is a living piece of legislation. It is a living document." Also, in the case of *Ndyanabo vs. Attorney General* (2001) TLR, p. 493, the Tanzanian Court of Appeal stated as follows of the liberal interpretation of the Constitution: "We propose to allude to general provisions governing Constitutional interpretation. These principles may, in the interest of brevity, be stated as follows. First, the Constitution is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of State policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As was stated by Mr. Justice E.O. Ayoola, a former Chief Justice of the Gambia, "a timorous and unimaginative exercise of the Judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document." Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed." The two foregoing Courts decisions on liberal interpretation of the Constitution can however be contrasted with the East Africa Supreme Court decision in *Republic v. Elman* (1969) E.A. 357, p. 360, which established the *Elman doctrine* in the following words: "We do not deny that in certain contexts, a liberal interpretation may be called for, but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous, they are to be construed in their ordinary and natural sense."

³⁴³ *Njoya & 6 Others vs. Attorney General & 3 Others* (2004) 1 KLR, p. 277.

teleologically to give effect to those values and principles...The concept of Constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other; none is supreme. The Constitution is supreme and they all bow to it."

Section 70 of the Constitution is the umbrella provision for the protection of fundamental human rights in Kenya.³⁴⁴ It sets out the fundamental rights and freedoms and also provides a limitation clause signifying the circumstances in which the rights may be abridged.³⁴⁵ Section 70 provides thus:

"Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex, but subject to the respect for the rights and freedoms of others and for the public interest, to each and all of the following namely:

- a) Life, liberty, security of the person and the protection of the law;*
- b) Freedom of conscience, of expression and of assembly and association; and*
- c) Protection of the privacy of his home and other property and from deprivation of property without compensation*

The provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as contained in those provisions being limitations designed to ensure that the enjoyment of those rights

³⁴⁴ In *Kisya Investment Ltd vs. Attorney General & Another* (2005) eKLR, p. 9, the High Court of Kenya stated of the overarching status of section 70 of the Constitution as follows: "Section 70 in our view is the threshold to Chapter V of the Constitution of Kenya which enshrines the protection of fundamental rights and freedoms of the individual, i.e. the Bill of Rights. It lays down the foundation of the said protections in general, summarised but firm manner while the subsequent sections 71-83 specifically define the said specific rights and manner of protection...section 70 is declaratory of rights and freedoms of the individual and the extent of application. It does not of itself create any of the enforceable protections or the violable constitutional rights and in some cases the consequences, penalties or remedies. In the premises, we are of the view that strictly, it is not capable of express violation to the extent that enforceable rights accrue. However, there is no doubt that if any of the protective sections are offended or violated, then the spirit of section 70 would also be breached."

³⁴⁵ *Muhia & 2 Others vs. Kenya Power & Lighting Company Ltd* (2004) eKLR, p. 19.

and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”³⁴⁶

While emphasising the qualification of fundamental rights and freedoms under section 70 of the Constitution, the High Court of Kenya, in *Willy Munyoki Mutunga vs. Republic* stated:

“It is worth emphasising that section 70 of the Constitution, with which chapter V begins, makes such rights subject to respect for the rights and freedoms of others and for the public interest and again, subject to limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. It cannot be stressed too often that such rights exist and are enforceable, only where law and order prevails. Once peace and stability disappear, such rights also go overboard without a whimper.”³⁴⁷

This part of the thesis analyses the following rights under the Kenyan Constitution relevant to the HIV positive worker:

4.2.1.1 **Discrimination and the Constitution of Kenya**

Section 82 of the Constitution is the umbrella provision on the right against discrimination in Kenya. It provides *inter alia* that no law shall make any provision that is discriminatory either of itself or in its effect.³⁴⁸ The phrase “discrimination” under the Kenyan Constitution is used in a restrictive manner.³⁴⁹ The parameters for discrimination are set out under section 82(3) to mean:

³⁴⁶ Constitution of the Republic of Kenya, above, note 2, S. 70.

³⁴⁷ *Willy Munyoki Mutunga vs. Republic* (1982) KLR 23.

³⁴⁸ Constitution of the Republic of Kenya, above, note 2, s. 82(2) states: “No person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority”

³⁴⁹ In *Nganga v. Republic* (1985) KLR 456, the High Court of Kenya stated: “The meaning of the phrase “discriminatory” in section 82(2) of the Constitution is not the same as the natural or ordinary meaning of the word “discriminatory”. The word has been assigned a special meaning as stated in section 82 subsection (3)...The expression “discriminatory” is, therefore, here used in a special restrictive manner and is specially defined by section 82 sub-section (3).”

“...affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex 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.”³⁵⁰

The Constitution does not explicitly outlaw discrimination based on HIV status. Considering that over 2 million in Kenya are infected with HIV,³⁵¹ discrimination on the basis of HIV status therefore affects a large portion of the population.³⁵² The failure by the Constitution of Kenya to expressly outlaw discrimination based on HIV status³⁵³ creates a legislative gap with the consequence that in all sectors of the society, discrimination is perpetrated based on the distinction as to whether one is infected with HIV or not. Employers can therefore discriminate against the HIV positive workers or prospective workers.³⁵⁴ Under section 82(8) of the Constitution, Parliament has power to enact laws that are discriminatory.³⁵⁵ In this regard, the Kenyan Parliament has enacted laws that permit discrimination of categories of workers in the workplace.³⁵⁶

³⁵⁰ Constitution of the Republic of Kenya, above, note 2, s. 82(3).

³⁵¹ Government of Kenya (July 2008), *Kenya AIDS Indicator Survey, 2007*, above, note 40, p. 1.

³⁵² HIV/AIDS cause massive premature adult mortality, thereby destroying existing human capital and reducing the labour force on a large scale. Also, the transmission of human capital to future generations is weakened, as children are left orphaned and surviving adults are correspondingly burdened. As a consequence, per capita income decreases and communities can hardly afford to raise and educate children as they did before the outbreak of the disease. See Rahoma B. (2008). *The Long-run Effects of HIV/AIDS in Kenya*. Available at <http://www.ideas.repec.org>, accessed last on 26th August 2009.

³⁵³ Section 82(3) of the Constitution of Kenya only expressly outlaws discrimination on the basis of “race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.”

³⁵⁴ See, for instance, *J.A.O vs. Homepark Caterers Ltd & 2 Others* (2004) eKLR.

³⁵⁵ Above, note 10, s. 82(8) states: “(8) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of a description mentioned in, subsection (3) may be subjected to a restriction on the rights and freedoms guaranteed by sections 76, 78, 79, 80 and 81, being a restriction authorized by section 76 (2), 78 (5), 79 (2), 80 (2), or paragraph (a) or (b) of section 81 (3).” Section 76 of the Constitution guarantees the right against arbitrary search and entry; section 78 of the Constitution guarantees freedom of conscience; section 79 of the Constitution guarantees freedom of expression; section 80 of the Constitution guarantees freedom of assembly and association; and section 81 of the Constitution guarantees the freedom of movement. Sections 76(2); 78(5); 79(2); 80(2); and section 81(3)

A number of cases touching on the rights of HIV positive workers have been discussed before Kenyan courts. In *Olivia Akinyi Midwa vs. John Michael Midwa*,³⁵⁷ the parties were husband and wife. They had solemnised their marriage under the African Christian Marriage and Divorce Act. Both were employed and had two children. About six years of their marriage, the wife allegedly tested HIV positive. The husband petitioned for divorce on the grounds of cruelty, amongst the particulars of which were stated that the wife, having tested HIV positive, was endangering the life of the husband. Other instances of cruelty cited in the petition were assaults, abuse and other matrimonial offences allegedly committed by the wife upon the person of the husband and the issues of the marriage. The wife cross-petitioned.

Pending the hearing of the divorce, both parties applied for exclusion of the other from the matrimonial home, but the husband went further by stating on oath that he was prepared to provide the wife with alternative accommodation. After listening to both parties at the interlocutory stage, the High Court ordered that the wife be excluded from the matrimonial home, but be allowed to stay in the servant quarters. It is against this judgement that the wife sought an order for stay of execution of the order of the High Court, by which order the appellant, wife to the respondent, was expelled from the matrimonial home into the servants' quarter, after the wife was tested HIV positive. The husband argued that he could not live with his wife under the same roof as she posed a grave risk to his life. This was notwithstanding the fact that the appellant's (wife's) salary was deducted every month in payment of the mortgage taken to complete the construction of the matrimonial home.

The Court of Appeal held that anything done to upset and alter the state of health of the appellant would be rendered nugatory. In granting the stay of execution of the order of

paragraphs (a) and (b) of the Constitution empower Parliament to enact laws that limit the enjoyment of the respective rights and freedoms.

³⁵⁶ See for instance, the Employment Act No. 11 of 2007, sections 3(2) & 5(4). An in-depth analysis of the Act. is attempted here-under.

³⁵⁷ *Midwa vs. Midwa* (2000) EALR 453.

the High Court, the Court of Appeal ordered that the wife be put back in the matrimonial home forthwith. The husband's perception of the appellant was the appellant was highly infectious as she was HIV positive.³⁵⁸ From the Court of Appeal's holding, termination of employment of a HIV positive worker or denial of access to employment of a HIV positive worker fall within the category of actions that "upset the health" of the HIV positive worker, and should therefore be held illegal in all instances. At no instance should it be justifiable that an HIV positive worker is discriminated against at the workplace on the basis of his/her health status.

4.2.1.2 Arbitrary search and the Constitution of Kenya

Section 76 of the Constitution is the umbrella provision for protection against arbitrary search or entry. Section 76(1) provides:

"Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

From the section, it is implied that lack of consent makes a search arbitrary. Under the section, the word "search" is not defined. As a cardinal rule of interpretation, words should be given their natural and ordinary meaning.³⁵⁹ Black's Law Dictionary defines the word "search" as follows:

"It consists of probing, exploration for something that is concealed or hidden from the searcher, or examination of a person's body, property or other area that the person would

³⁵⁸ This perception is however stereotypical as scientific evidence has proved that HIV cannot be spread by sharing a place of abode. See Albertyn S. & Rosengarten D. (1993). HIV and AIDS: Some Critical Issues in Employment Law in *South African Journal of Human Rights Law*. Available at <http://www.heinonline.id=93print=12ext=pdf>, accessed last on July 15, 2009. See also San Francisco AIDS Foundation (2006). How AIDS is spread. Available at <http://www.sfaf.org/aid101/transmission.html>, accessed last on August 26, 2009. According to the author, direct contact of a mucous membrane or the blood stream with a bodily fluid containing HIV, such as blood, semen, vaginal fluid and breast milk can result into transmission of HIV.

³⁵⁹ See Rigney M. (2009). *Natural Meaning of words is susceptible of innocent construction*, p. 2. According to the author: "determination of a meaning of a statement and whether it is susceptible of innocent construction is a question of law. Every court should endeavour to give a natural construction of the statement for it to be free from being a purveyor of irrelevancies."

reasonably consider as private, or an invasion, a quest with some sort of force, either constructive or actual.”³⁶⁰

In common parlance, the right against arbitrary search and entry is referred to as the right to privacy. The drawing of blood from a person for HIV screening purposes without his/her consent would, therefore, in liberal interpretation of the Constitution, constitute a search and infringe the person’s right to privacy.

The right to privacy of HIV positive workers was emphasised by the Kenyan Court in *J.A.O vs. Homepark Caterers Ltd & 2 Others*.³⁶¹ In this case, the plaintiff had been a worker of the 1st defendant company for over a decade. The 2nd and 3rd Defendants, who were a doctor³⁶² and a medical institution³⁶³ respectively, conducted an HIV test on the Plaintiff and upon finding that the Plaintiff was HIV positive, they disclosed to the 1st Defendant the HIV status of the Plaintiff without the Plaintiff’s consent. On realising that the plaintiff was HIV positive, the 1st defendant summarily dismissed the Plaintiff without any compensation. The plaintiff filed the suit seeking damages for unlawful dismissal and reinstatement to employment and for a declaration that the 2nd and 3rd Defendants breached her rights to privacy. The High Court awarded the plaintiff Kshs. 2.25 million in damages for unfair dismissal of the plaintiff by the 1st defendant on the basis of the defendant’s HIV status. The court declared that:

- a) Testing of a worker or prospective worker without her informed consent is unlawful and constitutes invasion of privacy; and
- b) Disclosing a worker’s HIV status to an employer without the worker’s consent is unlawful.³⁶⁴

³⁶⁰ Garner B. (Ed) (2004), *Black’s Law Dictionary*, p. 1377. A search is arbitrary when it is determined by impulse rather than reason, unrestrained by law and therefore tyrannical. See Max B. (2009). *Letters to Einstein*. Available at <http://en.wikiquote.org/wiki/Einstein>, accessed last on August 28, 2009.

³⁶¹ *J.A.O vs. Homepark Caterers Ltd & 2 Others* (2004) eKLR.

³⁶² The 2nd Defendant was a medical doctor Prismus Ochieng.

³⁶³ The 3rd Defendant was a private Health Clinic called “Metropolitan Health Services.”

³⁶⁴ Above, note 360, p. 8. The Court stated: “(1) The 2nd and 3rd Defendants conducted an HIV test on the Plaintiff without her consent and thus violated her Constitutional right to privacy. (2) The 2nd and 3rd

But another concern arises. What is consent? And when should a person reasonably be deemed to have given consent to a search? According to Black's Law Dictionary, "consent" is defined as:

*"Agreement, approval or permission to some act or purpose, especially given voluntarily by a competent person"*³⁶⁵ (emphasis added)

A person is competent to give consent if she/he has the capacity and ability to give the consent.³⁶⁶ Peter Westen, for instance, argues that consent exists only when:

*"A person's choice is the product of such competence to assess one's interests, knowledge of the circumstance, freedom from pressure and motivation. It is indistinguishable from the choice that a person would have made for herself if she had possessed the option of making her choice under such conditions of competence, knowledge and freedom."*³⁶⁷

Where the person to give consent to search is incapacitated, then the factors that inhibit the giving of the consent in the strict sense of the word must first be addressed before a person can be deemed to have actually consented to the search. The phraseology of section 76(1) of the Constitution can be interpreted to mean that once a person consents to a search of his person or of his property, his/her right to privacy is not deemed violated *per se*. What section 76(1) of the Constitution fails to address is the unequal bargaining powers of a desperate prospective or existing worker pitted against a capitalist employer. Economic pressure on the worker may compel the worker to concede to an HIV test in order to salvage his employment. According to Paul Roth, workplace testing tends to take place generally at the pre-employment stage, where the

Defendants disclosed the said HIV status of to the first Defendant without the Plaintiff's knowledge or consent thereby violating her Constitutional right to confidentiality. (3) The 2nd Defendant breached his professional and statutory duty to confidentiality and disclosed the HIV status of the Plaintiff, thereby breaching the Plaintiff's right to privacy. For the said reasons, the Plaintiff's Constitutional right to privacy was violated and she is entitled to damages."

³⁶⁵ Garner B., above, note 359, p. 323.

³⁶⁶ Ibid.

³⁶⁷ Westen P. (2004). *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*. Burlington, (USA: Ashgate Publishing Company), p. 340.

ability of workers to withhold consent is most constrained.³⁶⁸ In effect, such prospective workers have no option but to accede to testing which are intrusive, demeaning, or of dubious relevance or reliability.

Does this therefore mean that the Constitution of Kenya condones arbitrary search of HIV positive persons? Section 76(2) of the Constitution provides:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision:

- a) that is reasonably required in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or the development and utilisation of any other property in such a manner, as to promote public benefit;*
- b) That is reasonably required for the purpose of promoting the rights or freedoms of other people...”* (emphasis added)

From the provisions of section 76(2) of the Constitution, Parliament can effectively enact a law that qualifies the enjoyment of the rights to privacy on the premise of public defence, public safety, public order, public morality, public health, in such a manner, as to promote public benefit or for the purposes of promoting the enjoyment of the right to privacy by other people. In exercise of its unfettered legislative power under section 30 of the Constitution,³⁶⁹Parliament enacted the HIV and AIDS Prevention and Control Act.³⁷⁰ The said Act at section 14(1) (c) empowers a medical practitioner to perform an HIV test on a person even without the consent of that person and/or his guardians.³⁷¹

³⁶⁸ Roth P. (2008). *The International Labour Office Code of Practice on the Protection of Workers’ Personal Data*, available at <http://www.austlii.edu.au/databases.html>, accessed last on August 1, 2008.

³⁶⁹ Constitution of the Republic of Kenya, above, note 2, s. 30 states: “The legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly.”

³⁷⁰ HIV and AIDS Prevention and Control Act No. 14 of 2006.

³⁷¹ Ibid, s. 14(1) (c) states: ‘Subject to subsection (2), no person shall undertake an HIV test in respect of another person except... (c) if, in the opinion of the medical practitioner who wishes to undertake the

This position is a violation of the right to privacy and personal integrity of the HIV positive worker. Section 5(4) of the Employment Act³⁷² also authorises employers to undertake pre-employment tests on prospective workers and workers on the basis of the “inherent requirements of a job”.³⁷³ This exercise of the legislative power by Parliament is defined by section 76(2) of the Constitution,³⁷⁴ which seems to sanction the enactment of laws that violate fundamental rights.³⁷⁵ HIV/AIDS does not offend public defence, public safety, public order, public morality, public health. HIV/AIDS is not a public health issue but an infection transmitted through direct contact of a mucous membrane or the blood stream with a bodily fluid containing HIV, such as blood, semen, vaginal fluid and breast milk.³⁷⁶ Kenyan Parliament has, therefore, no legal basis

HIV test, the other person has a disability by reason of which he appears incapable of giving consent, with the consent of- (i) a guardian of that person; (ii) a partner of that person; (iii) a parent of that person; or (iv) an adult offspring of that person; *Provided that a medical practitioner may undertake the HIV test if the persons referred to in paragraphs (i), (ii), (iii) and (iv) are either absent or are unwilling to give consent (emphasis added).*”

³⁷² Employment Act No. 11 of 2007, above, note 14.

³⁷³ Constitution of the Republic of Kenya, above, note 2, s. 82(5) states: “Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to race, tribe, place of origin or residence or other local connection, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.”

³⁷⁴ Section 5(4) of the Employment Act No. 11 of 2007, above, note 14, presupposes that before the employer can declare that a worker cannot satisfy the inherent requirements of a job, for instance on the basis of the worker’s health status, the employer must have investigated the health status of the worker; plainly put, the employer must have infringed the privacy of the worker for the purposes of determining whether the worker has the requisite health status to meet the inherent job requirements. Such infections that would affect the health status of a worker is HIV/AIDS, and considering the stereotypes surrounding HIV/AIDS infection, Parliament has inadvertently authorised employers to infringe the privacy of HIV positive workers in the disguise of ascertaining that they are capable of meeting the inherent job requirements.

³⁷⁵ Having stated that Parliament was guided by section 76(2) of the Constitution of Kenya in enacting section 5(4) of the Employment Act No. 11 of 2007 as well as section 14(1) (c) of the HIV and AIDS Prevention and Control Act No. 24 of 2006, the two provisions were therefore enacted for purposes of “public defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, the development and utilisation of any other property in such a manner, as to promote public benefit or for the purposes of promoting the enjoyment of the right to privacy by other people.”

³⁷⁶ Albertyn S. & Rosengarten D. (1993). HIV and AIDS: Some Critical Issues in Employment Law in *South African Journal of Human Rights Law*. Available at <http://www.heinonline.id=93print=12ext=pdf>, accessed last on July 15, 2009. See also San Francisco AIDS Foundation (2006). How AIDS is spread. Available at <http://www.sfaf.org/aid101/transmission.html>, accessed last on August 28, 2009.

for enacting a statute that would infringe the right of privacy of an HIV positive person. The enactment of the HIV and AIDS Prevention and Control Act, 2006 and the Employment Act 2007³⁷⁷ create a basis for the infringement to the right to privacy of the individual³⁷⁸.

4.2.1.3 **Inhuman and degrading treatment and the Constitution**

An action is inhuman and degrading if it has the effect of grossly humiliating and debasing the recipient, forcing the recipient to act against his will and conscience, inciting fear and anguish and forcing the recipient to commit or omit an act.³⁷⁹ In common parlance, inhuman and degrading treatment is similar to the breach of one's dignity.³⁸⁰

Section 74 of the Constitution prohibits subjecting a person to inhuman and degrading treatment. The section provides:

"(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Kenya on 11 December, 1963"

³⁷⁷ Employment Act No 11 of 2007 and HIV and AIDS Prevention and Control Act No. 24 of 2006.

³⁷⁸ Ibid.

³⁷⁹ Lauterpatcht E. et al. (1997). *International Law Reports*. Llandysul, Britain: Gorner Press, p. 187. According to the authors, "there is a consensus among international law publicists that utter disregard of the due process of the law such as discriminatory application of law or other intentional affliction of physical or mental suffering constitutes cruel, inhuman or degrading treatment." See page 188.

³⁸⁰ While equating inhuman and degrading treatment to breach of one's right to dignity, the High Court of Kenya, in *Marete v. Attorney General* (1987) KLR 690 at 692, stated: "Man's humanity to man makes countless thousands mourn. The founding fathers of this Nation, in the hopes of lessening the number of mourners, enacted section 74 of the Constitution, which reads "(1) No person shall be subject to torture or to inhuman or to inhuman or degrading punishment or other treatment." The Constitution of the Republic is not a toothless bulldog nor is it a collection of pious platitudes...section 74 of the Constitution might have been enacted because this Nation was eager to uphold the dignity of the human person and to provide remedies against those who wield power."

From the foregoing, the right to dignity can only be violated on the strength of the force of law.³⁸¹ It would be a violation of a worker's dignity to undergo an HIV test as a precondition for employment or for continued employment. The Kenyan High Court has in the past held that dismissing or suspending a person from employment is in itself inhuman and degrading treatment. The Court, in *Marete v. Attorney General*,³⁸² stated:

*"I have no doubt that to subject a person to 2½ years without pay and without work is mental torture and inhuman and degrading treatment. Such treatment becomes even more reprehensible when inflicted upon a married man with 4 children...Had these proceedings invoked section 73 of the Constitution which forbids the holding of a person in servitude, the Court would have no hesitation in holding that the plaintiff had been in servitude for the period of two and a half years as well."*³⁸³

From the foregoing, access to employment is closely intertwined with the preservation of the dignity of the individual. Where an employment opportunity is pegged on the HIV status of an individual, persons found to be HIV positive and eventually denied employment on that basis are therefore subjected to inhuman and degrading treatment.

4.2.1.4 Enforcement of fundamental rights and freedoms

Where the right of an HIV positive worker is breached in the workplace, section 84 of the Constitution allows such a worker to approach the High Court for redress. Section 84(1) of the Constitution states:

³⁸¹ Constitution of the Republic of Kenya, above, note 2, s. 74(2) states: "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963"

³⁸² *Marete vs. Attorney General* (1987) KLR 690.

³⁸³ *Ibid.* In this case, the plaintiff was a worker in the Ministry of Agriculture and Livestock Development where he had served for thirteen years. Following an attempt by a section of Kenya's armed forces to overthrow the government on August 1, 1982, the Office of the President asked the Permanent Secretary in the Ministry of Livestock Development to dismiss the plaintiff for disloyal behaviour. On December 15, 1982, the District Livestock Development Officer in charge of Wajir, where the plaintiff was stationed, purported to dismiss the plaintiff and on January 25, 1983, the Permanent Secretary informed the plaintiff that he was suspended and that he would receive no pay during his suspension. The plaintiff brought this suit in which he claimed that his suspension was unlawful and that he had been subjected to torture and inhuman and degrading treatment during his suspension."

“(1) Subject to section (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”³⁸⁴

In enforcement of the fundamental rights and freedoms of the individual, the High Court has powers to issue such orders that would ensure the preservation of the rights and freedoms of the applicant.³⁸⁵ The orders issued by the High Court can apply even to officers of the Government if such orders are necessary for the enforcement of the fundamental rights and freedoms of the individual, contrary to the argument that an injunction does not apply against orders of officers of Government.³⁸⁶ A person aggrieved by the decision of the High Court has a right of appeal to the Court of Appeal of Kenya.³⁸⁷

³⁸⁴ Above, note 322, s. 84(6) states: “The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court).”

³⁸⁵ Ibid, s. 84(2) states: “(2) The High Court shall have original jurisdiction:

(a) to hear and determine an application made by a person in pursuance of sub-section (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of sub-section (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 70 to 83 (inclusive).”

³⁸⁶ In *B v. Attorney General* (2004) KLR 431 at 447, 448, the High Court of Kenya stated:

“The provisions of section 84(2) give clear power to this Court to ensure that constitutional rights and freedoms are upheld. To do that, the Court is given power to “make such orders, issue writs and issue such directions as it may consider appropriate”. In the light of this clear power, there is no justification whatsoever to state that this Court has no power to issue an injunction against officers of the Government if that remedy is necessary for the enforcement of fundamental rights and freedoms under the Constitution. In fact, the statement that no injunction can be issued against officers of the Government has no support in the practice of this Court.”

³⁸⁷ Above, note 329, s. 84(7) states: “A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right.”

Whereas section 84 of the Constitution establishes the High Court as a Constitutional Court, the justice system in Kenya is so rigorous and expensive that it is not easy for any person to access the court.³⁸⁸ Considering the desperate economic conditions of most HIV positive workers or prospective workers, the right to judicial redress under section 84 of the Constitution quite often ends up as a paper right, not tenable to an ordinary Kenyan citizens. The level of legal illiteracy is high in Kenya,³⁸⁹ and it is therefore difficult for any ordinary citizens to enforce their fundamental rights and freedoms.³⁹⁰ Advocates who enjoy the right of audience before the courts of law,³⁹¹ charge high professional fees.³⁹²

4.2.2 The Employment Act³⁹³

In the year 2007, Kenyan Parliament enacted four new labour statutes³⁹⁴ which repealed all previous labour laws in the country.³⁹⁵ All of the new labour statutes came into force

³⁸⁸ For instance, in *J.A.O vs. Homepark Caterers Ltd & 2 Others* (2004) eKLR, above, note 360, it took the input of civil societies and other human rights groups in support of the plaintiff for the plaintiff to enforce her right against discrimination contrary to section 82 of the Constitution and her right to privacy under section 76 of the Constitution. Left alone, the plaintiff would have despaired in enforcing her right owing to the exorbitant court fees and professional charges by advocates.

³⁸⁹ According to the Law Society of Kenya website, there are a total of 7000 advocates in Kenya, serving a population of over 36 million Kenyans. See The Law Society of Kenya (2009). *Members Directory*. Available at http://www.lsk.or.ke/members_directory.php, accessed last on August 29, 2009.

³⁹⁰ Penal Code (Cap 63) Laws of Kenya, s. 7.

³⁹¹ Advocates Act (Cap 16) Laws of Kenya, s. 31 states: "(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction. (2) Any person who contravenes subsection (1) shall— (a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and (b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and (c) in addition be guilty of an offence.

³⁹² Ojwang J. & Salter D. (Vol. 34, No. 1: 1990). "The Legal Profession in Kenya," in *Journal of African Law*, (Cambridge: Cambridge University Press), p. 9-26. According to the author, advocates are perceived in Kenya to be exorbitant due to the poor economic situation in Kenya.

³⁹³ Above, note 14.

³⁹⁴ The new labour statutes include the Employment Act No. 11 of 2007; the Labour Relations Act No. 14 of 2007; The Labour Institutions Act No. 12 of 2007; and the Occupational Health and Safety Act No. 15 of 2007.

³⁹⁵ The previous labour laws that were repealed by the new statutes include the Employment Act (Cap. 226) Laws of Kenya; the Trade Unions Act (Cap. 233) Laws of Kenya; the Trade Disputes Act (Cap. 234) Laws of Kenya; the Workmen's Compensation Act (Cap. 236) Laws of Kenya; and the Factories Act (Cap. 514) Laws of Kenya.

in December 2007. In making provisions on various employment matters, it would be expected that the laws should have made comprehensive provisions addressing emerging HIV/AIDS challenges in the labour sector. However, only some of the new statutes make very little reference to HIV/AIDS. Employment issues arising as a result of HIV/AIDS challenges, therefore, still remain largely unaddressed by the labour laws in Kenya.³⁹⁶

The Employment Act protects HIV positive workers by prohibiting unfair termination of employment on the basis of HIV/AIDS or disability.³⁹⁷ The Act defines disability in section 2 as:

“...a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapacity, which impacts adversely on a person’s social and economic participation.”

On the basis of its legal definition, disability is understood in Kenya to include temporary mental or physical disability resulting from HIV status. Such ground, *per se*, does not constitute a valid ground for denial of employment or termination of employment, unless the employer can show or prove that the disability makes an individual incapable of performing employment in issue.³⁹⁸ Lacking under the Employment Act is the requirement for instructions, training and counselling prior to dismissal of a worker on the basis of HIV status or disability. The affected worker is thus denied an opportunity for adjustment or re-adjustment to the employment in

³⁹⁶ See also Dwasi J. (2009). *The Human Right to Work in the Era of HIV and AIDS*. Nairobi: Law Africa Publishers, p. 107.

³⁹⁷ Above, note 14, s. 46.

³⁹⁸ *Ibid*, s. 45 states: “(2) A termination of employment by an employer is unfair if the employer fails to prove—(b) that the reason for the termination is a fair reason— (i) related to the worker’s conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and (c) that the employment was terminated in accordance with fair procedure...(5) In deciding whether it was just and equitable for an employer to terminate the employment of a worker, for the purposes of this section, a labour Officer, or the Industrial Court shall consider...(b) the conduct and capability of the worker up to the date of termination.” See sections 45(2) (b) (i) & (ii), and section 45(5) (b).

issue, where such need is necessary on the basis of the mental or physical impairment of the worker.

The employment relationship in Kenya is based on the contract of service,³⁹⁹ whose particulars are unilaterally drawn by the employer, and in which the worker's participation is limited to consenting to the laid down particulars of employment. Section 9(2) of the Act states:

“An employer who is a party to a written contract shall be responsible for causing the contract to be drawn up and stating particulars of employment and that the contract of employment is consented to in accordance with subsection (3)

(3) For the purpose of signifying his consent to a written contract of service, a worker may—

(a) Sign his name thereof, or

(b) Imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.”

By failing to involve a worker in the drawing of the contract of service, the provisions of section 9(2) of the Employment Act envisage that once the employer draws the contract of service, the worker only has the option of accepting the terms of employment as drawn by the employer.

The Act prohibits an employer from discriminating against a worker or a prospective worker on the grounds of their HIV status. Under section 5(3):

“(3) No employer shall discriminate directly or indirectly, against a worker or prospective worker or harass a worker or prospective worker-

a) on grounds of race, colour, sex language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

³⁹⁹ Ibid, s. 8 states: “The Provisions of this Act shall apply to oral and written contracts.”

in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment..."⁴⁰⁰

The requirement for non-discrimination of a worker on the basis of his HIV status was reinforced by the High Court of Kenya in *JAO V Home Park Caterers Ltd & 2 Others*,⁴⁰¹ where the Court averred that termination of employment only on the ground of the worker's HIV status is unlawful. This High Court decision is a positive precedent as it shows that Kenyan courts are sensitive to discrimination of workers on the basis of their HIV status. Poverty level in Kenya, however, inhibits many victims of discrimination from seeking redress in court in case of such discrimination. In *JAO vs. Home Park Caterers Ltd et al*, for instance, it took the input of civil societies and other human rights groups⁴⁰² to argue the case as the plaintiff was a destitute. In the absence of adequate assistance to victims of discrimination on the basis of HIV status at the workplace, such victims may not by themselves have the capacity to enforce their rights within the contemporary Kenyan legal framework.

Section 5(4) of the Act precludes allegations of non-discrimination where a person is denied employment because of an affirmative action, "inherent requirement of a job," national employment policy, or in the interest of state security.⁴⁰³ The Act does not also apply to the members of the Armed Forces, Kenya Police, Kenya Prisons Service, Administration Police Force, and National Youth Service.⁴⁰⁴ This leaves room for denial of employment in the specified areas on account of HIV status. The Employment Act

⁴⁰⁰ Ibid, s. 5(3).

⁴⁰¹ Above, note 360.

⁴⁰² Federation of Women Lawyers (FIDA), Kenya Chapter, and International Commission of Jurists (ICJ), Kenya Section.

⁴⁰³ Ibid, s. 5(4) states: "(4) It is not discrimination to— (a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace; (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job; (c) employ a citizen in accordance with the National employment policy; or (d) restrict access to limited categories of employment where it is necessary in the interest of state security. It is notable that under section 44 of the Act, it is prohibited for an employer to summarily dismiss a worker, unless the worker has breached the contract of service. Also, under section 45, it is prohibited to unfairly terminate an employment relationship."

⁴⁰⁴ Ibid, s. 3(2).

expressly states that it is not discriminatory to restrict access to limited categories of employment where it is necessary in the interest of state security.⁴⁰⁵ The Act, however, does not identify the limited categories of employment envisaged, nor does the Act give indicators as to what would legally constitute interest of state security in relation to employment. This legislative gap can be exploited by employers to the disadvantage of HIV positive workers by denying the workers access to employment.

