SALC Litigation Manual Series

# Equal rights for all: Litigating cases of HIV-related discrimination

SOUTHERN AFRICA LITIGATION CENTRE

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**About the Southern Africa Litigation Centre**

The Southern Africa Litigation Centre (SALC), established in 2005, aims to provide support—both technical and financial—to human rights and public interest initiatives undertaken by domestic lawyers in southern Africa. SALC works in Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Zambia and Zimbabwe. Its model is to work in conjunction with domestic lawyers in each jurisdiction who are litigating public interest cases involving human rights or the rule of law. SALC supports these lawyers in a variety of ways, including, as appropriate, providing legal research and drafting, training and mentoring, and monetary support. While SALC aims primarily to provide support on a specific case-by-case basis, its objectives also include the provision of training and the facilitation of legal networks within the region.

Since 2007, SALC's HIV Programme has focused on strengthening the rights of people living with and affected by HIV in southern Africa through supporting public interest cases in domestic courts. The HIV Programme provides technical and monetary support to public and private lawyers, civil society organisations, and community-based organisations to use the law to achieve concrete policy and legal outcomes that advance and solidify the rights of those infected with and affected by HIV in southern Africa.

SALC has worked on numerous HIV-related cases throughout southern Africa. These include challenging unfair dismissal and mandatory HIV testing of employees in Zambia; ending coerced sterilisation of HIV-positive women in public hospitals in Namibia; ensuring women's property and inheritance rights in Botswana, Lesotho and Malawi; and protecting the rights of sexual minorities in Malawi.

**Authorship and Acknowledgement**

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# List of Acronyms and Abbreviations

| | |
|---|---|
| **ACHPR** | African Charter on Human and Peoples' Rights |
| **African Commission** | African Commission on Human and Peoples' Rights |
| **African Court** | African Court on Human and Peoples' Rights |
| **CEDAW** | Convention on the Elimination of All Forms of Discrimination against Women |
| **CESCR** | Committee on Economic, Social and Cultural Rights |
| **HRC** | Human Rights Committee |
| **ICCPR** | International Covenant on Civil and Political Rights |
| **ICESCR** | International Covenant on Economic, Social and Cultural Rights |
| **ILO** | International Labour Organisation |
| **Protocol on Women** | Protocol to the African Charter on Human and Peoples' Rights of Women in Africa |
| **SADC** | Southern African Development Community |
| **UDHR** | Universal Declaration of Human Rights |
| **WHO** | World Health Organisation |

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CHAPTER 1

# Background

## 1.1 Purpose and scope of this manual

As of 2009, one-third of all people living with HIV resided in 10 countries in southern Africa—Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia, and Zimbabwe—with Swaziland estimated to have the highest adult HIV prevalence in the world at over 25%.[1] Despite the high HIV prevalence in southern Africa, people living with HIV continue to face discrimination and stigma as a result of their HIV status, particularly when accessing health care services and in employment.[2]

This manual seeks to be a resource for private and public lawyers in southern Africa who are litigating cases in domestic courts that strengthen the rights of people living with and affected by HIV. It may also be useful to civil society organisations seeking to use litigation as part of an advocacy strategy to promote and protect the rights of people living with and affected by HIV. It aims to provide concrete legal arguments for use in litigation before domestic courts. This publication focuses on litigating cases of HIV-related discrimination.

Discrimination on the basis of HIV status occurs in numerous arenas, including employment, prison, housing, adoption, education, and health care settings. This manual focuses on two specific areas where people living with HIV often face discrimination: in employment settings and when accessing health care services. It does not particularly

[1] UNAIDS, *Global Report: Fact sheet sub-saharan Africa* (Geneva 2010), pg 2 *available at* **http://www.unaids.org/documents/20101123_FS_SSA_em_en.pdf** (last visited 21 Aug 2011).

[2] One study documented high levels of HIV-stigma reported by people living with HIV (PLHA) and nurses in five African countries (Lesotho, Malawi, South Africa, Swaziland and Tanzania):

- 64.2% of all PLHAs and 83.7% of nurses reported experiencing one or more HIV stigma events over the last 3 months.
- 83.6% of all PLHAs reported one or more HIV-stigma events at baseline and this decreased, but was still significant 1 year later when 64.9% reported experiencing at least one HIV-stigma event in the last 3 months.
- At baseline, 80.3% of the nurses reported experiencing one or more HIV-stigma events and this increased to 83.7% 1 year later.

Holzemer WL et al., *Measuring HIV Stigma for PLHAs and Nurses Over Time in Five African Countries*, J. OF SOCIAL ASPECTS OF HIV/AIDS, Vol 6(2), Sept. 2009, pp 79-81 *available at* **http://www.ajol.info/index.php/saharaj/article/view/49753/36081** (last visited 21 Aug 2011).

address cases of discrimination in other settings, though some of the arguments outlined in the manual may be relevant in such cases.

Domestic lawyers will be familiar with the laws of their respective jurisdiction, but often fail to use international, regional and comparative jurisprudence to support and bolster their arguments before domestic courts. This is often due to the lack of awareness of international, regional and comparative law and a misconception that international, regional and comparative law is not useful in domestic litigation. This manual attempts to address both of these issues in the hopes that more private and public lawyers will utilise international, regional and comparative law in domestic litigation.

To that end, the manual starts by outlining why domestic courts should look to international, regional and comparative law in its deliberations. It then discusses the international and regional law relevant when litigating cases of discrimination based on HIV status. The international and regional law sections are organised according to specific rights. This is to provide lawyers easy access to needed information as they are drafting particular arguments based on particular rights. The manual also discusses comparative jurisprudence from countries where courts have addressed cases of discrimination and outlines responses to justifications that have routinely been offered for discriminatory behaviour. The manual does not discuss in detail domestic constitutional or legislative frameworks.

Most of the sections start with a checklist aimed at guiding lawyers in constructing arguments to support their cases before domestic courts. In addition, all of the sections start with a list of important documents and cases discussed in each respective chapter.

Finally, each section is extensively referenced, with the footnotes providing online locations for the supporting documentation. The aim is to provide lawyers with the relevant authoritative sources to strengthen legal arguments before domestic courts. In addition, the manual includes a list of useful online resources for lawyers.

## 1.2 Discrimination in employment settings

HIV-related discrimination in the employment setting falls into three general categories:

- discrimination while seeking employment;
- limited opportunities while employed; and
- dismissal from employment.

Examples in the pre-employment category include cases where a prospective employer requires an HIV test prior to considering a potential employee for a position.

Cases in the second category include when an employee is denied a promotion or a job-based opportunity as a result of their HIV status; for example, when a military employee is denied the opportunity to be deployed overseas because of his HIV status.

Finally, examples of dismissal due solely to HIV status or perceived incapacity as a result of HIV include:

- Where the employee is dismissed for incapacity based on his or her HIV status without an objective medical assessment of incapacity;
- Where the employee is dismissed for incapacity without being provided with an opportunity to access antiretroviral treatment; and
- Where no HIV workplace policy exists and workplace stigma leads to constructive dismissal.

Discrimination in employment can take place either as part of a broader policy or legislation or as individual action against a potential or current employee. For example, a domestic worker can be dismissed by an individual employer on the basis of her HIV status. On the other hand, an airline company could have a general policy that refuses to employ cabin attendants living with HIV. Both can be challenged in domestic courts throughout southern Africa.

## 1.3 Discrimination in health care settings

People living with HIV experience regular discrimination in health care settings due to such factors as:

- Pervasive stigma against people living with HIV, especially against women living with HIV;[3]
- Health care workers' ignorance of HIV transmission routes;[4]
- Failure to prioritise patients living with HIV due to limited resources; and
- Fear of exposure to HIV due to a lack of protective equipment.

The most common examples of discrimination experienced by people living with HIV in medical settings include:

- Failure to provide comprehensive and timely treatment to a patient as a result of HIV status;[5]
- Administration of unnecessary medical procedures, such as coerced sterilisation, because of HIV status;
- Ill-treatment of patients living with HIV including neglect, verbal abuse, separation and disrespect;

[3] Many women living with HIV report experiencing significant stigma by health care workers especially with respect to accessing sexual and reproductive services and rights. Women living with HIV in Namibia and South Africa have reported being stigmatized for getting pregnant whilst knowing their HIV status.

[4] For example, a study of health care workers' attitudes to HIV in Nigeria found that almost 80% of health care workers said they would refuse surgery or assistance at surgery on them by an HIV-infected doctor or nurse. Sadoh, AE et al., *Attitude of Health Care Workers to Patients and Colleagues Infected with Human Immunodeficiency Virus,* J. OF SOCIAL ASPECTS OF HIV/AIDS, Vol 6(1), Mar. 2009, pg 17 *available at* **http://www.ajol.info/index.php/saharaj/article/viewFile/49726/36055** (last visited 21 Aug 2011).

[5] A UNAIDS document cites the example of Nigeria where, in a survey of more than 1,000 health care professionals working directly with HIV patients in four Nigerian states, 43 percent observed others refusing a patient with HIV hospital admission. UNAIDS, *Reducing HIV Stigma and Discrimination: a Critical Part of National AIDS Programmes: a Resource for National Stakeholders in the HIV Response* (Geneva 2007), pg 9 *available at* **http://data.unaids.org/pub/Report/2008/JC1521_stigmatisation_en.pdf** (last visited 21 Aug 2011).

- Failure to obtain informed consent for HIV testing and other medical procedures;
- Violation of patient confidentiality because of the patient's HIV status; and
- Implementation of policies that directly or indirectly discriminate against people living with HIV by denying access to life-saving treatment such as kidney dialysis, blood transfusion, intensive care, or palliative care.

Discrimination in health care settings occurs in private and public health facilities and can be part of an official government or health care facility's policy or as part of individual action.

CHAPTER 2

# Use of international, regional and comparative law in domestic courts

## Checklist

- Is your domestic legal system monist or dualist?
- If monist, then international and regional law is directly enforceable.
- If dualist, does your Constitution provide any guidance on the relevance of international, regional and comparative law in domestic litigation?
- If dualist, is there any jurisprudence that outlines the relevance of international, regional, and comparative law in domestic litigation and/or which uses international, regional or comparative law in reaching its decision?
- If dualist, cite jurisprudence from other similarly situated countries where courts have taken into account international, regional and comparative law.

## Relevant cases discussed in this chapter

- Banda v Lekha
- Hoffmann v South African Airways
- Joy Mining Machinery (Pty) Ltd v National Union of Metal Workers of South Africa (NUMSA) and Others
- Kingaipe and Another v Attorney-General
- Legal Resources Foundation v Zambia
- Longwe v Intercontinental Hotel
- Monare v Botswana Ash (Pty) Ltd
- Odafe v Attorney-General
- Zimbabwe Human Rights NGO Forum v Zimbabwe

In most countries in southern Africa international and regional legal obligations are neither justiciable nor directly enforceable in domestic courts. However, a few countries in the region have monist legal systems, whereby ratified international and regional treaties automatically become part of the domestic law.[6] Lawyers should first determine whether their legal system is monist or dualist. If the domestic legal system is not monist whereby a country's international and regional legal obligations are not directly enforceable in domestic courts, international and regional law can still impose obligations on countries that have ratified particular treaties.

The African Commission on Human and Peoples' Rights (African Commission), responsible for monitoring compliance with regional human rights treaties, has noted that "international treaties which are not part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties."[7]

Moreover, the African Commission noted in *Zimbabwe Human Rights NGO Forum v Zimbabwe* that:

> "Human rights standards do not contain merely limitations on State's authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation."[8]

Given that a country's international and regional legal obligations do impose obligations, lawyers should first look to domestic law to persuade courts to take into account international, regional and comparative jurisprudence.

In some countries, domestic constitutional provisions provide for courts to look at international, regional and comparative law in reaching their decisions. For example, section 11(2)(c) of the Malawi Constitution states that: "[i]n interpreting the provisions of this Constitution a court of law shall where applicable, have regard to current norms of public international law and comparable foreign case law".[9]

Similarly, in South Africa, the Constitution provides under article 39(1) that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum-

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[6] Civil law countries such as Angola, Mozambique and the Democratic Republic of Congo adopt a monist legal system. In those cases, lawyers will not need to persuade domestic courts to look at international and regional legal obligations in its decision-making. However, the arguments outlined above may be useful in persuading a court to look at comparative constitutional jurisprudence.

[7] *Legal Resources Foundation v Zambia*, Comm. 211/98, para 60 *available at* **http://caselaw.ihrda.org/doc/211.98/pdf** (last visited 21 Aug 2011).

[8] *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. 245/2002, para 143 *available at* **http://caselaw.ihrda.org/doc/245.02/pdf** (last visited 21 Aug 2011).

[9] The Constitution of the Republic of Malawi, 1994, section 11(2)(c) *available at* **http://www.chr.up.ac.za/images/files/documents/ahrdd/malawi/malawi_constitution.pdf** (last visited on 17 Aug 2011).

a. ...;

b. must consider international law; and

c. may consider foreign law."[10]

In addition, lawyers should look to decisions by domestic courts to ascertain the accepted relevance of international, regional and comparative law. For example, in Zambia, the High Court in *Longwe v Intercontinental Hotel* held that Zambia's ratification of an international treaty "is a clear testimony of a willingness by that state to be bound by the provisions of such a document". [11]

Similarly, in the case of *Joy Mining Machinery v NUMSA*, the South African Labour Court explained that domestic legislation, the *Employment Equity Act*, should be interpreted:

...

> "(d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation". [12]

In Nigeria, the High Court went further in holding that the refusal to provide HIV-positive pre-trial prisoners access to antiretroviral treatment violated their right to enjoy the best attainable state of physical and mental health as guaranteed under the African Charter on Human and Peoples' Rights (the Charter).[13] Though there is no right to health care in the Nigerian Constitution, the court held that Nigeria was obliged to provide for adequate medical treatment under the Charter as it had been ratified by Nigeria.[14]

In addition, lawyers can cite decisions from other similarly situated courts, where international, regional and comparative law was utilised.

Courts in southern Africa have often used international, regional and comparative law, including international and regional guidelines to interpret the breadth of domestic constitutional and statutory rights especially when there is no relevant domestic jurisprudence.In the context of HIV for example, the Botswana Industrial Court has held that that *ILO Code of Practice on HIV/AIDS* is not binding but provides "useful guidelines, based on internationally accepted labour standards".[15]

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[10] Constitution of the Republic of South Africa, 1996, art. 39(1) *available at* **http://www.constitutionalcourt.org.za/site/constitution/english-web/ch2.html** (last visited 21 Aug 2011).

[11] *Longwe v Intercontinental Hotel,* [1993] 4 LRC 221, paras 233c-233d.

[12] *Joy Mining Machinery (Pty) Ltd v National Union of Metal Workers of South Africa (NUMSA) and others*, [2002] ZALC 7, para 16 *available at* **http://www.saflii.org/za/cases/ZALC/2002/7.html** (last visited on 21 Aug 2011).

[13] *Odafe v Attorney-General*, (2004) AHRLR 205 *available at* **http://www.southernafricalitigationcentre.org/library/item/odafe_and_others_v_attorney_general_and_others_high_court_2004** (last visited on 15 Aug 2011).

[14] *Id.* at paras 37-38.

[15] *Monare v Botswana Ash (Pty) Ltd,* (2004) IC No 112 of 1998, pg 23 *available at* **www.southernafricalitigationcentre.org/download/6/15** (last visited 21 Aug 2011).

In Zambia, the High Court in *Kingaipe and Another v Attorney-General* referred to the rights guaranteed under the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights in reaching its decision that mandatory HIV testing violated the right to privacy and freedom from inhuman and degrading treatment.[16]

In *Hoffmann v South African Airways*, the Constitutional Court used international and regional law to support its decision to strike down discrimination on the basis of HIV status in employment. The court stated:

> "South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples' Rights. In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination. Apart from these Conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment, formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status 'should not be a factor in job status, promotion or transfer.' It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV."[17]

Finally, Malawi's Industrial Relations Court in *Banda v Lekha* used regional and comparative law to define the scope of Malawi's constitutional right to be free from discrimination, holding that though not specifically listed it protected individuals from discrimination on the basis of HIV status. The court stated:

> "Section 20 of the Constitution prohibits unfair discrimination of persons in any form. Although the section does not specifically cite discrimination on the basis of one's (*sic*) HIV status, it is to be implied that it is covered under the general statement of anti discrimination in any form...The position on anti discrimination enunciated in the *Hoffmann* case fits squarely with the situation in Malawi. Malawi ratified the African Charter which came into force on 21 October 1986 and it also ratified Convention 111 on 22 March 1965 both of which, place a constitutional duty on the State to pass protective legislation and formulate national policy that give effect to fundamental rights entrenched in the Charter and the Convention. Malawi has formulated the National AIDS policy, which among other things is aimed at ensuring that all people affected or infected with HIV are equally protected under the law." [18]

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[16] *Kingaipe and Another v Attorney-General*, Case No. 2009/HL/86 (2010), pp J44-J45 *available at* **http://www.southernafricalitigationcentre.org/library/item/stanley_kingaipe_and_charles_chookole_v_the_attorney_general_2009_hl_86** (last visited on 21 Aug 2011).

[17] *Hoffmann v South African Airways*, [2000] ZACC 17, para 51 *available at* **http://www.saflii.org/za/cases/ZACC/2000/17.html** (last visited 21 Aug 2011).

[18] *Banda v Lekha*, [2005] MWIRCC 44, pp 2-3 *available at* **http://www.malawilii.org/mw/cases/MWIRC/2005/44.pdf** (last visited 21 Aug 2011).

