

REVIEW AND ASSESSMENT OF LAWS AFFECTING HIV/AIDS IN TANZANIA

By Magdalena K. Rwebangira and Maria Tungaraza

TANZANIA WOMEN LAWYERS' ASSOCIATION

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This Assessment, prepared by TAWLA, responds to a request from the Ministry of Justice and Constitutional Affairs, Deputy Attorney General and Permanent Secretary, Kulwa S. Massaba, on 3 April 2001. The activities of TAWLA were funded under a POLICY Project subcontract. POLICY is a five-year project funded by the U.S. Agency for International Development under Contract No. HRN-C-00-00006-00, beginning July 7, 2000. The project is implemented by the Futures Group International in collaboration with Research Triangle Institute (RTI) and the Centre for Development and Population Activities (CEDPA).

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
BAKWATA	National Muslim Council of Tanzania
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBO	Community-based organization
CCBRT	Comprehensive Community-based Rehabilitation in Tanzania
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
FGM	Female genital mutilation
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LHRC	Legal and Human Rights Center
MOH	Ministry of Health
MOJCA	Ministry of Justice and Constitutional Affairs
MTP	Medium Term Plan
NACP	National AIDS Control Program
NGO	Nongovernmental organization
PLHA	People living with HIV/AIDS
PMTCT	Prevention of mother-to-child transmission
STD	Sexually transmitted disease
STI	Sexually transmitted infection
STP	Short Term Plan
SUWATA	Shirika la Uchumi la Wanawake Tanzania
TACAIDS	Tanzania Commission for AIDS
TAMWA	Tanzania Media Women Association
TAWLA	Tanzania Women Lawyers Association
TLS	Tanganyika Law Society
TNGP	Tanzania Gender Network Programme
UDHR	Universal Declaration of Human Rights
UNAIDS	United Nations Programme on HIV/AIDS
VCT	Voluntary counselling and testing
WAMATA	Walio Katika Mapambano na UKIMWI Tanzania (Organization to Support People Affected by HIV/AIDS)
WLAC	Women's Legal Aid Clinic

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Executive Summary

This review and assessment of Tanzania laws affecting HIV/AIDS responds to a letter request, dated April 3, 2001, to TAWLA from Kulwa S. Massaba, Deputy Attorney General and Permanent Secretary, MOJCA.

Secretary Massaba requests TAWLA, as follows:

...to undertake a review and assessment of Tanzania laws affecting HIV/AIDS and identify with recommendations, provisions that need to be changed to better support HIV/AIDS prevention and care in Tanzania. We understand that the POLICY Project, under the advice and direction of Mr. Lane Porter, with funding from the U.S. Government will support TAWLA in the conduct of these activities to terms of references attached hereto. I look forward to receiving TAWLA's report and to continuing efforts to create a more supportive legal framework to address HIV/AIDS prevention and care in Tanzania.

1. Purpose of Review and Assessment of Tanzania Laws Affecting HIV/AIDS

Thus, pursuant to the request of the POLICY Project, the purpose of the review and assessment of Tanzania Laws affecting HIV/AIDS ("the Report") is:

- a. To identify laws considered impediments to HIV/AIDS prevention and care.¹
- b. To suggest law reforms considered necessary to advance HIV/AIDS prevention and care.
- c. To suggest enactment of laws considered necessary to advance HIV/AIDS prevention and care.

The information in the Report is presented in three parts, constituting fifteen chapters, references, and annexes.

2. The Tanzania National Policy on HIV/AIDS, 2001

The National Policy on HIV/AIDS, 2001 is a comprehensive instrument that provides for a framework for leadership and coordination of the national multisectoral response to the HIV/AIDS epidemic. However, it has some lacunae to be filled. These include: (i) HIV/AIDS prevention and support services for people with disability, (ii) HIV/AIDS prevention and support services for refugees, and (iii) specific guidelines for establishment of voluntary counselling and testing (VCT) services. Other issues that have not been addressed by the policy but have been commented upon in this study are: (i) HIV testing, (ii) donor blood safety, (iii) prevention of cross infection, (iv) rights of PLHA, (v) voluntary HIV testing, (vi) management of sexually transmitted diseases (STDs), (vii) prevention of sexual transmission, and (viii) gender issues in relation to HIV/AIDS. It was observed that while in the first three items there was complete omission, the rest had shortcomings mainly in relating the guidelines with the cultural values and material, social, and economic conditions of Tanzania.

¹ It is arguable whether, by making specific reference to prevention and care, the terms of reference have looked at HIV/AIDS from the perspective of health and not as a broad crosscutting phenomena. However, the authors take the definition of health as defined by the WHO as being the complete well being of a human person including socially, psychologically, and economically. This is the approach that has been adopted in this study and therefore covers many areas outside the medical disciplines.