Also, it is an unfair labour practice under section 46(g) of the Employment Act to terminate the employment of a worker on the basis of HIV status or disability.⁴⁰⁶ Workers in certain occupations are however excluded from the protection of non discrimination on the basis of their HIV status. The workers include members of the Armed Forces, Kenya Police and members of the Kenya National Youth Service.⁴⁰⁷ If such exclusions were to be maintained and employers were free to dismiss certain categories or classes of workers, or workers in certain occupations with HIV/AIDS, many government departments and private sector businesses in Kenya would have to close because of the high prevalence of HIV/AIDS in Kenya.⁴⁰⁸

4.2.3 Labour Relations Act⁴⁰⁹

This is a statute that provides for the registration, regulation, management and democratisation of trade unions and facilitation of the enjoyment of the freedom of association as constitutionally provided under section 80 of the Constitution.⁴¹⁰ The

⁴⁰⁵ Ibid, s. 5(4) (d).

⁴⁰⁶ Ibid, s. 46(g) states, "The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty...a worker's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability."

⁴⁰⁷ Ibid, s. 3(2) states: "This Act shall not apply to— (a) the armed forces or the reserve as respectively defined in the Armed Forces Act; (b) the Kenya Police, the Kenya Prisons Service or the Administration Police Force; (c) the National Youth Service; and (d) an employer and the employer's dependants where the dependants are the only workers in a family undertaking."

⁴⁰⁸ Dwasi J., above note 395, p. 108.

⁴⁰⁹ Above, note 332.

⁴¹⁰ Above, note 2, s. 80 states: "(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for

right to organise and bargain collectively is the right of worker associations to collectively negotiate, as workers, with employers, on terms and conditions of work, including wages, health, safety and leave.⁴¹¹

Section 4 of the Act confers upon a worker⁴¹² the freedom to join or leave a trade union, as a mechanism for protecting the collective interests of the workers in employment relationships.⁴¹³

Sections 5(1)⁴¹⁴ and 5(2) of the Labour Relations Act⁴¹⁵ prohibit employers from discriminating against workers on the basis of their formation, membership or

the protection of his interests. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; (c) that imposes restrictions upon public officers, members of a disciplined force, or persons in the service of a local government authority; or (d) for the registration of trade unions and associations of trade unions in a register established by or under any law, and for imposing reasonable conditions relating to the requirements for entry on such a register (including conditions as to the minimum number of persons necessary to constitute a trade union qualified for registration, or of members necessary to constitute an association of trade unions qualified for registration, and conditions whereby registration may be refused on the grounds that another trade union already registered or association of trade unions already registered, as the case may be, is sufficiently representative of the whole or of a substantial proportion of the interests in respect of which registration of a trade union or association of trade unions is sought), and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

⁴¹¹ Dwasi J., above, note 395, p. 101.

⁴¹² In its section 2, the Act defines a worker as a person on salary or wages. The section defines a worker as "a person employed for wages or a salary and includes an apprentice and an indentured learner." The effect of these provisions is to limit the protection of bargaining powers to persons already employed. Prospective workers remain at the discretion of employer in determining the terms of employment or lack of it.

⁴¹³ Above, note 332, s. 4 states: "(1) Every worker has the right to - (a) participate in forming a trade union or federation of trade unions; (b) join a trade union; or (c) leave a trade union. (2) Every member of a trade union has the right, subject to the constitution of that trade union to - (a) participate in its lawful activities; (b) participate in the election of its officials and representatives; (c) stand for election and be eligible for appointment as an officer or official and, if elected or appointed, to hold office; and (d) stand for election or seek for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in accordance with the provisions of this Act or a collective agreement. (3) Every member of a trade union that is a member of a federation of trade unions has the right, subject to the constitution of that federation to - (a) participate in its lawful activities; (b) participate in the election of any of its office bearers or officials, and (c) stand for election or seek for appointment as an office bearer or official and, if elected or appointed, to hold office."

participation in their trade union activities. In Kenya, therefore, all workers, regardless of their HIV status have the right and are at liberty to form and join associations, groups or organisations of their choice for the purpose of advancing all of their work related interests. ⁴¹⁶ No worker should therefore be barred from forming or joining any association for the purpose of advancing his/her work related rights or interest on account of his/her HIV status.

The right of association of HIV positive workers is a positive move under the Act. It is through exercise of such right that workers, including those with HIV/AIDS could collectively negotiate favourable terms of employment with employers. It is through such negotiation that workers, impacted by HIV/AIDS could, directly or through their representatives, present facts about HIV/AIDS to allay fears, assumptions and stereotypes regarding their competence and continued participation in work. Through collective bargaining, HIV positive workers can negotiate in their favour for reasonable accommodation that may be necessary and useful to both workers in particular circumstances and employers. HIV positive workers could also, without disclosing their HIV status, present valuable information that would allow adequate consideration of the possibility of an HIV infected worker to continue working; how those infected may be facilitated or assisted to continue working without interruption; the need for workplace intervention such as ARV therapy to improve the health of those infected to

⁴¹⁴ Ibid, s. 5(1) states: “(1) No person shall discriminate against a worker or any person seeking employment for exercising any right conferred in this Act.”

⁴¹⁵ Ibid, s. 5(2) states: “(2) Without limiting the general protection conferred by sub-section (1), no person shall do, or threaten to do any of the following - (a) require a worker or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union; (b) prevent a worker or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act; (c) dismiss or in any other way prejudice a worker or a person seeking employment - (i) because of past, present or anticipated trade union membership; (ii) for participating in the formation or the lawful activities of a trade union; (iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or (iv) for failing or refusing to do something that a worker may not lawfully permit or require a worker to do.”

⁴¹⁶ Notable, though, is that section 3 of the Labour Relations precludes the application of the Act to “any person in respect of his employment or service - (a) in the armed forces, or in any reserve force thereof; (b) in the Kenya Police, the Administrative Police Force, the Kenya Prisons Service and the National Youth Service, or in any reserve force or service thereof.”

keep them in employment; and ways to allow the worker rest and leisure through limitation of working hours and thus avoiding overworking or straining workers infected with HIV.

4.2.4 HIV and AIDS Prevention and Control Act⁴¹⁷

This is a statute that provides for measures for the prevention, management and control of HIV/AIDS.⁴¹⁸ Principally, the Act promotes public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV/AIDS. Part II of the Act obliges the Government to promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV/AIDS through a comprehensive nationwide educational and information campaign conducted by the Government through its ministries, departments, authorities and other agencies such as institutions of learning, workplaces and amongst communities.⁴¹⁹ Specifically, section 13 of the Act protects human rights and civil liberties of a person suspected or known to be infected with HIV/AIDS by way of majorly prohibiting compulsory HIV testing. The section states:

*“(1) Subject to this Act, no person shall compel another to undergo an HIV test.
(2) Without prejudice to the generality of sub-section (1), no person shall compel another to undergo an HIV test as a precondition to, or for the continued enjoyment of-
a) Employment...”*

The section is therefore imperative in outlawing pre-employment HIV testing requirements. Under section 22, it is prohibited to:

“...disclose any information concerning the result of an HIV test or any related assessment to any other person except-

⁴¹⁷ Above, note 369.

⁴¹⁸ Ibid, preamble states: “An Act of Parliament to provide measures for the prevention, management and control of HIV and AIDS, to provide for the protection and promotion of public health and for the appropriate treatment, counselling, support and care of persons infected or at risk of HIV and AIDS infection, and for connected purposes”

⁴¹⁹ Ibid, Part II.

a) *with the written consent of that person;*

...

c) *If that person is unable to give written consent, with the oral consent of that person or with the written consent of the person with the power of attorney for that person...*⁴²⁰

However, in instances where the disclosure of the HIV/AIDS statistics “could not reasonably be expected to lead to the identification of the person to whom it relates,”⁴²¹ the Act permits disclosure about the HIV status of a person.

Further, the Act outlaws discrimination against persons infected with or perceived to be infected with HIV/AIDS. Section 31 of the Act states:

“(1) Subject to sub-section (2), no person shall be:

a) *denied access to any employment for which he is qualified; or*

b) *transferred, denied promotion or have his employment terminated, on the grounds only of his actual, perceived or suspected HIV status.*

⁴²⁰ Ibid, S. 13.

⁴²¹ *ibid*, s. 22 states: “(1) No person shall disclose any information concerning the result of an HIV test or any related assessments to any other person except- (a) with the written consent of that person; (b) if that person has died, with the written consent of that person’s partner, personal representative, administrator or executor; (c) if that person is a child, with the written consent of a parent or legal guardian of that child: Provided that any child who is pregnant, married, a parent or is engaged in behaviour which puts other persons at risk of contracting HIV may in writing directly consent to such disclosure; (d) if that person is unable to give written consent, with the oral consent of that person or with the written consent of the person with power of attorney for that person; (e) if, in the opinion of the medical practitioner who undertook the HIV test, that person has a disability by reason of which the person appears incapable of giving consent, with the written consent, in order, of- (i) a guardian of that person; (ii) a partner of that person; (iii) a parent of that person; or (iv) an adult offspring of that person; (f) to a person, being a person approved by the Minister under section 16, who is directly involved in the treatment or counselling of that person; (g) for the purpose of an epidemiological study or research authorized by the Minister; (h) to a court where the information contained in medical records is directly relevant to the proceedings before the court or tribunal; (i) if the person to whom the information relates dies, to the registrar of births and deaths pursuant to section 18 of the Births and Deaths Registration Act; or (j) if authorized or required to do so under this Act or under any other written law. (2) Subsection (1) shall not apply to a disclosure of statistical or other information that could reasonably be expected to lead to the identification of the person to whom it relates.

(2) Sub-section (1) shall not apply in any case where an employer can prove, on application to the Tribunal that the requirements of the employment in question are that a person be in a particular state of health or medical or clinical condition.” ⁴²²

The Act seeks also to eradicate conditions that aggravate the spread of the HIV infection. It is prohibited to recklessly and/or knowingly infect another person with HIV.⁴²³ Section 25 of the Act establishes the HIV and AIDS Tribunal⁴²⁴ with both original and appellate jurisdiction in cases of violation of the Act.⁴²⁵ The Tribunal has powers of a magistrate court to award damages in respect of any proven financial loss or in respect of pain and suffering and psychological suffering as a result of the discrimination against the complainant.⁴²⁶

⁴²² Ibid, s. 31.

⁴²³ Ibid, s. 24 states: “...(2) A person who is and is aware of being infected with HIV or who is and is aware of carrying HIV shall not, knowingly and recklessly, place another person at the risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected...”

⁴²⁴ Ibid, s. 25 states: “(1) There is hereby established a Tribunal to be known as the HIV and AIDS Tribunal which shall consist of members appointed by the Attorney General as follows-

- a) a chairman who shall be an advocate of the High Court of not less than seven years standing;
- b) two advocates of the High Court of not less than five years standing;
- c) two medical practitioners recognised by the Medical Practitioners and Dentist Board as specialists under the Medical Practitioners and Dentist Act; and
- d) two persons having such specialised skill or knowledge necessary for the discharge of the functions of the Tribunal...”

⁴²⁵ Ibid, s. 26 states: “(1) The Tribunal shall have jurisdiction-

- a) to hear and determine complaints arising out of any breach of the provisions of this Act;
- b) to hear and determine any matter or appeal as may be made to it pursuant to the provisions of this Act; and
- c) to perform such other functions as may be conferred upon it by this Act or by any other written law being in force...”

(2) The jurisdiction conferred upon the Tribunal under sub-section (1) excludes criminal jurisdiction.”

⁴²⁶ Ibid, s. 27 states:

“(1) On the hearing of a complaint or an appeal made pursuant to section 26, the Tribunal shall have all the powers of a subordinate court of the first class to summon witnesses, to take evidence upon oath or affirmation and to call for the production of books and other documents...”

(7) Upon any complaint or appeal being made to the Tribunal under this Act, the Tribunal may-

- d) without prejudice to the generality of paragraph (b), make an order-
 - i) for the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question;
 - ii) directing that specific steps be taken to stop the discriminatory practice;

The creation of the HIV and Aids Tribunal under section 25 of the Act is a positive move to expedite and facilitate access to justice by HIV positive workers at a relatively cheap cost. In particular, section 27(2) of the Act provides:

“Where the Tribunal considers it desirable for the purpose of minimising expense or avoiding delay or for any other special reason, it may receive evidence by affidavit and administer interrogatories and require the person to whom the interrogatories re administered to make full and true reply to the interrogatories within the time specified by the Tribunal.”⁴²⁷

A complainant of discrimination on the basis of HIV status in the workplace, therefore, needs not hire the exorbitant services of a lawyer, or concern themselves with the complex court procedures in the ordinary courts. However, the composition of the Tribunal does not sufficiently protect the interests of HIV positive workers. The Attorney General is under no legal duty to appoint representatives of HIV/AIDS civil rights groups or workers to sit in the Tribunal.⁴²⁸ This denies the Tribunal the essential first hand experiences of victims of discrimination at the workplace on the basis of their HIV status.⁴²⁹ Moreover, the Tribunal has jurisdiction commensurate to that of the

-
- iii) for the maintenance of the status quo of any matter or activity which is the subject of the complaint or appeal until the complaint or appeal is determined;
 - iv) requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal’s order.”

⁴²⁷ Ibid, s 27(2).

⁴²⁸ Ibid, s. 25 states: “(1) There is hereby established a Tribunal to be known as the HIV and AIDS Tribunal which shall consist of members appointed by the Attorney General as follows- (a) a chairman who shall be an advocate of the High Court of not less than seven years standing; (b) two advocates of the High Court of not less than five years standing; (c) two medical practitioners recognized by the Medical Practitioners and Dentists Board as specialists under the Medical Practitioners and Dentists Act; and (d) two persons having such specialized skill or knowledge necessary for the discharge of the functions of the Tribunal.(2) At least two of the persons appointed under subsection (1) (a), (b) and (c) shall be women..”.

⁴²⁹ According to Dwasi J. (2009), above, note 395, p. 223, “HIV positive workers are better placed to make input on issues affecting their health and work performance because as the old adage goes, “the wearer of the shoe knows better where it hurts.” Those who know where the shoe hurts also know what needs to be done to make life tolerable and employment duties workable. In this regard, there is need to greatly involve people living with HIV/AIDS in developing workable solutions to the challenges facing workplace as a result of HIV/AIDS by those with the most intimate experience and knowledge.”

subordinate court of the first class. This only means therefore that even the awards of the tribunal under section 27(7) of the Act⁴³⁰ are hinged upon the jurisdiction of subordinate court and not beyond. Considering that denying a person an employment opportunity is inhuman and degrading,⁴³¹ it is highly doubtful that an award of the HIV and AIDS Tribunal to an HIV positive worker dismissed from work or prospective worker denied an employment opportunity would make any significant improvement to the livelihood of the worker or the prospective worker.

4.2.5 Industrial Property Act⁴³²

The Industrial Property Act was passed into law in June 2001, and assented to by the President on 27 July 2001. The regulations under this Act have since been gazetted.⁴³³ In essence, the Act repeals the 1989 Industrial Property Act. The major objective of the 2001 Act is to enable thousands of Kenyans to get affordable treatment with generic antiretroviral drugs without necessarily flouting patent laws.⁴³⁴

⁴³⁰ Above, note 320, s. 27(7) states: “(7) Upon any complaint or appeal being made to the Tribunal under this Act, the Tribunal may- (a) confirm, set aside or vary the order or decision in question; (b) make such other order as may be appropriate in the circumstances; (c) without prejudice to the generality of paragraph (b), make an order- (i) for the payment of damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering as a result of the discrimination in question; (ii) directing that specific steps be taken to stop the discriminatory practice; (iii) for the maintenance of the status quo of any matter or activity which is the subject of the complaint or appeal until the complaint or appeal is determined; (iv) requiring the respondent to make regular progress reports to the Tribunal regarding the implementation of the Tribunal’s order.”

⁴³¹ In *Marete vs. Attorney General* (1987) KLR 690, the High Court of Kenya stated: “I have no doubt that to subject a person to 2½ years without pay and without work is mental torture and inhuman and degrading treatment. Such treatment becomes even more reprehensive when inflicted upon a married man with 4 children...Had these proceedings invoked section 73 of the Constitution which forbids the holding of a person in servitude, the Court would have no hesitation in holding that the plaintiff had been in servitude for the period of two and a half years as well.”

⁴³² Above, note 333.

⁴³³ Kenya Gazette Supplement No. 31 of 12 April, 2002.

⁴³⁴ In Kenya, patents are granted by the Kenya Industrial Property Institute (KIPI) and regionally, through African Regional Industrial Property Office (ARIPO). “Patents are official documents that are issued by sovereign power to grant privileges that give inventors exclusive rights to make, use and mend their inventions

Before a regional patent enters into force in a member state, the member state has a right within her territory to accept or veto under the doctrine of “Public Interest..” Thus, there is nothing like an international patent. What exists is the Patent Co-operation Treaty (PCT) filing system. This system enables users to make single patent application, but is later facilitated to obtain protection in any member

In Kenya, the majority of people infected with HIV/AIDS cannot afford drugs⁴³⁵ as the drugs are patented.⁴³⁶ By investing exclusive rights in a patent holder, patents give inventors a monopoly for a set period of time. Without competition from other manufacturers to drive the price down, patent holders can charge high prices for their inventions.⁴³⁷ In this way, patent rights function as an incentive for corporations to invest in researching new drugs and to reveal their inventions, as well as a reward for their “costly” investment.⁴³⁸ Governments reduce the cost of patented goods by way of parallel importing⁴³⁹ and compulsory licensing. Compulsory licensing of drugs is a government grant of permission to third parties to manufacture generic versions of medicines under patent without the holder’s authorisation.⁴⁴⁰ In practice, the introduction of several manufacturers of the drug promotes market competition and

states. See Olembo N. (2001), *Patent Rights and the Rights to Public Health*, Paper presented at the National conference on Laying a Basis for HIV/AIDS Legislation held at Safari Park Hotel, Nairobi on 5-9 December, 2001.

⁴³⁵ See UNICEF (2001), *Sources and Prices of Selected Drugs and Diagnostics for People Living with HIV/AIDS*, available at http://www.unaids.org/acc_access/access_drugs/Sources0501.doc, accessed last on August 11, 2008.

⁴³⁶ According to D’Amato A. & Estelle E (1997), *International Intellectual Property Law*, p.3 a patent is a grant issued by a national government conferring the right to exclude others from making, using, or selling the invention within the national territory. The prohibitively expensive drug prices are the result of strong patent protection, which governments must provide under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). While TRIPS is mostly favourable to the rich industrialised world and its multinational corporations, it provides some flexibility for states to address their public health needs by allowing public interest exceptions to patent protection. Through the use of controversial practices such as compulsory licensing and parallel importing, drug prices in developing countries feasibly could be reduced by ninety percent. See Kara M. (2001), *Can South Africa Fight AIDS? Reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement*, p. 273; Gathii J. (2001). “Constructing Intellectual Property Rights and Competition Policy Consistently with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers, in *Florida Law Review* p. 759.

⁴³⁷ Theodore C. (2001), *Innovation and Access: The Role of Compulsory Licensing in the Development and Distribution of Anti-retroviral drugs*, pp.202-04.

⁴³⁸ Bomach K. (2001), *Can South Africa Fight AIDS? Reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement*, p.282.

⁴³⁹ Parallel importing is the government importing of patented drugs from other countries where those same patented drugs are cheaper. It is distinct from importing of generics. Patented drugs may be cheaper elsewhere because drug companies sell their products at varying prices in different countries, and because different countries offer varying levels of patent protection. Where a country has a weaker level of patent protection, competition from generics drives down the price of patented drugs. See Nash D. (2000). ‘south Africa’s Medicines and Related Substances Control Amendment Act of 1997’ in *Technology Law Journal*, p.15; Bomach K. (2001). *Can South Africa Fight AIDS? Reconciling the South African Medicines and Related Substances Act with the TRIPS Agreement*, p.198-99.

⁴⁴⁰ *Ibid*, pp. 276-77.

reduces the drug's price. As one scholar puts it, compulsory licensing can cut the price of some drugs up to ninety percent.⁴⁴¹

Kenya, like other developing countries, has attempted to reduce the prices of Anti-retroviral drugs by compulsory licensing.⁴⁴² Section 53 (1) (b) of the Industrial Property Act, 2001 grants a patent holder:

*"...within the limits defined in section 58, to preclude any person from exploiting the patented invention in the manner referred to in section 54..."*⁴⁴³

Section 54 defines exploitation of the patent to mean:

*"(a)... (1) Making, importing, offering for sale, selling and using the product; or
(ii) stocking such products for the purposes of offering it for sale, selling or using the product;
b) When the patent has been granted in respect of a process:
(i) using the process; or
(ii) doing any of the acts referred to in subsection (a), in respect of a product obtained directly by means of the process..."*

The rights to a patent can be limited:

*"...by the provisions on compulsory licences for reasons of public interest or based on interdependence of patents and by the provisions on State exploitation of Patented inventions..."*⁴⁴⁴

The foregoing provisions, therefore, rely on "public interest" as the basis for a State exploitation of a patented invention. The Act, however, does not define "public interest" nor does the Act give indicators as to what would constitute "public interest."

⁴⁴¹ Gathii J. (Vol. 27: 2001), "Constructing Intellectual Property Rights and Competition Policy Consistent with Facilitating Access to Affordable AIDS Drugs to Low-End Consumers," in *Florida Law Review*, p.759.

⁴⁴² Above, note 333, s. 53.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid, s. 58(5).

Further, the Industrial Property Act has not defined the place of TRIPS in relation to the Industrial Property Act, particularly section 58 (5) on limitation of Patent Rights.

Kenyan Courts have had the opportunity to rule on a matter in which a pharmacology professor at the University of Nairobi misrepresented the effectiveness of an alleged cure for HIV and AIDS. In *Kenya AIDS Society vs. Arthur Obel*,⁴⁴⁵ the appellant, a non-governmental organisation with the objective to lobby for the recognition and protection of people with HIV/AIDS not to be discriminated against at work or in social, cultural, educational or such like institutions whatsoever by reason of their condition, alleged that the respondent, through print media, held out to the members of the public that he had found a cure for HIV/AIDS by the name "Pearl Omega". The members of the appellant organisation bought the drug in large numbers and used the same, just to find it ineffectual against HIV/AIDS. In an appeal for damages against the appellant, the Court of Appeal of Kenya declined to grant the appeal, arguing that the appellant and its members were not bound to buy "Pearl Omega" and that it had the duty to inform its members not to buy the drug. This was an unfortunate judgement, considering the qualifications of the appellant adorned himself with in public that would reasonably lead any ordinary member of the public to believe that he was competent to discover a cure for HIV/AIDS.⁴⁴⁶ Through the doctrine of holding out, the appellant would have been held liable for his actions.

4.2.6 National Code of Practice on HIV and AIDS in the Workplace⁴⁴⁷

The Code is a reference point in addressing the challenges brought into occupational setting by the effects of HIV/AIDS. It seeks to guide each sector and organisation on

⁴⁴⁵ *Kenya AIDS Society vs. Arthur Obel*, Civil Appeal No. 188 of 1997.

⁴⁴⁶ The appellant identified himself as, "...a Professor of Medicine in the University of Nairobi and a Specialist Physician, Researcher and a trained Clinical Pharmacologist."

⁴⁴⁷ Government of Kenya (July 2009). *National Code of Practice on HIV and AIDS in the Workplace*. Nairobi: Government Printers.

developing their own workplace and wellness programmes to facilitate a planned and effective response in the management and prevention of HIV/AIDS at the workplace.⁴⁴⁸

Paragraph 6.4 of the Code prohibit screening of workers either as a precondition to retaining employment or otherwise. The paragraph provides that HIV infection does not constitute lack of fitness to carry out employment.⁴⁴⁹ In providing for observance of the right to confidentiality, the Code, in paragraph 6.5 states that HIV related personal information may be disclosed in a manner consistent with, among other laws, the Employment Act, 2007, and the HIV and AIDS Prevention and Control Act, 2006.⁴⁵⁰ The Code therefore inherits the weaknesses under the Employment Act, 2007 and HIV and AIDS Prevention and Control Act in regard to confidentiality of HIV related information. For instance, the Code inherits the discretion given to medical practitioners under section 14(1)(c) of the HIV and AIDS Prevention and Control Act, 2006 to conduct HIV testing even without the person's or his guardian's consent.⁴⁵¹ Under paragraph 6.6, the Code prohibits non-discrimination of workers on the basis of their HIV positive status, and emphasises the need to observe the dignity of the HIV positive workers. The paragraph states:

⁴⁴⁸ Orago A. (July 2009). "Statement from the Director of the National AIDS Control Council," in *National Code of Practice on HIV and AIDS in the Workplace*. Nairobi: Government Printers, p. xiii.

⁴⁴⁹ Above, note 446, paragraph 6.4 states: "It is against the law to subject any current or prospective staff to HIV testing to inform employment decisions. HIV screening ought not to be a precondition for employment because HIV infection does not, in itself, constitute lack of fitness to carry out duties. All persons should be provided with a fair and equitable opportunity for employment, skills development, promotion and other benefits irrespective of their HIV status. The infected staffs have the same rights and privileges as everyone else while in the organisation's employment."

⁴⁵⁰ Ibid, paragraph 6.5 states: "There is no justification for asking job applicants or any workers to disclose their HIV related personal information, and co-workers are not obliged to reveal such personal information about colleagues. Access to personal data relating to worker's HIV status is bound by the rules relating to confidentiality consistent with the Employment Act, 2007, the National HIV Testing and Counselling Guidelines and the ILO Code of Practice on the Protection of Worker's Personal Data..."

⁴⁵¹ Above, note 320, s. 14(1) (c) states: "Subject to subsection (2), no person shall undertake an HIV test in respect of another person except... (c) if, in the opinion of the medical practitioner who wishes to undertake the HIV test, the other person has a disability by reason of which he appears incapable of giving consent, with the consent of- (i) a guardian of that person; (ii) a partner of that person; (iii) a parent of that person; or (iv) an adult offspring of that person; *Provided that a medical practitioner may undertake the HIV test if the persons referred to in paragraphs (i), (ii), (iii) and (iv) are either absent or are unwilling to give consent (emphasis added).*"

“A non-discriminatory environment at the workplace encourages optimal staff cohesion and motivation, and helps improve productivity and performance of the organisation. A human rights approach to HIV/AIDS in the workplace is necessary is a necessary step to creating an environment where all are treated with dignity and respect irrespective of their HIV status. A non-discriminatory and non-stigmatising culture at the workplace encourages meaningful involvement of people living with HIV in the fight against the pandemic...”

Unfortunately, the Code is a policy measure by the Government and can only be a guide to the concerned stakeholders, but not binding upon them. The principle of priority of laws as codified under section 3 of the Judicature Act⁴⁵² does not even mention policy decision as a source of law in Kenya. Thus the Code cannot be relied on, per se, to enforce any violation of the rights of the HIV positive workers within the labour sector. To this extent, the Code is only a policy document and therefore the force of law.

4.3 CONCLUSION

Kenyan legal framework on HIV/AIDS in the labour sector does not sufficiently protect HIV positive workers. In terms of scope, the Constitution does not list HIV/AIDS as a ground for non-discrimination in its section 82.⁴⁵³ The Constitution does

⁴⁵² Judicature Act (Cap 8) Laws of Kenya, s. 3 states: “3. (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with - (a) the Constitution; (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule; (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary. (2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.”

⁴⁵³ Constitution of the Republic of Kenya, above, note 2, s. 82.

not therefore protect HIV positive workers. Other Constitutional provisions such as the provision on the right to confidentiality;⁴⁵⁴ the right against inhuman or degrading treatment;⁴⁵⁵ and the right to life⁴⁵⁶ also do not expressly take cognisance of the need to protect the rights of HIV/AIDS workers in the labour sector. The Kenyan legal framework assumes that an employer and HIV positive worker are equal bargaining parties to an employment contract and confers upon the employer exclusive right to draft the employment contract.⁴⁵⁷ The statutory provisions on non-discrimination of HIV positive workers exclude certain categories of workers from the non-discrimination clause.⁴⁵⁸ More specifically, the following areas are worth addressing in the Kenyan labour sector:

4.3.1 Discrimination in the workplace

HIV positive workers are not sufficiently protected against discrimination in the workplace. The right against discrimination under section 82 of the Constitution of Kenya fails to expressly list HIV or AIDS as a ground against discrimination. It is therefore elusive to invoke the Constitution in a bid to protect HIV positive worker against discrimination.⁴⁵⁹ Other statutory provisions against discrimination such as the Employment Act⁴⁶⁰ as well as the HIV and AIDS Prevention and Control Act are in themselves self limiting. For instance, whereas section 5(3) of the Employment Act⁴⁶¹ prohibits non-discrimination on the basis of HIV/AIDS, section 5(4) of the Act⁴⁶² does not deem as discriminatory preclusion from employment because of an affirmative action, “inherent requirement of a job,” national employment policy, or in the interest of state security. The Act neither defines any of the listed grounds nor issues guidelines

⁴⁵⁴ Ibid, s. 74.

⁴⁵⁵ Ibid, s. 76.

⁴⁵⁶ Ibid, s. 71.

⁴⁵⁷ Employment Act, above, note 14, s. 9.

⁴⁵⁸ Above, note 14, s. 3(2).

⁴⁵⁹ Above, note 2.

⁴⁶⁰ Employment Act, above, note 14, s 5(3).

⁴⁶¹ Ibid, s. 5(3).

⁴⁶² Ibid, s. 5(4).

for determining what constitutes the listed grounds. Further, section 3(2) of the Act precludes the application of the entire Act, including the non-discrimination clause in respect to the armed forces or the reserve as respectively defined in the Armed Forces Act; the Kenya Police, the Kenya Prisons Service or the Administration Police Force; the National Youth Service; and an employer and the employer's dependants where the dependants are the only workers in a family undertaking.⁴⁶³

The creation of the HIV and AIDS Tribunal under section 25 of the HIV and AIDS Prevention and Control Act is a positive move in ensuring that HIV positive workers are not discriminated against.⁴⁶⁴ However, the composition and mandate of the Tribunal is self defeating. First, the Tribunal has both original and appellate jurisdiction. The twin jurisdiction denies an appellant the opportunity to be heard by an impartial and independent Tribunal, which in itself is a rule of natural justice.⁴⁶⁵ When the Tribunal sits as an Appeal Court, it sits to hear an appeal against its very judgement. Secondly, the Act does not provide for representation of the interests of HIV positive workers before the tribunal as the Act does not oblige the Attorney General to appoint as a member of the Tribunal, representatives of HIV positive workers.⁴⁶⁶ This denies the Tribunal hands on experience as to the plight of HIV positive workers. Further, parties to an employment contract are in most instances unequal. Such that, when a contract of service under section 9(2) of the Employment Act, and the worker appends his/her signature, the assumption under the Act is that the worker has consented to the contract of service. The Act is not alive to ulterior circumstances such as economic pressure on the worker, or ulterior factors such as coercion by the employer that takes away the free

⁴⁶³ Ibid, s. 3(2).

⁴⁶⁴ Above, note 320.

⁴⁶⁵ Ibid, s. s. 26 states: "(1) The Tribunal shall have jurisdiction-

- a) to hear and determine complaints arising out of any breach of the provisions of this Act;
- b) to hear and determine any matter or appeal as may be made to it pursuant to the provisions of this Act; and
- c) to perform such other functions as may be conferred upon it by this Act or by any other written law being in force..."

⁴⁶⁶ Ibid.

will of the worker in entering into an employment under the service of contract. As Westen notes, “a person’s choice is the product of such competence to assess one’s interests, knowledge of the circumstance, freedom from pressure and motivation. It is indistinguishable from the choice that a person would have made for herself if she had possessed the option of making her choice under such conditions of competence, knowledge and freedom.”⁴⁶⁷ Such that the fact that the Employment Act has not qualified what would constitute a voluntary contract between a worker and an employer, the Act is deficient in protecting the interest of HIV positive worker in the labour sector.

4.3.2 Breach of the right to privacy

Section 76(1) of the Constitution grants every person in Kenya the right to privacy, the High Court of Kenya has in the past recognised in *J.A.O vs. Homepark Caterers Ltd & 2 Others*⁴⁶⁸ that subjecting a worker to an HIV test is a breach to one’s privacy. However, such a right to privacy may be limited by Parliament under section 76(2) of the Constitution on the grounds of “public defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, the development and utilisation of any other property in such a manner, as to promote public benefit or for the purposes of promoting the enjoyment of the right to privacy by other people.”⁴⁶⁹ HIV/AIDS is not a threat to either of the listed grounds, whereas Kenyan Parliament has enacted legislations that take away the privacy rights of HIV positive workers. For instance, section 14(1) (c) of the HIV and AIDS Prevention and Control Act,⁴⁷⁰ empowers a medical practitioner to perform an HIV test on a person even without the consent of the person to be tested and/or his

⁴⁶⁷ Westen P. (2004). *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, (Burlington, USA: Ashgate Publishing Company), p. 340.

⁴⁶⁸ *J.A.O v. Homepark Caterers Ltd & 2 Others* (2004) eKLR. Above, note 359.