## Additional examples of use of international instruments by domestic courts in southern Africa

***South Africa:*** "Although the ILO Code of Practice on HIV/AIDS and the World of Work is not binding on the Labour Court, it is fortifying to note that as an international instrument, it echoes some of the important provisions of our law. Its key principles include an acknowledgement that HIV/AIDS is a workplace issue; promotion of non-discrimination against workers on the basis of real or perceived HIV status; prohibition of HIV testing at the time of recruitment or as a condition of continued employment; prohibition of mandatory HIV testing; recommendations about conditions for voluntary testing at the insistence of employees and adherence to strict confidentiality and disclosure requirements."[19]

***South Africa:*** "South African anti-discrimination legislation derives its mandate from International Labour Organisation Conventions, including C111 Discrimination (Employment and Occupation) Convention of 1958, which prohibits workplace discrimination on a number of specific grounds, but does not proscribe HIV discrimination. More recently, the ILO Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 has recognised the impact of discrimination based on real or perceived HIV status and its increasing prevalence."[20]

***Botswana:*** "[T]he International Labour Organisation Code of Practice on HIV/AIDS... although not having a force of law, is persuasive in so far it is consistent with Botswana's international obligations, (see Convention no 111 (Discrimination, Employment and Occupation Convention, 1958), which Botswana has ratified)."[21]

***Botswana:*** "As the Industrial Court is not only a court of law but also a court of equity, it applies rules of natural justice, or rules of equity as they are sometimes called, when determining trade disputes. These rules of equity are derived from conventions and recommendations of the International Labour Organisation (ILO). These conventions and recommendations are international labour standards. The basic requirements for a substantively fair dismissal, which will include dismissal because of incapacity due to ill health, are set out in Art 4 of ILO Convention No 158 of 1982, which provides as follows: '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*, establishment or service'..."[22]

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[19] *PFG Building Glass v CEPPAWU*, (2003) 5 BLLR 475, para 77.

[20] *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrain Centre*, [2011] ZALC 2, para 40 *available on* **http://www.saflii.org/za/cases/ZALC/2011/2.html** (last visited 22 Aug 2011).

[21] *Lemo v Northern Air Maintenance (Pty) Ltd*, [2004] 2 BLR 317, pg 19 *available at* **http://www.southernafricalitigationcentre.org/library/item/lemo_v_northern_air_maintenance_pty_ltd_industrial_court_2004** (last visited 22 Aug 2011).

[22] *Monare*, *supra* note 15, pg 11.

CHAPTER 3

# International law relevant to discrimination on the basis of HIV status

## 3.1 Introduction

This chapter outlines the international law jurisprudence that may be relevant when litigating cases of discrimination on the basis of HIV status. For a discussion on why domestic courts should look to its international law obligations, please refer to Chapter 2.

### Checklist

- Which international human rights are violated in your particular case?
- Which international treaties provide for the particular rights you have identified? Look to UN and ILO treaties.
- Has your country signed and ratified the particular treaty? If so, make sure the events at issue took place after the ratification of the treaty.
- Has your country made any reservations to the treaty that may be applicable to the facts of your case?
- Have any of the committees monitoring compliance with the identified treaties issued any General Comments or General Recommendations which elaborate on the scope and breadth of the identified right(s)?
- Has there been any concluding observations, statements from UN bodies that are relevant to your case? Appendix A provides a list of relevant online sources.
- Are there any relevant international guidelines that provide additional support for your case?

## Relevant documents discussed in this chapter

- Code of Practice on HIV/AIDS and the World of Work
- Convention Concerning Termination of Employment
- Convention on the Elimination of Discrimination against Women
- Declaration of Commitment on HIV/AIDS
- Discrimination (Employment and Occupation) Convention
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Guidelines on HIV/AIDS and Human Rights
- Political Declaration on HIV/AIDS
- Recommendation Concerning HIV and AIDS and the World of Work 200 of 2010
- Resolution 41.24 on the Avoidance of Discrimination in relation to HIV-infected People and People with AIDS
- Universal Declaration on Human Rights

***The chapter is divided into the following sections:***

- Overview of relevant international law relating to HIV discrimination;
- Right to be free from discrimination;
- Right to equality;
- Freedom from cruel, inhuman and degrading treatment;
- Right to life;
- Right to health; and
- Right to work.

Table 1: Case examples of specific rights violations

| Right | Case examples |
|---|---|
| Right to equality and to be free from discrimination | In any case where an individual is treated differently from someone similarly situated because of her HIV status. It could include dismissal from work, failure to obtain health care services, or mistreatment by health care workers due to HIV status. |
| Freedom from cruel, inhuman and degrading treatment | • People living with HIV are forcibly sterilised by health care workers.<br>• People living with HIV are denied access to health care services or where access is delayed. |
| Life | • People living with HIV denied access to antiretroviral treatment. |
| Dignity | • People living with HIV are forcibly sterilised by health care workers.<br>• People living with HIV are denied access to health care services or where access is delayed.<br>• Dismissal from employment or refusal to hire due to a prospective employee's HIV status. |
| Right to health | In any case where a person living with HIV is denied access to health care services or antiretroviral treatment. |
| Right to work | • Dismissal of an employee due to HIV status.<br>• Denial of promotion or other job opportunities due to employee's HIV status.<br>• Failure to employ prospective applicant solely due to HIV status. |

## 3.2 Overview of relevant international law

The primary source of international law is treaties and conventions. Once a state has ratified a treaty or convention, they are legally binding.[23] States can make reservations when ratifying treaties and conventions, expressing their reservation from adhering to certain provisions of the treaty.

[23] It should be noted that, even where States have not signed or ratified conventions or treaties, these can still be binding if their principles form part of customary international law. In addition, signing a treaty obligates the country to abide by the object and purpose of the treaty. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, entered into force on Jan 27, 1980, art. 18(1) *available at* **http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf** (last visited 23 Aug 2011).

Table 2 provides the state of ratifications/accessions for countries in southern Africa for key international treaties.[24]

### Table 2: Dates of ratification/accession of international instruments

| Country | ICCPR | ICESCR | CEDAW | ILO Termination Convention | ILO Discrimination Convention |
|---|---|---|---|---|---|
| Angola | 10/1/1992 | 10/1/1992 | 17/9/1986 | - | 4/6/1976 |
| Botswana | 8/9/2000 | - | 13/8/1996 | - | 5/6/1997 |
| Dem. Rep. of Congo | 1/11/1976 | 1/11/1976 | 17/10/1986 | 3/4/1987 | 20/6/2001 |
| Lesotho | 9/9/1992 | 9/9/1992 | 22/8/1995 | 14/6/2001 | 27/1/1998 |
| Malawi | 22/12/1993 | 22/12/1993 | 12/3/1987 | 1/10/1986 | 22/3/1965 |
| Mozambique | 21/7/1993 | - | 21/4/1997 | - | 6/6/1977 |
| Namibia | 28/1/1994 | 28/11/1994 | 23/11/1992 | 28/6/1996 | 13/11/2001 |
| Swaziland | 26/3/2004 | 26/3/2004 | 26/3/2004 | - | 5/6/1981 |
| Zambia | 10/4/1984 | 10/4/1984 | 21/6/1985 | 9/2/1990 | 23/10/1979 |
| Zimbabwe | 13/5/1991 | 13/5/1991 | 13/5/1991 | - | 23/6/1999 |



Lawyers defending the rights of complainants in HIV-related discrimination cases can utilize various international treaties to support their arguments. This manual will discuss the rights provided for in the following UN treaties:

- The *International Covenant on Civil and Political Rights* (ICCPR);[25]
- The *International Covenant on Economic, Social and Cultural Rights* (ICESCR);[26] and
- The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).[27]

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[24] Ratifications for ICCPR, ICESCR, and CEDAW are available at **http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en**; ratifications for the ILO Termination Convention and ILO Discrimination Convention are available at **http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C158** and **http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C111** respectively.

[25] *International Covenant on Civil and Political Rights*, Dec 16, 1966, 999 U.N.T.S. 171, entered into force Jan 3, 1976 *available at* **http://www2.ohchr.org/english/law/pdf/ccpr.pdf** (last visited 21 Aug 2011) [hereinafter ICCPR].

[26] *International Covenant on Economic, Social and Cultural Rights*, Dec 16, 1966, 993 U.N.T.S. 3, entered into force Jan 3, 1976 *available at* **http://www2.ohchr.org/english/law/pdf/cescr.pdf** (last visited 21 Aug 2011) [hereinafter ICESCR].

[27] *Convention on the Elimination of All Forms of Discrimination against Women*, Dec 18, 1979, 1249 U.N.T.S. 13, entered into force Sept 3, 1981 *available at* **http://www2.ohchr.org/english/law/cedaw.htm** (last visited 21 Aug 2011) [hereinafter CEDAW].

These treaties and their respective human rights bodies expand upon the basic human rights principles set forth in the *Universal Declaration of Human Rights* (UDHR), adopted by the General Assembly of the United Nations in 1948.[28]

In addition to the UN treaties, the International Labour Organisation (ILO) has also adopted two relevant international treaties regarding discrimination in employment—*Discrimination (Employment and Occupation) Convention* and the *Convention Concerning Termination of Employment*—both of which can be relevant when addressing cases of employment discrimination.[29]

Country compliance to each of the UN treaties is monitored by an expert committee. The monitoring bodies for each treaty are as follows:

- The *Human Rights Committee* (HRC), which monitors compliance with the ICCPR;[30]
- The *Committee on Economic, Social and Cultural Rights* (CESCR), which monitors compliance with the ICESCR;[31] and
- The *Committee on the Elimination of Discrimination against Women*, which monitors compliance with CEDAW.[32]

Each committee is also tasked with defining the scope and nature of the rights enshrined in the respective treaties. This is primarily done through the issuing of general comments and general recommendations on particular rights. The general comments and general recommendations provide additional support on the nature and scope of rights enshrined in each respective treaty.

In furtherance of its mandate to monitor country compliance, the committees issue concluding observations, decisions on individual cases, and statements with respect to individual country activities. These can be particularly helpful in providing specific factual situations in which violations of a specific right is found.

In addition to international treaties, a number of guidelines and declarations can be useful in litigating HIV-related discrimination cases as they often provide more detailed set of requirements to ensure compliance with basic rights. These include:

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[28] *The Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 *available at* **http://www.un.org/en/documents/udhr/index.shtml** (last visited on 2 Aug 2011) [hereinafter UDHR].

[29] Int'l Labour Office, *Discrimination (Employment and Occupation) Convention*, C111, June 25, 1958, entered into force June 15, 1960 *available at* **http://www.ilo.org/ilolex/cgi-lex/convde.pl?R111** (last visited 21 Aug 2011) [hereinafter ILO Convention]; Int'l Labour Office *Convention Concerning Termination of Employment*, C158, June 22, 1982, entered into force Nov 23, 1985 *available at* **http://www.ilo.org/ilolex/cgi-lex/convde.pl?C158** (last visited 21 Aug 2011).

[30] For more information regarding the HRC, please see **http://www2.ohchr.org/english/bodies/hrc/** (last visited 22 Aug 2011).

[31] For more information regarding the CESCR, please see **http://www2.ohchr.org/english/bodies/cescr/index.htm** (last visited 22 Aug 2011).

[32] For more information regarding the Committee on the Elimination of Discrimination against Women, please see **http://www2.ohchr.org/english/bodies/cedaw/index.htm** (last visited 22 Aug 2011).

- *International Guidelines on HIV/AIDS and Human Rights*, promulgated by the Office of the United Nations High Commissioner for Human Rights;[33]
- ILO's *Code of Practice on HIV/AIDS and the World of Work*;[34]
- ILO's *Recommendation concerning HIV and AIDS and the World of Work 200 of 2010*;[35]
- World Health Assembly's *Resolution 41.24 on the Avoidance of Discrimination in relation to HIV-infected People and People with AIDS*;[36]
- UNGASS's *Declaration of Commitment on HIV/AIDS*;[37] and
- *Political Declaration on HIV/AIDS* adopted by the General Assembly.[38]

## 3.3 Right to be free from discrimination

The right to freedom from discrimination is at the core of the rights relevant to protecting people living with HIV from discrimination. A number of international treaties protect individuals from discrimination on the basis of HIV status. The relevant treaties discussed in this manual are the ICCPR, ICESCR and CEDAW. In addition, numerous international guidelines, resolutions and declarations specifically urge countries to refrain from HIV discrimination and stigmatisation.

The UDHR sets out the basic principles of non-discrimination under article 2, which 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..."[39]



[33] Office of the UN High Commissioner for Human Rights and Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version* (Geneva 2006) *available at* **http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf** (last visited 21 Aug 2011) [hereinafter International Guidelines].

[34] Int'l Labour Office, *Code of Practice on HIV/AIDS and the World of Work* (Geneva 2010) *available at* **http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/normativeinstrument/kd00015.pdf** (last visited 21 Aug 2011) [hereinafter ILO Code].

[35] Int'l Labour Office, *Recommendation Concerning HIV and AIDS and the World of Work (No. 200)* (Geneva 2010) *available at* **http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_142613.pdf** (last visited 21 Aug 2011) [hereinafter ILO Recommendation].

[36] World Health Assembly, *Resolution 41.24 on the Avoidance of Discrimination in Relation to HIV-infected People and People with AIDS*, 1998, *excerpted in* UNDP, Compendium of key documents relating to human rights and HIV in Eastern and Southern Africa (Pretoria University Law Press 2008), pg 39 *available at* **http://www.pulp.up.ac.za/pdf/2008_03/2008_03.pdf** (last visited 22 Aug 2011) [hereinafter UNDP Compendium].

[37] UNGASS, *Declaration of Commitment on HIV/AIDS*, 2001 *available at* **http://www.un.org/ga/aids/coverage/FinalDeclarationHIVAIDS.html** (last visited 21 Aug 2011) [hereinafter UNGASS Declaration].

[38] General Assembly, *Political Declaration on HIV/AIDS*, 2006 *available at* **http://data.unaids.org/pub/Report/2006/20060615_hlm_politicaldeclaration_ares60262_en.pdf** (last visited 21 Aug 2011) [hereinafter Political Declaration].

[39] UDHR, *supra* note 28, art.2.

The principle of freedom from discrimination is guaranteed in article 2(1) of the ICCPR which 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*."[40]

The ICESCR has a similar provision under article 2(2).[41]

Both article 2(1) of the ICCPR and article 2(2) of the ICESCR only guarantee non-discrimination with respect to the rights provided for in each treaty. Thus, in a case challenging the dismissal of an employee solely due to HIV status, one must argue that the dismissal violated article 2(2) of the ICESCR because it discriminated against the employee in his exercising his right to work as provided for under article 6(1) of the ICESCR.[42] Simply arguing a violation of article 2(2) of the ICESCR is not enough.

### *Definition and scope of discrimination*

The HRC has defined discrimination as:

> "imply[ing] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[43]

This definition has been adopted by the CESCR with respect to the discrimination provisions in the ICESCR.[44]

CEDAW under article 1 provides a more particular definition of discrimination against women as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[45]

The protection against discrimination under the ICESCR and ICCPR extends to both direct and indirect discrimination. Direct discrimination "occurs when an individual is treated

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[40] ICCPR, *supra* note 25, art. 2(1) (emphasis added).
[41] ICESCR, *supra* note 26, art. 2(2).
[42] *Id*. at art. 6(1).
[43] Human Rights Comm., 37th session, 1989, General Comment No. 18, para 7 *available at* **http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument** (last visited 21 Aug 2011) [hereinafter HRC, General Comment No.18].
[44] Comm. on Economic Social and Cultural Rights, 42nd session, 2009, General Comment No. 20, para 7 *available at* **http://www2.ohchr.org/english/bodies/cescr/comments.htm** (last visited on 2 Aug 2011) [hereinafter CESCR, General Comment No. 20].
[45] CEDAW, *supra* note 27, art. 1.

less favourably than another person in a similar situation for a reason related to a prohibited ground".[46] Denying a person employment based on their HIV status is an example of direct discrimination. Indirect discrimination, on the other hand, "refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of [] rights [under each treaty] as distinguished by prohibited grounds of discrimination".[47] A policy requiring a physical medical examination for school enrolment can be an example of indirect discrimination as it may discriminate against persons with HIV who may be unable to pass such a test.

The prohibition of direct and indirect discrimination is further supported in the *International Guidelines on HIV/AIDS and Human Rights* (International Guidelines) which specify that both direct and indirect discrimination should be prohibited, "as should cases where HIV is only one of several reasons for a discriminatory act".[48]

State obligations to eradicate discrimination extends to both ending it formally in laws and substantively in practice.[49] That is, merely addressing formal discrimination in a state's constitution, laws and policy documents "will not ensure substantive equality" as intended by article 2(2) of the ICESCR. The CESCR elaborated under its General Comment No. 20, stating that:

> "Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination."[50]

### *Prohibited grounds of discrimination*

Neither the ICCPR nor the ICESCR specifically list HIV status as a prohibited ground of discrimination. However, the CESCR explicitly stated that the inclusion of "other status" in the ICESCR is a clear indication that the list is not exhaustive and that "other grounds" may be incorporated into this category. The CESCR stated that:

> "A flexible approach to the ground of 'other status' is thus needed in order to capture other forms of differential treatment that cannot be reasonably and objectively justified and are of a comparable nature to the expressly recognized grounds in article 2, paragraph 2 [of the ICESCR]."[51]

The CESCR has recognised several other prohibited grounds in a non-exhaustive list that includes health status, including HIV, as well as age, disability, nationality, marital and family status, sexual orientation and gender identity, place of residence, and economic and social situation.[52]

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[46] CESCR, General Comment No. 20, *supra* note 44, para 10(a).
[47] *Id*. at para 10(b).
[48] International Guidelines, *supra* note 33, para 22(a)(ii) (emphasis added).
[49] CESCR, General Comment No. 20 *supra* note 44, para 38.
[50] *Id*. at para 8.
[51] *Id*. at para 27.
[52] *Id*. at paras 28-35.