3. There Has Been No Tanzania Legislative Intervention Specific to HIV/AIDS

No attempt has been made so far to comprehensively incorporate HIV/AIDS issues within Tanzanian laws. This notwithstanding, there is some legislation that contains provisions of general application that are relevant to HIV/AIDS issues. This legal assessment has related these provisions.

4. Need for Comprehensive HIV/AIDS Law: Proposed Tanzania HIV/AIDS Prevention and Control Act of 2004

As the diversity of the epidemic becomes more apparent, it becomes evident that a comprehensive legislative approach covering different public health aspects of HIV/AIDS is needed (The “Tanzania HIV/AIDS Prevention and Control Act of 2004” or “the Act”). This report proposes enactment of the Act to address comprehensively HIV/AIDS prevention, care, and support issues. The Act will also amend all legislation that affects HIV/AIDS prevention, care, support, and human rights issues.

In this way, a legal framework will be established to support the national policy on HIV/AIDS and the gaps in the national policy that are identified in this report. As part of the comprehensive new policy, legislative statutes will have to be reviewed.

See Annex 5 for a proposed outline of the HIV/AIDS Prevention and Control Act of 2004.

5. International Human Rights Law

The shortcomings in domestic law notwithstanding, under the auspices of the United Nations, the world community has elaborated a range of internationally binding legal instruments in the field of human rights.² Together, these instruments constitute a formidable armory in the fight against violation of all the commonly recognized categories of human rights, including certain group rights and against invidious discrimination in their enjoyment.³

The main international human rights instruments are:

- International Covenant on Civil and Political Rights (ICCPR)⁴
- International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶

² O’Flaherty, Michael. 1996. “Human Rights and the UN, Practice Before The Treaty Bodies.” London: Sweet and Maxwell; Cited Tungaraza, Maria B. 1997. “The AIDS Epidemic and Rights of Women (Tanzania).” Thesis submitted in partial fulfilment of Master of Laws Degree Course (LLM), Washington, D.C.: Georgetown University.

³ Id.

⁴ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

⁵ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

⁶ Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁷
- Convention on the Rights of the Child (CRC)⁸

Tanzania has signed and ratified these international human rights instruments. However, these international instruments have not been incorporated into domestic laws for them to be legally enforceable.

Five priority issues in HIV/AIDS prevention and care that should be the subject of law reform within the next two years have been identified. Also identified are priority issues in HIV/AIDS prevention and care that should be the subject of law reform within the next five years.

6. Priority Issues for New or Reformed Legislation Within Next Two Years

Priority issues for law reform within the next two years include:

- Importance of VCT service as a prevention measure against the spread of HIV/AIDS.
- Abolition of customs and traditional practices that make individuals vulnerable to HIV transmission.
- Protection of the rights of PLHA with special focus on prevention of stigmatization and discrimination of PLHA in various settings and treatment, including the review of employment laws.
- Protection of the rights of women, children, and other vulnerable groups against vulnerability to HIV infection, including care of orphans.
- Institutionalizing deterrent measures against wilful transmission of HIV.

Priority 1: Importance of VCT service as a prevention measure against the spread of HIV/AIDS

Voluntary testing of HIV/AIDS takes place in laboratory services. Consequently, it is essential that legislation (Private Health Laboratories Act, No. 10 of 1997) be amended to enunciate a special provision for establishing quality VCT services. Such legislative reform should take into consideration provisions of service by competent laboratory technicians well trained in HIV testing, prevention and care.

Priority 2: Abolition of customs and traditional practices that increase the risk of HIV/AIDS transmission

Abolition of customs and traditional practices, which place individuals at high risk of infection from HIV/AIDS transmission, is recommended. Research on useful alternative customs and traditions, which may help to reduce HIV/AIDS transmission, is recommended.

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987.

⁸ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

Considered of particular importance for girls—as highly relevant in the context of HIV/AIDS—is the abolition of traditional practices that are prejudicial to health, such as early marriage, female genital mutilation (FGM), and denial of equal sustenance and inheritance.

Priority 3: Protecting the rights of PLHA with special focus on prevention of stigmatization and discrimination of PLHA in various settings, including the review of employment laws

Pursuant to the Bill of Rights⁹ enunciated in the Constitution of the United Republic of Tanzania in 1984, antidiscrimination principles in relation to one's HIV status are stipulated therein under general provisions. The Bill of Rights recognizes the principle of equality of all human beings and equality before the law. The right of life is enshrined therein.