⁴⁶⁹ Above, note 2, s. 76(2).

⁴⁷⁰ Above, note 369.

guardians.⁴⁷¹ Also, section 5(4) of the Employment Act⁴⁷² authorises employers to distinguish prospective workers on the basis of the “inherent requirements of a job”. Section 5(4) of the Employment Act No. 11 of 2007 presupposes that before the employer can declare that a worker cannot satisfy the inherent requirements of a job, for instance on the basis of the worker’s health status, the employer must have investigated the health status of the worker.⁴⁷³ Paragraph 6.5 of the National Code of Practice on HIV and AIDS in the Workplace follows the practice under the Employment Act and HIV and AIDS Prevention and Control Act in prohibiting breach of confidentiality of HIV positive workers, thus the Code does not offer any better guidance in respect of privacy rights of HIV positive workers.

4.3.3 Violation of the right to dignity

As the High Court of Kenya observed in *Marete vs. Attorney General*,⁴⁷⁴ section 74 of the Constitution was enacted because Kenya was eager to uphold the dignity of the human person and to provide remedies against those who wield power. This dream is yet to be realised in respect of HIV positive workers, as section 74 of the Constitution of Kenya is yet to list HIV/AIDS as a ground upon which one’s right to dignity should not be breached. Legislations such as the HIV and AIDS Prevention and Control Act, 2006, sections 25 and 31⁴⁷⁵ as well as Employment Act, 2007, section 5(4),⁴⁷⁶ still permit the screening of blood of workers for purposes of determining their HIV status where the “inherent requirements of a job” as determined by the employer. Neither of the Acts

⁴⁷¹ Ibid, s. 14(1) (c) states: ‘subject to subsection (2), no person shall undertake an HIV test in respect of another person except... (c) if, in the opinion of the medical practitioner who wishes to undertake the HIV test, the other person has a disability by reason of which he appears incapable of giving consent, with the consent of- (i) a guardian of that person; (ii) a partner of that person; (iii) a parent of that person; or (iv) an adult offspring of that person; *Provided that a medical practitioner may undertake the HIV test if the persons referred to in paragraphs (i), (ii), (iii) and (iv) are either absent or are unwilling to give consent* (emphasis added).’

⁴⁷² Above, note 14.

⁴⁷³ Ibid.

⁴⁷⁴ *Marete v. Attorney General* (1987) KLR 690 at 692.

⁴⁷⁵ Above, note 369, ss. 25, 31.

⁴⁷⁶ Above, note 4, s. 68.

define what constitutes an “inherent requirement of a job” thereby subjecting an HIV positive worker to potentially discretionary decisions of the employer.

4.3.4 **Lack of the right to work**

Access to employment is not expressly recognised under the Kenyan Constitution. Section 80 of the Constitution only provides for the right to association and to join or leave a trade union depending on one’s volition. Trade unions are formed to advocate for the rights of workers and under section 2 of the Labour Relations Act, 2007, the definition of ‘workers’ is limited to persons already employed. Persons seeking employment cannot therefore purport under the Kenyan legislation to properly form trade unions to advocate for their rights. Sections 5(1)⁴⁷⁷ and 5(2) of the Labour Relations Act⁴⁷⁸ prohibit employers from discriminating against workers on the basis of their formation, membership or participation in their trade union activities. In Kenya, therefore, all workers, regardless of their HIV status have the right and are at liberty to form and join associations, groups or organisations of their choice for the purpose of advancing all of their work related interests.⁴⁷⁹ Notable, though, is that section 3 of the Labour Relations Act precludes the application of the Act to any person in respect of his employment or service in the armed forces, or in any reserve force thereof; in the Kenya Police, the Administrative Police Force, the Kenya Prisons Service and the National Youth Service, or in any reserve force or service thereof.⁴⁸⁰ This limitation

⁴⁷⁷ Above, note 332 s. 5(1) states: “(1) No person shall discriminate against a worker or any person seeking employment for exercising any right conferred in this Act.”

⁴⁷⁸ Ibid, s. 5(2) states: “(2) Without limiting the general protection conferred by sub-section (1), no person shall do, or threaten to do any of the following - (a) require a worker or a person seeking employment not to be or become a member of a trade union or to give up membership of a trade union; (b) prevent a worker or person seeking employment from exercising any right conferred by this Act or from participating in any proceedings specified in this Act; (c) dismiss or in any other way prejudice a worker or a person seeking employment - (i) because of past, present or anticipated trade union membership; (ii) for participating in the formation or the lawful activities of a trade union; (iii) for exercising any right conferred by this Act or participating in any proceedings specified in this Act; or (iv) for failing or refusing to do something that a worker may not lawfully permit or require a worker to do.”

⁴⁷⁹ Ibid.

⁴⁸⁰ Above, note 332, s. 3.

precludes a huge chunk of workers, including HIV positive workers in such departments from enjoying the benefits of the Labour Relations Act.

4.3.5

Access to affordable Anti-retroviral drugs

Notwithstanding that Kenya is a developing state, the constitution does not provide for the right to access affordable drugs or medication for the Kenyan largely poor population. Section 71 of the Constitution provides for the right to life, but access to affordable drugs, which essentially sustain the very life, especially in respect to persons infected with HIV virus, is not contemplated by the Constitution of Kenya. The same trend is followed by the HIV and AIDS Prevention and Control Act, 2006, which has no single provision on access to affordable Anti-retroviral drugs. Whilst section 58 of the Kenya Industrial Property Act, 2001 confers upon the government the power to grant compulsory licences in respect of patented products and processes in the interest of public interest, the phrase “public interest” is not defined. It is, thus, unclear whether the Kenyan government considers access to Anti-retroviral drugs as a matter of public interest. Other options for facilitating affordability of patented products such as parallel importation are not contemplated by the Industrial Property Act, 2001. Inventors may therefore still monopolise the prices of patented Anti-retroviral drugs in Kenya, with the risk as to inflated prices of the drugs, notwithstanding the high poverty levels in Kenya.

CHAPTER 5

COMPARATIVE ANALYSIS: PROTECTION OF HIV POSITIVE WORKERS IN SOUTH AFRICA

5.1 INTRODUCTION

Discrimination against HIV positive workers is not unique to Kenya. Countries the world over have realized the seriousness of the phenomenon and as a result, many statutes and Court decisions touching on this question now exist. Discrimination on the basis of HIV status violates the rights to liberty, privacy, equality, dignity and other related rights. Human rights law is relevant not only to the treatment of the infected workers, but also to wider policies that influence their vulnerability to HIV/AIDS. This is because populations that are discriminated against, marginalised and stigmatised are at a greater risk of contracting the disease.

Whereas international human rights law has indeed influenced domestic laws and policies regarding HIV/AIDS in the workplace, certain states have enacted legal frameworks that give effect to the international instruments on the protection of HIV positive workers.

This chapter undertakes a critical analysis of the legal framework governing the HIV positive worker in South Africa. It analyses the country's legislative provisions and judicial trends. The conclusion of this chapter compares the South African legal regime with Kenya's legal regime on the protection of the HIV positive worker in respect of:

- Discrimination of HIV positive workers in the workplace;
- Right to privacy of HIV positive workers;
- Right to dignity of HIV positive workers;
- The role of culture in discrimination of HIV positive workers;
- Right to work of HIV positive workers; and
- Access to affordable Anti-retroviral drugs.

For the purposes of this thesis, particularly in relation to South African legislation, the phrase “worker” includes “employee.”

5.2 LEGISLATION

South Africa has a number of laws devoted to the protection of HIV positive worker. Whereas some of the laws do not expressly mention HIV/AIDS in the workplace, their provisions, in effect impact on the status of HIV positive workers. These laws include:

5.2.1 Constitution of the Republic of South Africa⁴⁸¹

The Constitution of the Republic of South Africa was promulgated on December 18, 1996 and came into force on February 4, 1997. The Constitution affirmed three fundamental changes in South Africa that had been initiated by the Interim Constitution of 1994. Firstly, it brought about an end to the racially qualified Constitutional order that had existed before its enactment.⁴⁸² Secondly, the doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy and a Bill of Rights was incorporated to safeguard human rights.⁴⁸³ Thirdly, the strong central government of the past was replaced by a system of government with federal elements.⁴⁸⁴ One of the Interim Constitution’s principal purposes was to set out the procedures for the negotiation and drafting of a “final” Constitution. The Constitution

⁴⁸¹ No. 108 of 1996.

⁴⁸² University of Pretoria (2006), *Human Rights Protected? Nine Southern African Country Reports on HIV, AIDS and the Law*, p. 215.

⁴⁸³ See Christof Heyns (Ed) (1998), *Human Rights Law in Africa*, p.340. See also the Preamble to the Constitution of the Republic of South Africa, which states: “We, the people of South Africa, recognise the injustices of our past; honour those who suffered for justice and freedom in our land; respect those who have worked to build and develop our country; and believe that South Africa belongs to all who live in it, united in our diversity. We, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to- heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; improve the quality of life of all citizens and free the potential of each person; and build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations...” .

⁴⁸⁴ Currie & J. De Waal (2002). *The Bill of Rights Handbook*, p. 2.

is the supreme law of South Africa, binding the legislature, the executive, the judiciary and all organs of state.⁴⁸⁵

The Constitution obliges all levels of Government to respect, protect, promote and fulfil the rights,⁴⁸⁶ thereby divesting such levels of government of any authority to make any laws or policies that take away the guarantees under the Constitution. Specifically, Parliament cannot enact any legislation that defeats the very provision of the Constitution.

The human rights norms enshrined in the Constitution are justiciable.⁴⁸⁷ The Bill of Rights guarantees civil and political rights as well as economic, social and cultural rights. Numerous provisions in the Bill of Rights impact directly and indirectly on HIV/AIDS. Among the provisions in the Bill of Rights that provide for civil and political rights include section 9 on the right to equality; section 10 on human dignity; section 11 on the right to life; section 12 on the right to freedom and security of the person; section 13 on the right against slavery, servitude and forced labour; section 14 on the right to privacy; section 15 on the freedom of religion, belief and opinion; section 16 on the freedom of expression; section 17 on the right to assembly; section 18 on the

⁴⁸⁵ Above, note 473, s. 8 states: "(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. (3) When applying a provision of the Bill of Right to a natural or juristic person in terms of subsection (2), a court- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitations is in accordance with section 36(1). (4) A juristic person is entitled to the rights in the Bill of rights to the extent required by the nature of the rights and the nature of that juristic person."

⁴⁸⁶ Ibid, s. 7 states: "(1) This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency. (2) This Constitution shall bind all legislative, executive and judicial organs of State at all levels of Government. (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

⁴⁸⁷ Ibid, s. 38 provides for the enforcement of rights and states: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

freedom of association and section 19 on political rights. Socio-economic rights are provided for in section 23 on labour relations; section 24 on environmental rights; section 26 on the right to housing; section 27 on the right to health care, food, water and social security; and section 29 on the right to education.

Section 9 of the Constitution provides for the right to equality before the law and equal protection of the law without any discrimination on the grounds of:

*“...race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.”*⁴⁸⁸ (Emphasis added)

The prohibition of discrimination on the grounds of disability prohibits non-discrimination on the basis of HIV status.⁴⁸⁹ Section 10 of the Constitution provides for the right to dignity. The section states:

“Every person shall have the right to respect for and protection of his or her dignity”

The right to dignity includes the right not to be subjected to inhuman and degrading treatment. Thus, employment practices, such as conducting mandatory pre-employment testing, undermine the dignity of the worker or the prospective worker. According to Black’s Law dictionary, dignity refers to “a state of being noble.”⁴⁹⁰ That is, it is the capacity of a person to acquire and retain respect from the right thinking members of the society. Considering the stigma that is still inherent in HIV/AIDS related infections in the African societies, and the myths surrounding its mode of transmission, it is evident that persons who are proved to be infected with HIV/AIDS risk losing their dignity.

⁴⁸⁸ Constitution of the Republic of South Africa, s. 9.

⁴⁸⁹ Various jurisdictions, like the United States of America, have defined disability to include HIV status. The provision therefore lays a good basis for non-discrimination of HIV workers at the workplace. See *Bragdon vs. Abbott* (1998) 524 U.S. at 638; *Murphy vs. United Parcel Service, Inc.* (1999) 527 U.S. 517; and *Sutton vs. United Airlines, Inc.* (1999) 527 U.S. 471.

⁴⁹⁰ Bryan A Garner, *Black’s Law Dictionary*, p. 488.

South African courts have also developed jurisprudential arguments when interpreting the existing laws in the context of workers with HIV/AIDS. In *Irvin & Johnson Ltd V. Trawler & Line Fishing Union & Others*,⁴⁹¹ the employer applied to the labour court to conduct voluntary and anonymous HIV testing for his workers, arguing that such a testing did not fall under section 7(2) of the *Employment Equity Act*⁴⁹² that prohibits mandatory testing. The employer argued that it required the information on HIV/AIDS prevalence in its workforce to assess the potential impact of HIV/AIDS on the workforce and therefore enable the employer to engage in appropriate manpower planning so as to minimise the impact of HIV/AIDS mortalities and HIV and AIDS related conditions. The employer also argued that it needed to put in place adequate support structures to cater for the needs of workers living with HIV/AIDS; and to facilitate the effective implementation of proactive steps to prevent workers from becoming infected with HIV/AIDS.

The court considered the distinction between compulsory testing and voluntary testing and noted that compulsory testing meant the imposition by the employer of a requirement that workers or prospective workers submit to the testing on the pain of some or other sanction or disadvantage if they refuse to consent. This is contrasted with voluntary testing where it is up to the worker to decide whether he or she wishes to be tested and where no disadvantages attach to a decision by the worker not to submit to the testing. Further, it found that HIV testing is anonymous if it does not enable the employer to know the HIV status of a particular worker. Accordingly, because the employer had applied for a voluntary and anonymous testing, the Labour Court held that such an application did not fall within the ambit of section 7 of the *Employment Equity Act* which applied to compulsory testing.

⁴⁹¹ *Irvin & Johnson Ltd vs. Trawler & Line Fishing Union & Others* (2002) C1126.

⁴⁹² *Employment Equity Act* No. 55 of 1998, s. 7(2) states: "Testing of a worker to determine that worker's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50(4) of this Act."

The authority of the Labour Court was therefore immaterial before the employer could conduct the voluntary and anonymous testing.⁴⁹³ The Court's judgement, though failed to expressly prohibit use of worker HIV data to the detriment of the worker. This would be in acknowledgement of the unequal bargaining powers between an employer and the worker, in which case, the worker almost always accedes to HIV testing in fear of losing his job if he declines.

Also, in *Joy Mining Machinery vs. National Union of Metal Workers of South Africa and Others*,⁴⁹⁴ Joy Mining Machinery applied to conduct HIV testing among its staff in order to plan for an effective HIV/AIDS prevention strategy and evaluate its training and awareness programme. The application was in terms of section 7(2) of the *Employment Equity Act*, which states:

*"Testing of a worker to determine that worker's HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act."*⁴⁹⁵

The requirement for the testing was to be voluntary, and no adverse consequences would meet a person who declined to participate in the HIV testing by the company. Because the proposed testing was to be voluntary and anonymous and was not to be used for discriminatory purposes, the court granted the application.

⁴⁹³ It is arguable, though, that the Court assumed a number of long term effects of its judgement on HIV workers or prospective workers. Considering that the employer in the case wanted to utilise that data on HIV/AIDS prevalence at the workplace to evaluate the correlation between HIV/AIDS and the workforce, if the data would indicate that HIV retards viability of the workplace, then it is arguable that the employer would find a ground for declining to employ HIV positive prospective worker, or even terminating services of HIV positive workers on the premise that nature of his work may not be performed by HIV positive workers.

⁴⁹⁴ *Joy Mining Machinery vs. National Union of Metal Workers of South Africa and Others* (2002) (23) ILJ 391 (SALC 2002).

⁴⁹⁵ Employment Equity Act, No. 55 of 1998, s. 50(4) of the Act states: "If the Labour Court declares that the medical testing of a worker as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to- (a) the provision of counselling; (b) the maintenance of confidentiality; (c) the period during which the authority for any testing applies; and (d) the category or categories of jobs or workers in respect of which the authorisation for testing applies."

The right to life is guaranteed under section 11 of the Constitution. In South Africa, the right to life can only be limited if such limitation is reasonable and justifiable in an open democratic process. Broadly interpreted, the right to life includes the right of access to the means of staying alive. More particularly, section 27 of the Constitution provides for the right to health care, food, water and social security. The section states:

- “(1) Everyone has the right to have access to-*
- (a) health care services, including reproductive health care;*
 - (b) sufficient food and water; and*
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.*
- (2) The State must take responsible legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
- (3) No one may be refused emergency medical treatment.”*

The South African Constitutional Court has considered access to anti-retroviral drugs to be a right envisaged under the right of access to health care as provided for under the Constitution. In *Minister of Health and Others v. Treatment Action Campaign and Others*,⁴⁹⁶ the South African Constitutional Court interpreted the right of access to health care to include the government’s responsibility to make antiretroviral and other HIV related drugs available to the public. The Government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified nevirapine as its drug of choice for this purpose. The programme imposed restrictions on the availability of nevirapine to test sites, thereby limiting access. The respondents contended that the restrictions were unreasonable when measured against the Constitution, which commands the State and all its organs to give effect to the rights guaranteed by the Bill of Rights. They stated thus:

⁴⁹⁶ *Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) (5) SA 717.

“...At issue here is the right given to everyone to have access to public health care services and the right of children to be afforded special protection. The rights are expressed in the following terms in the Bill of rights...

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights...”⁴⁹⁷

Thus, the issue in question was whether the South African Government’s measures to provide access to health care services for its population fell short of its obligation under the Constitution. Quite interesting at this stage is the conclusion by the Court that the State has an inevitable obligation to provide basic health care services to its population. The obligation is not dependent on the availability of resources to the state, and it is no less guarantee than the right to life of the state population, because, if anything, it is irrational to prioritise the right to life, when the means of facilitation of the right to life such as access to basic health care services is sidelined. Without access to health care services, the right to life itself is not tenable, and the very provision of the Bill of Rights defeated. In its judgement, the Court of Appeal held that the Government has a constitutional responsibility to ensure access to health services to combat transmission of HIV.

In *Van Biljon and Others vs. Minister of Correctional Services and Others*,⁴⁹⁸ the applicants were all HIV positive prisoners. They approached the Constitutional Court, claiming that they have a right to medical treatment when they reach symptomatic stage of the diseases.⁴⁹⁹ They also claimed that they are entitled to receive at State expense, appropriate anti-viral medication individually or in combination. They based their claim on section 35(2) of the Constitution of the Republic of South Africa:

“(2) Everyone who is detained, including every sentenced prisoner, has the right...

⁴⁹⁷ See United Nations Development Programme (UNDP) (2008). *Compendium of Key Documents Relating to Human Rights and HIV in Eastern and Southern Africa*, p. 222. Pretoria: Pretoria University Law Press.

⁴⁹⁸ *Van Biljon and Others vs. Minister of Correctional Services and Others*, (1997) (4) SA 441 (C).

⁴⁹⁹ Whose CD4+ count are less than 500/ml.

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment..."

In its obiter dicta, the court noted that lack of funds by the state cannot be an excuse to a prisoner's constitutional claim to adequate medical treatment. That once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment, and it would be no defence for the government that it cannot afford to provide that form of medical treatment.

HIV positive persons are entitled to appropriate medical advice. In *Treatment Action Campaign et al. vs. Matthias Rath et al*,⁵⁰⁰ the applicants alleged that the respondents carried out activities which the applicants believed were unlawful and placed at risk the health and lives of people with HIV/AIDS. The applicants alleged that the respondents sold and distributed medicines which were not registered; sold products containing scheduled substances; made false and unauthorised statements about efficacy of their medicines in treating or preventing AIDS; conducted unauthorised and unethical clinical trials on people with AIDS; and made false statements that Anti-retroviral virus (ARVs) are ineffective in treating AIDS, and are poisonous and they discouraged people with HIV/AIDS from taking medicines which are an essential element of an effective treatment programme. The Appeal Court granted an order restraining the respondents from selling, distributing or misleading the public about the treatment of HIV/AIDS, and ordered that the respondents pay the applicants' costs.⁵⁰¹

Under section 14, the Constitution grants the right to privacy. The section states:

⁵⁰⁰ *Treatment Action Campaign et al. vs. Matthias Rath et al* (2005) SA.

⁵⁰¹ This case creates a new impetus in protection of HIV positive from misleading medical instructions. It will be remembered that when Kenya was faced with the same issue in *Obel's* case, the Kenyan Court opted to support medical scientists even in the face of outright misleading of the public in regard to cure for HIV and AIDS.

“Every person shall have the right to his or her personal privacy, which includes the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.”⁵⁰²

In South Africa, the Constitutional Court has confirmed the legal requirement that the HIV status of a worker should be confidential and be disclosed only with the written consent of the worker. It is therefore the duty of the relevant doctor to ensure that the results of the medical test are not divulged to anyone, including fellow workers of the patient. The extent of preserving the confidentiality of HIV positive persons was discussed in *Jansen van Vuuren vs. Kruger*.⁵⁰³ A unanimous bench of five appellate judges upheld an appeal in breach of confidentiality claim against a doctor who told two golf course companions of the HIV status of his patient, Barry Mc Geary. He did so in breach of professional guidelines on the topic, without consulting with his patient and without establishing whether there was any need to inform his golfing partners.⁵⁰⁴

Mr Justice Harms held that the duty of a physician to respect the confidentiality of his patient was not merely ethical but was also legal. However,

“...the right of the patient and the duty of the doctor are not absolute but relative...one is, as always, weighing up conflicting interests and...a doctor may be justified in disclosing his knowledge “where his obligations to society would be of greater weight than his obligations to the individual...”⁵⁰⁵

⁵⁰² Constitution of the Republic of South Africa, 1997, s. 14.

⁵⁰³ *Jansen van Vuuren vs. Kruger* (1993) (4) SA 842 (A). In the case, Mc Geary approached his doctor, the defendant, for an HIV test. He was informed some days later that it had proved positive for antibodies to the virus. McGeary was extremely distressed. He was also concerned about confidentiality. His doctor gave him an assurance that it would be respected. The very next day, the doctor joined two medical colleagues from the same town in a golf game. Both knew McGeary socially and had treated him in the past. During the golf game, the defendant mentioned to them that McGeary had tested positive for HIV. Within days, the whole town seemed to know. Mc Geary felt victimized and ostracized. Suffering enormous psychological stress, he instituted action against the doctor for damages for injurious breach of confidentiality. He died in September 1991, while the trial was in progress. The trial judge rejected the claim.

⁵⁰⁴ Ibid.

⁵⁰⁵ Ibid.

The weighing process on whether or not to disclose the patient's medical information is not without dangers. An American writer has drawn attention to how alluring courts may find the temptation "to throw aside the notion that the chances of harm to the person with HIV and AIDS matters at all in risk assessment." He states in part:

*"...Freed of the need to consider probability, it is disturbingly easy for a judge to paint a person with HIV as the embodiment of disaster..."*⁵⁰⁶

From a public health point of view, the judgement implicitly endorsed a number of conclusions.

- a) The Court emphasised that the reasons for enforcing medical confidentiality were two-fold. On the one hand, the court stated that confidentiality protects the privacy of the patient. On the other hand, it performs a public interest function.⁵⁰⁷

- b) The Court inferred the probability of occupational transmission of HIV. Many have rationalised disregard for confidentiality in relation to HIV by relying on the risk of transmission, however small the occupational setting. As Burris has pointed out:

*"...if possibility of death, however unlikely, is always enough to create a compelling reason to test or disclose, people with HIV will always lose..."*⁵⁰⁸

⁵⁰⁶ Burris S. (1993), "Testing, Disclosure and the Right to Privacy" in *AIDS Law Today- A New Guide for the Public*, pp. 135-37.

⁵⁰⁷ The court emphasised the importance of public health of respecting individual confidentiality, viz: "In the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited as a source of education, for future individual patients "will not come forward if doctors are going to squeal on them". Consequently, confidentiality is vital to secure public as well as private health, for unless those infected come forward, they cannot be counselled and self-treatment does not provide the best care..."

⁵⁰⁸ Above, note 507, p. 137.

The increasing weight of scientific research has shown the argument based on risk of transmission outside a sexual context can be unwarranted and unjustifiable. The court squarely rejected such “unscientific scaremongering”. It accepted instead the expert evidence led by the plaintiff who stated that:

“...Although HIV is “highly infective”, it is far less infectious than many other common viruses. The mode of transmission follows well defined routes.”⁵⁰⁹

- c) Most importantly, the Court accepted that the need for confidentiality in the case of AIDS was especially compelling. By the very nature of the disease, the court noted that it is essential that persons who are at risk should seek medical advice or treatment. Disclosure of the condition has serious personal and social consequences for the patient. This is because s/he is often isolated or rejected by others, which may lead to increased anxiety, depression and psychological conditions that tend to hasten the onset of AIDS.

Also, in *N. M. and Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae)*,⁵¹⁰ the names of three women living with HIV were published in a book without their consent.⁵¹¹ The Constitutional Court held that the disclosure violated the women’s rights to privacy and dignity, and infringed on their rights to keep their HIV status confidential. The Court relied on the case of *Bernstein and Others v. Bester NNO and Others*, where privacy was stated to encompass the right of a person to live his life as he pleases. The court stated:

“A very high level of protection is given to the individual’s intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that,

⁵⁰⁹ Supra note 504.

⁵¹⁰ *N. M. and Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC).

⁵¹¹ A biography of Ms Patricia de Lille entitled “*Patricia de Lille*” authored by Ms Charlene Smith and published by New Africa Books (Pty) Ltd disclosed the HIV status of the women. A sequel to that publication was an action for damages in the Johannesburg High Court. The High Court dismissed with costs the action against Ms Smith and Ms de Lille.

in regard to this most intimate core of privacy, no justifiable limitation thereof can take place..."

The Court's decision can be applauded for being emphatic in expressly denouncing limitation of a person's right to privacy. The violation of the right has been a common place at the workplace, where employers use their vantage positions to influence workers to concede to HIV testing, with an implied risk of loss of employment if the worker declines.

Further, in *South African Human Rights Commission v. SABC & Another*,⁵¹² the complaint concerned a broadcast disclosing the identity of a minor, as well as his HIV positive status, without masking the minor's face or digitally fragmenting his image. The Court held that,

"...since there was a compelling societal interest that the AIDS pandemic be communicated to the public, and since the parents had granted their permission, the broadcasters had not contravened the Code..."

Considering that HIV is not communicable, it is unclear what public interest can justify violation of people's right to privacy.

The Constitution of the Republic of South Africa recognises the right to employment in any sector of the economy. A person can freely engage in economic activity and pursue a livelihood anywhere in the economy. This Constitutional guarantee is essential in limiting or eradicating the employer's discretion in classifying jobs on the basis of "their inherent requirements". Further, the provision links "right to employment" to the source of livelihood, thereby affirming the argument that an employment opportunity is indispensable to guaranteeing the right to life, as it is from the employment that a worker gets the means by which to facilitate his/her right to life.

⁵¹² *South African Human Rights Commission vs. SABC & Another* (2003) SABCT.

Under section 23(1) of the Constitution, workers have a right to fair labour practices. The section states:

“(1) every person shall have the right to fair labour practices.

The general limitation clause states that the rights under the Bill of Rights can only be derogated from if the derogation is:

“...reasonable, justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right...”⁵¹³

In essence, whereas parliament has the law making duty, it cannot make laws which take away rights conferred by the supreme Constitution. The limitation of Rights by Parliament must be reasonable and justifiable.

5.2.2 Labour Relations Act⁵¹⁴

Enacted on December 13, 1995,⁵¹⁵ the Labour Relations Act gives effect to section 27 of the Constitution by regulating organisational rights of trade unions, facilitating collective bargaining at the workplace, resolution of labour disputes, and promoting worker participation in decision making through the establishment of workplace forums.⁵¹⁶

⁵¹³ Supra note 481, s. 36 states:

“(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

- a) Shall be permissible only to the extent that it is-
 - i) reasonable; and
 - ii) justifiable in an open and democratic society based on freedom and equality; and
- b) shall not negate the essential content of the right in question...

(2) Save as provided for in sub-section (1) or any other provision of this Constitution, no law, whether a rule of Common Law, Customary Law or Legislation, shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter...”

⁵¹⁴ *Labour Relations Act* No. 66 of 1995.

⁵¹⁵ The Act was assented to by the President on November 29, 1995.

⁵¹⁶ *Ibid*, preamble.

The Act prohibits unfair dismissal and unfair labour practices at the workplace. Section 185 thereof grants every worker the right not to be unfairly dismissed and not to be subjected to unfair labour practices.⁵¹⁷ The Act defines dismissal to include an instance where a worker reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or fails to renew it.⁵¹⁸ Dismissal is automatically unfair if it is premised on extraneous considerations such as disability or HIV status of the worker.⁵¹⁹ Under the Act, the definition of the term “worker” is restricted to those on salaries or on wages. Such workers are still subject to the unequal bargaining power between the employer and the prospective worker as such workers are not accorded the freedom to join legally recognised associations to advocate for their interests at the workplace.

5.2.3 Basic Conditions of Employment Act⁵²⁰

The broad objective of the Act is to give effect to fair labour practices referred to in section 23(1) of the Constitution and as required under the International Labour Organisation.⁵²¹ Effectively, the Act can be said to have domesticated good labour practices as enshrined under the International Labour Organisation Regulations.

⁵¹⁷ Ibid, s.185 states: “Every worker has the right not to be:

- a) unfairly dismissed; and
- b) Subjected to unfair labour practice...”

⁵¹⁸ Ibid, s. 186.

⁵¹⁹ Ibid, s. 187 provides: “(1) A dismissal is automatically unfair if the employer, in dismissing the worker, acts contrary to section 5 or, if the reason for the dismissal is...

(f) that the employer unfairly discriminated against a worker, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

⁵²⁰ Act No. 75 of 1997. The Act was assented to by the President on November 26, 1997.

⁵²¹ Ibid, preamble states:

“(An) Act to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide matters connected therewith.”

The Act entitles every worker to a sick leave cycle, which is a period of 36 months' employment with the same employer immediately following a worker's commencement of employment, or preceding the worker's completion of the worker's prior sick leave cycle.⁵²² During the sick leave, the worker is entitled to an amount of paid sick leave equal to the number of days the worker would normally work during a period of six weeks. An employer is however not required to pay a worker the sick leave if the worker has been absent from work for more than two consecutive days or more than two occasions during an eight week period, and on request by an employer, does not produce a medical certificate stating that the worker was unable to work for the duration of the worker's absence on account of sickness or injury.⁵²³

5.2.4 Employment Equity Act⁵²⁴

The Employment Equity Act was passed, particularly to eradicate employment discrimination.⁵²⁵ It sets to achieve equality in the work place by:

- "a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and*
- b) Implementing affirmative action measures to redress the disadvantages in employment experienced by disadvantaged groups, in order to ensure their equitable presentation in all occupational categories and levels in the workforce."*⁵²⁶

⁵²² Ibid, s. 22.

⁵²³ Ibid, s. 23(1).

⁵²⁴ Employment Equity Act No. 55 of 1998. The Act is however precluded from applying to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service. See *ibid*, s. 4(3).

⁵²⁵ Ibid, preamble states:

"Recognising that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. Therefore, in order to promote the constitutional rights of equality and exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation.

⁵²⁶ Employment Equity, above, note 523, s 2.

To give more meaning to the object of the Act, Section 6 of the Employment Equity Act, 1998, spells out the Act's thrust of prohibition against unfair discrimination thus:

"(1) No person may unfairly discriminate, directly or indirectly, against a worker, in any employment policy or practice, on one or more grounds, including race gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to –

(a) Take affirmative action measures consistent with the purpose of this Act; or

(b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."⁵²⁷

The Employment Equity Act, 1998 at section 6 protects a "worker" against unfair discrimination.⁵²⁸ The protection is extended by section 9 of the Employment Equity Act, 1998 also to applicants for employment.⁵²⁹ Section 6 of the Act is of wide ranging protection in that it provides that "no person" may discriminate. It does not speak only of the employer. However, the definition is arguably limited by the reference to "employment policy or practice". But since the section speaks of "no person", it may be said that it also prohibits discrimination by one worker against another, and this provision is given effect by the Act providing that where one worker alleges a contravention of the Act at the workplace, the alleged contravention must be brought to

⁵²⁷ Ibid, s. 6.

⁵²⁸ The definition of "worker" contained in Section 1 of the Employment Equity Act 1998 is similar to the definition contained in the Labour Relations Act, 1995. Under section 213 of the of the Labour Relations Act, 1995 the term "worker" is defined in two parts as follows:

"Worker means-

(a) Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and

Any other person whom in any manner assists in carrying on or conducting the business of an employer.