With respect to discrimination on the basis of HIV status, it urges states to "ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant".[53] It refutes the view that restricting human rights in the context of a person's health status is necessary for the protection of public health, noting that such restrictions are discriminatory, including "when HIV status is used as the basis for differential treatment with regard to access to education, employment, health care, travel, social security, housing and asylum."[54]

Similarly, the HRC has found that the non-discrimination provision of the ICCPR protects individuals from discrimination on the basis of HIV status. In its Concluding Observations, the HRC noted its concern that people living with HIV were subjected to discrimination in a myriad of situations in Moldova in violation of article 2 of the ICCPR.[55]

The prohibition against discrimination on the basis of HIV is echoed in a number of international resolutions, declarations, and guidelines. The Commission on Human Rights has noted that "other status" in non-discrimination provisions includes health status, including HIV/AIDS. The International Guidelines state:

> "States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, that will ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation and provide for speedy and effective administrative and civil remedies."[56]

The World Health Assembly—the highest decision-making body of the World Health Organisation—in 1988 urged member states to "avoid discriminatory action against, and stigmatisation of [people living with HIV] in the provision of services, employment and travel".[57]

Similarly, the UNGASS *Declaration of Commitment on HIV/AIDS* adopted by the UN General Assembly urges states to

> "enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against…people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia education, inheritance, employment, health care, social and health services, prevention, support, treatment, information and legal protection".[58]

This was reaffirmed by the General Assembly in 2006 in its *Political Declaration on HIV/AIDS*.[59]

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[53] *Id*. at para 33.

[54] *Id*.

[55] Human Rights Comm., *Concluding Observations (Rep. Of Moldova)*, 2009, para 12 *available at* **http://www.universalhumanrightsindex.org/documents/825/1629/document/en/text.html** (last visited 21 Aug 2011).

[56] International Guidelines, *supra* note 33, guideline 5.

[57] World Health Assembly, *Resolution 41.24 on the Avoidance of Discrimination in Relation to HIV-infected People and People with AIDS*, 1998, *excerpted in* UNDP Compendium, *supra* note 36.

[58] UNGASS Declaration, *supra* note 37, para 58.

[59] Political Declaration, *supra* note 38, para 29.

Various international guidelines also specifically protect against HIV-related discrimination in employment. These will be discussed in more detail under section 2.6.

### *Discrimination against women*

The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) is particularly relevant when addressing cases of discrimination against women living with and affected by HIV. For example, CEDAW is relevant in cases where women living with HIV are made to sign employment contracts promising to not get pregnant or where women living with HIV fail to access appropriate health care while pregnant as a result of discrimination.

CEDAW's basic principle of non-discrimination is set forth in article 2 as follows:

> "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
>
> a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
>
> b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
>
> c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
>
> d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
>
> e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
>
> f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;
>
> g) To repeal all national penal provisions which constitute discrimination against women."[60]

Moreover, article 12(1) of CEDAW urges states to work towards the elimination of "discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning".[61] Article 13 expands this principle to discrimination in other areas of economic and social life, and article 14 specifically addresses discrimination against women in rural areas.[62]

[60] CEDAW, *supra* note 27, art 2.
[61] *Id.* at art. 12(1).
[62] *Id.* at arts. 13-14.

The Committee on the Elimination of Discrimination against Women has issued a specific recommendation on women and AIDS noting the particular hurdles women face in accessing health care and information regarding HIV. The committee recommended:

> "(a) That [countries] intensify efforts in disseminating information to increase public awareness of the risk of HIV infection and AIDS, especially in women and children, and of its effects on them;
>
> (b) That programmes to combat AIDS should give special attention to the rights and needs of women and children, and to the factors relating to the reproductive role of women and their subordinate position in some societies which make them especially vulnerable to HIV infection;
>
> (c) That States parties ensure the active participation of women in primary health care and take measures to enhance their role as care providers, health workers and educators in the prevention of infection with HIV..."[63]

In addition, recognising the breadth of discrimination experienced by women around the world, the ICCPR under article 3 specifically provides that all countries "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the [ICCPR]".[64] The ICESCR has a similar provision under article 3 of that treaty.[65] The protection under article 3 of the ICCPR and ICESCR is limited to the rights provided for under each treaty, respectively.[66]

Of particular relevance in HIV discrimination cases, the ICESCR under article 12 guaranteeing the right to health, provides specifically for the elimination of discrimination against women in accessing health, including:

> "interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services... the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health....[and] undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights".[67]

A number of international guidelines, resolutions and declarations promote the end of discrimination against women living with and affected by HIV.

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[63] Comm. on the Elimination of Discrimination against Women, 9th session, 1990, General Recomm. No. 15 *available at* **http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom15** (last visited 21 Aug 2011).

[64] ICCPR, *supra* note 25, art. 3.

[65] ICESCR, *supra* note 26, art. 3.

[66] Comm. on Economic Social and Cultural Rights, 34th session, 2005, General Comment No. 16, para 2 *available at* **http://www.unhchr.ch/tbs/doc.nsf/0/7c6dc1dee6268e32c125708f0050dbf6/$FILE/G0543539.pdf** (last visited 21 Aug 2011).

[67] Comm. on Economic Social and Cultural Rights, 22nd Session, 2000, General Comment No. 14, para 21 *available at* **http://www2.ohchr.org/english/bodies/cescr/comments.htm** (last visited 21 Aug 2011) [hereinafter CESCR, General Comment No. 14].

The International Guidelines recommend that countries "promote a supportive and enabling environment for women…by addressing underlying prejudices and inequalities…"[68]

Similarly, the *Political Declaration on HIV/AIDS* calls for the end of gender inequality through:

> "the provision of health care and services, including, inter alia, sexual and reproductive health, and the provision of full access to comprehensive information and education; ensure that women can exercise their right to have control over, and decide freely and responsibly on, matters related to their sexuality…"[69]

## 3.4 Right to equality

Article 7 of the UDHR sets out the principle of equality stating:

> "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."[70]

The ICCPR also broadly requires that all national laws be free from discrimination under article 26, which states that:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*."[71]

This article does not limit the scope of the rights protected from discrimination. In cases of HIV-related discrimination, it is useful to allege both violations of article 26 of the ICCPR and the non-discrimination articles of the appropriate treaties.

### *Limitation on right to equality and non-discrimination*

According to the HRC, states are permitted to differentiate in treatment but only if "the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]".[72]

Similarly, the CESCR warns that differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is "reasonable and objective".[73] However, the CESCR does make clear that failure to remedy differential treatment on the basis of a lack of available resources "is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State

[68] International Guidelines, *supra* note 33, guideline 8.
[69] Political Declaration, *supra* note 38, para 30.
[70] UDHR, *supra* note 28, art.7.
[71] ICCPR, *supra* note 25, art. 26 (emphasis added).
[72] HRC, General Comment No. 18, *supra* note 43, para 13.
[73] CESCR, General Comment No. 20, *supra* note 44, para 13.

party's disposition in an effort to address and eliminate the discrimination, as a matter of priority".[74]

Whether discriminatory behaviour can be deemed as justifiable as provided for under the ICCPR and ICESCR and other relevant law is discussed in more detail in chapter 5.

## 3.5 Freedom from cruel, inhuman and degrading treatment

Article 7 of the ICCPR prohibits the use of torture, cruel, inhuman or degrading treatment or punishment. Included in such treatment is the subjection of an individual to "medical or scientific experimentation" without their free consent.[75]

### Case example: Forced sterilisation of HIV positive women

In 2008, three women living with HIV sued the Government of Namibia for having been subjected to coerced sterilisation in public hospitals. The women alleged that they were forced into consenting to the sterilisation as consent was obtained while they were in labour or as a pre-condition for accessing other necessary medical treatment. None of the women were allegedly informed of the nature of the procedure. The women alleged, among others, a violation of their right to be free from cruel, inhuman and degrading treatment.

The HRC has relayed that the aim of article 7 is to "protect both the dignity and the physical and mental integrity of the individual".[76] It further explains that: "[t]he prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim… It is appropriate to emphasize in this regard that article 7 protects, in particular, children, pupils and patients in teaching and *medical institutions*."[77]

The right to be free from cruel, inhuman and degrading treatment may be relevant in cases of discrimination on the basis of HIV status. Examples of such cases include where individuals are stigmatised by health care workers and forced into degrading situations or where a person with AIDS is denied pain relief due to their HIV status and thus is subjected to immense physical and mental anguish or in cases of forced sterilisations and abortions.[78]

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[74] *Id*.

[75] ICCPR, *supra* note 25, art. 7.

[76] Human Rights Comm., 44th session, 1992, General Comment No. 20, para 2 *available at* **http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument** (last visited 21 Aug 2011) [hereinafter HRC, General Comment No. 20].

[77] *Id*. at para 5 (emphasis added).

[78] Human Rights Comm., 68th session, 2000, General Comment No. 28, para 11 *available at* **http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument** (last visited 21 Aug 2011) [hereinafter HRC, General Comment No. 28] ("To assess compliance with article 7 of the Covenant… [t]he States parties should also provide the Committee with information on measures to prevent forced abortion or forced sterilization.").

In addition, the International Guidelines helpfully note that "[d]enial to prisoners of access to HIV-related information, education and means of prevention (bleach, condoms, clean injection equipment), voluntary testing and counselling, confidentiality and HIV-related health care and access to and voluntary participation in treatment trials, could constitute cruel, inhuman or degrading treatment or punishment."[79]

## 3.6 Right to life

The right to life may be implicated in cases where discriminatory behaviour results in a loss of life. In addition, in countries where socio-economic rights are not guaranteed under national constitutions, one can argue that the constitutionally provided right to life encompasses many socio-economic rights such as the right to access to health care and the right to work.[80] In making this domestic law argument, international law obligations may be helpful and relevant for additional support.

### Case example: Discrimination in employment

The Bombay High Court, in *MX of Bombay Indian Inhabitant v M/s ZY,* addressed whether the dismissal of an employee due to his HIV status violated his right to life. The court reasoned that the right to life encompasses the right to livelihood and thus the right to work. Under that reasoning, the court found that failure to hire an individual solely on the basis of HIV status violated the right to livelihood.

Article 6(1) of the ICCPR provides that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[81]

The HRC has argued that the right to life should not be interpreted too narrowly:

> "The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."[82]

The right to life can be relevant in cases where certain classes of persons are unable to access life-saving HIV treatment, for example, in cases where prisoners living with HIV are denied treatment or where non-citizen prisoners are denied HIV treatment by the government when citizen prisoners are provided with such treatment.

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[79] International Guidelines, *supra* note 33, para 152.

[80] The Indian High Court took this view in its landmark decision, *MX of Bombay Indian Inhabitant v M/s ZY and another*, 1997(2) BOMLR 504 *available at* **http://www.indiankanoon.org/doc/1264404/** (last visited 21 Aug 2011).

[81] ICCPR, *supra* note 25, art. 6(1).

[82] Human Rights Comm., 16th session, 1982, General Comment No. 6, para 5 *available at* **http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument** (last visited 21 Aug 2011).

The HRC has found the right to life to be implicated in cases where countries have failed to adequately provide for equal access to medical services for people living with HIV, including equal access to HIV treatment. For example, the HRC expressed concern with Uganda in 2004, stating that given the requirements under article 6 providing for the right to life, it "remain[ed] concerned about the effectiveness of these measures and the extent to which they guarantee access to medical services, including antiretroviral treatment, to persons infected with HIV".[83]

## 3.7 Right to health

International law on the right of access to health care can be relevant and helpful in cases of discrimination by health facilities, especially in countries where the right to health is provided for under domestic constitutions. However, relying on other rights such as the right to be free from cruel, inhuman and degrading treatment and the right to life may be more persuasive in jurisdictions where the right to health is not provided for in the domestic law.

The right to health is recognized by the UDHR in article 25(1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services..."[84]

The ICESCR provides more clearly for the right to health in international law under article 12(1) which recognises "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".[85]

The CESCR interprets the right as one to have access to health care services and the concomitant duty on the state as one to make those services accessible to all.[86] The CESCR further explains that the right to health includes certain freedoms and entitlements such as the right to be free from non-consensual medical treatment and experimentation and entitlement to a system of health that provides "*equality of opportunity* for people to enjoy the highest attainable level of health".[87] Obstacles to the realization of the right to health related to HIV/AIDS must be taken into account when interpreting article 12.[88]

The CESCR breaks down the right to health into four distinct elements, but most relevant for the purposes of cases related to HIV-discrimination is accessibility to health care. The accessibility to health care is further broken down into four "overlapping dimensions"

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[83] Human Rights Comm., *Concluding Observations (Uganda)*, 2004, para 14 *available at* **http://www.universalhumanrightsindex.org/documents/825/593/document/en/text.html** (last visited 21 Aug 2011). *See also* Human Rights Comm., *Concluding Observations (Kenya)*, 2004, para 15 *available at* **http://www.universalhumanrightsindex.org/documents/825/725/document/en/text.html** (last visited 21 Aug 2011); Human Rights Comm., *Concluding Observations (Namibia),* 2004, para 10 *available at* **http://www.universalhumanrightsindex.org/documents/825/477/document/en/text.html** (last visited 21 Aug 2011).

[84] UDHR, *supra* note 28, art. 25(1).

[85] ICESCR, *supra* note 26, art.12(1).

[86] CESCR, General Comment No.14, *supra* note 67, paras 8-12.

[87] *Id*. at para 8 (emphasis added).

[88] *Id*. at para 10.

that include non-discrimination, physical accessibility, economic accessibility and information accessibility.[89]

Non-discrimination is explained as making health facilities, goods and services "accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds".[90]

The CESCR clarifies that the right to health read with the non-discrimination provisions under articles 2(2) and 3 of the ICESCR prohibits discrimination "in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of…*health status (including HIV/AIDS)*".[91] It further notes that eradicating discrimination in health requires minimal resources and thus should be achievable by countries.[92] More particularly, CEDAW insists that women and men have equal access to health and health care services. This includes the equal right to information regarding health care.[93]

Even in cases where states argue discrimination is necessary in accessing health care services due to limited resources, the CESCR requires states attain a minimum core of health care services, which include ensuring the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.[94]

## 3.8 Right to work

The ICESCR under article 6 provides for the right to work:

> "1. The States Parties to the present Covenant recognize 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 realization 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."[95]

More specifically, article 6 read in combination with the principle of non-discrimination in the ICESCR has been recognized by the CESCR as requiring states to guarantee that the right to work is exercised without discrimination on the basis of health status, including HIV/AIDS, among others:

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[89] *Id*. at para 12(b).
[90] *Id*. at para 12(b)(i).
[91] *Id*. at para 18 (emphasis added).
[92] *Id*.
[93] Comm. on the Elimination of Discrimination against Women, 20th session, 1999, General Recomm. No. 24 *available at* **http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom15** (last visited 21 Aug 2011).
[94] CESCR, General Comment No. 14, *supra* note 67, para 43(a).
[95] ICESCR, *supra* note 26, art. 6.

> "Under its article 2, paragraph 2, and article 3, the Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality."[96]

The CESCR notes with approval article 2 of the ILO *Discrimination (Employment and Occupation) Convention*, which states that countries should "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".[97]

The CESCR emphasises that at a minimum, article 6 "encompasses the obligation to ensure non-discrimination and equal protection of employment" and includes the following requirements:

> "(a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, permitting them to live a life of dignity;
>
> (b) To avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups;
>
> (c) To adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations. Such an employment strategy and plan of action should target disadvantaged and marginalized individuals and groups in particular and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed." [98]

Noting that discrimination on the basis of HIV status "inhibits efforts aimed at promoting HIV/AIDS prevention", the ILO *Code of Practice on HIV/AIDS and the World of Work* (ILO Code) also provides that "there should be no discrimination against workers on the basis of real or perceived HIV status".[99] The ILO Code further provides that mandatory HIV testing "should not be required of job applicants or persons in employment" as it would constitute discrimination.[100]

The ILO has also issued a *Recommendation Concerning HIV and AIDS and the World of Work 200 of 2010* (ILO Recommendation) which constitutes an unequivocal commitment by the ILO's constituency of member states "to tap into the immense contribution that the world of work can make to ensuring universal access to prevention, treatment, care and support".[101]

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[96] Comm. on Economic, Social and Cultural Rights, 35th session, 2005, General Comment No. 18, para 12(b)(i) *available at* **http://www2.ohchr.org/english/bodies/cescr/comments.htm** (last visited 21 Aug 2011) [hereinafter CESCR, General Comment No.18].

[97] *Id*. at para 12(b)(i).

[98] *Id*. at para 31.

[99] ILO Code, *supra* note 34, art. 4.2.

[100] *Id*. at art. 4.6.

[101] ILO Recommendation, *supra* note 35.

The ILO Recommendation recognises the impact of discrimination based on real or perceived HIV status and its increasing prevalence. [102] The ILO Recommendation states that:

> "Real or perceived HIV status should not be a ground of discrimination preventing the recruitment or continued employment, or the pursuit of equal opportunities consistent with the provisions of the Discrimination (Employment and Occupation) Convention, 1958."[103]

### *Termination*

The right to work under the ICESCR includes the right to not be unfairly terminated.[104] This is echoed in the ILO's *Termination of Employment Convention* (Termination Convention) requiring that "[t]he 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, establishment or service".[105] The Termination Convention further states that if an employee's work is being terminated based on capacity or performance then he should be "provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".[106]

The ILO Code also notes that "HIV infection [cannot be] a cause for termination of employment. As with many other conditions, persons with HIV-related illnesses should be able to work for as long as medically fit in available, appropriate work."[107]

The ILO Recommendation echoes this, stating:

> "Real or perceived HIV status should not be a cause for termination of employment. Temporary absence from work because of illness or caregiving duties related to HIV or AIDS should be treated in the same way as absences for other health reasons, taking into account the Termination of Employment Convention, 1982.
>
> ...
>
> Persons with HIV-related illness should not be denied the possibility of continuing to carry out their work, with reasonable accommodation if necessary, for as long as they are medically fit to do so. Measures to redeploy such persons to work reasonably adapted to their abilities, to find other work through training or to facilitate their return to work should be encouraged, taking into consideration the relevant International Labour Organization and United Nations instruments."[108]

[102] The term "discrimination" refers to any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. ILO Convention, *supra* note 29.
[103] ILO Recommendation, *supra* note 35, para 10.
[104] CESCR, General Comment No. 18, *supra* note 96, para 4.
[105] ILO Convention, *supra* note 29, art. 4.
[106] *Id*. at art. 7.
[107] ILO Code, *supra* note 34, art. 4.8.
[108] ILO Recommendation, *supra* note 35, paras 11-13.