By recognizing antidiscrimination principles, the human rights of PLHA are well protected under the Constitution of the United Republic of Tanzania. The issue to be considered in this context is enforcement of these human rights to adequately address stigmatization and discrimination of PLHA by communities and in various sectors.

The Basic Rights and Duties (Enforcement) Act, 1994¹⁰ is an act to provide the procedure for enforcement of constitutional basic rights and duties and for related matters. Sections 10 and 13 should be scrutinized clearly for the act to be able to properly address infringement of the human rights of PLHA.

PLHA and employment. On its face, the Employment Ordinance, Cap. 366 of the Laws (Revised)¹¹ does not seem to be discriminatory of PLHA, however there are provisions that require medical examination as a prerequisite condition for employment and may therefore provide loopholes for discrimination against PLHA, e.g., S.47. Conditions for termination of contract also need to be examined, e.g., S.52. Care and welfare provisions should also accommodate the rights of PLHA, e.g., S.100.

The Security of Employment Act, 1964¹² is mute on security of employment in relation to PLHA as it is of general application. In order to oblige employers to observe human rights of PLHA, it is important that the act be revised to explicitly protect those rights.

The Regulation of Terms of Employment (Entitlements of Benefits) Order 1968:¹³ As opportunistic infections are common in AIDS cases, issues related to the right of paid sick leave gain particular importance at work places. PLHA should be given equal treatment.

Workmen's Compensation Ordinance, Cap. 263¹⁴: Although the rights of PLHA in respect of workmen's compensation are not excepted from the scope of application of the ordinance, the provisions of the ordinance do not address issues relevant to HIV/AIDS injuries suffered in the course of employment.

Severance Allowance Act: Like all labour laws, the act is of general application and does not mention circumstances surrounding HIV/AIDS-related issues. There are, however, a few

⁹ Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984).

¹⁰ The Basic Rights and Duties (Enforcement) Act, 1994.

¹¹ Employment Ordinance, Cap. 366 of the Laws (Revised)

¹² The Security of Employment Act, 1964

¹³ The Regulation of Terms of Employment (Entitlement of Benefits) Order, 1968

¹⁴ The Workmen's Compensation Ordinance, Cap. 263

provisions related to health conditions that may affect the rights of PLHA for various reasons. For instance, it is stated in the Act that, where the employee lawfully terminates the employment or the employee contract of service expires and he refuses to renew the same on account of his incapacity due to illness, the employer shall pay to the employee a severance allowance. Caution should be taken so that PLHA do not invoke this provision simply because of fear of stigmatization in the workplace unless they are incapacitated by illness. Specific provisions, which will address HIV/AIDS issues with greater precision, should be enunciated in the act.

Priority 4: Protecting the rights of women, children, and other vulnerable groups against the vulnerability to HIV infection, including orphan support

Women. Harmful traditional practices still put women at risk of being infected and transmitting HIV/AIDS. These practices should be abolished and people should be given accurate information on the advantages for abolition. Inheritance laws are still discriminatory of women and therefore deny women economic power. The right to custody of children also needs to be revised.

The Law of Marriage Act, 1971¹⁵ regulates the law relating to marriage, personal and property rights as between husband and wife, separation, divorce and other matrimonial relief and other matters connected therewith and incidental thereto. The act has several provisions that expose women to HIV vulnerability for a number of reasons.

These may be classified as follows:

- Kinds of marriages
- Conversion of marriage
- Minimum age
- Free will
- Requirement of consent
- Notice of intention to marry
- Publication of notice of intention
- Notice of objection
- Avoidable marriages
- Rights to damages for adultery
- False statements in notice of intention to marry or in notice of objection
- Coercion or fraud
- Polyandry

The Constitution of the United Republic of Tanzania¹⁶ is not discriminatory on its face against women but is discriminatory in practice. For example, gender-oppressive laws run concurrently with the Bill of Rights enunciated in the Constitution of the United Republic of Tanzania in 1984,¹⁷ even though they appear to be directly contrary to the provisions of the Bill of Rights.

Children. There is no unified law which deals with the rights of a child. Those rights are articulated in the Constitution of the United Republic of Tanzania¹⁸ and various statutes, which include the Penal Code,¹⁹ the Criminal Procedure Act,²⁰ the Evidence Act,²¹ the National

¹⁵ The Law of Marriage Act, No. 5 (1971)

¹⁶ Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984).

¹⁷ Id.

¹⁸ Id.