⁵²⁹ Employment Equity, above, note 523, s. 9 states: "For purposes of sections 6, 7 and 8, "worker" includes an applicant for employment.

the attention of the employer, who must consult with all the relevant parties to try and eliminate the conduct.⁵³⁰

The Constitutional Court in the landmark case of *Hoffmann vs. South African Airways*⁵³¹ considered the issue of non-discrimination of worker on the basis of HIV status. In this case, Hoffmann applied to South African Airways (SAA) for employment as a cabin attendant. He went through a four-stage selection process and was found, together with 11 other applicants, to be a suitable applicant for employment. The decision was subject to a pre-employment medical examination which included a blood test for HIV. He was found to be clinically fit. However, his blood test showed that he was HIV positive. He was therefore regarded as unsuitable for employment as a cabin attendant and was not employed.

Hoffmann challenged the Constitutionality of the refusal to employ him in the High Court, alleging that the refusal to employ him constituted unfair discrimination and violated his Constitutional right to equality, human dignity and fair labour practices. SAA opposed the application alleging that its flight crew had to be fit for world-wide duty. They had to be inoculated against yellow fever but persons who were HIV positive could react negatively to this vaccine and were not permitted to take it. They could therefore contract yellow fever and pass it on to passengers. SAA alleged that such persons were liable to contract opportunistic diseases. If they fell ill, they would not be able to perform emergency and safety procedures required of them as cabin attendants. SAA also relied on the perceptions of its passengers and the policies of competing airlines.

⁵³⁰ Section 6 of the Employment Equity Act, 1998- If the employer fails to take the steps, and the contravention is proved, the employer will be held liable (even where the employer fails to take the steps, and the contravention is proved, the employer will be held liable (even where the employer did not contravene the Act - say another worker did). The employer can only escape liability for the contravention of other workers if the employer either followed the procedure (that is, consult in an attempt to eliminate) or if the employer can prove that it did all that was reasonably practicable to ensure that the worker would not contravene the Employment Equity Act, 1998.

⁵³¹ *Hoffmann vs. South African Airways* (2000) CCT 17/00.

The Constitutional Court held that at the heart of the prohibition of unfair discrimination is the recognition that under the Constitution of the Republic of South Africa, that all human beings, regardless of their position in the society, must be accorded equal dignity. However, there is prejudice against HIV positive persons, as discrimination against them is a fresh instance of stigmatisation and is an assault on their dignity. The court was satisfied that SAA discriminated against Hoffmann because of his HIV status.⁵³²

Further, section 5 of the Act obliges the employer to take steps that promote equal opportunity at the workplace and to eliminate unfair discrimination in any employment policy or practice. Such discrimination is unfair if it is informed by HIV status of the worker⁵³³. The Act permits medical testing of a worker if the inherent requirements of a job so demands. Section 7 of the Act states:

“(1) Medical testing of a worker is prohibited, unless

a) Legislation permits or requires the testing;

b) It is justifiable in light of medical facts, employment conditions, social policy, the fair distribution of worker benefits, or the inherent requirements of the job (emphasis added).

⁵³² Notable in *Hoffman’s case, ibid*, is that medical evidence showed that not all persons living with HIV cannot be vaccinated against yellow fever or are prone to contracting infectious diseases. It is only those persons whose infection has reached the stage of immuno-suppression and whose CD4+ count has dropped below 350 cells per micro-litre of blood who are vulnerable. Hoffmann was at the asymptomatic stage of infection, but as he was HIV positive, he was automatically excluded from employment as a cabin attendant. Existing cabin attendants were not tested for HIV/AIDS. They could continue to work despite the infection and regardless of the stage of infection. Yet they pose the same health, safety and operational hazards as prospective cabin attendants. SAA did not pay attention to window period involved in a blood test. The Court found that the fact that some persons who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants did not justify the exclusion from employment as cabin attendants of all people living with HIV/AIDS. The Court noted that legitimate commercial requirements are an important consideration in determining whether to employ an individual, but stereotyping and prejudice must not be allowed to creep in under the guise of commercial interests. That people living with HIV/AIDS must not be condemned to “economic death” by the denial of equal opportunity in employment.

⁵³³ *Ibid*, s. 6 states:

“(1) No person may unfairly discriminate, directly or indirectly, against a worker, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth...”

(2) *Testing of a worker to determine the worker's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50(4) of this Act...*⁵³⁴

Whenever it is alleged that a worker is discriminated against within the labour sector, the burden of proving that the discrimination is fair vests entirely with the employer.⁵³⁵ The shifting of the burden of proof to the employer no doubt takes into consideration the prejudiced status of a worker, pitted against an employer.

Notable is that not all forms of discrimination are unfair.⁵³⁶ In the context of employment, when we talk of “discrimination”, we often think of “differentiation” – treating workers differently by including some, excluding others, preferring some workers over others.⁵³⁷ Section 6(2) of the Employment Equity Act, 1998 provides that affirmative action measures that are consistent with the purposes of the Act will not be unfair.⁵³⁸ Further, the Act provides, it will not be unfair, to discriminate based on the inherent requirements of a job.

⁵³⁴ Ibid, s. 7. Section 8 of the Act extends non-discrimination of workers by prohibiting psychometric testing, unless it is scientifically valid and reliable, it can be applied fairly to workers, and if it is not biased against any worker or group.

⁵³⁵ Ibid, s. 11.

⁵³⁶ The wording of both the constitutional protection of equality in Section 9 of the Constitution, 1996 and Section 6 of the Employment Equity Act, leave it open that not all forms of discrimination are in themselves unfair. However, both the provisions provide for a presumption of unfairness once discrimination has been proven – In particular section 11 of the Employment Equity Act, 1998 states that whenever unfair discrimination is alleged in terms of the Act, the employer against whom the allegation is made must establish that it is fair. Put in another way, the person alleging the discrimination does not have to prove the unfairness.

⁵³⁷ There may be a number of reasons for differentiating between workers (such as educational qualifications, experience or security), some of which do not amount to discrimination *strictu sensu*. The test however is whether the act complained of meet the following test: “Whether objectively, the ground [reason] is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. See *Hanksen v. Lane No.1988 (1) SA 300 (cc)*.”

⁵³⁸ See also section 15 of the Act which describes affirmative action measures as those designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer. Some of the affirmative action measures include: (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affects people from designated groups; (b)

In terms of representation of the interests of the worker, the Act establishes the Commission for Employment Equity,⁵³⁹ comprising, among others, representatives of an organised labour.⁵⁴⁰ Members of an organised labour are workers. The Commission advises the Minister who for the time being is responsible for labour, on the codes of good practices, regulations and policies as promulgated by the Minister.⁵⁴¹

5.2.5 Medical Schemes Act⁵⁴²

The Medical Schemes Act, Act No.131 of 1998 came into force on 1 August 1999. The Act was aimed at regulating and reforming private health care providers and insurance providers. Section 24(2)(e) of the Act provides:

“No medical schemes shall be registered under the Act unless the Council is satisfied that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health”.

This provision is fortified by Section 29, which states that:

“The Registrar shall not register a medical scheme under the Section, and no medical scheme shall carry on any business, unless provision is made in its rules for certain matters.”⁵⁴³

measures designed to further diversity in the workplace based on equal dignity and respect of all people; (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are represented in the workforce of a designated employer; (d) measures to ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and measures to retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

⁵³⁹ Ibid, s. 28.

⁵⁴⁰ Ibid, s. 29(2)(a). Other members of the Commission include representatives of organized business and representatives of the State.

⁵⁴¹ Ibid, s. 30. The Commission also awards employers who further the objectives of the Act, and research on norms and benchmarks that set numerical goals in various labour sectors.

⁵⁴² Medical Schemes Act, No. 131 of 1998.

Therefore the Act prohibits health insurers from unfairly excluding people living with HIV/AIDS from health insurance.

With this clear provision, it is apparent that the Medical Schemes Act is intended to regulate the industry by replacing what is commonly known as the principles of risk and exclusion or limitation with principles of community rating and social solidarity.⁵⁴⁴ Put differently, where a person can afford the premiums associated with health insurance, an insurer cannot exclude him or her. Besides, registered members will not be forced to pay higher premiums based on age or health status; rather member contributions will be based on an “average”, which will only increase if the principal member wishes to register additional dependants.⁵⁴⁵ One important factor to note is that all medical schemes in South Africa are legally obliged to adequately and fully fund the treatment for opportunistic infections as part of the mandated basic minimum package of care and treatment.

The Code of practice on Aspects of HIV/AIDS and Employment refers specifically to worker benefits in section 10. It recommends that workers who are ill with AIDS should be treated the same as other workers with comparable life threatening diseases with

⁵⁴³ The terms and conditions applicable to the admission of a person as a member and his or her dependants, which terms and conditions shall provide for the determination of contributions on the basis of income or the number of dependants or both the income and the number of dependants, and shall not provide for any other grounds, including age sex, past or present state of health of the applicant or one or more of the applicants dependants the frequency of rendering of relevant health services to an applicant of one or more of the applicant’s dependants other than for the provision as prescribed.

⁵⁴⁴ Centre for the study of AIDS and the Centre for Human rights (2004), *HIV/AIDS and Human Rights in SADC: HIV/AIDS and Human Rights in South Africa*, University of Pretoria p.31. Available at www.hri.capartners/alp/resource/docs/sa.view99.doc., accessed last on August 30, 2008.

⁵⁴⁵ Webber D. (1999) *AIDS and the Law in South Africa: An overview*, available at www.hri.capartners/alp/resource/docs/sa.view 99.doc., accessed last on August 30, 2008. The author argues that Regulation No.1262 of 20 October, 1999 under the *Medical Schemes Act* provides that HIV - associated diseases are categorized under the prescribed minimum benefits that provide for the compulsory cover of medical and surgical management for opportunistic infections or localized malignancies. The Regulations require a review every two years with the specific focus of developing protocols for the medical management of HIV/AIDS (GN 20061 RG 6530/7 May 1999).

respect to access to worker benefits. Where a medical scheme is offered as part of the worker benefit package, it is important that the scheme does not discriminate, directly or indirectly on the basis of HIV status.

5.2.6 Medicines and Related Substances Control Amendment Act⁵⁴⁶

The Act amends the Medicines and Related Substances Control Act, 1965, by among others, providing for the procedures for expediting the registration and sale of essential medicines.⁵⁴⁷

Section 15C of the Act empowers the Minister to prescribe conditions for the supply of affordable medicines, notwithstanding the patentability of the medicines. The section states:

“The Minister may prescribe the conditions for the supply of more affordable medicines in certain circumstances so as to protect the health of the public, and in particular may-

(a) Notwithstanding anything to the contrary contained in the Patents Act, 1978 (Act 57 of 1978), determine that the rights with regard to any medicine under

⁵⁴⁶ No. 90 of 1997. The Act was assented to by the President on December 12, 1997.

⁵⁴⁷ Ibid, preamble states: “(An) Act to amend the Medicines and Related Substances Control Act, 1965, in relation to the definitions; to provide that the council shall be a juristic person; to make other provision for the constitution of the council; to provide that a member of the council or a committee shall declare his or her commercial interest related to the pharmaceutical or healthcare industry; to provide that the appointment of members of the executive committee shall be subject to the approval of the Minister; to make further provision for the prohibition on the sale of medicines which are subject to registration and are not registered; to provide for procedures that will expedite the registration of essential medicines, and for the re-evaluation of all medicines after five years; to provide for measures for the supply of more affordable medicines in certain circumstances; to require labels to be approved by the council; to prohibit sampling of medicines; to further regulate the control of medicines and scheduled substances; to provide for the licensing of certain persons to compound, dispense or manufacture medicines; to provide for generic substitution of medicines; to provide for the establishment of a pricing committee; to regulate the purchase and sale of medicines by wholesalers; to make new provisions for appeals against decisions of the Director general or the Council; to further regulate the powers of inspectors; to increase the jurisdiction of magistrates’ courts in respect of penalties in terms of this Act; to provide that the council may acquire and appropriate funds; to regulate a new the Minister’s power to make regulations; and to provide for the rationalization of certain laws relating to medicines and related substances that have remained in force in various territories of the national territory of the Republic by virtue of section 229 of the Constitution of the Republic of South Africa, 1993; and to provide for matters connected therewith.

a patent granted in the Republic shall not extend to acts in respect of such medicine which has been put onto the market by the owner of the medicine, or with his or her consent..."

The foregoing provision is important in a developing economy where majority of HIV positive persons cannot afford HIV drugs. It provides a legal basis through which the Government can exploit the patent in order to avail the drugs to HIV positive persons at an affordable price.

The Amendment Act also places an obligation upon pharmacists to educate persons who visit their pharmacies on the differences between branded and generic drugs and advantages of using either of the drugs. Section 22F of the Act states:

"(1) Subject to sub-sections 2, 3 and 4, a pharmacist or a person licensed in terms of section 22(c) (1) (a) shall-

- a) inform all members of the public who visit the pharmacy or any other place where dispensing takes place, as the case may be, with a prescription for dispensing, of the benefits of the substitution for a branded medicine by an interchangeable multisource medicine, and shall, in the case of a substitution, take reasonable steps to inform the person who prescribed the medicine of such substitution;*
- b) dispense an interchangeable multi-source medicine instead of the medicine prescribed by a medical practitioner, dentist, practitioner, nurse or other person registered under the Health Professions Act, 1974, unless expressly forbidden by the patient to do so."*

The obligation no doubt goes a long way in educating on not only the difference between branded and generic drugs, but also on what drugs are appropriate for what illness. This is important in a developing economy where a large proportion of its population is semi-illiterate.

5.2.7 National Health Act⁵⁴⁸

This is an Act that provides a framework for a structured uniform health system in South Africa. ⁵⁴⁹ The Act was assented to by the President on July 18, 2004, and came into force on May 2, 2005.

The objective of the Act is to protect, respect and promote equitable access to health care by South Africans as a Constitutional right.⁵⁵⁰ The Minister is empowered to prescribe categories of persons that are eligible for free health care services at public health establishments. In determining the categories of persons that are eligible to free health care services, the Minister must have regard to:

“...the needs of the vulnerable groups such as women, children, older persons and persons with disabilities.”⁵⁵¹

It is prohibited to administer health care service on any user without that user’s informed consent, unless the user authorises another person to give consent, or the law precludes the requirement for such consent.⁵⁵² The requirement for consent before

⁵⁴⁸ No. 61 of 2003.

⁵⁴⁹ Ibid, preamble states: “(An) Act to provide for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on the national, provincial and local governments with regard to health services; and to provide for matters connected therewith.”

⁵⁵⁰ Ibid, s. 2 states:

“The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by: a) establishing a national health system which (i) encompasses public and private providers of health services; and (ii) provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford; (b) setting out the rights and duties of health care providers, health workers, health establishments and users; and (c) protecting, respecting, promoting and fulfilling the rights of (i) the people of South Africa to the progressive realization of the constitutional right of access to health care services, including reproductive health care; (ii) the people of South Africa to the progressive realization of the constitutional right of access to health care services including reproductive health care; (ii) the people of South Africa to an environment that is not harmful to their health or well-being; (iii) children to basic nutrition and basic health care services contemplated in section 28(1) (c) of the Constitution; and (iv) vulnerable groups such as women, children, older persons and persons with disabilities.”

⁵⁵¹ Ibid, s. 4(2) (c).

⁵⁵² Ibid, s. 7 states: “(1) Subject to section 8, a health service may not be provided to a user without the user’s informed consent, unless (a) the user is unable to give informed consent and such consent is given by a person (i) mandated by the user in writing to grant consent on his or her behalf; or (ii) authorized to

administering health service on a user is important in preserving the dignity of the user. All information concerning a user, including information relating to his or her health status, treatment or stay in a health establishment is confidential. Section 14(2) of the Act only in instances where:

“... (a) the user consents to that disclosure in writing; (b) a court order or any law requires that disclosure; or (c) non-disclosure represents a serious threat to public health.”

The foregoing section is fortified by section 15(1) thereof which permits a health care provider who has access to health records of a user to only disclose personal information of a user if such disclosure is:

“...necessary for any legitimate purpose within the ordinary course and scope of his or her duties, where such access or disclosure is in the interests of the user...”⁵⁵³

5.2.8 Public Service Regulations (2001)

This is a policy measure by the Government of South Africa to reduce the ramifications of HIV/AIDS. Part VI of the Regulations gives a concise analysis of an ideal working environment in relation to HIV positive workers and prospective workers. Paragraph A thereof provides that whereas the working environment should support effective and efficient service delivery, it should as far as possible take into account the worker's personal circumstances such as HIV status.⁵⁵⁴ This provision has the ultimate effect of ensuring that the employer balances his/her commercial interests and humanitarian considerations of ensuring sustained employment opportunity to the HIV positive

give such consent in terms of any law or court order; (b) the user is unable to give consent and no person is mandated or authorized to give such consent, and the consent is given by the spouse or partner of the user or, in the absence of such spouse or partner, a parent, grandparent, an adult child or a brother or sister of the user, in the specific order as listed; (c) the provision of health service without informed consent is authorized in terms of any law or a court order...”

⁵⁵³ Ibid, s. 15(1).

⁵⁵⁴ Public Service Regulations (2001), Paragraph A states: “The working environment should support effective and efficient service delivery while, as far as reasonably possible, taking workers’ personal circumstances, including disability, Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) and other health conditions.”

workers. Under paragraph E.2, it is prohibited to unfairly discriminate against a worker or prospective worker on the basis of his/her HIV status. The paragraph states:

“A head of department shall

a) ensure that no worker or prospective worker is unfairly discriminated against on the basis of his HIV status, or perceived HIV status, in any employment policy or practice; and

*b) Take appropriate measures to actively promote non-discrimination and to protect HIV positive workers and workers perceived to be HIV positive from discrimination.”*⁵⁵⁵

Whereas workers and prospective workers are sensitised to undertake voluntary HIV testing, such testing should be done only with the consent of the labour court and should never be mandatory.⁵⁵⁶ The results of the test are strictly confidential and can be disclosed to a third party with the worker’s written consent.⁵⁵⁷

5.2.9 Code of Good Practice: Key Aspects of HIV/AIDS and Employment⁵⁵⁸

The Minister of Labour Commission on advice of the Commission for Employment Equity has power under section 54(1) (a) of the Employment Equity Act, 1998 to make a Code of Good Practice for the Employment sector. In exercise of this power, the Minister established the Code of Good Practice: Key Aspects of HIV/AIDS and

⁵⁵⁵ Ibid, Paragraph E.2.

⁵⁵⁶ Ibid, paragraph E.3 states:

“A head of department shall

a) encourage voluntary counselling and testing for HIV and other related health conditions and, wherever possible, facilitate access to such services for workers in the department; and

*b) ensure that no worker or prospective worker of the department is required to take an HIV test unless the Labour Court has declared such testing as justifiable in terms of the *Employment Equity Act, 1998* (Act No. 55 of 1998).”*

⁵⁵⁷ Paragraph E.4 provides: *“All workers shall treat information on worker’s HIV status as confidential and shall not disclose that information to any other person without the worker’s written consent.”*

⁵⁵⁸ *Code of Good Practice: Key Aspects of HIV/AIDS and Employment, 2000.*

Employment in 2000. The Code recognises that HIV/AIDS are serious public health problems with socio-economic and human rights implications.⁵⁵⁹

Specifically, the Code sets out to:

- “a) Eliminate unfair discrimination in the workplace based on HIV status;*
- (b) Promote non-discriminatory workplace in which people living with HIV or AIDS are able to be open about their HIV status without fear of stigma or rejection;*
- (c) Promote appropriate and effective ways managing HIV in the workplace;*
- (d) Create a balance between the rights and responsibilities of all parties; and*
- (e) Give effect to the regional obligations of the Republic as a member of the Southern African Development Community.”⁵⁶⁰*

Quite outstanding from the objectives of the Code is the demonstration of the willingness of the Republic of South Africa to effect regional obligations on HIV/AIDS at the workplace in their judicial system. The Code has also commendably related a non-discriminatory workplace to the willingness of HIV positive workers to disclose their HIV status without any fear of stigmatisation or rejection. From the human rights perspective, an environment that freely allow people to talk about their health conditions nurtures the trend of recognition of the health condition as an ordinary status in life. This in effect acts as an information forum on HIV and AIDS as well as eradicating stereotyped mentality about HIV and HIV positive workers.

Paragraph 6.1 of the Code prohibits “unfair” discrimination of HIV positive workers within the employment relationship or within any employment policies or practices with regard to:

- “(i) recruitment procedures, advertising and selection criteria;*

⁵⁵⁹ Ibid, paragraph 1.1 states: “The Human Immuno-deficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health Problems which have socio-economic, employment and human rights implications.”

⁵⁶⁰ Ibid, paragraph 1.6.

- (ii) Appointments, and the appointment process, including job placement;*
- (iii) Job classification or grading;*
- Remuneration, employment benefits and terms and conditions of employment...*
- (xiii) Termination of services."*

The provision is broad enough to include all avenues through which an HIV positive worker may be discriminated against on the basis of his/her HIV status. Further, the provision covers instances of discrimination of HIV/AIDS job applicants. The term "unfair" is a very relative and ambiguous concept, open to a myriad of definitions and a fertile ground for importing stereotyped thinking in determining the fate of HIV positive workers at the workplace. The Code should have expressly provided that in cases where it is scientifically proved that an HIV positive worker is still capable of performing his/her duty, no discrimination in the strict sense of the word shall lie against the worker or job applicant. Further, that the capacity of an HIV positive worker to perform the job in question shall not be generalised, but shall be determined on a case-by-case basis.

Paragraph 7 prohibits HIV testing for the purposes of employment, but authorises the Labour Court to grant permission for such a test to be conducted. Unfortunately where a worker tests HIV positive, then the employer can decline to take them on. The Code should have been emphatic that HIV status is not a basis for the employer determining on whether or not to employ or continue to employ a job applicant or existing worker. In as much as viability of a worker impacts on the total output of a country's economy, it is a better approach to determine who to employ strictly on the basis of merit, not on the basis of HIV status. As long as it is scientifically proved that a worker has the capacity to perform the job in question, his/her HIV status is overtly immaterial.

5.3 CONCLUSION

The foregoing analysis demonstrates that South Africa has a more developed regime of law concerning HIV/AIDS in the workplace as compared to the Kenyan system. The system, though, is not ideal. Quite noticeable is the supremacy clause of the Constitution of the Republic of South Africa which expressly binds the legislature in addition to other state organs in exercise of their respective mandates. This can be interpreted to mean that the Legislature in South Africa can only enact laws that promote equitable enjoyment of the rights and freedoms under the Constitution, but not laws that have the effect of taking away the very rights and freedoms like in the Kenyan scenario. That is, the Constitution of the Republic of South Africa is in its phraseology and effect, a supreme constitution, unlike the Kenyan constitution, whose phraseology depicts it as a supreme constitution, but in effect, it perpetrates parliamentary supremacy. The general provision on the South African Bill of Rights obliges the State to protect the rights there-under. Section 7(2) of the Constitution states:

“The State must respect, protect, promote and fulfil the rights in the Bill of Rights.”

This is unlike the Kenyan situation where Parliament has the unfettered discretion to waive the rights and freedoms guaranteed under the Kenyan Constitution. More specifically, South African regime of law on HIV/AIDS at the workplace can be compared with the Kenyan regime on the following strands:

5.3.1 Discrimination of HIV positive workers in the workplace

Unlike the Kenyan situation where the Constitution has no express provision on discrimination on the basis of HIV status, section 9 of the Constitution of the Republic of South Africa expressly provides for the right against discrimination on the basis of disability. Various courts, such as in *Bragdon vs. Abbott*⁵⁶¹ as well as in *Murphy vs. United Parcel Service, Inc*⁵⁶², have defined the term disability to include infection with HIV.

⁵⁶¹ *Bragdon vs. Abbott* (1988) 524 US.

⁵⁶² *Murphy vs. United Parcel Service, Inc* (1999) 527 US.

Thus, it can rightly be argued that the Constitution of the Republic of South Africa expressly acknowledges non-discrimination on the basis of HIV status.

As a reinforcement of the non-discrimination clause under the Constitution of The Republic of South Africa, the Occupational Health and Safety Act⁵⁶³ does not include AIDS as a communicable disease at the workplace. In essence therefore, the Act affirms the scientific proof that HIV cannot be transmitted in an ordinary work relationship except in cases of blood contact of an HIV positive individual and another person at the workplace. This position is the same under the Kenyan scenario where under the second schedule to the Work Injury Benefits Act, 2007, HIV/AIDS is not included as an occupational infection. This means that nobody can properly allege to have been infected with HIV/AIDS in an ordinary work relationship.

Further, the Labour Relations Act⁵⁶⁴ prohibits discriminatory dismissal of workers at the workplace, requiring that work policies on health and safety at the workplace be consultative between the employer, worker representatives and health experts. This goes a long way in ensuring that employment policies on HIV/AIDS are informed by scientific proof, not by employer's personal prejudices about HIV/AIDS. This provision is unlike the Kenyan situation where section 9(2) of the Employment Act, 2007, gives unfettered discretion to the employer to design employment policies. Also, the non-discrimination clause under Paragraph A of the Public Service Regulations, 2001, calls for a working environment conscious of the pecuniary circumstances of HIV positive workers. Without doubt, the regulation is essential in cushioning against dismissal of HIV positive workers at the labour sector owing to their vulnerable circumstances which require that they have a means of income.

⁵⁶³ Occupational Health and Safety Act, No. 85 of 1993.

⁵⁶⁴ Labour Relations Act No. 66 of 1995.

The non-discrimination clause under section 6 of the Employment Equity Act⁵⁶⁵ is similar to the Kenyan situation. Just like the HIV and AIDS Prevention and Control Act, 2006 establishes the HIV/AIDS Tribunal under section 31 thereof with the power to permit the employer to discriminate against a worker on the basis of the HIV status where the “inherent requirements of a job” so requires, section 50(4) of the Employment Equity Act establishes the Labour Court with the power to permit discrimination of an HIV positive worker where the “inherent requirements of a job” so demand. Like the Kenyan situation in regard to the HIV/AIDS Tribunal, the Labour Court in South Africa has no distinct guidelines on the nature of jobs that cannot be performed by HIV positive workers. This lacuna invites the application of prejudices against HIV positive workers by both the South African Labour Court and the Kenyan HIV/AIDS Tribunal.

5.3.2 Right to privacy of HIV positive workers

The constitutional provision on the right to privacy under section 14 of the Constitution of the Republic of South Africa has no overriding provisions. Parliament in South Africa cannot therefore properly enact legislation that would take away a person’s right to privacy. South African courts have also defined the inviolability of the right to privacy. Court cases such as *Van Vuuren & Another v. Kruger*⁵⁶⁶; *N.M. & Others v. Smith*⁵⁶⁷, as well as *South African Human Rights Commission vs. SABC & Another*⁵⁶⁸ all confirm the need for the protection of the HIV positive worker. This is unlike the Kenyan situation where section 76 of the Kenyan Constitution does not have express phrase on privacy rights of HIV positive workers. The said provision of the Kenyan Constitution provides for “arbitrary search” and the said Constitution does not proceed to define what is “arbitrary”. Kenyan Parliament has also unlimited discretion to enact a legislation that would effectively take away the enjoyment of the right to privacy.

⁵⁶⁵ Employment Equity Act No. 55 of 1998.

⁵⁶⁶ *Van Vuuren & Another vs. Kruger* (1993) (4) SA.

⁵⁶⁷ *N.M. & Others vs. Smith* (2007) (5) SA 250.

⁵⁶⁸ *South African Human Rights Commission vs. SABC & Another* (SABCT) 203.

5.3.3 Right to dignity of HIV positive workers

Unlike the Kenyan situation, the right to dignity under section 10 of the Constitution of the Republic of South Africa is without overriding provisions. Parliament in South Africa cannot therefore enact a legislation that has the effect of taking away the enjoyment of the right to dignity. South African courts have been vigilant in developing jurisprudence on the right to dignity as provided for under the Constitution. As earlier on stated, cases such as *Irvin & Johnson Ltd vs. Trawler & Line Fishing Union and Others*⁵⁶⁹; *Joy Mining Machinery vs. National Union of Metal Workers of South Africa & Others*⁵⁷⁰; as well as *Hoffman vs. South African Airways*⁵⁷¹ are all emphatic that a work policy that requires testing of a worker for HIV violates the worker's right to dignity. Even where the testing for HIV is permissible, the court in *Irvin's case* held that the test should be so anonymous that it does not permit the employer to know the HIV status of the particular worker. In *Hoffman's case*, the court was very categorical that at the heart of the Constitution of the Republic of South Africa is the right to dignity of all persons in South Africa irrespective of their position in the society.

In the Kenyan situation, section 74 of the Constitution speaks of "degrading and inhuman treatment", which wording is so relative that it may be open to abuse depending on the interpreter of the Constitution. The South African situation is more concise on this point. Further, the right against "degrading and inhuman treatment" is waived by subsection (2) thereof, in the sense that Parliament has all the discretion to enact laws that inhibit the right to dignity in Kenya. This is unlike South Africa, where the Constitution is silent on the power of Parliament to even limit the enjoyment of the right to dignity.

⁵⁶⁹ *Irvin & Johnson Ltd vs. Trawler & Line Fishing Union and Others* (2002) C1126.

⁵⁷⁰ *Joy Mining Machinery vs. National Union of Metal Workers of South Africa & Others* (2002) (23) ILI 391 (SALC 2002).

⁵⁷¹ *Hoffman vs. South African Airways* (2000) CCT 17/00.

5.3.4 Culture and HIV/AIDS

The Constitution of the Republic of South Africa permits every person within its jurisdiction to participate in cultural activities of his/her own choice. The participation should not to the prejudice of the Bill of Rights. These provisions are essential in outlawing retrogressive cultural practices in South Africa, which perpetrate stigmatisation and trauma against HIV positive workers. Section 31 of the Constitution of the Republic of South Africa codifies culture as a fundamental right, with an express overriding provision that culture should not be practiced in such a manner as to interfere with the enjoyment of the rights by others. This provision serves the twin role of preserving people's right to their culture, while ensuring that cultural beliefs are not exercised in a way as to prejudice the status of anybody in the society.

5.3.5 Right to work

As earlier on stated, the right to work is not expressly recognised under the Kenyan Constitution, and can only be inferred to be a constituent of the right to life under section 71 of the Constitution. In South Africa, section 22 of the Constitution accords everyone the right free choice of occupation, and under section 23, everyone has the right to fair labour practices. This provision goes a long way in ensuring that HIV positive persons and job applicants are not discriminated against at the labour sector on the basis of their HIV status.

Concerning the terms of employment and their formulation, the Kenyan scenario is such that the employer, in exercise of the codified freedom of contract under section 9(2) of the Employment Act, 2007, can unilaterally include any terms at his discretion to a contract of service. In South Africa, the contract of service is consultative, rather than a discretion of the employer. Policies, such as health and safety policies at the workplace are consultative between the employer, worker representatives and health experts under section 84 of the Labour Relations Act, 1995. Such consultative employment terms, without doubt, take into consideration the interests of HIV positive workers.

5.3.6 Access to affordable Anti-retroviral drugs

Unlike the Kenya situation, the Constitution of South Africa recognises the right to health care services, including medical treatment as a fundamental right. Where a patient cannot support him/herself, section 27 of the Constitution grants every such person and his/her dependents the right to appropriate social assistance. In its subsection (3), the provision expressly states that no one “may be refused emergency medical treatment.” This provision effectively covers access to affordable HIV drugs as of right. Considering that HIV infection at times leads to periods of dementia, the provision provides for social security services, not only to the HIV positive workers, but also to their dependants. Such a constitutional right is unknown to the Kenyan situation, where access to basic health care and social security can only be argued to form the wider interpretation of the right to life under section 71 of the Constitution. The risk in such an approach to constitutional interpretation is that the subject in issue, in this case, access to affordable healthcare, is considered as a mere fact to be proved to the Court, but not a constitutional right.

South African Courts have interpreted access to affordable HIV drugs as a matter of right, unlike the Kenyan situation which still is silent on the issue. Court cases such as *Minister of Health and Others vs. Treatment Action Campaign and others*; and *Van Biljon and Others vs. Minister of Correctional Services and Others* have added a new impetus to the requirements for access to Anti-retroviral drugs by the HIV positive worker as of right. The access to drugs as a matter of right has been interpreted in South Africa to include the right not to be fraudulently misled by dealers or inventors of the HIV drugs. Relatively, Kenyan courts have taken the opinion in *Kenya AIDS Society vs. Arthur Obel* that the “buyer beware” principle applies even in cases of fraudulent sale and advertisement of ineffective HIV drugs. This can be contrasted from the South African decision of *Treatment Action Campaign et al vs. Mathias Rath et al*, where the court granted an order restraining the respondents from making false and unauthorised statements about the efficacy of their medicines in treating or preventing HIV and AIDS.

Further, South Africa has designed laws to ensure a reduction in the prices of Anti-retroviral drugs. In 1997, the South African parliament proposed an amendment to its existing Medicines and Related Substances Act (“Medicines Act Amendment”) to allow the government to take measures to ensure wider access to essential drugs.⁵⁷² The Multi-National drug companies, in tandem with the U.S. Government, however, have aggressively opposed such legislation, characterising it as an infringement on their intellectual Property Rights by allowing practices such as parallel importing and compulsory licensing.⁵⁷³ In South Africa, for example, subsidiaries of the major multinational drug companies filed a law suit to prevent implementation of the amended law.⁵⁷⁴

While the drug industry and its supporters have defended the intellectual property rights of drug companies, it is best arguable access to affordable Anti-retroviral drugs is a human rights issue, and should be understood as such at the workplace, because, employment is the most viable opportunity to facilitate the affordability of even the cheapest generic Anti-retroviral drugs in the market, through wages and salaries earned out of the employment. Denying HIV positive workers an employment opportunity is equivalent to supporting high prices of Anti-retroviral drugs as the underlying commonality in both instances is the failure to enhance the capacity of the HIV positive worker to access the Anti-retroviral drugs.