CHAPTER 4

# Regional law relevant to discrimination on the basis of HIV status

## 4.1 Introduction

This chapter focuses on regional jurisprudence relevant in cases of HIV-related discrimination. For why domestic courts should look to regional law obligations, please refer to Chapter 2.

### Checklist

- Which regional human rights are violated in your particular case?
- Which regional treaties provide for the particular rights you have identified?
- Has your country signed and ratified the particular treaty? If so, make sure the events at issue took place after the ratification of the treaty.
- Has your country made any reservations to the treaty that may be applicable to the facts of your case?
- Has the African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, and Southern African Development Community issued any relevant decisions on the rights you have identified? Look at Appendix A for online sources for these decisions.
- Are there any relevant resolutions, statements or guidelines issued by the African Commission on Human and Peoples' Rights or the Southern African Development Community?

## Relevant documents and cases discussed in this chapter

- African Charter on Human and Peoples' Rights
- Charter of Fundamental Social Rights in SADC
- Maseru Declaration on the Fight against HIV/AIDS in the SADC Region
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- Resolution on HIV/AIDS Pandemic
- Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV
- SADC Code on HIV/AIDS and Employment
- SADC Protocol on Gender and Development
- SADC Protocol on Health
- Treaty of the Southern African Development Community (SADC)
- Annette Pagnoulle (on behalf of Abdoulaye Mazou)/Cameroon
- Doebbler v Sudan
- Garreth Anver Prince/South Africa
- Good v Botswana
- Legal Resources Foundation v Zambia
- Purohit and Moore v Gambia
- Sudan Human Rights Organisation and Centre on Housing Rights and Evictions/ Sudan

***The chapter is divided into the following sections:***

- Overview of relevant regional law;
- Right to be free from discrimination;
- Right to equality;
- Right to dignity;
- Freedom from cruel, inhuman and degrading treatment;
- Right to health; and
- Right to work.

## 4.2 Overview of relevant regional law

Lawyers defending the rights of complainants in HIV-related discrimination cases can utilize various treaties promulgated by the African Union to support their arguments, including:

- The *African Charter on Human and Peoples' Rights* (the Charter);[109] and
- The *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (the Protocol on Women).[110]

Country compliance to each of the treaties is monitored by the African Commission on Human and Peoples' Rights (African Commission). The Charter provides that the African Commission will:

> "draw inspiration from international law on human and peoples' rights, particularly from the provision of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries…as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations…"[111]

It furthermore notes that as subsidiary principles of law, the African Commission will:

> "take into consideration…other general or specialised international conventions… expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law…as well as legal precedents and doctrine".[112]

The African Commission also has a variety of experts covering specific areas monitoring country compliance. Relevant ones include the Special Rapporteur on Prisons and Conditions of Detention in Africa; Special Rapporteur on the Rights of Women in Africa; Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced Persons in Africa; and the Committee on the Protection of PLHIV and Those at Risk.

Recommendations, reports and decisions of the African Commission and special rapporteurs, as well as decisions of the African Court on Human and Peoples' Rights assist in determining the nature and scope of regional and national legal obligations.

In addition, resolutions, protocols and declarations made by regional bodies, including the African Union and organs of the Southern African Development Community (SADC) can provide guidance to domestic courts in southern Africa on the nature and scope of rights enshrined in national constitutions and legislation.

Relevant regional resolutions, protocols and declarations include the *Treaty of SADC; SADC Protocol on Health*; *SADC Code on HIV/AIDS and Employment*; *SADC Protocol on*

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[109] *African Charter on Human and Peoples' Rights*, June 27 1981, 21 I.L.M. 58, entered into force Oct 21, 1986 *available at* **http://www.achpr.org/english/_info/charter_en.html** (last visited 21 Aug 2011) [hereinafter African Charter].

[110] *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, Sept 13, 2000, OAU Doc. CAB/LEG/66.6, entered into force Nov 25, 2005 *available at* **http://www.achpr.org/english/_info/women_en.html** (last visited on 21 Aug 2011) [hereinafter Protocol on Women].

[111] African Charter, *supra* note 109, art. 60.

[112] *Id.* at art. 61.

*Gender and Development*; *Charter of Fundamental Social Rights in SADC*; and *Maseru Declaration on the Fight against HIV/AIDS in the SADC Region*.[113]

Table 3 provides the state of ratifications/accessions for countries in southern Africa for key regional treaties.[114]

Table 3: Dates of ratification/accession of regional instruments

| Country | African Charter on Human and Peoples' Rights | Protocol on the Rights of Women | Treaty of SADC | SADC Protocol on Health |
|---|---|---|---|---|
| Angola | 2/3/1990 | 30/8/2007 | 20/8/1993 | |
| Botswana | 17/7/1986 | - | 07/01/1998 | 9/2/2000 |
| Dem. Rep. of Congo | 20/7/1987 | 9/6/2008 | 28/2/2009 | |
| Lesotho | 10/2/1992 | 26/10/2004 | 26/8/1993 | 31/7/2001 |
| Malawi | 17/11/1989 | 20/5/2005 | 12/8/1993 | 7/11/2000 |
| Mozambique | 22/2/1989 | 9/12/2005 | 30/8/1993 | 13/11/2000 |
| Namibia | 30/7/1992 | 11/8/2004 | 14/12/1992 | 10/07/2000 |
| Swaziland | 15/9/1995 | Signed 7/12/2004 | 16/4/1993 | |
| Zambia | 10/1/1984 | 2/5/2006 | 16/4/1993 | |
| Zimbabwe | 30/5/1986 | 15/4/2008 | 17/11/1992 | 13/5/2004 |

[113] Southern African Development Community, *Treaty of SADC*, 1981 *available at* **http://www.sadc.int/index/browse/page/120** (last visited 22 Aug 2011); Southern African Development Community, *Protocol on Health*, 1999 *available at* **http://www.sadc.int/index/browse/page/152** (last visited 22 Aug 2011); Southern African Development Community, *Code on HIV/AIDS and Employment in the Southern African Development Community*, 1997 *available at* **http://www.chr.up.ac.za/undp/subregional/docs/sadc5.pdf** (last visited 21 Aug. 2011) [hereinafter SADC Code]; Southern African Development Community, *Protocol on Gender and Development*, 2008 *available at* **http://www.sadc.int/index/browse/page/465** (last visited 21 Aug 2011) [hereinafter SADC Protocol on Gender]; Southern African Development Community, *Charter of Fundamental Social Rights in SADC*, 2003 *available at* **http://www.sadc.int/index/browse/page/171** (last visited on 2 Aug 2011) [hereinafter Charter of Fundamental Social Rights]; Southern African Development Community, *Maseru Declaration on HIV/AIDS*, 2003 *available at* **www.sadc-tribunal.org/docs/HIV-AIDS.pdf** (last visited on 2 Aug 2011) [hereinafter Maseru Declaration].

[114] For ratifications of and accessions to the African Charter on Human and Peoples' Rights, see **http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf**. For ratifications of and accessions to the Protocol on the Rights of Women, see **http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20Rights%20of%20Women.pdf**. For ratifications of Treaty of SADC and SADC Protocol on Health, see S. Ebobrah and A. Tanoh (eds.), Compendium of African Sub-regional Human Rights Documents (Pretoria University Law Press 2010), pg 509 *available at* **http://www.pulp.up.ac.za/pdf/2010_06/2010_06.pdf** (last visited 26 Aug 2011).

## 4.3 Right to be free from discrimination

Article 2 of the Charter provides for the right to be free from discrimination:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth *or any status*."[115]

The right to be free from discrimination under article 2 of the Charter applies only to exercising those rights provided under the Charter.

The Charter also specifically protects women from discrimination in a separate article. In terms of article 18(3), countries "shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions".[116]

Furthermore, the Protocol on Women provides protection for women from discrimination under article 2(1):

> "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall…(d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;"[117]

In determining whether impermissible discrimination has taken place under the Charter, the African Commission has stated that:

> "A violation of the principle of non-discrimination arises if:
>
> a) equal cases are treated in a different manner;
>
> b) a difference in treatment does not have an objective and reasonable justification; and
>
> c) if there is no proportionality between the aim sought and the means employed."[118]

The African Commission has found violations of article 2 and given meaning to its terms. In *Legal Resources Foundation v Zambia*, the African Commission found that Zambian constitutional provisions that rendered persons not of Zambian descent ineligible for presidential office violated article 2. In so doing, the Commission explained:

> "Article 2 of the Charter abjures (sic) discrimination on the basis of any of the grounds set out, among them 'language…national or social origin…birth or other status…'. The right to equality is very important. It means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or the lack of it affects the capacity of one to enjoy many other rights."[119]

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[115] African Charter, *supra* note 109, art. 2 (emphasis added).

[116] *Id*. at art. 18(3).

[117] Protocol on Women, *supra* note 110, art. 2(1)(d).

[118] *Good v Botswana*, Comm. 313/05, para 219 *available at* **http://caselaw.ihrda.org/doc/313.05/pdf/** (last visited 21 Aug 2011).

[119] *Legal Resources Foundation v Zambia, supra* note 7, para 63.

In a 2005 recommendation, *Good v Republic of Botswana Rapporteur*, the African Commission again described the importance and breadth of the principle of non-discrimination, which it described as "a fundamental principle in international human rights law. All international and regional human rights instruments and almost all countries' constitutions contain provisions prohibiting discrimination. The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally in law and practice."[120]

The African Commission has not directly addressed whether discrimination on the basis of HIV status is covered under article 2. However, the African Commission recently passed a resolution creating a Committee on the Protection of PLHIV and Those at Risk to look specifically at the rights of people living with and affected by HIV, including discrimination.[121] Furthermore, the African Commission in 2001 called upon African governments to "ensure human rights protection of those living with HIV/AIDS against discrimination."[122] Given that, it is likely that article 2 of the Charter protects against discrimination on the basis of HIV status.

Numerous resolutions and declarations also acknowledge the importance for people living with and affected by HIV to be free from discrimination. In the employment setting, the *Code on HIV/AIDS and Employment in SADC* (the SADC Code) specifically rejects "direct or indirect pre-employment test for HIV" as well as workplace testing.[123] It further recommends that HIV should not be a "factor in job status, promotion or transfer".[124] Helpfully, the SADC Code outlines the proper procedures for employers with employees living with HIV, stating that people living with HIV should continue employment:

> "for as long as they are medically fit to do so. When on medical grounds they cannot continue with normal employment, efforts should be made to offer them alternative employment without prejudice to their benefits. When the employee becomes too ill to perform their agreed functions, the standard benefits and conditions and standard procedures for termination of service for comparable life-threatening conditions should apply without discrimination."[125]

With respect to the rights of women living with HIV, the *SADC Protocol on Gender and Development* reinforces article 6(2) of the *Treaty of SADC* in reminding southern African states that they undertook "not to discriminate against any person on the grounds of… gender".[126]

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[120] *Good*, *supra* note 118, para 218.

[121] African Commission on Human and People's Rights, Resolution on the Establishment of a Committee on the Protection of the Rights of People Living With HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV, Res 163 (XLVII), 2010 *available at* **http://www.achpr.org/english/resolutions/Resolution163_en.htm** (last visited 22 Aug 2011).

[122] African Commission on Human and Peoples' Rights, Resolution on HIV/AIDS Pandemic—Threat against Human Rights and Humanity, AHG/229 (XXXVII), May 2001 *available at* **http://www.chr.up.ac.za/undp/regional/docs/achpr2.pdf** (last visited 19 Aug 2011).

[123] SADC Code, *supra* note 113, arts. 2 and 3(1).

[124] *Id*. at art. 4.

[125] *Id*. at art. 6(3).

[126] SADC Protocol on Gender, *supra* note 113, preamble.

The SADC Declaration outlines the content of that undertaking committing southern African states to changing all national law which discriminates against women; ensuring women equal access to property and employment among others; recognising, protecting and promoting the sexual and reproductive rights of women and girls; and ensuring women's access to health services.[127]

Finally, the *Maseru Declaration on HIV/AIDS* recognizes the importance of addressing discrimination against people living with HIV:

> "The upholding of human rights and fundamental freedoms for all including prevention of stigma and discrimination of People Living With HIV/AIDS (PLWHA) is a necessary element in our regional response to the HIV/AIDS pandemic..."[128]

## 4.4 Right to equality

The Charter provides under article 3 a broad right to equal protection, which requires all laws in a country to be non-discriminatory. Article 3 states that "[e]very individual shall be equal before the law" and "entitled to equal protection of the law".[129] This provision is similar to article 26 under the ICCPR discussed in section 3.4.

The African Commission has held that article 3 "guarantees fair and just treatment of individuals within the legal system of a given country."[130] It has further clarified that "[t]he aim of [article 3] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation."[131]

To establish a claim under article 3, a lawyer must show that the client was not treated the same as others in a similar situation under the law or that another in the same situation was given more favourable treatment from the client.[132]

Invariably, the right to non-discrimination and equality will feature highly in any litigation relating to HIV discrimination. It is important to note, however, that pleadings may want to refer to the range of related rights that are usually violated in cases of HIV-related discrimination. The scope and nature of these rights are set out below.

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[127] *Id*. at arts. 18-27.

[128] Maseru Declaration, *supra* note 113, preamble.

[129] African Charter, *supra* note 109, art. 3.

[130] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe / Zimbabwe*, Comm. 284/03, para 155 *available at* **http://caselaw.ihrda.org/doc/284.03/view/** (last visited 25 Aug 2011).

[131] *Id.*

[132] *See id.* at para 158.

## 4.5 Right to dignity

The Charter provides that "[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status".[133]

The Protocol on Women also affirms the right to dignity under article 3(1):

> "Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights."[134]

### Case example: Refusal to hire due to HIV status

In *Hoffmann v South African Airways*, the South African Constitutional Court addressed whether an airline could refuse to hire someone living with HIV solely on the basis of the applicant's HIV status. Hoffmann argued that the policy violated his right to human dignity, among others. The court held that the given the high levels of stigma against people living with HIV, discrimination on the basis of HIV status was an assault on the right to dignity.

The African Commission has held that:

> "Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right."[135]

The African Commission further elaborated on what constituted the right to dignity, noting that "exposing victims to personal sufferings and indignity violates the right to human dignity", further noting that "personal suffering and indignity can take many forms".[136]

Unfortunately, the African Commission has not yet applied this right in cases of HIV discrimination, but given its emphasis on personal suffering and indignity as part of the right to human dignity, it is likely that being denied health care services because of one's HIV status or being subjected to coerced sterilisation as a result of one's HIV status, would clearly violate the right to dignity.



[133] African Charter, *supra* note 109, art. 5.

[134] Protocol on Women, *supra* note 110, art. 3(1).

[135] *Purohit and Moore v. Gambia*, Comm. 241/01, para 57 *available at* **http://caselaw.ihrda.org/doc/241.01/pdf/** (last visited 21 Aug 2011).

[136] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE)/Sudan*, Comm. 279/03-296/05, para 158 *available at* **http://caselaw.ihrda.org/doc/279.03-296.05/pdf/** (last visited 21 Aug 2011).

## 4.6 Freedom from cruel, inhuman and degrading treatment

The Charter states that "[a]ll forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".[137] This provision is also included in the Protocol on Women under article 4. This right is closely tied to the right to dignity discussed above.

The African Commission emphasised in the case of *Doebbler v Sudan* that article 5 of the Charter "prohibits not only cruel but also inhuman and degrading treatment. [It] includes not only actions which cause serious physical or psychological suffering, but which humiliate or force the individual against his will or conscience."[138] The African Commission reiterated that "the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses".[139]

Given the Commission's emphasis on inhuman and degrading treatment and its view that the prohibition against cruel, inhuman and degrading treatment should be broadly construed, it is likely that HIV-related discrimination in employment settings, including mandatory testing and termination and discrimination due to HIV status in health care settings, including when accessing services, would be a violation of the prohibition on torture and cruel, inhuman and degrading treatment and punishment.

## 4.7 Right to health

Article 16 of the Charter provides that every person has the "right to enjoy the best attainable state of physical and mental health" and it affirmatively imposes obligations upon member states to "take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."[140]

In addition, article 18(4) of the Charter states that "[t]he aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".[141]

The African Commission has held that the right to health must be applied without discrimination. In *Purohit and Moore v The Gambia*, the African Commission held that the legislative regime in the Gambia for mental health patients violated both articles 16 and 18(4). In so doing, the Commission explained:

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[137] African Charter, *supra* note 109, art.5.

[138] *Doebbler v Sudan,* Comm. 236/00, para 36 *available at* **http://caselaw.ihrda.org/doc/236.00/pdf/** (last visited 21 Aug 2011); *see also International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.)/Nigeria*, Comm. 137/94-139/94-154/96-161/97 *available at* **http://caselaw.ihrda.org/doc/137.94-139.94-154.96-161.97/pdf/** (last visited 21 Aug 2011).

[139] *Doebbler*, *supra* note 138, para 37.

[140] African Charter, *supra* note 109, art. 16.