Whereas South Africa has made commendable efforts to enhance the protection of the rights of HIV positive workers at the workplace, one issue has still been overlooked by the legal regime. The definition of the term “worker” is still confined to such workers

⁵⁷² Bass N. (2002), “Implications of TRIPS Agreement for Developing Countries: Pharmaceutical Patent Laws in Brazil and South Africa in the 21st Century” in *Washington International Law Review*, pp. 191, 210.

⁵⁷³ Sell S. (2000), *TRIPS and the Access to Medicines Campaign*, p.481.

⁵⁷⁴ See *Pharmaceutical Association of South Africa vs. President of the Republic of South Africa, the Honourable Mr. N. R. Mandela* (1998) SA No. 4183/98, available at <http://www.cptech.org/ip/health/pharmasuit.html> accessed last on 5 August 2008.

that have already engaged in the provision of services, just like the Kenya situation under section 2 of the Labour Relations Act, 2007. This, without doubt, has left prospective workers to the whims of the employers.

CHAPTER 6

COMPARATIVE ANALYSIS: PROTECTION OF HIV POSITIVE WORKERS IN THE UNITED STATES OF AMERICA (USA)

6.1 INTRODUCTION

Stigmatisation that surrounds people with HIV/AIDS in the United States of America (USA) is associated with the history and myths about the disease. The history can be traced to 5 June 1981, when the Centres for Disease Control and Prevention (CDC) warned the public about an outbreak of the rare pneumocystis carinii pneumonia in the gay community.⁵⁷⁵ One month later, the CDC reported an increased number of cases of Kaposi's sarcoma, an unusual form of skin cancer endemic to individuals with immune deficiencies, affecting the same population.⁵⁷⁶ By 1982, the "gay cancer" afflicting a growing number of people in primarily large urban areas was labelled "Gay Related Immune Syndrome" (GRID). Subsequently, the first of many misconceptions of the epidemic, that only gay men were affected and therefore were responsible for the problem, was born. That same year, the CDC announced an official name- Acquired Immune Deficiency Syndrome (AIDS) - and identified four high risk behaviours or characteristics: sexual activity between men; intravenous drug use; Haitian origin, and Haemophilia A.⁵⁷⁷ As a result, individuals already subject to discrimination were marginalised further by the stigma connected with an actual HIV/AIDS diagnosis or the potential for one.⁵⁷⁸ Fear and misunderstanding grew. Accordingly, many people

⁵⁷⁵ Kaiser J., *The AIDS Epidemic at 20 Years: Selected Milestones*, available at <http://www.kff.org/docs/AIDSat20.pdf>, accessed last on August 5, 2008.

⁵⁷⁶ Altman L. wrote in the *New York Times* on 3 July 1981 as follows: "Doctors in New York and California have diagnosed among homosexual men 41 cases of a rare and often rapidly fatal form of cancer. Eight of the victims died less than 24 months after the diagnosis was made. The cause of the outbreak is unknown, and there is yet no evidence of contagion. But the doctor who have made the diagnoses, mostly in New York City and the San Francisco Bay area, are alerting other physicians who treat large numbers of homosexual men to the problem in an effort to help identify more cases and to reduce the delay in offering chemotherapy treatment." See Hebert B. (2001), "It hasn't gone away" *New York Times*, 31 May 2001, at Editorial/ OP-Ed.

⁵⁷⁷ Ibid.

⁵⁷⁸ National Lawyers Guild AIDS Network, (1991), *AIDS Practice Manual: A Legal and Educational Guide*, pp. 1-4.

living with HIV/AIDS suffered not only physically, but also emotionally when family members, employers, friends, teachers, doctors and the society generally began to treat them differently. They were treated more often with contempt than passion.⁵⁷⁹ By 1983, the discrimination increased. The CDC added female sexual partner of men with HIV and AIDS to its list of high-risk groups. The CDC attempted to reduce public scorn for HIV/AIDS through a publicity campaign designed to deter discrimination against people with HIV/AIDS and inform the public that the syndrome could not be transferred through casual contact. In the words of Andrias and Sullivan,

“...Whereas the U.S. Centres for Disease Control and Prevention (CDC) had emphatically stated that HIV could not be transmitted through casual contact, parents called for the segregation of school children with HIV; court officials wore “space suits” when dealing with prisoners with HIV; employers fired HIV positive workers who were fully capable of doing their job; and many people with HIV found it difficult to find lawyers willing to represent them...”⁵⁸⁰.

The public’s fear for HIV and AIDS plagued many areas of society. The Immigration and Naturalisation Service (INS) began excluding HIV-positive immigrants in 1987, and initiated mandatory anti-body testing of all non-citizens applying for entry into the United States.⁵⁸¹ This practice continued until July 2008, when President George W. Bush lifted the mandatory anti-body testing. The same year (1987), Congress adopted an amendment advanced by senator Jesse Helms banning the use of Federal Funds for AIDS education materials that “promote or encourage directly or indirectly,

⁵⁷⁹ Palmer C. & Mickelson L. (Vol. 28: 2002). “Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic”, in *William Mitchell Law Review*, p. 455.

⁵⁸⁰ Andrias R. & Sullivan B. (Vol. 31: 2004). “AIDS and the Law: Then and Now” in *ABA Human Rights Law Journal*, p. 23.

⁵⁸¹ AIDS and HIV infection were considered a “dangerous contagious disease” under section 212 (a) (6) of the Immigration and Nationality Act, 1961. President Ronald Reagan signed the 1987 Supplemental Appropriation Bill, which included the “Helms Amendment” directing the addition of HIV to the contagious disease list. See Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, Ss 518, 101 Stat. 391, 475 (1987).

homosexual activities” otherwise known as the “no promo homo” policy.⁵⁸² Due to the widespread discrimination, many at higher risk of HIV infection did not want to be tested, notwithstanding the potential health benefits to themselves and others resulting from accurate knowledge of their HIV status. They feared possible disclosure, knowing that tests create results, and that results become records. On the other hand, given the fear evoked by AIDS, many members of the public demanded that people be tested, and that the results of those tests be published generally.⁵⁸³

However, the situation changed with the passing of the Americans with Disabilities Act, 1990 which provided new protections for individuals living with disabilities, including those disabled by HIV/AIDS within government and private employment contexts. By 1998, the United States Supreme Court clarified the application of Americans with Disabilities Act, 1990 to include asymptomatic people with HIV/AIDS, or people in the early stages of HIV disease in the landmark case of *Bragdon vs. Abbott*⁵⁸⁴.

In a nutshell, discrimination against HIV positive persons has attracted the attention of law enforcers and government officials. This can be manifested by the many legislative framework and judicial jurisprudence that have been developed in the USA. Workplace laws have been enacted with succinct provisions on non-discrimination of HIV workers at the workplace. This chapter, therefore, examines the extent to which the USA legislature and courts have protected the rights of HIV positive workers at the workplace. More specifically, the conclusion hereto discusses the similarities and the differences between the USA and Kenyan legal regimes on:

- i. Discrimination of HIV positive workers at the workplace;
- ii. Observance of the Right to Privacy of HIV positive workers;

⁵⁸² Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, Ss 518, 101 Stat. 391, 475 (1987) (Codified at 52 Fed. Reg. 32, 540 (Aug. 28, 1987)).

⁵⁸³ Andrias R. & Sullivan B. (Vol. 31: 2004). “AIDS and the Law: Then and Now” in *ABA Human Rights Law Journal*, p. 24.

⁵⁸⁴ *Bragdon vs. Abbott* (1998) 524 U.S. 624.

- iii. Access to Anti-retroviral drugs; and
- iv. The right to work.

6.2 LEGISLATION

“The Law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution”⁵⁸⁵.

6.2.1 Americans with Disabilities Act (ADA)⁵⁸⁶

6.2.1.1 Definition of “disability” under ADA

The Americans with Disability Act (ADA) was intended to usher in dramatic societal change aimed at enabling the achievement of economic autonomy and social equality for the disabled. In the words of Bush G.:

“The Americans with Disability Act signals the end to unjustified segregation and exclusion of persons with disabilities from the mainstream of American Life. As the Declaration of Independence has been a beacon for people all over the world seeking freedom, it is my hope that (the) Americans with Disability Act will likewise come to be a model for the choices and opportunities of future generations around the world.”⁵⁸⁷

Congress states that the purpose of the ADA is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁵⁸⁸ Specifically, the ADA prohibits discrimination against individuals with disabilities by employers,⁵⁸⁹ public entities,⁵⁹⁰ and places of public accommodation.⁵⁹¹

⁵⁸⁵ Murphy J. in *Falbo vs. United States* (1944) 320 US 549 at 561.

⁵⁸⁶ Americans with Disabilities Act, 1990.

⁵⁸⁷ Statement by President George Bush upon signing s. 933, 1990 U.S.C.C.A.N. 601, 602, as quoted by Scott T., “Abbott (Vol. 15: 2008). “AIDS, and the ADA: Why a per se Disability Rule for HIV/AIDS is both just and a must” in *Duke Journal of Gender Law & Policy*, p. 1.

⁵⁸⁸ Americans with Disabilities Act, 1990, Preamble states: “An Act to establish a clear and comprehensive prohibition of discrimination on the basis of disability.”

⁵⁸⁹ Ibid Title I.

⁵⁹⁰ Ibid Title II.

⁵⁹¹ Ibid Title III.

According to the definition section of the ADA, the term “disability” means:

“With respect to an individual:

- a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; or*
- b) a record of such an impairment; or*
- c) Being regarded as having such impairment”⁵⁹².*

Hence, to be considered as disabled under the Act and thus be able to access its protections, a person must satisfy three criteria under paragraph a), that is, he/she must have (1) an impairment (2) that substantially limits (3) a major life activity. However, nowhere does the Act define what constitutes a major life activity. Nevertheless, this definition arguably will protect HIV positive persons whose physical health is irreversibly impaired by the HIV virus. As a justification for its enactment, the Act acknowledges that discrimination against individuals with disability persists in critical areas of the economy, such as employment and that people with disability, as a group, occupy inferior status in the society.⁵⁹³ Thus, it is the objective of the State to ensure that people with disability have equal opportunity, full participation, independent living and self sufficiency in all sectors of the economy.

U.S. Courts have ruled on a number of issues concerning HIV positive workers. The declaration by the U.S. Court in *Bragdon v. Abbott*⁵⁹⁴ that disability can be defined to include HIV/AIDS was emphatic. In this case, the court addressed the issue whether an individual who is infected with HIV, but has not manifested its most serious symptoms, has a disability for the purposes of Americans with Disability Act. To determine this, the Court looked at section 42 of the ADA which defines disability as a “physical or mental impairment that substantially limits a major life activity.”⁵⁹⁵With regard to the

⁵⁹² Ibid s. 3.

⁵⁹³ Ibid s.2.

⁵⁹⁴ (1998) 524 U.S. 624.

⁵⁹⁵ Ibid.

first element of impairment, the court relied heavily on the Department of Health, Education and Welfare Regulations, which defines “physical or mental impairment” as:

*“...any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems- neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive, digestive, genito-urinary; haemic and lymphatic; skin; and endocrine.”*⁵⁹⁶

The court, relying on these regulations, found that, from the moment of infection, HIV/AIDS “must be regarded as a physiological disorder with a constant and detrimental effect on the infected person’s hemic and lymphatic system”⁵⁹⁷; that even if an individual infected with HIV had not progressed to the symptomatic phase, HIV/AIDS still constituted a “disability” under section 42 of the Americans with Disability Act, as a “physical impairment that substantially limits one or more of the individual’s major life activities”. Indeed, the court concluded that “HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease”.⁵⁹⁸ The court did not perform an individual inquiry regarding the physical impairment aspect of the “disability” definition.⁵⁹⁹ The court did not determine whether it caused specific impairment to Abbott, but analysed the disease in the abstract, concluding that if a person had the virus, regardless of the symptoms or the CD4+ count, there is impairment. This is important because the Court recognised, at least implicitly, that an individualised inquiry need not be performed with respect to the physical impairment of the disability definition. Therefore, the *Bragdon* case supports the conclusion that an individualised inquiry is not necessary to determine the physical impairment of the individual.

⁵⁹⁶ Ibid, at p. 632.

⁵⁹⁷ Ibid, at p. 624.

⁵⁹⁸ Ibid.

⁵⁹⁹ See Hermann D. (Vol. 33: 2000). “The Development of AIDS Federal Civil Rights Law: Anti-Discrimination Law Protection of Persons infected with Human Immunodeficiency Virus”, in *Indiana Law Review*, p. 854.

Having determined that HIV infection constitutes physical impairment under the ADA, the court then turned its attention to the second element of “disability”, viz, whether or not a “major life activity” is being affected. The court noted that the plain meaning of the term “major” denoted comparative importance.⁶⁰⁰ Observing the breadth of the term “major life activity” the court held that nothing in the definition without a public, economic, or daily character were outside what constituted a “major life activity”. This holding opened the door for the court’s determination that reproduction is a “major life activity.”⁶⁰¹

After holding that reproduction was a “major life activity”, the court addressed the third element of the definition of disability which dealt with the question of. It did so by analysing medical data which suggested that an HIV positive woman trying to conceive imposes a significant risk of passing the infection to a man and to her child, despite anti-retroviral treatment.⁶⁰² The Court also noted that some state public health control measures forbid people with HIV from engaging in intercourse with others.⁶⁰³ Because of these laws and the significant risk of transmission to both sexual partner and foetus, the Court found that HIV was a substantial limitation on reproduction, a “major life activity”. Consequently, Abbott was “disabled” under the ADA and thus entitled to protection.⁶⁰⁴

In dissent, Chief Justice Rehnquist criticised the majority opinion in *Brandon’s* case for not doing enough of an “individualised inquiry”. To mollify these critics, courts would need to scrutinise and probe whether the particular plaintiff, in this case Abbott, was capable of having children, wanted to have children, or was planning on having children with seemingly no limit to how far the court can delve. The majority for a more benign and less intrusive implementation of the “individualised inquiry” into whether

⁶⁰⁰ Above, note 588.

⁶⁰¹ Ibid, at p. 639.

⁶⁰² Ibid.

⁶⁰³ Ibid, at 641.

⁶⁰⁴ Ibid.

there is a model, that without checks, can be just as malleable and soul searching as the standard called for by the dissent. To be specific, the *Bragdon* decision examined whether HIV substantially limits productivity of females, and to a certain extent, inquired into the personal, individual effect that HIV had on Abbott's life.⁶⁰⁵ The effect being that HIV deterred her from reproducing. However, by never spelling out how deep the individual inquiry is to go and by condoning the practice with regard to people with HIV/AIDS, the Court gave another avenue for courts to limit the protected class through judicial interpretation.

It did not take long for courts to take advantage of the vagaries and unanswered questions of *Bragdon*. Indeed, in the very next term, the court addressed the meaning of "major life activity", albeit this time, not in the context of HIV/AIDS. In *Sutton vs. United Airlines, Inc.* the Court, relying on the present indicative tense of ADA, held that an individual must be "presently" - not potentially or hypothetically- substantially limited in order to demonstrate a disability.⁶⁰⁶ The Court used this finding to buttress its ultimate decision, viz:

*"if a disability can be corrected through medication or technology, then it does not impair a "major life activity"."*⁶⁰⁷

This means that people with HIV/AIDS who, though per se impaired under *Bragdon*, can be treated with anti-retroviral and thus, are deemed not to have their major life activities affected under *Sutton* and are thus not disabled in the latter case. The *Sutton* decision hinges on the protection granted to HIV positive individuals on some future court's opinion of whether prevailing medicine "corrects" an HIV positive individual's ability to produce. Put differently, an HIV positive individual can expect her rights to be ever-changing and fleeting.

⁶⁰⁵ Ibid.

⁶⁰⁶ *Sutton vs. United Airlines, Inc.* (1999) 527 U.S. 471.

⁶⁰⁷ Ibid, at 482.

Moreover, the Court took the opportunity in *Sutton* to resolve what ambiguity had existed with regard to *Bragdon*, and specifically held that an individualised inquiry must be conducted to determine whether a person's major life activities are impaired.

The court stated:

*"...the determination whether a disability substantially limits one or more major life activities is a factor-specific, case-by-case analysis..."*⁶⁰⁸

Scholars like Scott Thomson have argued that the *Sutton* decision subjects each individual to a vast amount of scrutiny and subjects the courts to an incredible amount of work and resources in adjudicating discrimination claims under the ADA.⁶⁰⁹ The repercussion of such decisions is grave to the HIV positive worker, considering that the worker's retention of the employment opportunity is dependent on the workers freedom from HIV infection. Branding every HIV positive worker to be physically impaired, even those that have not reached the asymptomatic stage, amounts to nothing but unjust denial of such persons of their right of livelihood. It is for this reason that Hall, in his observation of the unavoidable intricacies of justice states:

*"Justice is to be sought only by a slow and painful process. I also know that error is, in its nature, flippant and compendious. It hops with airy and fastidious levity over proofs and arguments, and perches on assertion, which it calls conclusion."*⁶¹⁰

The judicial shrinking of the definition of "disability" continued in *Murphy v. United Parcel Service*,⁶¹¹ Inc. In this case, the Tenth Circuit Court and then the Supreme Court again took a chunk out of what constituted a "major life activity" and consequently, the size of the protected class. The court held that the plaintiff, who was dismissed from his job due to his hypertension, was not, in fact, disabled because while taking medication,

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

⁶¹⁰ As quoted by Du Cann R. (1980), *The Art of the Advocate*, p.55.

⁶¹¹ *Murphy vs. United Parcel Service, Inc*, (1999) 527 U.S. 517.

he was not limited in the tasks he could perform.⁶¹² As in *Sutton*, the Court held that the employer had regarded the worker as unable to perform a particular job and that for work to be a “major life activity”, the worker had to be unable or regarded as unable to perform a broad range of jobs.⁶¹³

Section 102 of the ADA expressly prohibits employers from discriminating against disabled workers in the workplace. The section states in part:

*“ a) No covered entity shall discriminate against an individual with disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of workers, worker compensation, job training and other terms, conditions and privileges of employment...”*⁶¹⁴.

An act is deemed discriminatory when it limits, segregates or classifies a job applicant or worker in a way that adversely affects the status of such applicant or worker because of the disability.⁶¹⁵ This definition on disability can arguably be said to divest the employer of the discretion to classify a job as being incapable of being performed by an HIV positive worker, as that would amount to segregation of such workers or prospective worker. As long as the prospective worker or existing worker is competent to perform a job, the HIV status of such worker becomes an irrelevant consideration.

The United States Courts have severally held that HIV positive workers should not be discriminated against on the basis of their disability. In *Chevron vs. Mario Echazabal*,⁶¹⁶ the respondent Mario Echazabal worked for independent contractors at an oil refinery owned by petitioner Chevron U.S. A. Inc. Twice he applied for a job directly with

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Americans with Disability Act, s. 102.

⁶¹⁵ Ibid s. 102 states: “...discriminate includes...limiting, segregating, or classifying a job applicant or worker in a way that adversely affects the opportunities or status of such applicant or worker because of the disability of such applicant or worker...”

⁶¹⁶ *Chevron vs. Mario Echazabal* (00-1406) 536 U.S. 73 (2002) 226 F.3d 1063.

Chevron, which offered to hire him if he could pass the company's physical examination. Each time, the exam showed him to be HIV positive, which according to Chevron, would be aggravated by continued exposure to toxins at Chevron's refinery. In each instance, the company withdrew the offer, and the second time Chevron asked the contractor employing Echazabal either to reassign him to a job without exposure to harmful chemicals or to remove him from the refinery altogether. The contractor laid him off in early 1996. Echazabal filed suit, ultimately removed to federal court, claiming, among other things, that Chevron violated the Americans with Disabilities Act in refusing to hire him, or even to let him continue working in the plant, because of a disability. Chevron relied on a regulation of the Equal Employment Opportunity Commission permitting the defence that a worker's disability on the job would pose a "direct threat" to his health. Although two medical witnesses disputed Chevron's judgment that Echazabal's disability would be aggravated under the job conditions in the refinery, the District Court granted summary judgment for Chevron. It held that Echazabal raised no genuine issue of material fact as to whether the company acted reasonably in relying on its own doctors' medical advice, regardless of its accuracy.

On appeal, the Ninth Circuit reversed the summary judgment. The court rested its position on the text of the ADA itself in explicitly recognizing an employer's right to adopt an employment qualification barring anyone whose disability would place others in the workplace at risk, while saying nothing about threats to the disabled employee himself. The majority opinion reasoned that "by specifying only threats to "other individuals in the workplace," the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the "direct threat" defence,"⁶¹⁷ and it indicated that any such regulation would unreasonably conflict with congressional policy against paternalism in the workplace.⁶¹⁸ The court went on to reject Chevron's further argument that Echazabal was

⁶¹⁷ Ibid, paragraphs 1066–1067.

⁶¹⁸ Ibid, paragraphs 1067–1070.

not “otherwise qualified” “ to perform the job, holding that the ability to perform a job without risk to one’s health or safety is not an “ essential function ” of the job.

6.2.1.2 HIV testing under ADA

To guarantee a worker’s dignity at the workplace, section 102 of the ADA prohibits an employer from conducting a medical examination or making inquiries of a job applicant as to whether such applicant is an individual with disability or as to the nature or severity of such disability.⁶¹⁹ This in effect generally outlaws pre-employment HIV testing of prospective workers as it amounts to mandatory testing. The general rule is however qualified where the “inherent requirements of a job” so demands of ascertainment of the medical condition of the worker or prospective worker.⁶²⁰ Various legal issues arise with this provision in the sense that it provides a lee way for the compulsory outrage upon the privacy and dignity of the worker in the disguise of pre-employment testing. The need for commercial survival coerces a prospective worker or existing worker to surrender to the archaic pre-employment testing. Such surrender cannot be interpreted to mean consent to the pre-employment HIV testing.

USA courts have considered the question as to whoever is mandated to authorise the testing of a worker for HIV. The precarious situation is exacerbated by court decisions such as *Bragdon*, where any HIV positive worker is considered to have suffered impairment of “major life activity” .

Some courts have however argued that it is upon the HIV positive worker to prove that he has not suffered substantial impairment of “major life activities” and hence can still perform in his employment. In *Roberts v. Unidynamics Corporation*,⁶²¹ the Eighth Circuit Court determined that remarks by co-workers that the plaintiff might have HIV were

⁶¹⁹ Ibid.

⁶²⁰ Ibid.

⁶²¹ *Roberts vs. Unidynamics Corporation*, (1997) 126 F.3d 1088, 1093 (8th Cir.).

insufficient to demonstrate that the company regarded him as having HIV.⁶²² The court held that even if the worker demonstrated that the employer regarded him as having HIV, the worker has the burden of demonstrating that the employer regarded him as having substantial impairment of a “major life activity” and discriminated against him for this reason. The risk in adopting this trend of judgment is that it presumes that the HIV positive worker has suffered “a major impairment of his life activities” and that this presumption may be only be rebuttable, upon proof by the worker, of his/her capacity to perform the job in question. The judgment puts the HIV positive worker in an awkward position and tends to justify discrimination against HIV positive workers.

Whereas it is now a well established jurisprudence that mandatory HIV testing of a worker is now prohibited and confidentiality of the results guaranteed, some American courts have held otherwise. The courts have argued that where an HIV positive worker presents “a direct threat to the public”, section 42 of the Americans with Disability Act, 1990 permits mandatory testing of the worker, and the subsequent availability of the results in the public knowledge. The section states in part:

*“...Public accommodations do not have to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others...”*⁶²³

In *EEOC v. Provo's Family Market Inc*⁶²⁴, the court adopted an ill substantiated concept of “direct threat” of a suspected HIV positive worker to hold that the worker was not fit for employment. In this case, a worker who worked with fresh produce was fired for refusing to submit to a medical examination. His employer had asked him to obtain from his doctor verification of his HIV status. The Court of Appeal ruled that the mandatory requirement for a medical examination for HIV infection was properly job

⁶²² Ibid.

⁶²³ Americans with Disability Act, 1990, s. 42.

⁶²⁴ *EEOC vs. Provo's Family Market Inc* (6th Cir. 1998) 135 F.3d 1089.

related, despite an expert evidence that the chances of transmission of HIV in the context of a produce department was one in ten million. The Court stated in part:

“HIV is a blood borne pathogen and can be transmitted in an environment such as that of a produce department of a grocery store, where one is susceptible to cuts and scrapes on a regular basis”

The deliberate decision of the Appeals Court to dismiss the medical evidence which showed an almost impossible transmission of HIV/AIDS in the employment shows the inherent prejudice that courts have had against HIV positive workers generally.

Further, in *Leckelt v. Board of Commissioners*,⁶²⁵ the Fifth Circuit held that Kevin Leckelt, a licensed practical nurse, was not qualified to perform his job because of his refusal to submit the results of an HIV test under a hospital’s policy for monitoring its workers for their exposure to infectious diseases. In spite of documentation showing that he would be placed on leave without pay if he tested positive for HIV, the Court of Appeal held that the District Court was right in finding that Leckelt failed to establish that he was discriminated against solely because of a perception that he was infected with HIV. The Appellate Court argued that Leckelt was wrong in failing to allow the respondents to conduct the inquiry necessary to protect patients, co-workers and the appellant himself from any possible risk he may pose because of his particular situation. Thus, the respondents had a reasonable belief that the plaintiff was not qualified for employment. This judgement is premised on the assumption that HIV is communicable, notwithstanding that medical evidence shows otherwise.⁶²⁶

⁶²⁵ *Leckelt vs. Board of Commissioners* (5th Cir. 1990) 909 F. 2d 820.

⁶²⁶ See also *Bradley v. University of Texas M.D. Anderson Cancer Center* (5th Cir. 1993) 3 F.3d 922. Here, the court held that an HIV positive surgical assistant could be denied surgical privileges because he was not otherwise qualified within the meaning of section 504 of the Americans with Disability Act. The Court concluded that it would be impossible to eliminate the risk of percutaneous injury to a surgical technician through reasonable accommodation because to do so would eliminate essential functions of his employment. The Court stated in part: “While the risk of HIV transmission via a surgical accident is small, it is not slow as to nullify the catastrophic consequences of an accident. A cognizable risk of

6.2.1.3 ADA and stereotypes

The misconception about the mode of transmission of HIV has seen courts decide cases of HIV on the assumption that is communicable. This is notwithstanding the overwhelming medical evidence to the contrary. In *Chalk vs. United District Court*,⁶²⁷ a teacher of hearing impaired students, Vincent Chalk, was diagnosed with AIDS after a bout of pneumocystis carinii pneumonia. Upon of his recovery and return to work, his employer re-assigned him to an administrative position and barred him from teaching in the classroom, in spite of the opinion of the director of epidemiology and disease control for the Orange County Health Care agency that:

"...nothing in Chalk's role as a teacher should place his students or others in the school at any risk of acquiring HIV infection"

The District Court required the school district to reinstate Chalk in his teaching position. On appeal, the Ninth Circuit Court reaffirmed the decision of the District Court on the ground that the plaintiff had demonstrated a strong probability of success on the merits. The Appeals Court noted that:

"...none of the identified cases of AIDS in the United States are known or are suspected to have been transmitted from one child to another in school, day care or foster care setting...no medical literature demonstrates that any appreciable risk of transmitting the AIDS virus under the circumstances likely to occur in the ordinary school setting..."

In granting an order for reinstatement of Chalk to his teaching job, the Appeals Court stated:

"The basic purpose of the section is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of

permanent duration with lethal consequences suffices to make a surgical technician with Bradley's responsibilities not "otherwise qualified"

Contrast this with *Estate of Mauro vs. Borgess Medical Centre* (6th Cir. 1998) 137 F.3d 398, where the court stated: "An employer is not permitted to deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The risk can only be considered when it poses a significant risk, i.e. high probability of substantial harm; a speculative or remote risk is insufficient"

⁶²⁷ *Chalk vs. United District Court* (9th Cir. 1988) 840 F.2d 701.

others...discrimination of HIV positive workers should not be justified by pernicious mythologies or irrational fear”⁶²⁸.

By holding that HIV/AIDS is not communicable, the case forms a firm premise for arguing that the dismissal of HIV positive workers from employment under the pretence of risk of transmission of the disease to other workers would not be allowed. Further, *Abbott’s* case identifying HIV/AIDS as a disability has a psychological effect of shaping the social orientation of empathising HIV positive workers instead of demonising them.

6.2.2 Rehabilitation Act⁶²⁹

The Act has provisions on community rehabilitation programmes that directly provide or facilitate the provision of vocational rehabilitation services to individuals with disabilities to maximize their opportunities for employment, including career advancement.⁶³⁰ Under sections 503 and 504 of the Act, it is prohibited to exclude persons with disability from employment on the basis of their disability. However, where an individual has a contagious disease or infection that constitutes a direct threat to the health or safety of other individuals, such an individual can “justifiably” be discriminated against in an employment opportunity under the Act. Employers have utilised this provision to exclude from employment opportunity, HIV positive workers or job applicants arguing that such workers pose a risk to the safety of other workers or clients. This unfortunate condition has occurred notwithstanding expert evidence that

⁶²⁸ See also *Thomas vs. Atascadero United School District* (C.D.Cal. 1987) 662 F. Supp. 376. In this case, the district court granted a preliminary injunction prohibiting a school district from excluding a child with AIDS, Ryan Thomas, from his kindergarten classroom. Even though the child was involved in a biting incident, the Appeals Court found: “...The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin. Any theoretical risk of transmission of the AIDS virus by Ryan in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis of any exclusionary action by the School District...” Similarly, the Eleventh Circuit Court ruled in *Doe vs. De Kalb County* (11th Cir. 1998) 145 F. 3d 1441, that the district court had improperly found only a “remote and theoretical” risk of transmission of HIV via physical contact between an HIV positive teacher and his sometimes emotionally disabled students.

⁶²⁹ Rehabilitation Act, 1973.

⁶³⁰ *Ibid* s. 7.

has shown that HIV/AIDS is not communicable. Thus, it is a matter of prejudice against HIV positive workers by the employers that can be blamed for the misfortunes of the HIV positive workers at the workplace.

6.2.3 HIV/AIDS, Tuberculosis, and Malaria Act (U.S. Leadership Act)⁶³¹

This Act was passed by the United States Congress on 27 May, 2003, and officially became a part of the strategy of the United Nations to fight HIV/AIDS worldwide.⁶³² The Act represents the United State's recognition of the severity of the HIV/AIDS pandemic and its dedication to helping reverse the trends of the crisis.⁶³³ The United States codified its contribution to the struggle against HIV/AIDS based on information and encouragement from the United Nations.⁶³⁴ The United Nations declared a strategic plan in 2001 to encourage its members to create policies and pledge aid to fight HIV/AIDS worldwide.⁶³⁵ In response, the United States Congress passed the U.S. Leadership Act and pledged a significant amount of funding, resources, and support to assist foreign countries in their struggles against HIV/AIDS, Tuberculosis and Malaria. The Act lays out a five-pronged strategy for meeting its goals, thus:

- a) Establishing a five year global strategy that encompasses a plan for phased expansion and improved co-ordination between the United States and foreign governments and international organisations;
- b) Providing increased resources for multilateral efforts to fight HIV/AIDS;
- c) Providing increased resources for United States bilateral efforts to combat HIV/AIDS;
- d) Encouraging the expansion of private sector efforts and expanding public sector partnerships to combat HIV and AIDS; and

⁶³¹ HIV/AIDS, Tuberculosis, and Malaria Act, 2003.

⁶³² Ibid s 711.

⁶³³ Ibid, s 712-18.

⁶³⁴ Ibid s 711.

⁶³⁵ See United Nations General Assembly Resolution S-26/2, U.N. Doc. A/RES/S-26/2, 27 June 2001.

- e) Intensifying efforts to support the development of vaccines and treatment for HIV/AIDS⁶³⁶.

In effect, therefore, the U.S. Leadership Act has tremendous potential to effect positive change in the lives of many individuals, as well as entire communities struggling with the problems associated with HIV/AIDS. In developing countries such as Kenya, the major obstacles to the prevention and control of HIV/AIDS include poverty and underdevelopment, which compound the problem of HIV and AIDS and impede support and prevention strategies. The U.S. Leadership Act pledges three billion dollars in aid to HIV/AIDS programmes all over the world⁶³⁷. Given this enormous financial commitment, the U.S. Leadership Act serves as the legal framework through which the United States uses its resources to mitigate the negative effects of the HIV/AIDS pandemic.

6.2.4 Presidential Emergency Plan for AIDS Relief (PEPFAR)

This is a \$15 billion, five year global HIV/AIDS strategy by the USA Government to treat two million HIV infected people worldwide with anti-retroviral therapy, care for ten million people already infected and affected by HIV and AIDS, and to prevent seven million new infections.⁶³⁸ To its credit, PEPFAR's focus on treatment represents a dramatic shift in U.S. international AIDS policy. It significantly prolongs the lives of many people by fulfilling their right to essential medicine.

⁶³⁶ Ibid, at 717-18.

⁶³⁷ Ibid at 711-745. The Act authorises the appropriation of three billion dollars per year for five years, beginning in fiscal year 2004 and continuing through fiscal year 2008. The Act also authorises a one billion dollar contribution to the Global Fund in 2004 and commits to contribute such sums as may be necessary for the fiscal years 2005-2008. the Global Fund was established in January 2002 as an international AIDS Trust Fund and the International Bank for Reconstruction and Development as its initial collection trustee.

⁶³⁸ See Rubenstein L. and Friedman E. (2004). "Human Rights and the President's AIDS Initiative", in *ABA Human Rights Journal*, p. 4.

The PEPFAR prevention strategy includes care to vulnerable and marginalised populations. It supports targeted interventions, such as education and condom distribution for marginalised groups, including sex workers, injecting drug users and men who have sex with men. PEPFAR also recognises the need to promote children's and women's rights, including eliminating gender inequalities in civil and criminal legal codes, confronting stigma and discrimination in communities, and providing legal assistance to children and families to protect them from abuse and secure their property rights. PEPFAR, though, does not address discrimination in employment situations, where breaches of HIV status confidentiality are prevalent.

By and large, the USA has not reached a level of balancing the interests of the many HIV negative members of the society to remain free from HIV infection, against the right of the unfortunate few HIV positive workers to remain free from the ostracization and abuse often imposed upon them by their employers or society in general. As can be drawn from the above analysis, the failure to achieve such a balance of interests has been perpetrated by ignorance, personal prejudice or apathy. As the American Bar Association's AIDS Coordinating Committee concluded after a review of cases involving HIV transmission in health care settings:

*"Scientists are concluding that the risk of becoming infected with the virus that causes AIDS based on transmission from an infected health care worker is infinitesimal. In fact, only one health care worker has ever been documented as the source of HIV transmission to a patient...The law lags behind science and has not yet incorporated the facts about the low risk of HIV transmission into its treatment of HIV-infected health care workers. Until courts and legislatures recognise the scientific facts about the low risk of HIV transmission and incorporate them into cases and statutes, HIV infected health care workers are likely to suffer unnecessary discrimination and other mistreatment..."*⁶³⁹

⁶³⁹ As quoted by Richardson E. & Russo S. (Eds.) (1995). *Calming AIDS Phobia: Legal Implications of the Low Risk of Transmitting HIV in the Health Care Setting*, p.28.

6.3 CONCLUSION

The United States of America has made commendable efforts in protecting the rights of HIV positive workers within the labour sector. These are in terms of legislative provisions and judicial jurisprudence, all of which have served to shape policy decisions in dealing with HIV positive workers at the workplace. Of significance is the interpretation by the US courts of the term disability to include HIV positive workers. This development has elicited mixed reactions from the Judiciary especially in regard to the stage from a HIV positive worker may be deemed to be disabled. But more specifically, the USA regime of law on HIV and AIDS at the workplace has covered the following areas of concern:

6.3.1 Discrimination of HIV positive workers in the workplace

The Americans with Disability Act, 1990 not only prohibits discrimination on the basis of disability at the workplace, but also proceeds to define discrimination of a disabled worker to include classifying certain jobs by the employer as being incapable of being performed by the worker. As earlier stated, US Courts in cases such as *Abbott v. Bragdon*; *Murphy v. United Parcel Services, Inc*; as well as *Sutton v. United Airlines Inc* have defined disability include infection with HIV status.

The right against discrimination is nevertheless complemented by sections 503 and 504 of the United States Rehabilitation Act which prohibit discrimination on the basis of disability, except in instances of contagious infections. As medical evidence has proved that HIV is not a communicable, such an infection can therefore justifiably be used by the employer to decline to engage the HIV positive worker in employment. This notwithstanding, employers in the USA have insisted on importing their prejudice against the HIV positive workers to discriminate against them in employment.

6.3.2 Right to privacy of HIV positive workers

As highlighted above, section 102 of the Americans with Disability Act, 1990 permits an employer to conduct a pre-employment HIV testing on workers and job applicants to determine the “severity” of the infection. This arguably is a worse legal provision than even the Kenyan situation as it out-rightly permits employers and potential employers to not only discover the HIV status of the workers and their prospective workers, but also use the information adversely to the HIV positive worker. American Courts such as in *EEOC vs. Prevo’s Family Market Inc*;⁶⁴⁰ *Lockett vs. Board of Commissioners*,⁶⁴¹ have confirmed the validation of the mandatory pre-employment testing, raising stereotypical concepts such as HIV positive workers being “a threat to the public”.

6.3.3 Role of culture in discrimination against HIV positive workers

Considering the foretasted myths surrounding the nature of infection and spread of HIV/AIDS, various US courts can be said to have strived to correct the prejudicial cultural norms that essentially discriminate against HIV positive workers. For instance, in *Chalk v. United Districts Court*⁶⁴², the court was very emphatic that HIV/AIDS cannot be transmitted in any ordinary work relationship, unless there are blood contacts between at least an individual infected with HIV/AIDS and another. Further, and as expounded in *Chalk’s case*, section 504 of the Americans with Disability Act, 1990 prohibits an employer from denying a worker access to an employment on the basis of biased attitudes or ignorance. That attitude against HIV positive workers should not be informed by pernicious mythologies or irrational fear.

6.3.4 Right to dignity of HIV positive workers

US Courts have had court pronouncements that seek to protect the dignity of HIV positive workers in the workplace. For instance, the landmark case of *Bragdon vs.*

⁶⁴⁰ *EEOC vs. Prevo’s Family Market Inc.* (6th Cir. 1998) 135 F. 3d 1089.

⁶⁴¹ *Lockett vs. Board of Commissioners* (5th Cir. 1990) 909 F. 2d 820.

⁶⁴² *Chalk vs. United Districts Court* (9th Circuit, 1998) 840 F 2d 701.

*Abbott*⁶⁴³ defines HIV/AIDS as a disability involving a physiological disorder in one's body. Such a court holding effectively puts HIV positive worker on an equal footing with any other disabled worker and ensures that HIV positive workers are not subjected to work policies that disparage their dignity by mere virtue of their health status.

Further, section 102 of the Americans with Disability Act, 1990 prohibits an employer from conducting a medical examination on a worker purposely to know the nature or extent of the disability of a worker. The provisions of the Americans with Disability Act, 1990 permits an employer to conduct a medical examination on a worker where the "inherent requirements of a job" so require. The Americans with Disability Act, 1990 is silent on what categories of jobs that may not be performed by what categories of disabled persons, thereby giving the employer the unfettered discretion to decide on whether or not to absorb an HIV positive worker in an employment.

6.3.5 HIV/AIDS and the Right to Work

Whereas the American Constitution has no direct provision on the right to work, the Rehabilitation Act, 1973 provide for rehabilitation programmes that directly facilitate access to employment. Such programmes are not available in Kenyan situation. Court decisions such as *Chalk vs. United District Court*, have served to complement the right to work by emphatically holding that HIV is not communicable and therefore HIV positive workers should not be discriminated against in employment opportunities.

⁶⁴³ *Bragdon vs. Abbott* (1998) 524 U.S. at 638.

CHAPTER 7

COMPARATIVE ANALYSIS: PROTECTION OF HIV POSITIVE WORKERS IN AUSTRALIA

7.1 INTRODUCTION

Australia has made commendable efforts to eliminate discrimination against HIV positive workers in the workplace. Worth noting is the Disability Discrimination Act (DDA), 1992. It has extensive provisions that eliminate discrimination against HIV positive workers, not only in the employment sector, but also in society generally. The Act has succinct provisions that divest the employer of the discretion to discriminate against the HIV positive worker under the guise of the “inherent requirement of the job”. This is supported by court cases that have established valuable jurisprudential analysis of the status of HIV/AIDS in the workplace, ranging from the requirement for voluntary testing of suspected HIV positive workers, confidentiality of the results, and the extent of the discretion of the employer in deciding on whether to employ HIV positive worker or prospective worker.

This chapter studies the efforts that have been made by the Australian Courts and Legislature in protecting the rights of HIV positive workers at the workplace. In its conclusion, the chapter analyses the efficiency of the Australian Legal regime on HIV positive workers at the workplace over the Kenyan system, particularly in regard to:

- a) Discrimination of HIV positive workers within the labour sector;
- b) Right to work; and
- c) The HIV positive workers’ right to privacy and dignity

7.2 LEGISLATION

7.2.1 Australian Bill of Rights Act, 1985

This is the Act that sets out the fundamental rights and freedoms of All Australians and all people in Australia,⁶⁴⁴ and broadly sets out its objectives to include:

⁶⁴⁴ Australian Bill of Rights Act, 1985, Preamble states:

- a) *to promote universal respect for, and observance of, human rights and fundamental freedoms for all persons without discrimination;*
- b) *to that end, to give effect to certain provisions of the International Covenant on Civil and Political Rights by enacting an Australian Bill of Rights;*
- c) *to ensure that any person whose rights or freedoms as set out in the Australian Bill of Rights are infringed by or under any law in relation to which that Bill of Rights operates has an effective remedy; and*
- d) *To promote, enhance and secure, as paramount objectives, the freedom and dignity of the human person, equality of opportunity for all persons and full and free participation by all Australians in public affairs and public debate.”⁶⁴⁵*

From the objectives of the Act, it is discernible that the Act recognises the centrality of equality and dignity in the enjoyment of the rights. The equality principles are complemented by article 1⁶⁴⁶ as read together with article 4⁶⁴⁷ of the Australian Bill of Rights, which advocate for equality in protection of rights without any adverse distinctions as to race, colour, sex, language, religion, political opinion, nationality or social origin, property, birth or *other status* (emphasis added). Whereas the Act does not expressly include “disability” or “HIV status” or “health grounds” as a basis for discrimination, paragraph (2) of article 4 of the Bill of Rights is very informative in protecting the rights of people living with HIV/AIDS. The provision states:

“2. Nothing in this Bill of Rights affects the operation of any earlier or later law by reason only of the fact that the law discriminates in favour of a class of persons for the

“An Act of Parliament relating to the human rights and fundamental freedoms of all Australians and all people in Australia.”

⁶⁴⁵ Ibid, Article 3

⁶⁴⁶ Australian Bill of Rights, Art 1 states: “1. Every person is entitled to equality before the law and to the human rights and fundamental freedoms set out in this Bill of Rights, irrespective of distinctions such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Men and women have the equal right to the enjoyment of the human rights and fundamental freedoms set out in this Bill of Rights.”

⁶⁴⁷ Ibid, Art 4 states: “1. Every person has the right without any discrimination to the equal protection of the law...”

purpose of redressing any disabilities particularly suffered by that class or arising from discrimination against that class."

The right against discrimination on the basis of HIV was considered by Court in *Hall Matthew vs. Victorian Amateur Football Association*.⁶⁴⁸ In this case, the applicant who was diagnosed with HIV in January 1996, did not play football that year and in 1997, not because he was unwell, but because he believed that he might be a risk to others if he played football. Over time, he became more knowledgeable about the consequences of being HIV positive and in early 1998, he approached the Victorian Amateur Football Association to permit him to play for the Old Ivanhoe Grammarians Football Club. Having discussed his HIV positive status with the President of the Club, the president of the Club wrote as follows on his application form: "please note that this player is HIV positive." The applicant therefore alleged discrimination on the basis of his HIV status. The Court held that:

"Whilst we conclude that not all risk to the health and safety of the class in question from transmission of HIV from the applicant to other players can be excluded if the applicant is permitted to play football, the risk is so low that it is not reasonably necessary to discriminate against him by banning him from playing football. In our view, health and safety in the class in question is better protected by an understanding of the nature of the very low risk and understanding of and implementation of the proper procedures to be taken in further reducing such risk, than by banning the applicant. Accordingly, we find that the Victorian Amateur Football Association discriminated against the applicant by excluding him from participating in amateur football."

Also, in *NC and Others vs. Queensland Corrective Services Commission*,⁶⁴⁹ prisoners applicants alleged that they were discriminated against by the Queensland Corrective Services Commission (the respondent), on the basis of their HIV positive status. The discrimination comprised, inter alia, a requirement that applicants be housed in the

⁶⁴⁸ *Hall Matthew vs. Victorian Amateur Football Association* (1999) VICCAT 333.

⁶⁴⁹ *NC and Others vs. Queensland Corrective Services Commission* (1997) QADT 22.

medical segregation unit of the Moreton Correctional Centre as opposed to any other correctional option within the prisons operated or supervised by the respondent within Queensland. The further common ground was that the prisoners were not given the option of seeking employment in the kitchen at Moreton Correctional Centre. The applicants also alleged that, for a period which expired in late 1995, they were unable to attend on the oval at Moreton Correctional Centre at the same time as mainstream protection prisoners from that institution and were required to attend at the oval at a time when the other prisoners were not present. They also alleged that they were transferred from the Moreton Correctional Centre to Numinbah Correctional Centre which is a low **security farm** environment.

In holding for the applicants, the Court stated:

“I find that the refusal to allow the complainants to be considered for work in the kitchen areas at either Moreton or Numinbah involve discrimination in the pre-work area pursuant to s. 14 of the Anti-discrimination Act. I find that the allocation to Moreton or to specially designated places in a cottage at Numinbah constituted discrimination in the accommodation area is comprehended by subparagraphs (a), (b) and (d) of s. 83 of the Anti-discrimination Act. This also constitutes direct discrimination in the pre-accommodation area as comprehended by subparagraph (d) of s. 82 of the Act. Restrictions with regard to playing touch football; non-segregated access to the oval; and the requirement that boxing gloves be worn constitutes discrimination in the area of supply of services. For example, such restrictions constitute discrimination in the terms on which services are supplied or unfavourable treatment in connection with the supply of such services pursuant to subparagraph (b) and (d) respectively of s. 41 of the Anti-discrimination Act. It also seems to me that each of the forms of different treatment identified, whether it be work, accommodation or supply of services, comes within the domain of s. 101 of the Act which relates to discrimination in the performance of functions or exercise of power, in each case, under State law. The respondent obviously carries out its obligations pursuant to State legislation and each of the activities which I

found to constitute different and unfavourable treatment on the basis of the identified impairment come within the terms of s. 101 of the Act. That the respondent, Queensland Corrective Services Commission, pay to each of the applicants the sum of \$2,000.00 as an amount considered appropriate as compensation for loss or damage caused by the contraventions of the Anti-discrimination Act.”

The right to privacy under article 12 of the Bill of Rights is defined to prohibit unlawful infringement upon the honour and reputation of a person. The right is limited in defined circumstances. For instance, paragraph 2 of the article states in part:

For the purpose of giving effect to the right referred to in paragraph 1 and without limiting the nature and extent of that right, a search or seizure is unlawful unless –

a) made pursuant to a warrant issued by a judge, magistrate or justice of the peace upon reasonable grounds, supported by oath or affirmation, particularly describing the purpose of the search, who or what is to be searched and what is to be seized...

c) made pursuant to a law authorising search or seizure where search or seizure so authorised is necessary to protect life or public safety;

d) made pursuant to a law authorising search or seizure where there is a compelling need for immediate action; or

e) In the case of a search – it is established that the search was made with free and voluntary consent and after the giving of a warning as to the consequences of the giving of consent to the search.”⁶⁵⁰

The limitation in the enjoyment of the right to privacy in particular circumstances ensures that the limitation is not clouded in undefined concepts such as “public interest”.⁶⁵¹

More specifically, article 32(2) prohibits medical examination without a person’s “free” consent. The provision states:

⁶⁵⁰ Ibid, Art 12(2).

⁶⁵¹ Like the situation presently obtains in Kenya.

“No person shall be subjected to medical or scientific experimentation without that person’s free consent.”

The provision arguably outlaws mandatory pre-employment HIV testing as economic factors may reasonably coerce an employee or job applicant to succumb to HIV testing. In the circumstance, the “consent” will not have been freely obtained.

Owing to the myths surrounding HIV/AIDS, Australia also has a history of associating HIV/AIDS with homosexuals. In 1924, the government of Australia passed the Tasmanian Criminal Code Number 69 of 1924 to replace individual maximum sentences for each offence with a general sentencing discretion to impose a sentence of up to 21 years and or a fine of unspecified amount. Sections 122(a) and (c) and section 123 of the Code criminalise all sexual contact between consenting male adults in private. The legality of these provisions in light of the International Instruments, particularly, the International Covenant on Civil and Political Rights (ICCPR) has been a matter of adjudication by the Court. In *Toonen vs. Australia*,⁶⁵² Toonen, a homosexual activist and an Australian citizen alleged that sections 122(a) and (c) and section 123 of the Tasmania Criminal Code breached the ICCPR because:

- a) their enforcement violates the right to privacy, as it brings private sexual activity into the public domain;
- b) they distinguish between individuals in the exercise of their right to privacy” on the basis of sexual activity, orientation or identity; and
- c) They discriminate between homosexual men and women.

In particular, Tasmania relied on article 17(1) of the ICCPR which states in part:

“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”

⁶⁵² *Toonen vs. Australia* (1994) CCPR/C/50/D/92.

The Court held that *Toonen* had no effective domestic remedy, because Australian courts could not provide a remedy for breaches of the ICCPR as part of domestic law. No “administrative” remedy was available, as support from the necessary parliamentary majority to have the Tasmanian Parliament repeal the legislation was lacking. Nevertheless, that adult consensual sexual activity was covered by the concept of privacy in the Australian Bill of Rights and that *Toonen* was actually affected by the continuing existence of the Tasmanian Law. The Tasmanian provisions were therefore an interference with Toonen’s Privacy.

Toonen is an important decision in a number of respects. It confirms that sexual conduct in private is a private affair. Further, the case develops the jurisprudence that lack of an effective domestic remedy will usually not provide impediments to the institution of suits for breach of rights especially if such rights have received recognition under international instruments. Most importantly, even where interferences with privacy are sanctioned by existing laws, like the Tasmanian Criminal Code in the circumstance, this does not impede the courts’ finding that such laws violate the rights and freedoms recognised under international law.

The right to life under article 18 of the Australian Bill of Rights is acknowledged as inviolable and no one can be deprived of it. The right to life, though, is not interpreted to include access to basic health care or even access to an employment opportunity. This demonstrates the laxity of the Bill of rights to rank economic and cultural rights in the same category with political rights.

To ensure compliance with the Rights and Freedoms under the Bill of Rights, the Bill of Rights Act establishes the Human Rights and Equal Opportunity Commission as an overseer body to the protection of the Rights and Freedoms.

7.2.2 Disability Discrimination Act⁶⁵³

This is an Act that eliminates discrimination on the ground of disability in areas of employment or provision of services and ensures that persons with disability enjoy the same rights and freedoms as other members of the community.⁶⁵⁴ Disability is defined to include presence of organisms causing or capable of causing disease or illness in the body.⁶⁵⁵ The definition of disability, therefore, can arguably be said to include HIV status. Under section 15, it is unlawful for the employer to discriminate against an employee on the basis of the employee's disability. The Act develops a broad perspective of employment discrimination to include discrimination in the arrangements determining who to employ; and conditions on which employment is offered.⁶⁵⁶ The discrimination against HIV positive workers is expressly outlawed in other particular sectors of the society including the education sector,⁶⁵⁷ in the provision of goods, services and facilities,⁶⁵⁸ in the provision of accommodation,⁶⁵⁹ and in the distribution of land.⁶⁶⁰

⁶⁵³ Disability Discrimination Act, No. 135 of 1992.

⁶⁵⁴ Ibid, section 3 states:

"The objects of this Act are:

- a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:
 - (i) work, accommodation, education, access to premises, clubs and sports; and
 - (ii) the provision of goods, facilities, services and land...
- b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community."

⁶⁵⁵ Ibid, s. 4.

⁶⁵⁶ Ibid, s. 15 states:

"it is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability or a disability of any of that other person's associates:

- a) in the arrangements made for the purpose of determining who should be offered employment; or
- b) in determining who should be offered employment; or
- c) in the terms or conditions on which employment is offered..."

⁶⁵⁷ Ibid, s. 22.

⁶⁵⁸ Ibid, s. 24.

⁶⁵⁹ Ibid, s. 25.

⁶⁶⁰ Ibid.

The broad based approach to outlawing discrimination in almost all the sectors of the society ensure that the cultural orientation based on ignorance, apathy and prejudice against HIV positive workers in particular, do not have any legal basis to thrive. In an attempt to limit the discretion of the employer in deciding whether or not to employ HIV positive worker, section 31 of the Act empowers the Minister to formulate disability standards in relation to employment⁶⁶¹. Considering that employers are driven by commercial interests, the provision ensures that the employer does not have a free hand in dictating the intricacies of his employment that may “justify” the exclusion of HIV positive workers from employment.

Discrimination of HIV positive workers at the workplace is not a new concept to the Australian Courts. The HIV/AIDS Legal Centre (HALC) has dealt with a number of cases where clients are discriminated against on the basis of their HIV status in employment. In these cases, the employers have discriminated on the grounds that the employee or potential employee is a danger to fellow employees and, in some cases, the public. The question is of particular importance for employees of the Australian Defence Forces (ADF), both because of the potential for participation in a theatre of operations, and because of the strongly entrenched nature of ADF culture, which can make it resistant to reform by laws such as anti-discrimination law.

The question was addressed in 1999 by the High Court in *X vs. The Commonwealth*.⁶⁶² This case looked at the meaning of the “inherent requirement” exemption. Since the decision in *X v. Commonwealth*, the Federal Government has proclaimed regulations giving further definition to the circumstances under which discrimination against members of the ADF⁶⁶³ is legally acceptable. The Disability Discrimination Act, 1999 (DDA) makes it unlawful for an employer to discriminate against an employee based on

⁶⁶¹ Ibid, s. 31 states:

“(1) The Minister may formulate standards, to be known as disability standards, in relation to:

a) the employment of persons of persons with disability...”

⁶⁶² *X vs. The Commonwealth* [1999] HCA 63.

⁶⁶³ ADF refers to Australian Defence Force.

an employee's disability by dismissing the employee.⁶⁶⁴ However, section 15(4) of the DDA provides an exemption, where it is not unlawful to discriminate on the basis of disability if:

"The person because of his or her disability... would be unable to carry out the inherent requirements of the particular employment".

The crucial question is how an inherent requirement is defined. The question has been addressed, but never satisfactorily resolved, by the courts in a number of decisions.

X vs. The Commonwealth was a case relating to discrimination by the ADF against a positive member of the ADF, and it is the leading case in Australia on the meaning of "inherent requirements". The recent increase in the number of employment-related discrimination cases being seen by HALC,⁶⁶⁵ suggests it is time to revisit *X v The Commonwealth* and other authorities in the area of discrimination in order to come to some conclusions about when an employer can lawfully discriminate against an employee based on their HIV status. In this case, the High Court considered the meaning of the phrase "unable to do the inherent requirements of the job". The court came to a decision relating to that phrase which is relevant to all forms of disability discrimination not just HIV/AIDS related discrimination. However, it is important to understand specifically what the court decided, in order to understand the limits of the decision and its relevance.

When the case was first argued in the Human Rights and Equal Opportunity Commission (HREOC),⁶⁶⁶ the Commonwealth argued that ADF's operational efficiency and effectiveness required its members be able to "bleed safely". This phrase describes an ADF member's ability, to be deployed to any location, in training or in combat, to be able to be injured and spill blood without risk of HIV transmission to another soldier. It

⁶⁶⁴ Disability Discrimination Act, 1999, section 15(2) (c).

⁶⁶⁵ HIV/AIDS Legal Centre.

⁶⁶⁶ *X vs. The Department of Defence* (1995) HREOCA 16 (29 June 1995).

was argued that a HIV positive status meant a soldier would be unable to carry out an inherent requirement of employment, namely deployment as required, because of the risk to other employees. The Commissioner rejected these arguments, and found that deployment of a soldier to a specific location was an “incident” of employment, rather than an inherent requirement, and found in favour of the complainant.

The Commonwealth applied to the Federal Court for review of the decision, where a single judge at first instance dismissed the application by the Commonwealth.⁶⁶⁷ The Commonwealth then appealed to the Full Court of the Federal Court, where the appeal was allowed.⁶⁶⁸

The complainant then appealed to the High Court, where the Court (with Kirby J dissenting) confirmed the decision of the Full Court of the Federal Court, which was in favour of the Commonwealth. It is important to note that the actual question in the appeal to the High Court was whether the “inherent requirements” of the employment covered issues external to the worker – the circumstances in which the work was to be carried out and, in this case, whether workplace safety was compromised by the ability to “bleed safely” when deployed. The decision was to remit the matter to HREOC to decide the case using a correct interpretation of the phrase “inherent requirements of the particular employment”. The High Court decided that it was included as an “inherent requirement” of any job that the employee be able to perform that job without endangering the safety of others, including other employees. The question not addressed by the High Court, is what is an acceptable level of risk in the work environment? The High Court did not decide, **as it is often supposed or argued**, that the discrimination against the ADF employee by the Commonwealth was lawful. The matter was remitted to HREOC to decide that point but it was settled before that decision could be made.

⁶⁶⁷ *Commonwealth of Australia vs. Human Rights and Equal Opportunity Commission* (1996) 70 FCR 76.

⁶⁶⁸ *Commonwealth of Australia vs. Human Rights and Equal Opportunity Commission* [1998] FCA 3 (13 January 1998).

Had the matter been heard before HREOC, it is likely that at least a part of the argument would have centred on whether the employee did, in fact, pose a risk to fellow employees. If so, whether that risk was so small as to be fanciful or so remotely unlikely in the circumstances that the employee could do the job in a manner that was safe to others, including employees.

The question of whether discrimination among employees who may not “bleed safely” is lawful or unlawful is therefore still a live one. There have been subsequent developments that impact specifically on ADF personnel, but the question remains an important one for employees outside of the defence forces. In relation to discrimination by the ADF, there is the added complication of section 53 of the DDA, which states that:

“This part does not render it unlawful to discriminate against another person in the ground of the other person’s disability in connection with employment... in the Defence Force... in a position involving combat duties or combat related duties or peacekeeping service”⁶⁶⁹

Regulations have been proclaimed which define “combat duties” and “combat related duties”. Combat duties are defined as duties which require, or which are likely to require, a person to commit, or participate directly in the commission of an act of violence in the event of armed conflict.⁶⁷⁰ Combat related duties are defined as “duties which require, or which are likely to require, a person to undertake training or preparation for, or in connection with, combat related duties... or which require or are likely to require a person to work in support of a person performing combat duties.”⁶⁷¹

⁶⁶⁹ Section 53(1)(a) Disability Discrimination Act 1992 (Cth), Section 53 then describes other circumstances in which discrimination is lawful if the employment is in connection with the Defence Forces – see section 53(1)(b) and 53 (1)(c) of the *Disability Discrimination Act 1992*.

⁶⁷⁰ Regulation 3, Disability Discrimination Regulations 1996.

⁶⁷¹ Regulation 4, Disability Discrimination Regulations 1996.

At the time the High Court decided *X vs. The Commonwealth*, there were no regulations defining combat duties or combat related duties. McHugh J discussed section 53 (combat duties and combat related duties), and stated that in his opinion, section 53 of DDA defines an area that the Executive can remove from the jurisdiction of HREOC. He stated that for an area of activity not contained in the regulations, (as it was at the time of *X vs. The Commonwealth*) HREOC retains its jurisdiction to test the lawfulness of an act of discrimination. However, once an activity falls within the ambit of a valid regulation, all inquiry as to the lawfulness of discrimination within that activity is foreclosed.⁶⁷²

Although “discrimination” has been defined in wide terms in the regulations, there is a strong argument that the effect of these terms of the regulations should be construed as narrowly as possible. If the intention of the legislature had been to allow the ADF to simply avoid the legislation (DDA), then it would have said so. There would not have been a need for complex language and regulations defining combat. The legislation could have simply said, “This part does not apply to the Defence Forces”. However, it did not.

In interpreting these regulations (and in interpreting anti-discrimination legislation generally), regard must be had to the purpose of the legislation. Legislation that is designed to help people, such as the DDA, should be interpreted in such a way as to give the best effect to the aim of the legislation. If this view is applied to the interpretation of the DDA and its regulations, the construction of the exclusion should be as narrow as possible, in order that the legislation can protect as many people as possible.⁶⁷³

⁶⁷² *X vs. The Commonwealth*, McHugh J at p 20.

⁶⁷³ See Brown H. (1999). *Female Age Pension: Pre-operative Transsexual, Gender Reassignment*, p.180.

If this view of the section is taken, then the definition of “combat related duties” would have to be as narrow as possible, in order that the effect of the legislation be as wide as possible. The definition of itself is very vague. It is only by interpreting section 53 of DDA as narrowly as possible that the purpose of the DDA is not entirely perverted. If the legislature were to do such a contradictory thing as to pass an Act protecting everyone from disability discrimination, and then allow the ADF to be exempt from the effect of that Act, then it would need to use clear words to do it. Section 53 of DDA, and its regulations, are complex, and contain layers of ambiguous meaning. The words are not clear and we cannot assume that the intent of the legislature was to exempt the ADF from the provisions of the DDA. The status of ADF members who are discriminated against is only partially resolved by looking at the provisions in the DDA. When it is read in conjunction with the High Court’s decision in *X vs. The Commonwealth* and the regulations to section 53 of the DDA, the legal position is not clear.

It may be that the ADF has a blanket exemption from the disability discrimination provisions, or it may be that the ADF will be restrained by a socially progressive interpretation of the Act. What is needed is a judicial interpretation of these provisions. It is to be hoped that the interpretation will be done in the spirit as well as the letter of the Act. Notwithstanding the “combat” regulations, there is the additional question relevant to both employees within and outside the ADF. This question is when does an employee with HIV endanger the health and safety of fellow employees to such an extent that it can be said that the employee is unable to do the inherent requirements of the job?

Essentially, the Australian Discrimination Disability Act protects the HIV positive worker at the workplace. Its greatest achievement is the removal of the discretion of the employer to engage the services of an HIV positive worker, as the determination of the disability standards vests with the minister in consultation with the Human Rights and Equal Opportunity Commission.

7.2.3 HIV/AIDS Preventive Measures Act⁶⁷⁴

This Act sets out measures for prevention and control of HIV, as well as for treatment, counselling and care of HIV positive persons.⁶⁷⁵ Section 6 of the Act prohibits any person from inducing a person to undergo HIV test for purposes of employment. The Secretary for the Department (Ministry) responsible for health is obliged to provide confidential HIV testing facilities to any person who wishes to undergo HIV testing.⁶⁷⁶ The prohibition of mandatory HIV testing is continued in section 7 of the Act, which emphasises the need for the consent of the person to be tested for HIV. In cases of HIV testing on a child, the Act empowers the guardian or parent of the child to consent to the HIV testing. Where the person to be tested is incapable of giving consent for whatever other reason, consent to HIV testing can be procured from the legal guardian, parent or a partner of that person or a prescribed independent authority. The requirement for consent may be waived under the Act, only in instances where a written law so permits, or where the person to be tested for HIV is unconscious and unable to give consent, and the doctor believes that the HIV test is for the benefit of the person to be tested.⁶⁷⁷ By emphasising the need for consent before conducting HIV test

⁶⁷⁴ HIV/AIDS Measures Act 1993. The Act was assented to on June 3, 1993.

⁶⁷⁵ Ibid, preamble states: "An Act to provide measures for the prevention and containment of HIV/AIDS and for the protection and promotion of public health and for appropriate treatment, counseling and care of persons infected with HIV/AIDS or at risk of HIV/AIDS infection."

⁶⁷⁶ Ibid, s. 6 states: "(1) The Secretary is to ensure that confidential HIV testing facilities are made available to persons who - (a) request an HIV test in respect of themselves; and (b) are required under this or any other Act to undergo an HIV test. (2) A person must not induce another person to undergo an HIV test for the purpose of any employment or the provision of goods or services."

⁶⁷⁷ Ibid, s. 7 states: "(1) A person must not undertake an HIV test in respect of another person except - (a) with the consent of that other person; or (b) if that person is a child under the age of 12 years, with the written consent of a parent or legal guardian of that child; or (c) if that person is a child between the age of 12 and 18 years and, in the opinion of the medical practitioner who wishes to undertake the HIV test, is incapable of giving consent, with the written consent of a parent or legal guardian of that child; or (d) if, in the opinion of the medical practitioner who wishes to undertake the HIV test, the other person has a disability by reason of which that person appears incapable of giving consent, with the consent, in order, of - (i) a legal guardian of that person; or (ii) a partner of that person; or (iii) a parent of that person; or (iv) an adult child of that person; or (v) a prescribed independent authority; or (e) if the other person is required to undergo such a test under this Act or any other Act; or (f) if an HIV test is required to be carried out on the blood of that other person under this or any other Act. (2) A medical practitioner responsible for the treatment of a person may undertake an HIV test without the consent of that person if (a) the person is unconscious and unable to give consent; and (b) the medical practitioner believes that such a test is clinically necessary or desirable in the interests of that person. (3) A medical

on a person, the foregoing provisions preserve the privacy and dignity of HIV positive worker.