[141] *Id.* at art. 18(4).

> "[e]njoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind."[142]

The African Commission also "read into Article 16 the obligation on the part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind".[143]

The African Commission has also found that the responsibility of countries "in the event of detention is even more evident to the extent that detention centres are its exclusive preserve".[144] The African Commission held in *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project* that denying a detainee in medical need access to a doctor was a violation of article 16 of the Charter.[145]

For cases involving discrimination against women living with HIV, including failure to gain access to health services due to HIV status or forced abortion or sterilisation due to a women's status, article 14 of the Protocol on Women provides that states "shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted". This includes:

a) The right to control their fertility;
b) The right to decide whether to have children, the number of children and the spacing of children;
c) The right to choose any method of contraception;
d) The right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;
e) The right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; and
f) The right to have family planning education.[146]

[142] *Purohit*, *supra* note 135, para 80.
[143] *Id.* at para 84. *See also Centre on Housing Rights and Evictions (COHRE)*, *supra* note 136.
[144] *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania*, Comm. 54/91-61/91-98/93-164/97_196/97-210/98, para 122 *available at* **http://caselaw.ihrda.org/doc/54.91-61.91-98.93-164.97_196.97-210.98/pdf/** (last visited 21 Aug 2011).
[145] *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project / Nigeria*, Comm. 105/93-128/94-130/94-152/96, para 91 *available at* **http://caselaw.ihrda.org/doc/105.93-128.94-130.94-152.96/pdf/** (last visited 21 Aug 2011). *See also International PEN*, *supra* note 138.
[146] Protocol on Women, *supra* note 110, art.14.

In terms of article 14(2) of the Protocol on Women, states "shall take all appropriate measures to provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas".[147]

The African Commission has yet to expand on the breadth and scope of these rights.

## 4.8 Right to work

Article 15 of the Charter states that "[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work".[148]

The African Commission has held that "[o]ne purpose of this Charter provision is to ensure that States respect and protect the right of everyone to have access to the labour market without discrimination".[149] Though this provision has yet to be applied in a case related to HIV discrimination, the African Commission has found violations of article 15 in cases where individuals were not remunerated for their work;[150] where a political prisoner was not reinstated in his former position upon release when others similarly situated were;[151] and when non-citizen workers with legitimate work authorisation were deported for engaging in legal work activities.[152]

The African Commission has permitted "certain restrictions [to article 15] depending on the type of employment and the requirements thereof".[153] In cases of HIV as is discussed at length in Chapter 6, legitimate justifications for discrimination in employment are narrow.

In the regional context, SADC states have signed the *Charter of Fundamental Social Rights in SADC* (the SADC Charter). The SADC Charter:

> "embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments".[154]

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147 *Id.* at art. 14(2)(a).

148 African Charter, *supra* note 109, art.15.

149 *Garreth Anver Prince / South Africa*, Comm. 255/02, para 46 *available at* **http://caselaw.ihrda.org/doc/255.02/pdf/** (last visited 21 Aug 2011).

150 *Malawi Africa Association*, *supra* note 144, para 135.

151 *Annette Pagnoulle (on behalf of Abdoulaye Mazou) /Cameroon*, Comm. 39/90, para 29 *available at* **http://caselaw.ihrda.org/doc/39.90_10ar/pdf/** (last visited 21 Aug 2011).

152 *Institute for Human Rights and Development in Africa/Angola*, Comm. 292/04, paras 74-76 *available at* **http://caselaw.ihrda.org/doc/292.04/pdf/** (last visited on 2 Aug 2011).

153 *Garreth Anver Prince*, *supra* note 149, para 46.

154 Charter of Fundamental Social Rights, *supra* note 113, art. 3.

The SADC Code provides detailed guidance for employers and employees on the rights of people living with HIV in employment. Particularly related to discrimination in employment, the SADC Code states that HIV status should not be a factor in job status, promotion or transfer but should be based on existing criteria of equality of opportunity, merit and capacity to perform.[155] More specifically, the SADC Code prohibits the dismissal of workers based on HIV status and provides that all HIV-positive employees should continue their work for as long as they are medically fit to do so.[156] The SADC Code requires countries to provide alternative employment for employees without prejudice to their benefits if they are unable to perform their specific job as a result of medical reasons.[157] The SADC Code also prohibits compulsory workplace testing and requires that all testing be voluntary, done by a suitably qualified person in a health facility with informed consent, and pre- and post-test counselling.[158]



[155] SADC Code, *supra* note 113, art. 4.
[156] *Id.* at art. 6.3.
[157] *Id.*
[158] *Id.* at art. 3.1.

CHAPTER 5

# Comparative law relevant to discrimination on the basis of HIV status

## 5.1 Introduction

A wealth of comparative case law exists that can be referred to in HIV discrimination litigation. This chapter focuses on comparative case law relating to discrimination on the basis of HIV status in employment and health care settings. For a discussion on why courts should look at the jurisprudence of likeminded countries, please refer to Chapter 2.

### Relevant cases discussed in this chapter

- Allpass v Mooikloof Estates (Pty) Ltd
- Banda v Lekha
- Bootes v Eagle Inc System KZ Natal (Pty) Ltd
- Bragdon v Abbott
- Diau v Botswana Building Society
- Fontaine v Canadian Pacific Ltd
- Hoffmann v South African Airways
- Lemo v Northern Air Maintenance (Pty) Ltd
- Makuto v S
- Mangani v Register Trustees of Malamulo Hospital
- MX of Bombay Indian Inhabitant v M/s ZY
- Nanditume v Minister of Defence
- Satellite Investments v Dlamini

Table 4: List of rights implicated in specific judicial decisions

| Right | Cases in which right is discussed |
|---|---|
| The right to equality and to be free from discrimination | Banda v Lekha<br>Diau v Botswana Building Society<br>Fontaine v Canadian Pacific Ltd<br>Hoffmann v South African Airways<br>Makuto v S<br>MX of Bombay Indian Inhabitant v M/s ZY<br>Nanditume v Minister of Defence<br>Satellite Investments v Dlamini |
| The right to liberty | Diau v Botswana Building Society<br>MX of Bombay Indian Inhabitant v M/s ZY |
| The right to privacy | Allpass v Mooikloof Estates (Pty) Ltd<br>Bootes v Eagle Inc System KZ Natal (Pty) Ltd<br>Diau v Botswana Building Society |
| The right to dignity | Allpass v Mooikloof Estates (Pty) Ltd<br>Bootes v Eagle Inc System KZ Natal (Pty) Ltd<br>Diau v Botswana Building Society<br>Hoffmann v South African Airways<br>Lemo v Northern Air Maintenance (Pty) Ltd<br>Satellite Investments v Dlamini |
| Freedom from cruel, inhuman and degrading treatment | Diau v Botswana Building Society |
| The right to fair labour practices | Allpass v Mooikloof Estates (Pty) Ltd<br>Banda v Lekha<br>Fontaine v Canadian Pacific Ltd<br>Hoffmann v South African Airways<br>Lemo v Northern Air Maintenance (Pty) Ltd<br>Nanditume v Minister of Defence<br>Satellite Investments v Dlamini |
| The right to access to health services | Mangani v Register Trustees of Malamulo Hospital |

***This chapter is divided into the following sections:***

- Case law on including HIV status as a prohibited ground for discrimination;
- Case law on unfair dismissal and refusal to employ based on HIV status; and
- Case law on discrimination in access to health services.

Limitations on constitutional rights and justification for discrimination in HIV-related cases will be discussed in chapter 6.

## 5.2 HIV status as prohibited ground for discrimination

Many constitutions in southern Africa do not enumerate health status, let alone HIV status as a prohibited ground in the protection from discrimination. However, numerous courts have held that discrimination on the basis of HIV status violates constitutional prohibitions against discrimination regardless of whether the ground is specifically enumerated.

In the **South African** Constitutional Court case, *Hoffmann v South African Airways*, the court held that the refusal by an airline company to employ an HIV-positive individual as a cabin attendant violated the right to equality and freedom from discrimination guaranteed by section 9 of the Constitution.[159]

The court in *Hoffmann* included HIV status as a prohibited ground of discrimination under the South African Constitution despite it not being specifically provided for under section 9(3). The case centred on the equality clause in the South African Constitution, which does not provide for protection against discrimination on the basis of health or HIV status. However, the court held that the right to freedom from discrimination was intricately linked to the right to dignity:

> "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim."[160]

The court used this test of dignity as a way to read HIV status into the list of prohibited grounds in the Constitution. The court reasoned that:

> "The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society.

[159] *Hoffmann*, *supra* note 17.
[160] *Id*. at para 27.

> Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.
>
> The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants of **all** people who are living with HIV. Were this to be the case, people who are HIV positive would never have the opportunity to have their medical condition evaluated in the light of current medical knowledge for a determination to be made as to whether they are suitable for employment as cabin attendants. On the contrary, they would be vulnerable to discrimination on the basis of prejudice and unfounded assumptions - precisely the type of injury our Constitution seeks to prevent. This is manifestly unfair…"[161]

The inclusion of HIV as a prohibited ground for discrimination was also adopted by the **Botswana** Court of Appeal in *Makuto v S*.[162] In *Makuto*, the court delineated a test for determining which groups should be included under the freedom from discrimination. The court held that it would look at whether the person was part of "[a]n identifiable group or class of persons who suffer discrimination as such group or class for no other reason than the fact of their membership of the group or class".[163]

The Court in *Makuto* went further, holding that:

> "Freedom from discrimination only on account of being a member of an identifiable and recognised group or class is guaranteed by the Constitution. That freedom has to be liberally interpreted. Indeed, the fact of including in the groups of those likely to be affected by discrimination persons afflicted by disease or disability is a result of such liberal interpretation."[164]

The *Makuto* decision was followed by the **Botswana** Industrial Court in the case of *Diau v Botswana Building Society*.[165] On the facts of *Diau*, the court did not find that the applicant was treated differently and dismissed, because of the suspicion or perception that she may be HIV-positive. The court, however, made various *obiter dicta* statements relating to the list of prohibited grounds in the Constitution.



[161] *Id*. at paras 28 and 32.
[162] *Makuto v S*, [2000] BWCA 21 *available at* **http://www.saflii.org/bw/cases/BWCA/2000/21.rtf** (last visited 22 Aug 2011).
[163] *Id*. at pg 6.
[164] *Id*. at pg 8.
[165] *Diau v Botswana Building Society*, IC No 50 of 2003 *available at* **http://www.southernafricalitigationcentre.org/library/item/diau_v_botswana_building_society_industrial_court_2003_botswana** (last visited 22 Aug 2011).

> "In my mind the grounds listed in terms of s 15(3) are not exhaustive. A closer interrogation of the said grounds show one common feature—they outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational. To dismiss a person because of perceived positive HIV status would offend against human dignity, in addition to being irrational.
>
> Consequently the ground of HIV status or perceived HIV status must be considered to be one of the unlisted grounds of s 15(3) of the Constitution of Botswana.
>
> The ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998, reaffirmed the constitutional principle of the elimination of discrimination at the workplace.
>
> I subscribe fully to the values of the above declaration and believe firmly that elimination of discrimination at work is essential if the values of human dignity and individual freedom are to go beyond mere formal pronouncements. I also believe that the above position is in line with the values of Convention no 111 (Discrimination Employment and Occupation Convention, 1958) that Botswana has ratified. I believe that the fact that Botswana has ratified the convention cannot be regarded as irrelevant. By doing so, Botswana has demonstrated its clear intention to comply with the provisions contained therein and the court should take cognizance of this action as an expression of the recognition which must be accorded to its provisions when interpreting similar fundamental provisions under the constitution."[166]

In the **Malawi** Industrial Relations Court case of *Banda v Lekha*, the applicant went for an HIV test and was dismissed without reason on his return to work.[167] The applicant had at that stage never been incapacitated for work. The court held that section 20 of the Constitution should be read to include HIV status as a prohibited ground and that the dismissal violated the applicant's right to equality and to fair labour practices.[168]

More recently, the **Swaziland** Industrial Court of Appeal, in the case of *Satellite Investments v Dlamini and Others*, addressed the question whether providing disparate wages for similar work constituted discrimination.[169] The court referred to section 20 of the Swaziland Constitution which sets out the prohibited grounds of discrimination. Section 20 does not include health or other status. The court held that this did not mean that the list of grounds was a closed list; for example, the court referred to the inclusion of HIV as a prohibited ground by other jurisdictions with similar constitutional provisions:

> "society throws up a vagary of new and unprecedented situations that the Legislature, in all its manifold wisdom would not have anticipated. The question then is, if there is a type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached by a litigant to distrain such conduct, turn a blind eye thereon for no other reason than that it is not specifically proscribed in either section? My answer is an emphatic No!

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[166] *Id*. at pg 37.

[167] *Banda*, *supra* note 18.

[168] *Id*.

[169] *Satellite Investments v Dlamini and Others*, [2011] SZICA 5 *available at* **http://www.swazilii.org/caselaw/2011-szica-5** (last visited 22 Aug 2011).

If that were to be so, it would mean that the Courts would thereby fail to protect victims of overt discrimination and the Courts' hands would be withered and be unable to move in order to give needed protection for no other reason than that the Legislature, many years ago, in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before Court. This would amount to the Courts failing to perform their duties."[170]

## Horizontal application of constitutional rights

The court in the case of *Diau v Botswana Building Society* considered the question whether the Bill of Rights in the Constitution applied to both the state (vertical application) and natural persons (horizontal application).[171] It should be noted that in the constitutions of many southern African countries, this issue is settled within the constitution itself.[172]

The *Diau* court held that the Bill of Rights in the Botswana Constitution had horizontal application:

> "Labour law is seen by a number of societies, not least the ILO, as a convenient instrument to address issues arising out of the inherent inequality [between employer and employee].
>
> In my view, in an employment setting, employees are in a position comparable to individuals of a powerful 'State' — it being recalled that traditionally a bill of rights was applicable vertically because the State was considered powerful and prone to abuse its power. This is notwithstanding the likelihood, that most private or juristic persons do not have the capacity to infringe human rights in a manner and on a scale comparable to that of the state. A reasoning that seeks to confine the application of our constitution to organs of the State is not only unauthorized by the constitution itself, but it is also a static approach in that it fails to take into account the realities of the modern distribution of power where in many instances it is not only the state, but the exercise of private power that poses the greatest threat to the exercise of fundamental human rights and freedoms."[173]

[170] *Id.* at paras 25-26.

[171] *Id.*

[172] *See e.g.* Constitution of the Republic of Angola, 2010, art. 28 *available at* **http://www.embangola-can.org/pdf/constituition.pdf** (last visited 26 Aug 2011); Constitution of the Democratic Republic of Congo Constitution, 2005, art. 60 *available at* **http://www.constitutionnet.org/files/DRC%20-%20Congo%20Constitution.pdf** (last visited on 26 Aug 2011); Constitution of Lesotho, 1993, section 4 *available at* **http://www.chr.up.ac.za/images/files/documents/ahrdd/lesotho/lesotho_constitution.pdf** (last visited 26 Aug 2011); Constitution of Malawi, *supra* note 9, section 15; Constitution of the Republic of Namibia, 1998, art. 5 *available at* **http://209.88.21.36/opencms/export/sites/default/grnnet/AboutNamibia/constitution/constitution1.pdf** (last visited on 26 Aug 2011).

[173] *Diau*, *supra* note 165, pp 29-30.

## 5.3 Unfair dismissal and refusal to employ based on HIV status

Numerous courts have addressed unfair dismissal and the refusal to employ individuals based on their actual or perceived HIV status, finding that discrimination based solely on HIV status is illegal.[174]

One of the earliest cases to refer to HIV discrimination in the workplace was in **India**. The Bombay High Court in *MX of Bombay Indian Inhabitant v M/s ZY and Another* held that:

> "the impugned rule which denies employment to the HIV infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at the workplace is clearly arbitrary and unreasonable and infringes the whole some requirement of Art. 14 (the right to equal treatment before the law) as well as Art. 21 (protection of life and personal liberty) of the Constitution of India."[175]

In order to determine whether unfair discrimination had taken place, the **South African** Constitutional Court in *Hoffmann* helpfully outlined the court's interrogation. It involved three basic enquiries:[176]

1. Whether the provision or behaviour under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of the right to equal treatment. If it bears such a rational connection, the second enquiry arises.

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[174] A number of cases of unfair dismissal will be discussed in more detail in chapter 6.

[175] *MX of Bombay*, *supra* note 80, para 54. The court furthermore stated the following, "In our opinion, the State and public Corporations like respondent No.1 cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. As is evident from the material to which we have made a detailed reference in the earlier part of this judgment, the most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution. The interests of the HIV positive persons, the interests of the employer and the interests of the society will have to be balanced in such a case." *Id.* at para 56.

[176] The three stages were set out concisely in *Harksen v Lane NO and Others*, 1998 (1) SA 300, para 53 *available at* **http://www.saflii.org/za/cases/ZACC/1997/12.html** (last visited 22 Aug 2011). In *Jooste v Score Supermarket Trading (Pty) Ltd*, 1999 (2) SA 1 *available at* **http://www.saflii.org/za/cases/ZACC/1998/18.html** (last visited 22 Aug 2011), the court noted that the only purpose of the first stage of the test was "an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference..." *Id.* at para 17. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1999 (1) SA 6 *available at* **http://www.saflii.org/za/cases/ZACC/1998/15.html** (last visited 22 Aug 2011), the court held that the rationality test does not inevitably precede the unfair discrimination test, and that the "rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable." *Id.* at para 18.

2. Whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of the right to equality. If the discrimination is found to be unfair, this will trigger the third enquiry. If the differentiation is on the basis of one of the prohibited grounds listed in the non-discrimination clause *or an analogous ground*, it is presumed to be unfair.
3. Whether the unfair discrimination can be justified under the limitations provision. This latter enquiry will be dealt with in detail in Chapter 5.