The Act further prohibits disclosure of information concerning the results of HIV test of a person, except with the written consent of that person, his guardian, or administrator where the person whose results are to be disclosed is dead.⁶⁷⁸ Where a person accesses records of an HIV test, the Act equally prohibits disclosure of such a record to any third party. In recognition of the stereotypes and stigmatisation associated with HIV/AIDS, the Act obliges the Court to order that proceedings relating to HIV be either heard in camera, or in the presence of only specified persons. Section 42 of the Act states as follows in this regard:

“In any proceedings, if a court is of the opinion that it is necessary to disclose information relating to the HIV or HIV antibody status of a person, the court, because of the social and economic consequences to that person, may –

(a) order that the whole or any part of the proceedings to be heard in closed session; or

practitioner who undertakes an HIV test under subsection (2) is not, by reason only of undertaking that test, liable to any civil or criminal liability in relation to that undertaking.”

⁶⁷⁸ Ibid, s. 19 states: “(1) A person must not disclose any information concerning the result of an HIV test or immune function test, including the HIV or HIV antibody status or the sexual behaviour of a person or the use of drugs by a person, to any other person except - (a) with the written consent of that person; or (b) if that person has died, with the written consent of that person’s partner, personal representative, administrator or executor; or (c) if that person is a child under the age of 12 years, with the written consent of a parent or legal guardian of that person; or (d) if that person is a child between the age of 12 and 18 years and, in the opinion of the medical practitioner who undertook the HIV test, is incapable of giving consent, with the written consent of a parent or legal guardian of that child; or (e) if that person is unable to give written consent, with the oral consent of that person or with the written consent of the person with power of attorney for that person; or (f) if, in the opinion of the medical practitioner who undertook the HIV test, that person has a disability by reason of which the person appears incapable of giving consent, with the written consent in order, of - (i) a legal guardian of that person; or (ii) a partner of that person; or (iii) a parent of that person; or (iv) an adult child of that person; or (v) a prescribed independent authority; or (g) to a person being an approved health care worker, approved specialist medical practitioner, a dentist, a medical practitioner or a nurse who is directly involved in the treatment or counseling of that person; or (h) for the purpose of an epidemiological study or research authorized by the Secretary; or (i) to a court or tribunal where that information contained in medical records is directly relevant to the proceedings before the court or tribunal; or (j) if authorized or required to do so under this Act. (2) Subsection (1) does not prevent a person from disclosing statistical or other information that could not reasonably be expected to lead to the identification of the person to whom it relates”

- (b) order that only specified persons may be present during the whole or any part of the proceedings; or
- (c) make an order prohibiting the publication of a report of the whole or any part of the proceedings or of any information derived from the proceedings.”

The HIV/AIDS Preventive Measures Act can be effectively relied upon to protect the privacy and dignity of HIV positive worker. It adequately balances the interest of the HIV positive worker against stigmatisation, and equally places an obligation on the HIV positive worker to disclose his HIV positive status, where it is foreseeable that non-disclosure would injure a party dealing with the HIV positive worker.⁶⁷⁹ The obligation to prevent deliberate HIV transmission was emphasised by the Federal Court of Australia in *Re E vs. Australian Red Cross Society & 2 Others*⁶⁸⁰ in the following words:

“We would be irresponsible if we do not take sensible precautions to minimise the risk of transmission of the disease in this country, and to prevent the risk of spread of disease from the high risk groups (the intravenous drug users and homosexuals) to others in the community.”

7.2.4 Anti-discrimination Act⁶⁸¹

This Act prohibits racial, gender and other types of discrimination in and promotes equality of opportunity between all persons.⁶⁸² Section 49A of the Act prohibits discrimination on the basis of the past, future and presumed disability of a worker or

⁶⁷⁹ See, for instance, section 20 of the HIV/AIDS Preventive Measures Act, *ibid*, which states: “(1) A person who is and is aware of being infected with HIV or is carrying and is aware of carrying HIV antibodies must - (a) take all reasonable measures and precautions to prevent the transmission of HIV to others; and (b) inform in advance any sexual contact or person with whom needles are shared of that fact. (2) A person who is and is aware of being infected with HIV or who is carrying and is aware of carrying HIV antibodies must not knowingly or recklessly place another person at risk of becoming infected with HIV unless that other person knew that fact and voluntarily accepted the risk of being infected...”.

⁶⁸⁰ *Re E vs. Australian Red Cross Society & 2 Others* (1991) FCA 20. In this case, the applicant alleged that the Australian Red Cross Society, the New South Wales Division and the Central Sydney Area Health Service transfused into him fresh frozen blood plasma which was HIV infected.

⁶⁸¹ Anti-discrimination Act, 1977.

⁶⁸² *Ibid*, long title.

prospective worker.⁶⁸³ An employer discriminates a worker on the basis of disability where the employer treats the worker less favourably because of the worker's disability; or requires the worker to comply with some higher conditions as a result of the worker's disability.⁶⁸⁴

The Act prohibits the employer from discriminating a worker or prospective worker from employment on the basis of the worker's disability. Section 49D of the Act states:

“(1) It is unlawful for an employer to discriminate against a person on the ground of disability:

- (a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or*
- (b) in determining who should be offered employment, or*
- (c) in the terms on which the employer offers employment...”*

An employer may only discriminate against a worker on the basis of the worker's disability if, after considering the worker's past training, qualifications and experience, the worker may not be able to carry out the inherent requirements of the particular employment, or may need devices that impose unjustifiable hardship to the employer.⁶⁸⁵ In order to determine what constitutes unjustifiable hardship, the Act

⁶⁸³ Ibid, s. 49A states: “A reference in this Part to a person's disability is a reference to a disability: (a) that a person has, or (b) that a person is thought to have (whether or not the person in fact has the disability), or (c) that a person had in the past, or is thought to have had in the past (whether or not the person in fact had the disability), or (d) that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the disability).”

⁶⁸⁴ Ibid, s. 49B states: “(1) A person (“the perpetrator”) discriminates against another person (“the aggrieved person”) on the ground of disability if, on the ground of the aggrieved person's disability or the disability of a relative or associate of the aggrieved person, the perpetrator: (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability or who does not have such a relative or associate who has that disability, or (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability, or who do not have such a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply...”

⁶⁸⁵ Ibid, s. 49D (4) states: “(4) Nothing in subsection (1) (b) or (2) (c) renders unlawful discrimination by an employer against a person on the ground of the person's disability if taking into account the person's past

requires that all relevant circumstances of the particular case be considered, including:

*“(a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, and (b) the effect of the disability of a person concerned, and (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship...”*⁶⁸⁶

Whereas the Act does not absolutely prohibit an employer from discriminating against a disabled worker, it restricts instances when an employer can claim that a disabled worker cannot perform the inherent requirements of a particular employment. The employer must discharge the burden of proving that a worker cannot perform the employment in issue as a result of the disability. The Act extends non-discrimination against disabled persons to other areas of the economy, including, education sector,⁶⁸⁷ accommodation,⁶⁸⁸ provision of goods and services,⁶⁸⁹ and in registered clubs.⁶⁹⁰

training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person’s performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability: (a) would be unable to carry out the inherent requirements of the particular employment, or (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an unjustifiable hardship on the employer...”

⁶⁸⁶ Ibid, s. 49C.

⁶⁸⁷ Ibid, s. 49L states: “(1) It is unlawful for an educational authority to discriminate against a person on the ground of disability: (a) by refusing or failing to accept his or her application for admission as a student, or (b) in the terms on which it is prepared to admit him or her as a student...”

⁶⁸⁸ Ibid, s. 49N states: “(1) It is unlawful for a person, whether as principal or agent, to discriminate against a person on the ground of disability: (a) by refusing the person’s application for accommodation, or (b) in the terms on which the person is offered accommodation, or (c) by deferring the person’s application for accommodation or according the person a lower order of precedence in any list of applicants for that accommodation...”

⁶⁸⁹ Ibid, s. 49M states: “(1) It is unlawful for a person who provides, for payment or not, goods or services to discriminate against a person on the ground of disability: (a) by refusing to provide the person with those goods or services, or (b) in the terms on which he or she provides the person with those goods or services...”

⁶⁹⁰ Ibid, s. 49O states: “(1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of disability: (a) by refusing or failing to accept the person’s application for membership, or (b) in the terms on which it is prepared to admit the person to membership...”

7.2.5 National HIV/AIDS Strategy⁶⁹¹

The HIV Strategy of Australia attempts to deal with new features of the epidemic. Its goal is to reduce HIV transmission and to minimise the personal and social impacts of HIV. Its overall objectives are to reduce the number of new infections; to improve the health and well being of people living with HIV; to reduce HIV related discrimination; and to develop and strengthen links with other related national strategies⁶⁹².

The policy recognises the involvement of people living with HIV/AIDS in policy and programme development, implementation, monitoring and evaluation. This participation is necessary for the effectiveness of responses, because it ensures that policies and programs are informed by the experiences of People Living with HIV, are responsive to the need, and take adequate account of the full range of personal and community effects of policy directions.⁶⁹³ Under paragraph 4.4, the Policy advocates for the elimination of all forms of discrimination against People Living with HIV/AIDS by ensuring their full enjoyment of all fundamental rights and freedoms. To achieve this, it recommends development of strategies to combat stigma and social exclusion connected with the epidemic.⁶⁹⁴

The Policy lays a basis for the elimination of discrimination of HIV positive workers at the workplace. The requirement to promote the enjoyment of fundamental rights and

⁶⁹¹ Australia's National HIV/AIDS Strategy (2005-2008), 2005.

⁶⁹² See O'Malley J. (2008). *Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa*, p. 275.

⁶⁹³ Australia's National HIV/AIDS Strategy (2005-2008), 2005, paragraph 4.3.

⁶⁹⁴ Ibid, Paragraph 4.4 states: "The success of the national strategy is dependent on sustaining a supportive social, legal and policy environment that encourages PLWH and affected communities to:

- support and promote education and prevention;
- respond to education;
- access voluntary testing and treatment services; and
- Participate effectively in all levels of the response...

The UN General Assembly Declaration of Commitment on HIV/AIDS requires governments to: a) eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by PLWH and members of vulnerable groups; and b) Develop strategies to combat stigma and social exclusion connected with the epidemic..."

freedoms by HIV positive workers envisages the rights such as right to dignity, right to life, and right to means of livelihood.

7.3 CONCLUSION

Australia has equally had its share of achievements and blame in regard to the protection of HIV positive worker at the workplace. Most outstanding achievement of the Australian system is the extension of the definition of the term “employee” to include job applicants. This means that in Australia, organizations of job applicants are legally recognised as having the capacity to advocate for employee rights. But more specifically, the Australian regime is comparable to the Kenyan regime under the following headings:

7.3.1 Discrimination of HIV positive workers in the workplace

The Australian Bill of Rights affirms the right to equality and advocates for the enactment of affirmative laws that serve to protect and bolster the interests of the vulnerable groups. Such a provision is essential in the enhancement of the rights of HIV positive workers at the workplace. The right against discrimination is complemented by the Disability Discrimination Act, 1992 and the Anti- Discrimination Act, 1977 which expressly requires that workers should not be discriminated against on the basis of their disability. Under the Anti- Discrimination Act, the employer has the obligation to prove how employment of a disabled worker, including HIV positive worker, can occasion to the employer unjustified hardship. Even then, the employer is under obligation to take into account the relevant experience and competence of the worker before he even seeks authority to discriminate against a worker on the basis of the worker’s disability. The Disability Discrimination Act, 1992 empowers the Minister for Labour to formulate disability standards in respect of particular employments, and this is essential in taking away the discretion of an employer to determine who is so disabled to perform a job. The anti-discrimination provisions under the Australian system specifically extends to all sectors of the society, thus helping stamp out retrogressive cultural prejudices that

employers quite often import in adversely deciding the fate of HIV positive workers in the workplace. Equally, Court decisions such as *Hall Matthew vs. Victorian Amateur Football Association*⁶⁹⁵ and *NC and Others vs. Queensland Corrective Services Commission*⁶⁹⁶ are instrumental in outlawing discrimination of a worker within the labour sector on the basis of his/her HIV status.

7.3.2 Right to privacy of HIV positive workers

Article 12 of the Australian Bill of Rights not only expressly provides for the rights to privacy, but also prohibits attacks upon the honour of a person. Considering that HIV screening is a direct attack upon the physical self of a person, the phraseology of the Australian system can be argued to be more explicit than the Kenyan one. Further, the limitation of the rights to privacy and dignity under the Australian regime is not an unlimited discretion of the Legislature as the case is in Kenya, but can only be made in certain and specific instances such as where it is necessary to protect life or public safety; in cases of compelling need for immediate action, among others. This protects the HIV positive employee from outrages upon their personal honour under the guise of the ambiguous public interest unlike the case in Kenya. Equally, article 32(2) of the Australian Bill of Rights has out-rightly prohibited scientific experimentations without the “free” consent of the donor. Such a right is not envisaged under the Kenyan Constitution. As was averred by the court in *Toonen vs. Australia*, the right to privacy exists, notwithstanding the fact that domestic legislations do not recognise such rights. In loose terms, it has acquired the status of *erga omnes* obligation⁶⁹⁷ upon states.

Moreover, the HIV/AIDS Preventive Measures Act⁶⁹⁸ prohibits mandatory HIV testing and disclosure of HIV data without the consent of the person who was tested for HIV or his/her guardian. The Act requires that HIV testing be performed only with the written

⁶⁹⁵ (1999) VICCAT 333.

⁶⁹⁶ (1997) QADT 22.

⁶⁹⁷ An internationally recognised obligation that states are required to observe whether or not they have ratified a convention creating the obligation.

⁶⁹⁸ HIV/AIDS Measures Act 1993. The Act was assented to on June 3, 1993.

consent of the person to be tested, his/her guardian, or as provided in accordance with a written law. The Act obliges Courts that hear cases on HIV to be heard in camera or in the presence of only a few selected individual, and must not be published. These provisions cumulatively preserve the privacy and dignity of the HIV positive worker. Data on the worker's HIV status cannot be used to the detriment of the worker.

7.3.3 Role of culture in discrimination of HIV positive workers

Culture informs attitude and attitude of an employer informs the employer's work policy. As earlier on demonstrated, HIV positive workers in Australia, just like in Kenya, have fallen victims to biased cultural norms that advocate for discrimination. This was the situation in *X vs. The Commonwealth*⁶⁹⁹ where the Australian Government work policy was informed by the unfounded attitude that HIV positive workers are highly infectious and can therefore infect co-worker in an employment relation. The Australian Court though overruled such prejudicial attitudes, unlike the Kenyan situation where the Kenyan courts are yet to deliver a single ruling that prejudicial cultural norms against HIV positive workers in the workplace are illegal.

7.3.4 Right to dignity of HIV positive workers

Article 12 of the Australian Bill of Right, 1985, prohibits unlawful attack upon the honour and reputation of any person in Australia, and Parliament can only enact a law that facilitates the enjoyment of the right to dignity. Further, in order to prevent outrages upon a person's dignity, section 32(2) of the Australian Bill of Rights confers upon every person the right not to be subjected to medical examination without his/her free consent. The clause does not have an overriding provision that would warrant the breach of the right to dignity.

⁶⁹⁹ *X vs. The Commonwealth* (1999) HCA 63

7.3.5 HIV/AIDS and access to drugs

The Australian Bill of Rights Act, 1985, has no express provision on access to healthcare as a matter of right. Article 18 of the Australian Bill of Rights, 1985, which is an equivalent of section 71 of the Kenyan Constitution, provides for the right to life and stops at that. No other provision accords the means of sustaining the life envisaged under article 18 of the Bill of Rights, such as access to medical care to the vulnerable HIV positive workers. However, the Australian National HIV/AIDS Strategy (2005-2008) advocates for the provision of health care services to HIV positive persons as a strategy for reducing the rate of new infections. The weakness is that the HIV/AIDS Strategy is a policy measure and does not have the legislative strength of a Constitution or an Act of Parliament. The rights of HIV positive workers to access drugs would have been more preserved if they were incorporated in legislation in addition to the Policy.

7.3.6 HIV/AIDS and the right to work

Just like the Kenyan situation, the Australian Bill of Rights has not expressly provided for the Right to life. In effect, the right can only be interpreted as a prerequisite to the enjoyment of the right to life under article 18 of the Bill of Rights. However, the Appeal Court decision in *X vs. Commonwealth* is very informative in eradicating the epithet “inherent requirements of a job” which has served to lock out potential HIV positive workers from the job market. In Kenya, courts have not been such pragmatic in affirming the right of everyone to access an employment opportunity as of right.

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS FOR IMPROVED PROTECTION OF HIV POSITIVE WORKERS IN KENYA

8.1 CONCLUSION

The rights of HIV positive workers can most effectively be protected by efficient legislative framework. The weaker the legislation, the more vulnerable the HIV positive workers are. Practically, insufficient legislative provisions on the rights of HIV positive workers in Kenya have occasioned unjustified discriminatory practices.

This thesis has appreciated the fact that Kenya has legislated on HIV/AIDS in the labour sector. However, the Constitution, as the supreme law of the Kenya, does not contain a provision that protects HIV positive workers from discrimination. Specific labour laws have weak legal provisions that inadequately protect HIV positive workers within the labour sector. The labour laws still do not address retrogressive cultural practices that cause prejudice against HIV positive workers and facilitate access to Anti-retroviral drugs as a prerequisite to the enjoyment of the right to life. Further there are no legal provisions that make the right to employment a fundamental right and outlaw HIV testing without the consent of the worker. This thesis identifies the following loopholes on the Kenyan regime of laws on HIV/AIDS within the labour sector:

8.1.1 Insufficient Constitutional guarantees

Not a single provision of the Kenyan Constitution expressly guarantees the right to work. Section 71 of the Constitution, which protects the right to life,⁷⁰⁰ does not provide

⁷⁰⁰ Constitution of the Republic of Kenya, s. 71 states: “(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of criminal offence under the law of Kenya of which he has been convicted. (2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case – (a) for the defence of any person from violence or for the defence of property; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) for the purpose of suppressing a riot, insurrection

that the right to life encompasses the right to those factors that sustain life, such as basic health care and employment.

Further, Section 82 of the Constitution only provides for non-discrimination on the basis of sex, race, colour, place of origin, creed, political opinion, but does not prohibit discrimination on the basis of HIV status or disability.⁷⁰¹ This provision of the Constitution permits discrimination in the interest of public health, safety, order and security thereby creating the possibility of discrimination against HIV positive workers.

Section 74 of the Constitution of Kenya which provides for protection against inhuman and degrading treatment does not list factors that contribute to inhuman treatment.⁷⁰² Further Section 76 of the Constitution which provides for the right to privacy is also subject to public health, safety, order and security.⁷⁰³ This creates the possibility for abuse and discrimination against HIV positive workers.

In effect, reliance on the Constitution to protect the rights of the HIV positive workers is by mere inference. The right to life has been interpreted to include the right to basic healthcare, as it forms the very essence of life. This argument has been used in this

or mutiny; or (d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war."

⁷⁰¹ Ibid, s. 82(3) states: "In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex 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.

⁷⁰² Ibid, s. 74 states: "(1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorized the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."

⁷⁰³ Ibid, s. 76 states: "(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision – (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources, or the development or utilization of any other property in such a manner as to promote the public benefit..."

thesis and other jurisdictions to advocate for the right of access to drugs by HIV positive workers. Though coined “second generation right”, the right to healthcare is a prerequisite to life, because a person without life is a person without basic health to support life. It is therefore a major weakness for the Constitution to fail to define “life” and to expressly acknowledge access to basic health care as a fundamental right. This can be in the form of access to drugs particularly to HIV positive workers.

In a number of jurisdictions, access to Anti-retroviral drugs is a Constitutional right. In *Minister of Health and Others vs. Treatment Action Campaign and Others*,⁷⁰⁴ the South African Constitutional Court held that the State has an inevitable obligation to provide basic health care services to its population. The obligation is not dependent on the availability of resources to the state, and it is no less guarantee than the right to life of the state population, because, if anything, it is irrational to prioritise the right to life, when the means of facilitation of the right to life such as access to basic health care services is sidelined.⁷⁰⁵ In *Van Biljon and Others vs. Minister of Correctional Services and Others*,⁷⁰⁶ the Constitutional Court noted that lack of funds by the state cannot be an excuse to a prisoner’s constitutional claim to adequate medical treatment. That once the government sets a standard affordable form of medical treatment, a prisoner has a constitutional right to that form of medical treatment.⁷⁰⁷ Section 27 of the South African Constitution expressly recognises the right to healthcare as a Constitutional right.⁷⁰⁸

⁷⁰⁴ *Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) (5) SA 717.

⁷⁰⁵ *Ibid*, the Court stated: “...At issue here is the right given to everyone to have access to public health care services and the right of children to be afforded special protection. The rights are expressed in the following terms in the Bill of rights... (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights...”

⁷⁰⁶ *Van Biljon and Others vs. Minister of Correctional Services and Others*, (1997) (4) SA 441 (C).

⁷⁰⁷ The Applicants based their claim on section 35(2) of the Constitution of the Republic of South Africa which states: “(2) Everyone who is detained, including every sentenced prisoner, has the right... (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment...”

⁷⁰⁸ Constitution of the Republic of South Africa, s. 27 states:“(1) Everyone has the right to have access to- (a) health care services, including reproductive health care...(2) The State must take responsible legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights...”

Also, a number of international instruments, such as the Universal Declaration of Human Rights recognise the right to health care.⁷⁰⁹ From the foregoing, the right to health care is no less a right than the right to life, and the government has an obligation to guarantee its citizens of access to Anti-retroviral drugs, at an affordable cost.

Related to the right to life is the means of sustaining life. Affordable Anti-retroviral drugs nevertheless come at a price, which price can only be afforded through a source of income- employment. In a capitalist economy, like Kenya, access to employment therefore becomes an inevitable avenue as a source of income for enabling the HIV positive worker to exercise his/her right to affordable health care; the right to employment is a mutual constituent of the right to life. The right to employment is expressly codified under article 23 of the Universal Declaration of Human Rights,⁷¹⁰ article 6 of the International Covenant on Economic, Social and Cultural Rights⁷¹¹ and article 15 of the African Charter on Human and People's Rights.⁷¹² The Constitution of Kenya makes no express provision for this fundamental right leaving it to inference. Further, the right against discrimination under the Constitution of Kenya does not include discrimination on the basis of HIV status. Section 82(5) of the Constitution of Kenya states:

“(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1) to the extent that it makes provision with respect to standards or qualifications (not being standards or qualifications specifically relating to

⁷⁰⁹ Universal Declaration of Human Rights, 1948, article 25 states: “Everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

⁷¹⁰ Universal Declaration of Human Rights, 1948, article 23 states: “(1) everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment; (2) everyone, without any discrimination, has the right to equal pay for equal work... (4) everyone has the right to form and join trade unions for the protection of his interests.”

⁷¹¹ International Covenant on Economic, Social and Cultural Rights, article 6 states: “(1) The State Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right...”

⁷¹² African Charter on Human and People's Rights, article 15 states: “Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work.”

race, tribe, place of origin or residence or other local connexion, political opinion, colour or creed) to be required of a person who is appointed to an office in the public service, in a disciplined force, in the service of a local government authority or in a body corporate established by any law for public purposes.”⁷¹³ (Emphasis added)

In effect, the section can be interpreted to mean that an employer can use the HIV status of a worker as a ground for disqualification from employment without violating the Constitutional provision on non-discrimination. The situation is different in other jurisdictions. In the United States of America, section 102 of the Americans with Disability Act prohibits employers from discriminating against disabled employees in the workplace.⁷¹⁴ The U.S. Court in *Bragdon vs. Abbott*⁷¹⁵ held that disability can be defined to include HIV/AIDS. In this case, the court argued that an individual who is infected with the HIV virus, but has not manifested its most serious symptoms, has a disability for the purposes of Americans with Disability Act.

The same lacuna is prevalent under section 74 of the Constitution on the right to humane treatment and section 76 of the Constitution on the Right to Privacy. By inference, the right to humane treatment has been interpreted to envisage the right of HIV positive worker not to be subjected to compulsory HIV testing or HIV testing at all by a prospective or existing employer. This is supported by the fact that HIV testing involves not only blood screening, but also exposition of the Health status of the HIV positive worker, the very essence of humanity. The right to Privacy has been interpreted to include the right to non-disclosure of the HIV status of the worker or job applicant. This right is in response to the stigmatization and trauma that has surrounded HIV positive workers not only at the workplaces, but also in society generally.

⁷¹³ Constitution of Kenya, s. 82(5)

⁷¹⁴ Americans with Disability Act, 1990, section 102 states: “(a) No covered entity shall discriminate against an individual with disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions and privileges of employment...”

⁷¹⁵ Ibid.

The major risk in protection of the rights of the HIV positive workers by way of inference from the Constitution is that it is subjected to the discretion of the Courts. The Courts are themselves human beings with their own prejudices and stereotypes about HIV/AIDS. It therefore becomes a matter of conjecture and coincidence that a judge upholds the rights of HIV positive workers on reliance on the Constitution of Kenya. Therefore HIV positive workers can be discriminated against in employment on the basis of their health status; they can be required to disclose to the whole world their health status and be left to die because they lack means to access the very exorbitant Anti-retroviral drugs. Finally they can be required to perform HIV tests to determine their HIV status whenever an employer is of the opinion that it is in public interest that the test be conducted and as long as the HIV positive workers fail to convince the judge that the Constitution, by inference, provides for their rights.

8.1.2 The supremacy clause dilemma

Section 3 of the Constitution states as follows:

“This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”⁷¹⁶

By dint of this provision of the Constitution, any law or practice under the law, which goes contrary to Constitution of Kenya, should be declared illegal. More particularly, where the Constitution grants a right or freedom, no authority in Kenya, or beyond can purport to take away the right or freedom. Whereas most world Constitutions recognise that the rights protected under the Bill of Rights or Charter of Rights are not absolute, the effect of limitation of the enjoyment of the rights and freedoms should be to facilitate the enjoyment of the very rights and freedoms by others, without divesting any of the beneficiaries of the rights and freedoms of their enjoyment of the same.

⁷¹⁶ Constitution of Kenya, s. 3.

As has been argued from the previous part of the conclusion, the rights of HIV positive workers can be protected by inference from the Constitution. The question that arises is on the enforcement of the rights and freedoms. This question can be addressed by looking at the statutory provisions on HIV/AIDS in the workplace.

Section 31(2) of the HIV and AIDS Prevention and Control Act, 2006 permits an employer to apply to the HIV and AIDS Tribunal established under section 25 of the Act to be authorised to discriminate against workers or potential workers on health grounds based on “the requirements of the job”, which requirements are not specified under the Act. The employer and prospective employer have the discretion to apply to the Tribunal for authority to test prospective or existing for HIV. The legality of this provision in light of the supreme Constitution raises a legal question. If the meaning of section 3 of the Constitution is anything to go by, the only institution that has the authority to take away a Constitutional Provision is the Constitution itself, and that is why Parliament, under section 47 of the Constitution has to first amend the Constitution, for them to introduce any contrary provision to the Constitution. HIV and AIDS Tribunal, other than not being Parliament, is a quasi-judicial institution, whose mandate is subject to the supervision of the High Court of Kenya, under section 65 of the Constitution.⁷¹⁷

Since the Constitution is supreme, then we can only talk of limitation of rights and freedoms to facilitate equitable enjoyment of rights and freedoms by all persons subject to the Constitution. If the HIV and AIDS Tribunal permits the employer and prospective employer to discriminate against HIV positive workers, then it can only mean that in the circumstance, the workers and potential workers are denied their rights.

⁷¹⁷ See Constitution of Kenya, above, note 2, s. 65(2) which states: “(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.”

The consequential denial of HIV positive workers of the right to work applies in similar measure to prospective workers. The worker's right to life is inhibited because s/he is unable to afford Anti-retroviral drugs. The worker's privacy is also laid bare to public scrutiny as everywhere in the employment environment and the larger society, it shall be either known or speculated that the HIV status of the worker has caused him/her his job. The right to dignity will also have been violated because if the HIV and AIDS Tribunal permits pre-employment test and other tests at the request of the employer. It is not provided that the hearings of the Tribunal in exercising its mandate be conducted in camera and it is therefore highly likely that the hearings of the Tribunal are conducted in open courts for "justice to be seen to be done". The effect of such hearings is the violation of the right to privacy and the rights against discrimination of the HIV positive worker. Consequently, the whole society becomes aware of the HIV status of the worker or prospective worker, notwithstanding the stigma with which HIV positive workers have to live in Kenya. It must be understood that in the circumstance, consent of the worker and the job applicant to HIV test will have been thrown out of the window, as the Tribunal will "demand" an expert opinion in "evidence" on the health situation of the worker. When a court of law or quasi-judicial tribunals in Kenya give an order, preferences and opinions as regards the order are instantaneously rendered immaterial, lest the person against whom the order is directed be deemed in contempt of court or the Tribunal.

8.1.3 Inefficient legislative provisions on the right of access to Anti-retroviral drugs

The main Act of Parliament on HIV/AIDS in Kenya is the HIV and AIDS Prevention and Control Act, 2006. The Act makes extensive provisions on dissemination of information about HIV/AIDS in the workplace and society generally, outlaws blood screening and mandatory testing, save in the instances of "inherent requirements of a job", and in uncertain terms outlaws deliberate transmission of HIV. What the Act glaringly omits is the means of prevention and control of HIV/AIDS.

Because of the consequences of HIV infection, Anti-retroviral drug manufacturing companies continue to take advantage of the HIV positive workers by charging exorbitantly for Anti-retroviral drugs, particularly under the TRIPS arrangement. The HIV and AIDS Prevention and Control Act, 2006 has no single provision on affordable access to Anti-retroviral drugs as a means of control of HIV/AIDS as envisaged by its very title. This has made reliance to be made on another general Act of Parliament on patenting, the Industrial Property Act, 2001. Section 58(5) of the Industrial Property Act, 2001, provides for compulsory licensing for purposes of Public interest. Even then, two things arise. First, the Industrial property Act, 2001, does not define what constitutes Public Interest to justify compulsory licensing. This is especially because there is prejudice against HIV positive workers within the wider society in Kenya.

Secondly, the Industrial Property Act, 2001 does not provide for parallel importing of Anti-retroviral drugs. As earlier on explained in this thesis, parallel importing in reference to Anti-retroviral drugs is the importation of original Anti-retroviral drugs at a relatively cheaper cost from countries offering the drugs at such costs. The effect of parallel importing is obvious. Because the drugs are imported at a cheaper cost, they compete in the market with other alternative Anti-retroviral drugs at a leveraged/lower price, thereby forcing down the price of the other alternative drugs. This eventually makes the Anti-retroviral drugs relatively affordable to the consumer. This option for facilitating access to Anti-retroviral drugs is not contemplated by the Industrial Property Act.

In effect, the Kenyan legal regime on HIV/AIDS does not take into account the reality that Kenya is a poor country and access to Anti-retroviral drugs not only enables the control of the infection, but also facilitates continued enjoyment of the rights granted under the Bill of Rights. To exacerbate the lacuna, the employers have the discretion to decide on whether or not to employ HIV positive workers. This makes it unlikely that

even if Anti-retroviral drugs were to be made affordable in Kenya, the HIV positive workers will have the economic capacity to afford the exorbitant Anti-retroviral drugs.

8.1.4 Freedom of contract in employment relations

Section 9(2) of the Employment Act, 2007 states as follows:

“(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the worker in accordance with subsection (3).”⁷¹⁸

Subsection (3) of the section states:

“(3) For the purpose of signifying his consent to a written contract of service a worker may—

(a) Sign his name thereof, or

(b) Imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.”⁷¹⁹

The foregoing provisions indicate two things. First, the employer in Kenya has the unfettered preserve to craft employment relations. Second, that the worker in Kenya has his/her participation in employment relationship restricted to accepting or declining to accept the already designed employment terms by the employer. Nothing can better define freedom of contract than these provisions.

But certain factors are assumed by these provisions. First, Kenya is a capitalist economy in which an employer is predisposed to design an employment relationship in such a way as to secure him/her maximum profits. To facilitate this, an employer will most likely be inclined to consider as vibrant workers, persons whose health status is whole. Merit of the workers or potential workers may be a factor for consideration, but the

⁷¹⁸ Employment Act, 2007, above, note 14, s. 9(2)

⁷¹⁹ Ibid, s. 9(3).

trend as was discerned in *JAO v. Home Park Caterers Case*, employers in Kenya consider HIV positive workers as an economic liability not worth retaining in a competitive job market, notwithstanding their merit. By giving the employer the authority to craft an employment contract, the Employment Act, 2007 has in essence affirmed and legalized the discretion of the employer to employ whom he/she wants.