In **Botswana**, the Industrial Court in *Lemo v Northern Air Maintenance (Pty) Ltd* helpfully addressed the employer's legal responsibilities in situations where an HIV-positive employee is ill. [177] In *Lemo*, the employee was ill and absent from work for extended periods of time.[178] He was dismissed when the employer became aware of his HIV status. The court held that the employee could not be dismissed purely on the basis of his HIV status without adequate procedures being followed to determine his incapacity. The court held:

> "It is my considered view that where an employee has become ill, and has in consequence been not reporting for duty for a cumulatively long period of time, whether such illness is a result of HIV/AIDS or any other illness, and is inconsequence unable to perform his duties, the normal rules as to termination of services for inability to perform the job apply. As I see it, even in the case of progressive incapacitation, the employee cannot be dismissed without first being given a fair enquiry, at which the nature of the incapacity; the cause of the incapacity; the likelihood of recovery; improvement or recurrence; the period of absence; its effect on the employer's operations; and the employee's length of service, to mention only some of the critical factors are considered."[179]

It further emphasised the importance of treating HIV-positive employees as it would all other employees, noting how the nature of HIV and the existence of antiretroviral treatment allowed employees to work for many decades. The court stated:

> "Where an employee is HIV positive, employers should refrain from any discriminatory practices towards an HIV/AIDS positive employee, and should view the employee in the same way as it would any other employee suffering from a life threatening illness. This is so because as a general rule an HIV positive employee may for years, even decades, experience no interference with his or her capacity for service in fulfilment of the demands of his job. This is particularly so in this era where anti-retroviral drugs are readily available."[180]

[177] Nevertheless, the Botswana Industrial Court has held in *Monare, supra* note 15, that an employer would be justified in dismissing an employee who is no longer able to perform his work, if the right procedures are followed. In that case, the applicant was the only employee doing a particular job. He was absent from work because of his illness. The respondent assisted the applicant during his illness with accommodation, medical care and transport to attend hospital. During the last few months of his employment, the applicant was weak and only able to work half days, while he was paid as if he had worked full days. The court held that the respondent was justified to dismiss the applicant due to ill-health since there was no chance of recuperation and for operational requirements. *Id.*

[178] *Lemo*, *supra* note 21.

[179] *Id.* at pg 17.

[180] *Id.*

The court held that the dismissal of the employee based on his HIV status was a violation of his constitutional right to dignity and freedom from inhuman and degrading treatment.

The **South African** Labour Court in *Bootes v Eagle Inc System KZ Natal (Pty) Ltd* held that using misconduct as an excuse to dismiss an HIV-positive employee constituted unfair discrimination. The court held that "[c]amouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices. Quick to perceive the unfairness, employees struggle to prove it."[181]

In the **Namibian** Labour Court case of *Nanditume v Minister of Defence*, the court held that exclusion from employment solely on the grounds of HIV status for employment with the Namibian Defence Force (NDF) constituted unfair discrimination as contemplated in section 107 of Namibia's Labour Act. [182] In reaching its decision, the court relied on the fact that the NDF did not dismiss existing HIV-positive employees from employment, but merely required that all prospective employees be tested and denied employment if they were HIV-positive. The court stated:

> "The case for applicant in this regard was considerably strengthened when Major Maiba testifying for respondent, said that personnel in the military, although this is a high risk environment are not tested for HIV once they have enlisted."[183]

The **South African** Labour Court also held that HIV-positive employees did not have to disclose their status to prospective employers in *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd*.[184] In *Allpass*, the applicant sought relief on two grounds: unfair dismissal and unfair discrimination based on his HIV status. South African labour law renders a dismissal for a discriminatory reason automatically unfair unless it can be justified on the grounds of inherent job requirements. The court referred to the *Hoffmann* case and the *Bootes* case, where the courts held that HIV was an arbitrary ground of discrimination as envisaged in the list of prohibited grounds for discrimination in the Constitution and Labour Relations Act.[185] The court further held that it "is trite law that the applicant was under no legal obligation to disclose his HIV status to his prospective employer and that the expectation that he should have so disclosed violates his right to dignity and privacy. It was this expectation moreover, that formed the primary reason for his dismissal."[186]

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[181] *Bootes v Eagle Inc System KZ Natal (Pty) Ltd*, (2008) 29 ILJ 139, para 70 *available at* **http://www.saflii.org/za/cases/ZALC/2007/52.html** (last visited 22 Aug 2011).

[182] *Nanditume v Minister of Defence*, Case No. 24/98 *available at* **http://www.lac.org.na/projects/alu/Pdf/haindongo.pdf** (last visited 22 Aug 2011).

[183] *Id.* at pp10-11. Whilst the court held that refusal to enlist or dismissal on the basis of HIV status alone is prohibited, it did acknowledge that the military would be able to dismiss someone once they are medically unfit: "Both medical experts were of the opinion that a person who contracts HIV is fit and healthy for several years and that the training routine would not be to his/her detriment. Dr Steinberg in fact said that regular exercise would be to such person's benefit. This, however, depends on the progress of the 'disease' in later years. It is therefore essential that the date when the HIV virus is contracted be established as accurately and as soon as possible. In this regard the co-operation and good faith of the recruit is essential. A comprehensive and proper test after basic training will enable the military authorities to place an HIV infected person in a suitable department of the NDF" *Id.* at pg 11.

[184] *Allpass*, *supra* note 20.

[185] *Bootes*, *supra* note 181.

[186] *Allpass*, *supra* note 20, para 63.

Limiting job advancement and other job opportunities for HIV-positive persons can also be a violation of constitutional and statutory rights. In **South Africa**, the South African Security Forces Union challenged the South African National Defence Force (SANDF) policy of denying recruitment, deployment, and promotion opportunities to HIV-positive persons. The SANDF eventually agreed to a settlement that was adopted by the High Court, finding that the SANDF policy was among others a violation of the rights to privacy, dignity, and to be free from unfair discrimination. The Court ordered the SANDF to develop a new policy in line with its finding.[187]

The **Canadian** Human Rights Tribunal in *Fontaine v Canadian Pacific Ltd* held that employers were liable for discriminatory acts of their employees in the absence of a workplace policy on HIV/AIDS. In *Fontaine*, Fontaine, who was a cook, disclosed his HIV status in his workplace, leading to a hostile work environment for him. The court held that Mr Fontaine was constructively dismissed based on the apprehension of fear created by his supervisor. Importantly, the court noted the appellant's "failure to have in place an express and clear policy about AIDS in the workplace has meant that employees [] have been left to deal with these situations based on their own personal misconceptions".[188] The tribunal cautioned that, based on the high incidence of HIV in that workplace, this incident may not be the last one unless the appellant "develops and disseminates among its employees a written policy against discrimination of those with AIDS or the HIV infection to educate its personnel and prevent irrational fears that could otherwise arise in these circumstances".[189]

## 5.4 Discrimination in access to health services

There are very few cases addressing discrimination in accessing health care services. One of the few cases that addresses HIV-related discrimination at a health facility is the 1991 **Malawian** High Court case of *Mangani v Register Trustees of Malamulo Hospital*. This is a medical negligence case in which the plaintiff claimed that her medical complaint was not attended to adequately. On the evidence available, the court held that the doctor was negligent in the failure to provide adequate care when it was clear to the staff at the hospital that the plaintiff sustained a serious injury while under their care. The judge noted *obiter dictum* that:

> "...there is not direct evidence on this point but from what can be gathered from the circumstantial evidence available the inescapable conclusion is that it was the view of Dr. Hayton that the patient was an HIV reactive victim and that it would be a waste of medicine and time to give medicine to such patient who is fated to die in any event...If this was his view, then it must be deplored in no uncertain terms as being both unethical and unprofessional."[190]

Comparative law

[187] *SASFU v Surgeon General*, Case No. 18683/07 (ordering the immediate employment of applicant who was denied employment solely because he was HIV positive).

[188] *Fontaine v. Canadian Pacific Ltd.*, 1989 CanLII 137 *available at* **http://www.canlii.org/en/ca/chrt/doc/1989/1989canlii137/1989canlii137.html** (last visited 22 Aug 2011).

[189] *Id.*

[190] *Mangani v Register Trustees of Malamulo Hospital*, High Court 1991, *excerpted in* UNDP Compendium, *supra* note 36, pg 231.

In the **United States**, the Supreme Court in *Bragdon v Abbott* addressed whether a dentist could refuse treatment to an HIV-positive patient, holding that if there is little risk of transmission based on objective criteria, then health care professionals cannot refuse treatment.[191]

Though there are few cases related to discrimination in health care, the inclusion in some countries of HIV as a prohibited ground for discrimination would be relevant in cases where access to adequate health care services is denied on the basis of an individual's HIV status.

## Reference to countries' national policies on HIV/AIDS

Countries' national HIV/AIDS policies are often far more comprehensive and progressive than national legislation, and specifically address issues related to HIV/AIDS that are not usually not dealt with in law. Thus, it can be useful in HIV-discrimination litigation to refer to a country's national HIV/AIDS policy as an indication of the government's commitment to certain values and principles, which can guide the court in its interpretation of constitutional provisions or national laws.

For example, the **Botswana** Industrial Court in *Diau v Botswana Building Society* considered the extent to which the country's National Policy on HIV/AIDS should be taken into consideration by the court in HIV discrimination-related cases.[192] Although there was no specific legislation relating to HIV/AIDS in the workplace in Botswana at the time, the court held that the Botswana National Policy on HIV/AIDS was consistent with the provisions in international codes and guidelines. Importantly, the court held that:

> "[T]he National HIV/AIDS Policy augments rather than detracts from the constitution, to the extent that the constitution entrenches the right to equality, human dignity, liberty and the right to privacy. It is not law. It therefore does not impose any direct legal obligations. However, to the extent that its provisions are consistent with the values espoused by the constitution, breach of its provisions may, in an appropriate case, constitute evidence of breach of constitutional provisions. In essence, the National HIV/AIDS Policy is a very progressive document in that it seeks to eliminate HIV/AIDS related unfair discrimination, promote equality and fairness especially at the workplace and more fundamentally, gives effect to Botswana's international obligations."[193]

[191] *Bragdon v Abbott*, Case No. 97-156, *available at* **http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=000&invol=97-156** (last visited 22 Aug 2011)

[192] *Diau*, *supra* note 165.

[193] *Id*. at pg 19.

CHAPTER 6

# Justifications used for HIV discrimination

As seen from the cases discussed in Chapter 5, a central aspect of a court's discrimination inquiry is whether the discriminatory behaviour at issue was in pursuance of a legitimate objective and thus justified. This chapter looks at some of the legal arguments that are sometimes used to justify HIV-related discrimination; how one can respond to such arguments; and how courts have assessed such justifications.

## Relevant documents and cases discussed in this chapter

- Bragdon v Abbott
- Canada v Thwaites
- Doe v District of Columbia
- Hoffmann v South African Airways
- Kingaipe and Another v Attorney-General
- Lemo v Northern Air Maintenance (Pty) Ltd
- Mangani v Register Trustees of Malamulo Hospital
- Minister of Health and Others v Treatment Action Campaign and Others
- Nanditume v Minister of Defence
- Thwaites v Canadian Armed Forces
- Joint ILO/WHO Guidelines on Health Services and HIV/AIDS
- Joint WHO/ILO Guidelines on Post-Exposure Prophylaxis to Prevent HIV Infection
- Preventing Needlestick Injuries among Health Care Workers
- WHO Antiretroviral Therapy for HIV Infection in Adults and Adolescents: Recommendations for a Public Health Approach

***The chapter is divided into three sections:***

- Science of HIV/AIDS;
- Arguments often used to justify HIV discrimination in employment; and
- Arguments often used to justify HIV discrimination in health care settings.

## 6.1 Science of HIV/AIDS

Placing scientific and medical evidence on specific aspects of the nature of HIV and treatment is essential in most cases related to HIV discrimination. In *Odafe v Attorney-General*, the Nigerian High Court when confronted with an argument that denying awaiting prisoners access to HIV treatment was a violation of the right to life failed to reach a decision on that issue due to a lack of scientific evidence placed before the court, stating that:

> "The nature and detailed consequences of the virus are not placed before the Court for me to arrive at the conclusion that the non-compliance is an infringement of their right to life. In other words, that if treatment is provided they will live, if not provided they will die. This is for an expert in the medical area concerned to tell the Court and there is no expert evidence before me."[194]

The **South African** Constitutional Court in the case of *Hoffmann v South African Airways*, considered in detail the extent to which the refusal to employ a person living with HIV as a cabin attendant could be justified for medical reasons.[195] The court's findings—based on the expert evidence placed before the court—on the medical aspects of HIV are important in so far as they refer to the progression of HIV, transmission of HIV, testing of HIV, viral load and immune function and treatment of HIV. The court's findings can be used as support in other jurisdictions.

On the progression of HIV/AIDS, the court held:

> "The medical opinion in this case tells us the following about HIV/AIDS: it is a progressive disease of the immune system that is caused by the Human Immunodeficiency Virus, or HIV. HIV is a human retrovirus that affects essential white blood cells, called CD4+ lymphocytes. These cells play an essential part in the proper functioning of the human immune system. When all the interdependent parts of the immune system are functioning properly, a human being is able to fight off a variety of viruses and bacteria that are commonly present in our daily environment. When the body's immune system becomes suppressed or debilitated, these organisms are able to flourish unimpeded. Professor Schoub identifies four stages in the progression of untreated HIV infection:
>
> a. **Acute stage**—this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.
>
> b. **Asymptomatic immunocompetent stage**—this follows the acute stage. During this stage the individual functions completely normally, and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.

[194] *Odafe*, *supra* note 13, at para 37.
[195] *Hoffmann*, *supra* note 17.

c. **Asymptomatic immunosuppressed stage**—this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells per microlitre of blood. However, it is only when the count drops below 350 cells per microlitre of blood that an individual cannot be effectively vaccinated against yellow fever. Below 300 cells per microlitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-microbials. Although the individual's immune system is now significantly depressed, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.

d. **AIDS (Acquired Immune Deficiency Syndrome) stage**—this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them."[196]

With respect to the transmission of HIV, the court held that:

> "HIV is an infectious disease that requires intimate contact for transmission. By far the predominant mode of transmission is via sexual contact. A small number of medical work-related injuries from needlestick or sharp instruments have accounted for some cases of HIV transmission. Transmission also occurs through mother-to-child routes, through transfusion of blood products, and through needle sharing by intravenous drug users. HIV has never been demonstrated to be transmissible through intact skin or through casual contact. It is not a highly transmissible infection."[197]

Related to testing for HIV, viral load and immune function testing, the court found that:

> "The standard test to diagnose HIV is a screening ELISA test followed by confirmatory tests. There is a window period of between two to twelve weeks depending on the tests used, within which an HIV-positive individual will test negative."[198]

> "Predicting an individual's risk of developing AIDS can be done accurately by assessing the immune function and the level of HIV burden. Immune function is determined by measuring a particular immune cell count in the blood, which is accepted as a marker. This is the CD4+ lymphocyte cell, which is attacked and destroyed by HIV. The CD4+ count is used to assess the risk of various opportunistic diseases. The level of HIV replication is assessed by quantifying the amount of HIV genetic material in the blood (HIV-1 RNA). This measurement is usually referred to as the individual's viral load. The viral load and the CD4+ lymphocyte count are now routinely used in patient management."[199]

[196] *Id.* at para 11.
[197] *Id.* at paras 13(2)-13(3).
[198] *Id.* at para 13(4).
[199] *Id.* at paras 13(5)-13(8).

Finally, the court recounted the state of HIV treatment at the time of the ruling, in 2000:

> "During the asymptomatic phase, HIV infected individuals are able to maintain productive lives and can remain gainfully and productively employed, particularly if they are properly treated with antiretrovirals and prophylactic antibiotics appropriate to their condition.
>
> The natural progression of HIV has been dramatically altered in consequence of recent advances in the available medication. There are now combinations of drugs that are capable of completely suppressing the replication of the virus within an HIV+ individual. This combination of drugs has been described as Highly Active Antiretroviral Therapy or HAART.
>
> With successful HAART treatment, the individual's immune system recovers, together with a very marked improvement in the CD4+ lymphocyte count. A significant improvement in survival rates and life expectancy results."[200]

One of the critical components to the success of treatment is adherence to the antiretroviral treatment.[201] Adherence to treatment requires that the patient takes the treatment every day as prescribed, including taking it at the right time and following any special diet restrictions, to ensure that the HI virus does not become resistant to the drug. Failure to adhere to the treatment regime can mean that the patient becomes resistant to the treatment, thereby raising significantly the risk to the patient's life. Furthermore, HIV patients on treatment should be monitored regularly to assess the impact of the treatment, especially in the first six months of treatment.[202]

It is important to keep in mind that the science of HIV, especially treatment, is constantly changing due to new scientific discoveries. Thus it is critical to look at the latest guidelines that have been issued on the relevant issues in the case.

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[200] *Id.* at paras 13(9)-13(11).

[201] World Health Organisation, *Antiretroviral Therapy for HIV Infection in Adults and Adolescents: Recommendations for a Public Health Approach* (Geneva 2010) *available at* **http://www.who.int/hiv/pub/arv/adult2010/en/index.html** (last visited 22 Aug 2011).

[202] *Id.*

## Reference to science in litigation

In cases of HIV discrimination, it is almost always necessary to include the relevant science of HIV. Though one can refer to the South African Constitutional Court's decision in *Hoffmann*, it is advisable to prepare expert evidence to address case specific issues relating to the science of HIV/AIDS. Depending on the legal and factual issues at stake, one might want to seek the services of a virologist to discount arguments relating to the risk of transmission of HIV, or medical practitioners who specialize in HIV/AIDS, to assess the disease progression of the applicant, his adherence to antiretroviral treatment and his capacity to perform his work.

In addition, relevant guidelines and documents from international and national health authorities can be helpful to the court in reaching its decision. For example, in the case of *Bragdon v Abbott*, the **United States** Supreme Court held that "the views of public health authorities, such as the U.S. Public Health Service, [Centers for Disease Control and Prevention] CDC, and the National Institutes of Health, are of special weight and authority".[203]

## 6.2 Justifications for HIV discrimination in employment

HIV-related discrimination in the workplace is usually justified on the basis of:

- incapacity;
- inability to perform inherent requirements of the job; and/or
- risk of transmission to others.

Each of these justifications is closely related and often overlap. They will be discussed below.

### *Incapacity*

There are two aspects that can be relevant.

1. Whether it is justified to dismiss employees for reasons of incapacity where their health is such that they are no longer able to perform their duties; and
2. Whether it is justified to dismiss an employee who is living with HIV, on the assumption that his or her current or future health status will lead to incapacity.

In most jurisdictions, labour law provides that an employee cannot be dismissed for incapacity-related reasons when proper procedures have not been followed to properly assess the employee's level of incapacity and to alternatively accommodate the employee where needed.

Numerous courts have rejected incapacity justifications for dismissals of or limitations on employees.

[203] *Bragdon*, *supra* note 191, pg 24.

In the **Botswana** Industrial Court case of *Lemo v Northern Air Maintenance (Pty) Ltd*, the employee had exhausted all of his sick and annual leave but remained ill and went on unpaid leave.[204] He was dismissed for "continual poor attendance", which was deemed "detrimental to the productivity and efficiency of the company".[205] The court, however, noted that at the date of dismissal, there was no evidence that the employee was incapacitated on account of ill-health to perform his duties. The court held that the employer by not taking action against the employee's previous conduct for the last three years, either waived its right to take action and/or condoned the employee's conduct. The court held:

> "It is my considered view that where an employee has become ill, and has in consequence been not reporting for duty for a cumulatively long period of time, whether such illness is a result of HIV/AIDS or any other illness, and is inconsequence unable to perform his duties, the normal rules as to termination of services for inability to perform the job apply. As I see it, even in the case of progressive incapacitation, the employee cannot be dismissed without first being given a fair enquiry, at which the nature of the incapacity; the cause of the incapacity; the likelihood of recovery; improvement or recurrence; the period of absence; its effect on the employer's operations; and the employee's length of service, to mention only some of the critical factors are considered."[206]

It can also be argued that a person living with HIV whose illness has been progressing, should be afforded the opportunity of regaining his or her health through antiretroviral treatment, before a dismissal for incapacity. For example, in *Lemo*, the court alluded to the possibility of an employee returning to health once on antiretroviral treatment. The court stated:

> "Where an employee is HIV positive, employers should refrain from any discriminatory practices towards an HIV/AIDS positive employee, and should view the employee in the same way as it would any other employee suffering from a life threatening illness. This is so because as a general rule an HIV positive employee may for years, even decades, experience no interference with his or her capacity for service in fulfilment of the demands of his job. This is particularly so in this era where anti-retroviral drugs are readily available."[207]

Similarly, the **Zambian** case, *Kingaipe and Another v Attorney-General*, the petitioners argued that their employer, the Zambian Air Force, was required to see how they responded to antiretroviral treatment prior to dismissing them based on incapacity.[208] The *Kingaipe* Court did not directly address this aspect of the petitioners' arguments in its decision.

The argument that employers must *reasonably accommodate* sick employees is further supported in the *Joint ILO/WHO Guidelines on Health Services and HIV/AIDS*, which makes the following recommendations:

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[204] *Lemo*, *supra* note 21.
[205] *Id*. at pg 6.
[206] *Id*. at pg 17.
[207] *Id*.
[208] *Kingaipe*, *supra* note 16.

"Reasonable accommodation refers to administrative or practical adjustments that are made by the employer to help workers with an illness or disability to manage their work. Workers with AIDS-related illnesses seeking accommodation should be treated like workers with any other chronic illness, in accordance with national laws and regulations. Employers, in consultation with workers and their representatives, should take measures to reasonably accommodate on a case-by-case basis. These could include:

a) rearrangement of working hours;

b) modified tasks and jobs, including modification in the case of HIV-positive workers who may be at risk…or pose a risk to patients by virtue of their performing invasive procedures…;

c) adapted working equipment and environment;

d) provision of rest periods and adequate refreshment facilities;

e) granting time off for medical appointments;

f) flexible sick leave;

g) part-time work and flexible return-to-work arrangements."[209]

### *Inherent requirement of the job*

The second justification for HIV discrimination in employment is that people living with HIV are unable to perform the inherent requirements of the job. This argument is based on assumptions regarding a person's incapacity and is routinely rejected by courts.

The question whether it is an inherent requirement of the job that someone is HIV-negative, has come up specifically in cases relating to airline cabin attendants, military recruits, and firefighters. There are three possible justifications usually put forward by employers:

1. All people living with HIV are unable to perform the job requirements.
2. It is in the best interest of the HIV-positive individual given that the inherent nature of the job may put his or her health at risk.
3. In the military context, employing people living with HIV would negative affect national security as HIV-positive persons may not be "battle ready" due to their illness and thus the military would have fewer battle ready individuals than necessary

With respect to the first argument that all people living with HIV are unable to perform the specific job requirements, the United States District Court rejected that argument with respect to firefighters. In the **United States** case of *Doe v District of Columbia and Others*, the court considered whether HIV-related discrimination against a firefighter was justified.[210] In reaching its decision that being HIV-positive did not *de facto* render an employee incapable of performing a firefighter's duties, the court heavily relied on the medical evidence of an infectious diseases specialist and an expert in infection control.

[209] International Labour Office, *Joint ILO/WHO Guidelines on Health Services and HIV/AIDS* (Geneva 2005), pp 33-34 *available at* **http://www.ilo.org/public/english/dialogue/sector/techmeet/tmehs05/guidelines.pdf** (last visited 22 Aug 2011).

[210] *John Doe v District of Columbia and Others*, 796 F. Supp. 559 (1992).

The court stated:

> "According to Dr Parenti, asymptomatic HIV-positivity does not affect a person's physical capabilities. For example, it does not impair a person's strength, agility or ability to breath. Dr Parenti specifically testified that an asymptomatic HIV-infected person should be able to perform all of the functions of a firefighter as stipulated to by the District. Based on this uncontroverted testimony, the Court finds that the ability to perform the functions of a firefighter is unaffected by asymptomatic HIV-positivity.
>
> According to Dr Parenti, the common conception that HIV-infected persons are more likely than others to catch colds, flus and other infections is inaccurate. Instead, most of the infections to which an asymptomatic HIV-positive person is susceptible are reactivations of prior infections (viral, fungal or parasitic), to which the person has been exposed or which the person actually had at one time. Re-activation is triggered by diminution in the function of the immune system. According to the uncontroverted testimony of Dr Parenti, which the Court accepts, the risk of re-activating a prior infection is not enhanced by performing the duties of a firefighter. Nor does fatigue or smoke inhalation accelerate the progression of the disease toward the symptomatic stage."[211]

The **South African** Constitutional Court case of *Hoffmann*, considered whether a person living with HIV could perform the work of a cabin attendant.[212] The court based its decision on the science of HIV holding that "where an HIV-positive individual is asymptomatic and immunocompetent, he or she will in the absence of any other impediment be able both:

- to meet the performance requirements of the job; and
- to receive appropriate vaccination as required for the job."[213]

The court further held that "[o]n medical grounds **alone**, exclusion of an HIV-positive individual from employment **solely** on the basis of HIV positivity cannot be justified".[214]

In discussing the impact of antiretroviral treatment on the rights of people living with HIV, the court found that "[w]ith the advent of [HAART] treatment, individuals are capable of living normal lives and they can perform any employment tasks for which they are otherwise qualified".[215]

The second argument—that it is in the best interests of the employee—was rejected by the **Canadian** Human Rights Tribunal in *Thwaites v Canadian Armed Forces*.[216] The tribunal's decision was confirmed by the Federal Court. The *Thwaites* case involved a military employee who was dismissed allegedly as a result of his HIV-positive status. He was on treatment and the Canadian Armed Forces (CAF) argued, in part, that the discrimination was justified as Thwaites' job would require him to be at sea for long periods of time, placing his health at risk.

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[211] *Id.* at pg 563.
[212] *Hoffmann*, *supra* note 17.
[213] *Id.* at para 14.
[214] *Id.*(emphasis in the original).
[215] *Id.*
[216] *Thwaites v Canadian Armed Forces*, 1993 CanLII 342 *available at* **http://www.canlii.org/en/ca/chrt/doc/1993/1993canlii342/1993canlii342.html** (last visited 22 Aug 2011).

In particular, the CAF argued that if Thwaites was to acquire opportunistic infections, he would be far away from the required medical help and that as he was on the HIV treatment available at the time, he was increasingly dependent on specialist medical care that would not be available when he was at sea.

The tribunal rejected the CAF's justifications, relying on evidence put forward by medical specialists stating that close monitoring by a medical specialist of an HIV-positive person on treatment was not necessary, and noting that opportunistic infections were gradual in their onset and that, as long as a patient was regularly monitoring his health on his own, there was enough time for him to get care for any oncoming opportunistic infections. The tribunal held that the CAF failed to "make a full assessment of Thwaites' condition and determine whether he was exposed to risks significantly greater than the usual risks…In essence, the…decision to dismiss him was not based upon the most authoritative and up-to-date medical, scientific and statistical information available."[217] The tribunal concluded that:

> "There is no doubt that Thwaites' going to sea and being away from direct specialist care would have increased the risk element but we are not satisfied that the increased risk was sufficient to warrant his exclusion It is now clear that the standard that the employer must meet is that the group of persons in question excluded by the employment practice will present a 'sufficient risk of employee failure'…Whenever an employer relies on health and safety considerations to justify its exclusion of the employee, it must show that the risk is based on the most authoritative and up to date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalizations."[218]

Finally, with respect to the last justification—that HIV-positive employees of the military put at risk national security since it is unclear when they will no longer be healthy enough to fight—a number of courts in other jurisdictions have rejected that argument, noting the likelihood of HIV-positive individuals returning to normal, healthy lives once on antiretroviral treatment.

In the **Namibian** Labour Court case of *Nanditume v Minister of Defence*, the court considered whether it was an inherent requirement of the job that an army recruit be HIV-negative.[219] The court considered expert evidence on the nature of the work and the ability of someone living with HIV to withstand the pressures that the work might demand. The court held that "[c]ommon sense tells one that the different departments or divisions or categories or branches of the military have different degrees of stress, physical and mental" and that a person was allocated to a particular department after his or her basic training.[220] Although basic training itself was said to be strenuous, both medical experts in the case agreed that a person who contracted HIV was fit and healthy for several years and that the training routine would not be to his/her detriment. The experts concluded that a person's fitness was dependent on the progression of HIV:

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[217] *Id.*
[218] *Id.*
[219] *Nanditume*, *supra* note 182, pg 11.
[220] *Id.*

"The two medical experts were in agreement that a person with a CD4 count below 200 and a viral load in excess of 1 00 000 would probably be incapable of participating in the strenuous and exacting work as required in the fighting units of the military."[221] The court accordingly held that one could not apply a blanket exclusion and that the more appropriate response would be to regularly monitor the health of employees and place them in suitable departments.

### *Risk of HIV transmission*

Since the early stages of the HIV epidemic, employers have often raised the alleged risk of HIV transmission as a reason justifying their refusal to employ a person living with HIV. This justification is entirely without grounds and the courts have repeatedly found against employers who use risk of transmission as a justification for HIV-discrimination.

In *Hoffmann*, the **South African** Constitutional Court considered South African Airways' argument that it had legitimate commercial requirements for refusing employment to a person living with HIV. It argued that this might affect public perception of the airline's commitment to the health and safety of its passengers. The court held that this argument has no substance: "we must guard against allowing stereotyping and prejudice to creep in under the guise of commercial interests".[222] It further stated:

> "The need to promote the health and safety of passengers and crew is important. So is the fact that if SAA is not perceived to be promoting the health and safety of its passengers and crew this may undermine the public perception of it. Yet the devastating effects of HIV infection and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits. Our treatment of people who are HIV positive must be based on reasoned and medically sound judgments. They must be protected against prejudice and stereotyping. We must combat erroneous, but nevertheless prevalent, perceptions about HIV. The fact that some people who are HIV positive may, under certain circumstances, be unsuitable for employment as cabin attendants does not justify a blanket exclusion from the position of cabin attendant of all people who are HIV positive."[223]

Similarly, in *Doe v District of Columbia and Others,* the **United States** District Court held:

> "There are only three recognized modes of transmitting the HI virus: intimate sexual contact, puncture by contaminated intravenous needles, and receiving contaminated blood products. HIV is not casually transmitted and is not a 'hardy' virus. There are no reported cases of transmission of HIV through shared toothbrushes or other common household items, or through casual contact such as touching or kissing.
>
> The difficulty of transmitting HIV is reflected by the low percentage of health care workers, ranging between 0.3 percent and 0.5 percent, who become infected as a result of being stuck with a needle contaminated with HIV-positive blood."[224]

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[221] *Id*.
[222] *Hoffmann*, *supra* note 17, para 34.
[223] *Id*. at para 35.
[224] *Doe*, *supra* note 210, pg 563.

The *Doe* court then cited expert evidence stating that:

> "[a]ccording to [expert] Dr. Parenti, there is 'no measurable risk' that the disease will be transmitted through the performance of the firefighting duties stipulated to by the defendant. Not even the performance of mouth-to-mouth resuscitation without the use of a barrier will pose any risk of transmission of HIV**.** In fact, according to Dr. Parenti, the risk of transmitting the disease through the performance of firefighting functions 'is like getting struck by a meteor while walking down Constitution Avenue' in Washington, D.C."[225]

In addition, the *Doe* court in its decision cited for support the testimony of a second expert, who testified that "there are no reported cases of transmission of HIV to or from a firefighter during the course of his duties".[226] She further testified that several departments throughout the United States employed HIV-positive firefighters in active-duty status without requiring special precautions and that the routine universal precautions required of all firefighters were sufficient to protect against harm to the firefighters or others. The court held that there was no measurable risk of the applicant transmitting HIV to other firefighters or the public during the performance of official firefighting duties. The court further noted that prejudice could not be tolerated and that public service officers could not cite alleged "public perception of persons with HIV" as a reason to discriminate.[227]

> "In reaching this conclusion, the court joins other courts that have refused to regard the theoretical or remote possibility of transmission of HIV as a basis for excluding HIV-infected persons from employment or educational opportunities."[228]

In the **Australian** case of *Hall v Victorian Amateur Football Association and Another*, the respondents banned the applicant, a football player, from playing when they found out his HIV status.[229] The applicant was fit and in good health and the case centred on the risk he posed to other football players on the field. An epidemiologist and actuary testified to attempt to quantify the risk of HIV transmission posed by Hall's presence on the field. The court held as follows:

> "We return to the balancing task of whether or not in all the circumstances the ban is reasonably necessary to protect the health and safety of those players registered with the [Football Association] and officials who may come into contact with Matthew Hall.
>
> Whilst we conclude that not all risk to the health and safety of the class in question from transmission of HIV from Matthew Hall to other players can be excluded if Matthew Hall is permitted to play football, the risk is so low (and can be further reduced by the proper application of [the Football Association] policy,) that it is not 'reasonably necessary' to discriminate against him by banning him from playing football.

[225] *Id*. at pp 563-564.
[226] *Id*. at pg 563.
[227] *Id*. at pg 570.
[228] *Id*. at pg 569.
[229] *Hall v Victorian Amateur Football Association and Another*, [1999] VICCAT 333 *available at* **http://www.austlii.edu.au/au/cases/vic/VICCAT/1999/333.html** (last visited 22 Aug 2011).

> In our view the health and safety of the class in question is better protected by an understanding of the nature of the very low risk and by an understanding of and the implementation of the proper procedures to be taken in further reducing such risk, than by banning Hall."[230]

In the military context, the High Court of **Australia** in *X v Commonwealth of Australia* held that it was relevant to ascertain whether there was a real risk to other persons in the case of an HIV-positive person's employment in the military.[231] However, the court noted that the employer needed to show that the risk could not be eliminated or appropriately nullified by the provision of services or facilities that could be provided without unjustifiable hardship.[232]

## 6.3 Justifications for HIV discrimination in health care settings

HIV-related discrimination in the health care setting occurs primarily due to entrenched stigma. However, the discrimination is often justified on two grounds: risk of transmission and limited resources. These two arguments are discussed separately below.

### *Risk of HIV transmission*

While medical personnel might be afraid of being infected with HIV by their co-workers or patients, this fear does not justify discriminatory practices within the health care setting.

In the **United States** Supreme Court case of *Bragdon v Abbott*, a dentist refused to fill his patient's cavities because of his HIV-positive status. The court held that:

> "The existence, or nonexistence, of a significant risk must be determined from the standpoint of the person who refuses the treatment or accommodation, and the *risk assessment must be based on medical or other objective evidence*...As a health care professional, petitioner had the duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession. His belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability."[233]

The World Health Organization (WHO) estimates that only 2.5% of the HIV infections among health care workers is attributable to exposures at work:

- Data from injection safety surveys conducted by the WHO and others show on average: four needle stick injuries per worker per year in the African, Eastern Mediterranean, and Asian populations.
- Seventy percent of the world's HIV population lives in sub-Saharan Africa, but only 4% of worldwide occupational cases of HIV infection are reported from this region.

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[230] *Id.*

[231] *X v Commonwealth of Australia*, [1999] HCA 63, para 50 *available at* **http://www.austlii.edu.au/au/cases/cth/HCA/1999/63.html** (last visited 22 Aug 2011).