Secondly, the provision has ignored the fact that an employer and a worker are unequal bargaining parties. Ordinarily, people sign up an employment relationship to enable them improve or maintain their livelihood. Taken that the aspired livelihood is either inexistent at the time of signing up the relationship, or is unsustainable in the absence of the employment, it can be argued that potential workers are desperate to get the employment and see themselves as receiving favours from the potential employer. The employer has therefore the leverage to dictate upon the workers the terms of employment and still receive the consent of the workers. This can be said to disregard workers right to privacy and integrity as can be inferred under the Kenyan Constitution.

Thirdly, the provisions assume the fact that employment contracts are ordinarily signed at the beginning of employment, when a potential worker cannot exercise the right of association under section 80 of the Constitution of Kenya and under section 4 of The Labour Relations Act, 2007. Section 4(1) of the Act States:

“Every worker has the right to:

- a) participate in forming a trade union of federation of trade unions;*
- b) join a trade union; or*
- c) Leave a trade union...”⁷²⁰*

Under section 2, the Act defines a worker as:

⁷²⁰ Labour Relations Act, 2007, above, note 332, s. 4(1).

“...a person employed for wages or a salary and includes an apprentice and an indentured learner”⁷²¹

Obviously, therefore, a prospective worker signing an employment relationship is not a worker for purposes of forming a trade union or any other association to advocate for his/her employment rights. Such potential workers remain at the mercy of the prospective employer in entering the employment relationship.

Lastly, the role of the potential worker under the provisions of *Employment Act, 2007* is virtually to sign or not to sign terms of employment as laid down by the employer. The process is not participatory and does not obviously take care of conditions of the worker such as HIV status.

8.1.5 The problem of domestication of international instruments and other jurisdictional legislations

International instruments have proved to have better provisions in protection of HIV positive workers in the labour sector. The ILO Conventions have expanded the definition of “worker” to embody potential worker. This has enhanced the capacity of such potential workers to be unionisable, and to have greater bargaining power in employment relationships.

To facilitate access to Anti-retroviral drugs the South African Medicines and Related Substances Act has been amended to allow not only compulsory licensing, but also parallel importing of Anti-retroviral drugs, thereby facilitating access to affordable drugs to HIV positive workers. South African Courts have taken cue by holding that accessibility of Anti-retroviral drugs is a Government obligation.

⁷²¹ Ibid, s.2.

The International Covenant on Economic Social and Cultural Rights has expressly incorporated the right to work as a fundamental right and not a second generation right whose fulfilment is dependent on state resources. In Kenya, the right to work is not justiciable as it is a second generation right.

The above provisions, among other international instruments, are good provisions which can be effectively be relied upon to eradicate discrimination of HIV positive workers within the Kenyan Labour sector.

Unfortunately, section 3 of the Judicature Act⁷²² does not list international law as one of the primary sources of law in Kenya. Such instruments must be domesticated first before they acquire judicial recognition in Kenya. Just to recount the Court of Appeal's Pronouncement in *Okunda vs. Republic*:

"...the provisions of a treaty entered into by the Government of Kenya do not become part of the municipal law of Kenya save in so far as they are made such by the law of Kenya. If the provisions of any treaty, having been made part of the municipal law of Kenya, are in conflict with the constitution, then, to the extent of such conflict such provisions are void"

Domestication of the Instruments takes inordinately long time, even after ratification of the instruments by Kenyan government. CEDAW, for instance, took close to twenty years to be domesticated in Kenya after ratification.

It is in light of these glaring lacunae within Kenya's legal framework on the protection of the HIV positive worker that this thesis has analysed the role that the law has played in this regard. No doubt, there is need to provide a better constitutional and other legal safeguards to enable the law adequately protect the HIV positive worker in Kenya.

⁷²² See Judicature Act (Cap 10), Laws of Kenya, s. 3.

8.2 RECOMMENDATIONS

The strategies and policies that have proven most realistic, and effective in the eradication of discrimination of HIV positive workers in the workplace are those that make human rights a priority and utilise the recommendations of international human rights agreements. These strategies, which emphasise personal choice and respect for individuals, hold the most promise in the fight against HIV/AIDS and are more prospective to the future. The strategies can be classified as medium term and long term

8.2.1 Medium term strategies

These are interim legal reforms that the Kenyan government can undertake in order to enhance the protection of HIV positive workers in the labour sector. They include:

8.2.1.1 *Constitutional amendments*

The rights of HIV positive workers can only be guaranteed to be safeguarded if they are incorporated into the supreme Constitution. As it has emerged from the earlier arguments in this thesis, the problems experienced by HIV positive workers in the labour sector essentially stem from the deficient protection provided by the Kenyan Constitution. As such, Parliament should amend a number of Constitutional provisions to enhance the protection of the HIV positive workers:

Section 82(3) of the Constitution does not include discrimination on the basis of HIV/AIDS. The section reads:

"In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex 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."

Certain jurisdictions have broader provisions on non-discrimination including non-discrimination on the basis of HIV/AIDS. For instance article 4 of the ILO Code of Practice on HIV/AIDS and the World of Work 2001⁷²³ expressly prohibits non-discrimination in the labour sector on HIV/AIDS as follows:

“In the spirit of decent work and respect for the human rights and dignity of persons infected or affected by HIV/AIDS, there should be no discrimination against workers on the basis of real or perceived HIV status. Discrimination and stigmatization of people living with HIV/AIDS inhibits efforts aimed at promoting HIV/AIDS prevention.”

In South Africa, whereas section 9 of the Constitution does not expressly prohibit discrimination on the basis of HIV/AIDS, the section provides for non-discrimination on the basis of “disability”. Courts have emphatically stated in *Bragdon vs. Abbott*;⁷²⁴ *Murphy vs. United Parcel Service, Inc.*;⁷²⁵ and *Sutton vs. United Airlines, Inc.*⁷²⁶ that HIV/AIDS status is a form of disability. Also, article 1 of the ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention⁷²⁷ defines disabled person to include HIV positive worker. Thus, the South African Constitution can be said to be an improvement to the Kenyan Constitution.

In this regard, therefore, the Kenyan Parliament should amend section 82(3) of the Constitution of Kenya to expressly include the right to non-discrimination on the basis of HIV not only in the employment sector, but also in the larger society. The section should read:

“In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour,

⁷²³ ILO Code of Practice on HIV/AIDS and the World of Work, 2001, ILO-AIDS-Code-2001-05-0165-1-EN.doc/v6.

⁷²⁴ *Bragdon vs. Abbott* (1998) 524 U.S. at 638.

⁷²⁵ *Murphy vs. United Parcel Service, Inc.* (1999) 527 U.S. 517.

⁷²⁶ *Sutton vs. United Airlines, Inc.* (1999) 527 U.S. 471.

⁷²⁷ ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention, No. 159, 1983 (Entered into force, 20 June 1985), Art 1(1) defines disabled person.

creed, sex or health status, 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."

With respect to the right to dignity, the Kenyan Constitution is weak in three ways. First, it does not define whatever constitutes the right to dignity. Secondly, it does not provide for the right not to be subjected to blood screening. Thirdly, it does not have any provision to the effect that the person whose blood samples are to be taken in whatever forum should give voluntary and informed consent to such taking of blood samples. Other jurisdictions have gone a notch higher in their provisions on the right to dignity to include within their ambit the right not to infringe the dignity of HIV/AIDS within the labour sector. For instance, in *Irvin & Johnson Ltd V. Trawler & Line Fishing Union & Others*,⁷²⁸ the court distinguished compulsory from voluntary testing of a worker. The court argued that where a worker submits to the testing on the pain of some or other sanction or disadvantage if they refuse to consent, it is compulsory testing and an infringement of the dignity of the worker.⁷²⁹

In line with this jurisprudence, the Kenyan Parliament should define the right to dignity under section 74 of the Constitution to include the right not to be subjected to blood screening except with one's voluntary and informed consent. It should be a constitutional requirement that the result of such blood screening should not be disclosed to any party whatsoever, unless the donor of the blood gives his/her informed consent. Even then, the results of the blood screening, if permitted, should not be used adversely against the donor of the blood. The amended constitutional provision should read:

⁷²⁸ *Irvin & Johnson Ltd vs. Trawler & Line Fishing Union & Others* (2002) C1126.

⁷²⁹ This is contrasted with voluntary testing where it is up to the worker to decide whether he or she wishes to be tested and where no disadvantages attach to a decision by the worker not to submit to the testing.

“74. (1) No person shall be subject to torture or to inhuman or degrading punishment or any other form of infringement of his dignity;

(1A). The right to dignity shall not be waived unless a person gives voluntary and informed consent in writing of a waiver to one’s right to dignity, in which case, such a waiver shall not be used to the disadvantage of the person submitting to the waiver of his right to dignity.”

Just like in South Africa, the Kenyan Constitutional supremacy clause should have a provision requiring that no law should take away the rights and freedoms granted under the Bill of Rights. This will ensure that where Parliament enacts laws that limit enjoyment of the rights and freedoms under the Bill of Rights, such laws do not divest any of the subjects of the Constitution of their rights and Freedoms, but only facilitate the progressive enjoyment of the rights and freedoms by all Kenyans. However, the limitation clauses under the Kenyan Constitution give Parliament so wide discretion that Parliament may abuse the discretion to enact legislations that take away the very constitutional right. In South Africa, section 36 of the Constitution allows for derogation from a right only where the derogation is:

“...reasonable, justifiable in an open and democratic society based on freedom and equality and shall not negate the essential content of the right...”⁷³⁰

The Kenyan Parliament should repeal all the limitation clauses under the respective rights and freedoms and enact a single general limitation clause which goes:

⁷³⁰ Ibid, s. 36 states:

“(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation-

- c) Shall be permissible only to the extent that it is-*
- iii) reasonable; and*
- iv) justifiable in an open and democratic society based on freedom and equality; and*
- d) shall not negate the essential content of the right in question...*

(2) Save as provided for in sub-section (1) or any other provision of this Constitution, no law, whether a rule of Common Law, Customary Law or Legislation, shall limit any right entrenched in this Chapter.

(3) The entrenchment of the rights in terms of this Chapter shall not be construed as denying the existence of any other rights or freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter...”

“(83A) No person or authority shall derogate from the rights and freedoms under Chapter V of this Constitution unless the derogation is reasonable, justifiable in an open and democratic society based on freedom and equality and the derogation does not negate the essential content of the right.”

8.2.1.2 Enabling access to Anti-retroviral drugs as a matter of right

The right to affordable HIV/AIDS treatment is a fundamental human right under international law, and Kenya has an obligation to respect, protect and fulfil that right. Several recent developments in international law reflect an emerging consensus that access to HIV/AIDS treatment is a human right. United Nations bodies have issued interpretive comments, resolutions, and guidelines declaring affordable HIV/AIDS treatment a fundamental human right and obligating States to ensure that right. Such international instruments include Universal Declaration of Human Rights,⁷³¹ article 25; and the United Nations Political Declaration on HIV/AIDS,⁷³² article 24 both of which emphasise the need for access to drugs by HIV positive persons. Articles 28-31 of Maputo Declaration on HIV/AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases, 2003 reaffirm this right. While these instruments are not legally binding per se, because the United Nations and regional instruments reflect the views of the majority of States, these instruments provide a formidable source of interpretation of the right to HIV/AIDS treatment as an internationally protected right. Cumulatively, these developments are evidence of the consensus in the International community that all persons have the right to affordable Anti-retroviral drugs, and that States have an affirmative obligation to ensure that right.

In addition, the right to affordable life-saving drugs is linked closely to various fundamental rights guaranteed under international law such as rights to life, development, and to share in scientific progress. Numerous scientific studies have

⁷³¹ Universal Declaration of Human Rights, 1948.

⁷³² United Nations Political Declaration, 2006.

proved that Anti-retroviral drugs are capable of prolonging the life of HIV positive workers. Thus, denying or withholding these life-prolonging Anti-retroviral drugs from people effectively violates their right to life. Since the right to life is guaranteed in the key human rights instruments, Kenya has a basic obligation under international law to guarantee the right to life for all people by ensuring equitable access to life saving Anti-retroviral drugs and social health care services to those who cannot afford the same.

To give effect to this internationally recognised right, the Kenyan Parliament should amend section 58(5) of the Industrial Property Act, 2001 to expressly provide for parallel importing of Anti-retroviral drugs. As earlier discussed,⁷³³ the statute only allows for limitation of patent by way of compulsory licences. Introducing parallel importing as another way of limitation of patents will further serve to lower the prices of Anti-retroviral drugs. The amended section should read:

“(5) The rights under the patent shall be limited by the provisions on compulsory licences and parallel importing for reasons of public interest or based on interdependence of patents and by the provisions on State exploitation of patented inventions.”

Whereas the HIV and AIDS Prevention and Control Act is the particular Act on the control of HIV/AIDS in Kenya, the Act neither recognises nor facilitates access to affordable HIV drugs as a matter of right. Other jurisdictions have emphatically stated that access to Anti-retroviral drugs is a matter of right. For instance, section 27 of the South African Constitution provides for the right to health care; in *Minister of Health and Others v. Treatment Action Campaign and Others*,⁷³⁴ the South African Constitutional Court interpreted the right of access to health care to include the government’s responsibility to antiretroviral and other HIV related drugs available to the public; the HIV/AIDS, and Tuberculosis, and Malaria Act (USA Leadership Act), 2003 emphasise on access to Anti-retroviral drugs as of right. Thus, Parliament should amend the HIV

⁷³³ See Chapter 4 of the thesis.

⁷³⁴ *Minister of Health and Others vs. Treatment Action Campaign and Others* (2002) (5) SA 717.

and AIDS Prevention and Control Act to obligate the government to provide Anti-retroviral drugs to all persons suffering from the infection. The new provision should read:

“12A (1) It shall be the duty of the Government to provide health care services, including Anti-retroviral drugs where appropriate, to all such persons with a monthly income of Ksh. 50,000 and below;

(2) For the purposes of this Act, Government refers to the Government of the Republic of Kenya.”

8.2.1.3 Participatory employment relationship

Section 9 of the Kenyan Employment Act, 2007 gives the employer the exclusive mandate to craft contract of service. Under section 2 of the Act, the term worker is defined to include only such workers in active employment. A number of international instruments and jurisdictions have expanded the scope of definition of worker to include job applicants. For instance, article 4(7) of the ILO Code of Practice on HIV/AIDS and the World of Work, 2001,⁷³⁵ protects defines a worker as inclusive of job applicant. Further, the ILO Collective Bargaining Convention,⁷³⁶ article 2, implores State Parties to promulgate national policies that encourage free negotiations and collective bargaining between employers and workers.

Thus, Parliament should amend section 2 of the Employment Act, 2007 on the definition of “worker” to include prospective workers and job applicants. Amended section 2 of the Act should read:

““Worker” means a person employed for wages or a salary and includes an apprentice and indentured learner as well as prospective workers.”

⁷³⁵ ILO Code of Practice on HIV/AIDS and the World of Work, 2001, ILO-AIDS-Code-2001-05-0165-1-EN.doc/v6.

⁷³⁶ ILO Collective Bargaining Convention, No. 154, 1981 (Entered into force, 11 August 1983).

Further, Parliament should amend section 9(2) of the Employment Act, 2007 to require the employer to consult with the worker or their representatives, government agencies, health experts, legal experts and insurance schemes in developing contract of service.

The amended version of section 9 of the Act should read:

*“(2) An employer who is a party to a written contract of service shall, **in consultation with the worker or their representatives, government agencies, health experts, legal experts and insurance schemes,** be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the worker in accordance with subsection (3).”*

These measures will serve to ensure that the interests of the HIV workers are taken into account in coming up with a contract of service. The inclusion of workers or their representatives is essential to give the bargaining parties live experiences of the workers and potential workers in cases of skewed contract of service. Health experts are necessary to give the parties an expert opinion on the circumstances, if any, under which may lead to the transmission of HIV at the work place. Legal experts serve to advice the bargaining parties on the rights and freedoms obtainable to HIV positive worker and the effect of any outcome of the collective bargaining on such rights and freedoms. Insurance schemes sensitises, particularly the employers on the need to take insurance cover even to HIV positive workers in the workplace.

8.2.1.4 Strict observance of ethics in HIV/AIDS related research

Currently, there is no distinct and comprehensive legislation in Kenya that prescribes ethical standards that should be observed by medical practitioners in conducting HIV/AIDS related research. The medical practitioners are only regulated by virtue of their Socratic oath. Cases such as *Joy Mining Machinery vs. National Union of Metal Workers of South Africa and Others*,⁷³⁷; *van Vuuren vs. Kruger*,⁷³⁸ and *N. M. and Others vs.*

⁷³⁷ *Joy Mining Machinery vs. National Union of Metal Workers of South Africa and Others* (2002) (23) ILJ 391 (SALC 2002).

Smith and Others (Freedom of Expression Institute as Amicus Curiae),⁷³⁹ have emphasised the need to observe the confidentiality of HIV test results owing to the stigma associated with the infection. There is therefore an urgent need for Parliament to enact legislation to be known as *Medical Research Regulation Act, 2009*, providing for both legal and ethical protection of human participants in HIV/AIDS related research. The legislation should include within its ambit the following cardinal principles:

- ❖ Community consultation in research design, implementation and evaluation, as well as publication and use of research results;
- ❖ Non-discriminatory selection of participants, for instance, women, children and minorities;
- ❖ Voluntary and informed consent;
- ❖ Confidentiality;
- ❖ Equitable access to information and benefits emanating from research;
- ❖ development of safe and efficacious pharmaceuticals, vaccines and medical devices; and
- ❖ Protection from discrimination.

8.2.1.5 *Amendment of anti-discrimination and protective statutes*

Discrimination is one of the most significant human rights abuses in the area of HIV/AIDS. It impedes the full participation and integration of people living with HIV/AIDS in the community. Section 5(3) of the Kenyan Employment Act, 2007 only requires an employer not to discriminate against a worker on the basis of HIV but the Act does not address the cultural prejudices that facilitate such discrimination. Parliament should amend section 5(3) of the Act to also prohibit cultural biases that promote distinctions made on the basis of HIV/AIDS. The amended section 5(3) of the Act should read:

⁷³⁸ *Jansen van Vuuren vs. Kruger* (1993) (4) SA 842 (A).

⁷³⁹ *N. M. and Others vs. Smith and Others (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC).

*“(3) No employer shall discriminate directly or indirectly, against a worker or prospective worker or harass a worker or prospective worker—
(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV/AIDS status. It shall be the duty of the employer and the Government to prohibit cultural biases in the workplace that facilitate discrimination of workers on the basis of HIV/AIDS status.”*

Further, Part II of the HIV and AIDS Prevention and Control Act, 2006 only obliges the Government to promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV/AIDS through a comprehensive nationwide educational and information campaign conducted by the Government through its ministries, departments, authorities and other agencies at the institutions of learning, workplaces and amongst communities.⁷⁴⁰ The Act has no provision on the sanctions that face a person who insists on importing cultural prejudices against HIV/AIDS persons in any dealings. The imposition of sanction is necessary as a deterrent measures to discrimination against HIV/AIDS persons. Moreover, the standards for proving discrimination on HIV/AIDS status in the employment sector should be low. Where, it becomes apparent that an employer, even among other factors, considered a worker’s HIV/AIDS status as a ground for discriminating against the HIV positive worker, the worker should be deemed to have sufficiently proved his/her case against the employer.

As such, the Kenyan Parliament should introduce a new section into the Act that imposes penalties to persons who discriminate against HIV/AIDS persons. The section should read:

“10A (1) It shall be an offence to discriminate against HIV/AIDS persons in all sectors of the society, including employment sector on the basis of cultural biases and stereotypes;

⁷⁴⁰ HIV and AIDS Prevention and Control Act, 2006, above, note 369, Part II.

(2) Persons who commit the offence under sub-section (1) shall be liable for a fine of Ksh. 30,000 or to 6 month imprisonment or to both fine and imprisonment.

(3) A person shall be considered to have sufficiently proved the offence under sub-section (1) upon proof of the culture and/or stereotype upon which the discrimination against the victim of discrimination was founded; it shall not be a requirement to prove the intention for such discrimination on the basis of HIV/AIDS”

8.2.1.6 *Expediting application of international instruments*

Section 3 of the Judicature Act does not include international instrument as a source of law in Kenya. This is because Kenya applies the dualist approach of interpretation of conventions, that is, a convention has to be both ratified and domesticated for it to have domestic application.⁷⁴¹ Later pragmatic court decisions such as *In the Matter of the Estate of Lerionka Ole Ntutu*,⁷⁴²; *Mary Rono vs. Jane Rono and William Rono*,⁷⁴³; and *Mburu Chuchu vs. Nungari Muiruri & 2 others*,⁷⁴⁴ have however emphatically stated that once Kenya ratifies a convention, it demonstrates the willingness of Kenya to be bound by the convention and it should therefore have domestic application. To institutionalise this commendable jurisprudence, there is need for Parliament to amend section 3 of the Judicature Act. This is because common law provisions are not sufficient safeguards to rely on in invoking an International instrument relating to discrimination of HIV positive worker at the workplace. Further, being common law provisions, it is likely that a larger bench or a court of appeal may overrule the existing pronouncements of the courts that are in favour of application of International Instruments. The amended version of section 3 of the Judicature Act should read:

“3.(1) *The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with –*

(a) the Constitution;

⁷⁴¹ See *Okunda vs. Republic* (1970) EALR 38.

⁷⁴² *In the Matter of the Estate of Lerionka Ole Ntutu* (2008) eKLR.

⁷⁴³ *Mary Rono vs. Jane Rono and William Rono* (2005) eKLR.

⁷⁴⁴ *Mburu Chuchu vs. Nungari Muiruri & 2 others* (2005) eKLR.

(b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary;

(d) Treaties entered into by the Government of Kenya which have been ratified by the Government.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

8.2.1.7 Interpretation of the concept of "inherent requirements of a job"

Where the requirements of a job call for it, sections 31(2) of the HIV and AIDS Prevention and Control Act, 2006 and 5(4) (b) of the Employment Act, 2007 permits the employer to discriminate against the worker or potential worker on the basis of HIV status. Neither of the Acts, however, makes effort to either give a yardstick for determining the category of jobs that cannot be performed by the worker, or to acknowledge that the capacity of an HIV positive worker to perform a particular job in question is a determination on case-by-case basis.

This is unlike other jurisdictions which have made some efforts to interpret the relevance of “inherent requirements of a job” in the labour sector. For instance, the Constitution of the Republic of South Africa expressly recognises the right to work, thereby prohibiting the importation of terms such as “inherent job requirements” as envisaged under the Kenyan system; everyone in South Africa is guaranteed an employment opportunity in South Africa and it is not left to the whims and discretion of the employer to import his/her prejudices in denying an otherwise qualified person from employment. Moreover, the USA Appeal Court decision in *Sutton vs. United Airlines, Inc.*⁷⁴⁵ has emphasised that the determination whether a disability limits one or more major life activities is a factor-specific, on case-by-case analysis. The court essentially argued against generalisation of the ability of HIV positive workers to perform the job they are assigned, and argued that there is need for examination of the individual HIV positive worker to determine whether indeed he may not perform the job in issue.

There is therefore need for Parliament to amend the HIV and AIDS Prevention and Control Act, 2006 by introducing a new provision that would lay a basis for determining the level of asymptomatic infection in terms of CD4+ count level from which an HIV positive worker may be presumed to be incapable of performing the job in question. Even then, where the CD4+ count level has reached the statutory minimum, but the HIV positive worker still retains the clarity of the mind and the physical strength to work, if the worker so wishes, he/she should be afforded an opportunity to work. The amended provision of the HIV and AIDS Prevention and Control Act, 2006 should read:

“31A (1) In hearing an application by an employer under section 31(2) above, the Tribunal shall employ the services of a qualified medical practitioner to determine the extent of the asymptomatic infection of the HIV positive worker and to advise the Tribunal on the ability of the worker to perform the job in issue.

⁷⁴⁵ *Sutton vs. United Airlines, Inc.* (1999) 527 U.S. 471.

(2) The employer shall bear the cost of employing the services of the medical practitioner under subsection (1)."

8.2.1.8 Public education and sensitisation campaign on HIV/AIDS in the labour sector

To eradicate prejudice and stigma suffered by HIV positive workers at the workplace, there is need for public awareness campaign beyond the workplace, to the society. This should be in the form of media programmes in languages easily understood by the target population; use of local community leadership such as religious leaders, social welfare groups, and sports. The education and sensitisation campaign should focus on informing the public that HIV/AIDS is not transmitted by physical contact, with the aim of reducing segregation of HIV positive workers in the workplace in fear of infecting fellow workers. The Government in collaboration with Trade Unions should organise periodic workshops and seminars to sensitise employers against discriminating HIV positive workers and potential workers on Health grounds.

Other areas of concern by the education campaign should include access to voluntary testing and counselling; safer sex practices; independent access to STD health information; women empowerment to refuse sexual relations; equal remuneration of men and women for work of equal value; avenues for addressing sexual harassment at the workplace; and equal access to sustenance, employment, health care and economic opportunities.

The methods of instructions during the sensitisation and education campaigns should be those that are easy to understand such as use of charts, staging of moot courts, adverts and music among others, unlike the ordinary use of theory. To take care of the interests of the disabled, figurative language should be given equal consideration like the ordinary mode of instructions.

8.2.2 Long term strategies

These are measures to be taken by the government in future, in consensus with a number of players such as parliament, judiciary, human rights groups and international community. The measures include:

8.2.2.1 *Enactment of a new constitution*

Constitutional making is not a new process in Kenya. From the late 1980s, Kenyans intensified the struggle for constitutional democracy, through marches and protests which were violently repressed by the government. Many sectors of the Kenya society, professionals, trade unions, religious groups, women, and the youth came together in a series of national conferences to agitate for and develop a reform agenda, to be implemented through a constituent assembly. The government gave in, first by limited reforms, including introduction of multiparty democracy and abolition of restrictions on freedom of speech and assembly, and later by conceding a full blown review of the constitution through a highly participatory process, by a constituent assembly, known as the National Constitutional Conference. The review was to produce a constitution that respected human rights, multi-party democracy, ethnic and gender equity. An independent commission, the Constitution of Kenya Review Commission, was set up to educate people about the constitutions, and to collect their views, based on which it had to prepare a draft to go to the constituent assembly. The result of this process was unfortunate. The Government managed to persuade Parliament to endorse a draft constitution that was very different in important ways from what was adopted at the Bomas Conference. It was put to a referendum and the people of Kenya rejected it. Some people voted against the “Proposed New Constitution” because they preferred the earlier draft; some because of general dissatisfaction with the government; and some for tribal reasons.⁷⁴⁶

⁷⁴⁶ See Ghai Y. & Cottrell J. *Making a constitution in Kenya*. Available at <http://www.undp.org/constitutionbuilding/elibrary/constitutiongeneral/Kenya%20process.pdf>, accessed last on 3 May 2009.

In 2008, Kenyan Parliament enacted the Constitution of Kenya Review Act, 2008, upon which President Mwai Kibaki of Kenya, in consultation with Parliament, appointed the Committee of Experts. The mandate of the Committee of Experts include:

- a) To study all existing draft constitutions (Constitution of Kenya Review Commission draft, 2002 (CKRC draft), draft Constitution of Kenya, 2004 (Bomas draft), and proposed New Constitution (Wako Draft));⁷⁴⁷
- b) Consult on the summary of the views of Kenyans collected and collated by the Constitution of Kenya Review Commission (CKRC);⁷⁴⁸
- c) Examine documents reflecting political agreement on critical constitutional questions;⁷⁴⁹
- d) Consider analytical and academic studies commissioned or undertaken by the CKRC and the National Constitutional Conference including the Kriegler Commission, 2008 and Waki Commission, 2008 reports;⁷⁵⁰ and
- e) Study the memoranda submitted to the Committee of Experts on what issues the public considers to be contentious.

On November 17, 2009, the Committee of Experts published its Harmonised Draft Constitution, which has a number of provisions touching on HIV positive worker.⁷⁵¹

Article 37 of the Draft Constitution states:

“(1) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth;

(2) A person shall not discriminate directly or indirectly against another person on any of those grounds...”

⁷⁴⁷ Constitution of Kenya Review Act, 2008, s. 29(b) & (c).

⁷⁴⁸ Ibid, s. 29(a).

⁷⁴⁹ Ibid, s. 29(d).

⁷⁵⁰ Ibid, ss. 29(e) and 30(1).

⁷⁵¹ Government of Kenya, *Harmonised Draft Constitution of Kenya*, available at <http://www.coekenya.go.ke>, accessed last on December 28, 2009.

Article 43 of the draft Constitution on disability states:

“(1) Persons with disabilities are entitled to enjoy all the rights and fundamental freedoms set out in the Bill of Rights, and to be full participants in society;

(2) Persons with disabilities have a right to-

(a) respect and human dignity including to be treated, addressed and referred to, in official or private contexts, in a manner and in words that are not demeaning or derogatory...

(e) participate in decision making at all levels...

(g) have access to materials and devices to overcome constraints arising from those disabilities; and

(h) treatment and opportunities in all spheres of life that are both fair and equal to those of other members of society...”

Article 45 on human dignity states:

“(1) Every person has inherent dignity and the right to have that dignity respected and protected...”

Article 58 on occupational rights states:

“(1) Every person has the right to choose a trade, occupation or profession.

(2) The practice of trade, occupation or profession may be regulated by legislation.”

Article 61 on social security states:

“(1) Every person has the right to social security.

(2) The State shall provide appropriate social security to persons who are unable to support themselves or their dependents.”

Article 62 on health rights states:

“(1) Every person has the right to health, which includes the right to health care services, including reproductive health care.

(2) No person may be refused emergency medical treatment.”

Whereas the Harmonised Draft Constitution may be construed to be an improvement on the current Kenyan Constitution to the extent that it expressly recognises issues that affect HIV positive workers, it has its share of weaknesses. The Draft Constitution has not listed sources of law in Kenya, thus section of the Judicature Act⁷⁵² still remains the authoritative legislation on the sources of law in Kenya. The Act does not recognise international law as a source of law. Section 37 on non-discrimination on the basis of disability does not define disability to include HIV positive status or at all. It therefore still remains to the courts to interpret whether HIV positive worker is disabled or not. The Draft Constitution does not prohibit subjecting a person to medical testing without his/her informed consent, either as a breach to the right to dignity or right to privacy or at all. Occupational right under article 58 of the Draft Constitution does not place an obligation on the state to provide employment opportunities on its citizens. A person cannot therefore be heard to state that he/she has a right to employment, as the Draft Constitution does not envisage that. Also, the right to health and health care services does not oblige the State, within its available resources or at all, to provide health care services to its citizens as of right, either freely or at subsidised rates.

Even if the Harmonised Draft Constitution is passed in the referendum scheduled for **May**, 2010, Parliament will still have to amend the aforesaid provisions of the Constitution in order that the HIV positive worker is adequately protected. More particularly, Kenya can borrow from the Constitution of the Republic of South Africa which expressly acknowledges:

- a) The right to work;
- b) Right to health care services including access to Anti-retroviral drugs;

⁷⁵² Cap 8, Laws of Kenya.

- c) Non-discrimination on the basis of HIV status;
- d) Prohibition of repugnant cultural practices that perpetrate prejudice against HIV positive persons.

This will ensure that HIV positive workers are not protected by inference, but by express constitutional provisions.

8.2.2.2 *Institutional reforms*

Effective administrative procedures for lodging complaints are essential. There should be independent, informal and quick avenues for redressing cases of discrimination against HIV positive workers in the labour sector. These include:

- i. The composition of the HIV and AIDS Tribunal should include health and legal experts to advise the Tribunal on the ability of HIV positive workers to perform defined jobs and until at what stages. The Tribunal, should expeditiously handle the cases before them, otherwise the employer may deliberately delay the proceedings before the Tribunal until the complainant dies. The jurisdiction of the Tribunal should be enhanced to make it capable of giving an award that is commensurate to the prejudice caused by an employer to a worker who is discriminated against in the employment sector.
- ii. The Parliament should extend the jurisdiction of the office of the ombudsman to deal with not only with complaints against government entities, but also private employers. This will enable HIV positive workers who cannot afford to lodge claims against their employers either in terms of cost and skills to be represented by the ombudsman. Human Rights groups should also have a legislative authority to lodge complaints on behalf of their membership and the vulnerable members of the society. All these should be envisaged in a statute to be enacted by Parliament to be known as the *Representations Act, 2009*.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ADA	Americans with Disability Act
ADF	Australian Defence Forces
AIDS	Acquired Immune Deficiency Syndrome
ARIPO	African Regional Industrial Property Office
CDC	Centres for Disease Control
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
COTU	Confederation of Trade Unions
DDA	Disability Discrimination Act
EAC	East African Community
eKLR	Electronic Kenya Law Report
FKE	Federation of Kenya Employers
GRID	Gay Related Immune Syndrome
HALC	HIV/AIDS Legal Centre
HIV	Human Immunodeficiency Virus
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILJ	Institute for Law and Justice
ILO	International Labour Organisation
KIPI	Kenya Industrial Property Institute
KLR	Kenya Law Report
LOA	Life Office's Association
LR	Law Report
PCT	Patent Co-operation Treaty
PEPFAR	Presidential Emergency Plan for AIDS Relief
STD	Sexually Transmitted Diseases

TLR	Tanzania Law Report
TRIPS	Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
WHO	World Health Organisation

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