[232] *Id.* at para 73.

[233] *Bragdon*, *supra* note 191 (emphasis added).

- In South Africa, 91% of junior doctors reported sustaining a needle stick injury in the previous 12 months, and 55% of these injuries came from source patients who were HIV-positive. [234]

Thus, while occupation exposures might be frequent, HIV infection as a result of such exposures are low.

The two most common causes of needle-stick injuries are two-handed recapping and the unsafe collection and disposal of sharps waste. There are various factors influencing the incidence of needle stick injuries, including:

- Overuse of injections and unnecessary sharps;
- Lack of supplies: disposable syringes, safer needle devices, and sharps-disposal containers;
- Lack of access to and failure to use sharps containers immediately after injection;
- Inadequate or short staffing;
- Recapping of needles after use;
- Lack of engineering controls such as safer needle devices;
- Passing instruments from hand to hand in the operating suite; and
- Lack of awareness of hazard and lack of training.[235]

Where a needle-stick injury has occurred, the risk of transmission of infection from an infected patient to the health care worker is relatively low, and estimated at 0.3% in the case of HIV.[236] Several factors can increase the risks of transmission of HIV including "a deep wound, visible blood on the device, a hollow-bore blood-filled needle, use of the device to access an artery or vein, and high-viral-load status of the patient".[237] Thus risks for occupational transmission of HIV vary with the type and severity of exposure.[238]

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[234] Wilburn SQ and Eijkemans G, *Preventing Needlestick Injuries among Healthcare Workers: A WHO–ICN Collaboration*, Int'l J of Occupational Environmental Health, Vol 10(4), 2004, pp 451-454 *available at* **http://www.who.int/occupational_health/activities/5prevent.pdf** (last visited 26 Aug 2011).

[235] *Id*. at pg 452.

[236] U.S. Dep't of Health and Human Services, *Selecting, Evaluating, and Using Sharps Disposal Containers*, Pub. No. 97-111, Jan 1998 *available at* **http://www.cdc.gov/niosh/sharps1.html** (last visited 22 Aug 2011). *See also* Adelisa L. Panlilio, MD, et al., *Updated U.S. Public Health Service Guidelines for the Management of Occupational Exposures to HIV and Recommendations for Post-Exposure Prophylaxis*, 54(RR09), Sept 2005, pp 1-17 *available at* **http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5409a1.htm** (last visited 22 Aug 2011). "In prospective studies of health care workers, the average risk for HIV transmission after a percutaneous exposure to HIV-infected blood has been estimated to be approximately 0.3% and after a mucous membrane exposure, approximately 0.09%.Although episodes of HIV transmission after non-intact skin exposure have been documented, the average risk for transmission by this route has not been precisely quantified but is estimated to be less than the risk for mucous membrane exposures. The risk for transmission after exposure to fluids or tissues other than HIV-infected blood also has not been quantified but is probably considerably lower than for blood exposures." Panlilio et al, *supra*.

[237] Wilburn et al., *supra* note 234, pg 452.

[238] "In a retrospective case-control study of HCP who had percutaneous exposure to HIV, increased risk for HIV infection was associated with exposure to a larger quantity of blood from the source person as indicated by 1) a device (e.g., a needle) visibly contaminated with the patient's blood, 2) a procedure that

It is important to note, however, that post-exposure prophylactic (PEP)[239] medication has been demonstrated to reduce the risk of transmission of HIV following a needle-stick injury by 80%.[240] According to the WHO:

> "PEP should be provided following exposure of non-intact skin (through percutaneous sharps injury or skin abrasion) or mucous membranes (through sexual exposure or splashes to the eyes, nose or oral cavity) to a potentially infected body fluid from a source that is HIV-positive or has unknown HIV status. Body fluids that may transmit HIV include blood, genital secretions and cerebrospinal, amniotic, peritoneal or pleural fluids."[241]

Instead of discriminating against patients or health care workers living with HIV, it is possible to reduce the risk of HIV transmission in the health care settings through a range of simple control measures, the most important being preventing exposure to needle-stick injuries. It has been noted that the implementation of education, universal precautions, elimination of needle recapping, and use of sharps containers for safe disposal have reduced needle-stick injuries by 80%, with additional reductions possible through the use of safer needle devices.[242] Control measures to prevent needle-stick injuries could include: eliminating the hazard and imposing engineering, administrative and workplace controls, including the provision of personal protective equipment.

### *Limited resources*

In the **Malawi** High Court case of *Mangani v Register Trustees of Malamulo Hospital*, the judge noted *obiter dictum* that a denial of treatment to a patient with HIV on the basis that the patient would "die in any event" was "unethical and unprofessional".[243]

Government policy should be reasonable and a government would be hard-pressed to justify discrimination against people living with HIV/AIDS based on resource constraint arguments.

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involved a needle being placed directly in a vein or artery, or 3) a deep injury. The risk also was increased for exposure to blood from source persons with terminal illness, possibly reflecting either the higher titer of HIV in blood late in the course of acquired immunodeficiency syndrome (AIDS) or other factors (e.g., the presence of syncytia-inducing strains of HIV). A laboratory study that demonstrated that more blood is transferred by deeper injuries and hollow-bore needles lends further support for the observed variation in risk related to blood quantity." Panlilio et al, *supra* note 236.

239 "The term post-exposure prophylaxis is generally understood to mean the medical response given to prevent the transmission of blood-borne pathogens following a potential exposure to HIV. In the context of HIV, post-exposure prophylaxis refers to the set of services that are provided to manage the specific aspects of exposure to HIV and to help prevent HIV infection in a person exposed to the risk of getting infected by HIV. These services might comprise first aid, counselling including the assessment of risk of exposure to the infection, HIV testing, and depending on the outcome of the exposure assessment, the prescription of a 28-day course of antiretroviral drugs, with appropriate support and follow-up. Int'l Labour Organisation and World Health Organisation, *Post-Exposure Prophylaxis to Prevent HIV Infection: Joint WHO/ILO Guidelines on Post-Exposure Prophylaxis (PEP) to Prevent HIV Infection* (Geneva 2007), pg 1 *available at* **http://whqlibdoc.who.int/publications/2007/9789241596374_eng.pdf** (last visited 22 Aug 2011) [hereinafter WHO/ILO PEP Guidelines].

240 Wilburn et al., *supra* note 234, pg 453.

241 WHO/ILO PEP Guidelines, *supra* note 239, pg 8.

242 Wilburn et al., *supra* note 234, pg 453.

243 *Mangani*, *supra* note 190.

This is especially so in the context of an HIV epidemic that places a significant strain on the public health system. A reasonable response would be to attend to the health needs of patients living with HIV/AIDS timeously so that their condition does not deteriorate. This issue was traversed in the **South African** Constitutional Court case on the prevention of mother-to-child HIV transmission in *Minister of Health and Others v Treatment Action Campaign and Others*:

> "The applicants do not suggest that nevirapine should be administered indiscriminately to mothers and babies throughout the public sector. They accept that the drug should be administered only to mothers who are shown to be HIV-positive and that it should not be administered unless it is medically indicated and, where necessary, counselling is available to the mother to enable her to take an informed decision as to whether or not to accept the treatment recommended. Those conditions form part of the order made by the High Court.
>
> In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.
>
> The cost of nevirapine for preventing mother-to-child transmission is not an issue in the present proceedings. It is admittedly within the resources of the state. The relief claimed by the applicants on this aspect of the policy, and the order made by the High Court in that regard, contemplate that nevirapine will only be administered for the prevention of mother-to-child transmission at those hospitals and clinics where testing and counselling facilities are already in place. Therefore this aspect of the claim and the orders made will not attract any significant additional costs.
>
> In evaluating government's policy, regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of nevirapine to mother and child at the time of birth. The safety and efficacy of nevirapine for this purpose have been established and the drug is being provided by government itself to mothers and babies at the pilot sites in every province.
>
> The administration of nevirapine is a simple procedure. Where counselling and testing facilities exist, the administration of nevirapine is well within the available resources of the state and, in such circumstances, the provision of a single dose of nevirapine to mother and child where medically indicated is a simple, cheap and potentially lifesaving medical intervention.[244]

[244] *Minister of Health and Others v Treatment Action Campaign and Others*, [2002] ZACC 15, paras 69-73 *available at* **http://www.saflii.org/za/cases/ZACC/2002/15.html** (last visited 17 Aug 2011).

CHAPTER 7

# Appendices

## Appendix A: Useful online resources

### International human rights law

- UN international human rights treaties and their monitoring bodies:
  http://www.ohchr.org
  http://treaties.un.org
- International Labour Organisation treaties and guidelines:
  http://www.ilo.org
- Universal Human Rights Index—searchable database of decisions from international treaty monitoring bodies:
  http://www.universalhumanrightsindex.org

### Africa-wide human rights law

- Africa-wide treaties and African Commission information:
  http://www.achpr.org
- African Court on Human and Peoples' Rights:
  http://www.african-court.org/en/
- African Human Rights Case Law Analyser—searchable database of African Commission decisions:
  http://caselaw.ihrda.org/
- African Legal Information Institute:
  http://www.africanlii.org
- African Union:
  http://www.au.int/en/
- Southern African Legal Information Institute:
  http://www.saflii.org/

## SADC guidelines on HIV/AIDS

- SADC regional documents:
  www.sadc.int or www.sadc-tribunal.org

## Comparative jurisprudence

- African jurisprudence—African Legal Information Institute:
  http://www.africanlii.org
- Southern African jurisprudence—Southern African Legal Information Institute:
  http://www.saflii.org/
- Worldwide jurisprudence—World Legal Information Institute:
  http://www.worldlii.org

## General HIV/AIDS related information

- AIDS Portal:
  http://www.aidsportal.org
- Joint United Nations Programme on HIV/AIDS:
  http://www.unaids.org
- World Health Organisation:
  http://www.who.int

**For particular research assistance or for hard copies of the documents referenced in the manual, please contact the Southern Africa Litigation Centre.**

## Appendix B: Sample expert affidavit

The following is a sample expert affidavit of a virologist in an HIV discrimination case against a domestic worker and child-minder. This sample can serve as a guide for lawyers seeking to draft a similar affidavit.

The affidavit highlights the basic lines of argument an expert could present to court on the risk of transmission based on the facts of the particular case. It should be noted that the affidavit addresses two separate issues: the risk of exposure to HIV in the circumstances of the case; and then, in the unlikely scenario that there had been an exposure, the likelihood, if any, of an HIV infection resulting from such exposure.

### SUMMARY OF EXPERT EVIDENCE ON THE RISK OF HIV TRANSMISSION

1. I am a medical doctor practising as such in … I am duly registered with the …
2. I hold the qualification of …
3. I am employed as … at …
4. I respectfully submit that I am, by virtue of my training and experience, duly qualified to provide expert testimony in this matter. My curriculum vitae is attached hereto as Annexure …
5. The Applicant informs me that she was employed as a domestic worker and child-minder by the Respondent and that, according to the Respondent, her duties would include feeding, bottle-feeding, changing nappies and, when the baby starts teething, applying oral medication.
6. I am further informed that the Respondent claims that it is an inherent requirement of the job that the Applicant be free of contagious diseases and that her HIV-positive status poses a risk to the child.
7. I am informed that, at the time of dismissal, the Applicant tested positive for HIV.
8. I have been requested by the Applicant to furnish a professional opinion on the risk of transmission of HIV by a person employed as a domestic worker and child-minder to the baby under her care.

### Risk of exposure to the Human Immunodeficiency Virus (HIV)

9. When considering the risks of health consequences from exposure to HIV, one must bear in mind that HIV transmission is confined to three modes: sexual transmission, mother-to-child transmission (in-utero, during birth and through breastfeeding) and contact with infected blood and body secretions. HIV is found in varying concentrations or amounts in blood, semen, vaginal fluid, breast milk, saliva and tears. HIV is present in negligible quantities in tears, blister fluid and saliva and is not present in urine, faeces, vomit or sweat.
10. HIV has been found in saliva and tears in very low quantities from some AIDS patients. It is important to understand that finding a small amount of HIV in a body fluid does not necessarily mean that HIV can be transmitted by that body

fluid. Simple contact with saliva, tears or sweat has never been shown to result in transmission of HIV.

11. There is abundant scientific evidence that HIV is not transmitted by casual contact, or through handling foodstuffs. HIV is not easily passed from one person to another and there is no risk of transmission in ordinary day to day contact with an HIV-positive adult or child. HIV cannot be spread by touching, hugging, kissing on the lips, coughing, sneezing or breathing the same air.
12. HIV does not survive well in the environment, making the possibility of environmental transmission remote. HIV is a fragile virus that dries out quickly and is extremely sensitive to disinfectants and alcohol, so its survival outside the body is short-lived and fluid and blood that have dried are not infectious. HIV cannot be spread by sharing accommodation, toilets, baths, bedding, furniture, telephones, eating utensils, towels or clothes with an individual who is infected with HIV.
13. Although HIV has been transmitted between family members in a household setting, this type of transmission is very rare. These transmissions are believed to have resulted from contact between skin or mucous membranes and infected blood. To prevent even such rare occurrences, precautions can be taken in all settings to prevent exposure to blood of persons who are infected with HIV, at risk for HIV infection or whose infection and risk status are unknown. The risk of such transmission is estimated to be 0.2 – 0.7 infections per 100 years of contact.
14. There have been reports in medical literature in which HIV appeared to have been transmitted by a bite. Severe trauma with extensive tissue tearing and damage and presence of blood were reported in these instances. Biting is not a common way of transmitting HIV and it is inconceivable that this could pose a risk in the present case.
15. In the routine course of work of a domestic worker and child-minder, the likelihood of such exposure must be considered extremely remote. It would be reasonable to consider such an exposure so unusual as to be practically impossible. A child-minder would have to be actively bleeding while attending to the baby. Further, the baby would have to have an open wound or have the blood come directly into contact with her mucosa (lining of internal organs) or conjunctiva (lining of eyes). Moreover, such contact would have to take place fairly quickly after the child-minder bled as the survival of the HI virus outside the human body is poor. As can be appreciated, the likelihood of such an event in the routine course of a child-minder's work is effectively nil. The risk of exposure can be eliminated through the use of universal precautions.

## Risk of HIV infection

16. Following a specific exposure of HIV, the risk of infection may vary with factors such as:
    a. The pathogen involved;
    b. The type of exposure;
    c. The amount of blood involved in the exposure; and
    d. The amount of virus in the patient's blood at the time of exposure.

17. Even if there has been a significant exposure to HIV, only a minority of exposures will actually result in transmission of HIV.
18. The most useful evidence to quantify the likelihood of transmission from such exposures comes from studies conducted among health care professionals performing surgery or drawing blood who come into contact with HIV-positive patients and who sustain needle-stick injuries during such procedures. Studies have shown that the overall risk associated with a single needle-stick injury involving an HIV-positive patient is 0.34%.
19. In contrast, contact with blood on mucosal surfaces is associated with a lower risk (roughly estimated to be 0.09%). No cases of transmission through intact skin have been reported by the Centers for Disease Control and Prevention in the United States after many years of epidemiological surveillance for HIV.
20. The risk after exposure of non-intact skin to HIV-infected blood is estimated to be less than 0.1%. HIV cannot penetrate through intact skin, so blood splashes onto intact skin of the hands are not deemed to be infectious. There have been no documented cases of HIV transmission caused by an exposure involving a small amount of blood on intact skin.
21. The amount of virus in the blood (viral load) at the time of exposure also plays a role in the risk of infection after exposure to HIV-infected blood. This depends on the stage of the disease and whether the person is on antiretroviral treatment. People with a high viral load have more HIV in their body fluids and are likely to be more infectious.
22. It is possible, with the use of antiretroviral medication, to slow down the progression of HIV. The correct, timely and appropriate use of antiretroviral treatment will reduce the patient's viral load and result in the improvement of the clinical condition, quality and quantity of life in the majority of people living with HIV. It also helps to reduce and/or eliminate opportunistic infections.

## Prevention of the risk of exposure to HIV

23. There are general preventative measures that can be taken to prevent HIV in a community setting. These measures can be applied within the household, at school, in the workplace, or in the general community setting. These measures are referred to as universal precautionary measures.
24. Simple precautions on the part of the domestic worker or child-minder would help to reduce any risk of direct contamination with blood or body fluids.
25. Any exposure to blood or body fluids must be managed immediately. This entails wound management and cleaning spillages or droplets of blood or body fluids. A culture of good hygiene practices must be cultivated.
26. In general one should avoid any direct contact with blood and body fluids. Gloves should be worn when blood is being cleaned from a floor, surfaces or clothes. The same precautions should be applied to other body fluids or excreta. If gloves are not available, intact plastic bags can provide protection.

27. People should be encouraged to keep all wounds, abrasions or lesions covered at all times. Any skin exposed to blood must be cleaned promptly with running water. The area should be cleaned with antiseptic or household bleach diluted in water. Cuts, sores or breaks on both the caregiver's and the child's exposed skin should be covered with bandages.
28. If blood is splashed on the face, particularly the conjunctiva of the eyes or the mucous membranes of the nose and mouth, these should be flushed with running water.
29. Contaminated surfaces and floors should be cleaned with bleach and water. Any contaminated instruments or equipment should be washed, soaked in bleach for an hour and dried. Ensure that bathrooms and toilets are clean, hygienic and free from blood spills.
30. Universal precautions do not apply to faeces, nasal secretions, sputum, sweat, tears, urine and vomit unless they contain visible blood. The risk of transmission of HIV from these fluids and materials is extremely low or non-existent. HIV has been isolated in some of these fluids; however, epidemiological studies in the health care and community settings have not implicated these fluids or materials in the transmission of HIV or the more infectious HBV.

**For additional sample affidavits, please contact the Southern Africa Litigation Centre.**

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