¹⁹ Penal Code, Cap. 16

²⁰ Criminal Procedure Act, No. 9 (1985)

Education Act,²² the Children and Young Persons Act,²³ the Employment Ordinance, the Law of Marriage Act, and the Corporal Punishment Ordinance.²⁴ Evinced from the foregoing legislation, there is no consensus as to the definition of a child. Every provision in legislation defines a child to serve its objectives. For instance, in the Children and Young Persons Act, a child is a person under the age of twelve years, and a young person is between twelve and sixteen years of age.²⁵ Under the Criminal Procedure Act,²⁶ a child is a person who has not attained the age of sixteen.²⁷ Pursuant to the Corporal Punishment Ordinance,²⁸ a juvenile is under the age of sixteen years.²⁹

Save for the Penal Code,³⁰ Sexual Offences Special Provisions Act,³¹ and the Law of Marriage Act,³² which contain general provisions that protect children from sexual abuse and from infectious diseases, none of these statutes specifically focus on the rights of the child living with HIV/AIDS. These statutes further do not protect the child from being infected by HIV/AIDS.

Other vulnerable group: people with disabilities. The rights of people with disabilities are not covered under a unified legislation, they are, however, spelt out in several legislation that stipulate for various issues relevant to people with disability. Two major legislations directly deal with the rights of people with disabilities, namely:

- Disabled Persons (Employment) Act, 1982³³
- Disabled Persons (Care and Maintenance) Act, 1982³⁴

The above legislation protects various rights of people with disabilities on employment, care, and maintenance issues. Despite this attempt, the law is not exhaustive because health matters are not referred to and the legislation is mute on HIV/AIDS/STDs preventive issues. Basing on this legislation it is impossible to safeguard the rights of people with disabilities against the effects of the epidemic. There are no provisions of general application that explicitly or by implication provide for protection against transmission of diseases dangerous to life. Likewise, rights of people with disabilities who are also infected with HIV/AIDS are not stipulated. It is essential that the legislation be revised to enunciate provisions on HIV/AIDS/STDs prevention that will protect people with disability against HIV transmission and safeguard the rights of those infected with the virus.

²¹ Evidence Act, No. 6, (1967)

²² Education Act, 1978

²³ Corporal Punishment Ordinance, Cap. 17

²⁴ See also Bahroon Said Amin. 1996. "Legal Protection of The Rights of Children Who are Living With or Affected by HIV/AIDS." Presented in the Training Manual "Ethical, Legal, and Human Rights Challenges in Relation to HIV/AIDS Prevention and Control." Ministry of Justice and Constitutional Affairs and National AIDS Control Programme with Support of UNDP.

²⁵ S. 2

²⁶ 1985 (No. 9 of 1985)

²⁷ S. 2

²⁸ Cap. 17 of the Revised Laws in Tanzania

²⁹ S. 2

³⁰ Penal Code, Cap. 16

³¹ The Sexual Offences (Special Provisions) Act, 1998

³² The Law of Marriage Act, No. 5 (1971)

³³ Disabled Persons (Employment) Act, 1982

³⁴ Disabled Persons (Care and Maintenance) Act, 1982

Another important issue to be considered is whether the legislation should be extended to cover the rights of PLHA who have been physically disabled by the disease. It is indisputable that fully blown AIDS is a health condition that may in some instances lead to physical disability.

Other vulnerable group: refugees. The Immigration Act, 1995³⁵ is silent on HIV/AIDS issues, and it may be said that HIV/AIDS status is not a prerequisite condition for immigration rights in Tanzania. However, the only ambiguous provision is Section 10(c)(i), which defines infectious disease as an element that constitutes a condition for prohibited immigrants. The expression “prohibited immigrant” means any person who, if he seeks to enter Tanzania is, or if he has entered Tanzania was at the time of his entry, a person who is certified by a medical practitioner to be suffering from a contagious or infectious disease which makes or would make his presence in Tanzania dangerous to the public. Seen on its surface, the provision may mistakenly be construed to encompass HIV/AIDS since it is an infectious health condition. Nevertheless, this provision should not be construed to mean that HIV/AIDS being an infectious disease is potentially dangerous to public. Under normal circumstances HIV/AIDS status alone does not render a person dangerous to the public; rather, PLHA seeking immigration rights becomes dangerous to public when after his entry in the country, he wilfully transmits the virus. What is required of the law is to explicitly state that a person should not be denied entry in Tanzania on grounds of HIV/AIDS status.

The Refugee Act, 1998,³⁶ Section 18(2)(c), implies the protection of refugees from HIV/AIDS. This provision empowers the director or settlement officer to give such orders or directions, either orally or in writing, to any asylum seeker or refugee as may be necessary or expedient to ensure that all proper precautions are taken to preserve the health and well being of the asylum seekers or refugees. The act needs a more effective provision to address HIV/AIDS issues.

7. Priority Issues for New or Reformed Legislation Within the Next Five Years

Priority issue areas in HIV/AIDS prevention and care that should be subject of law reform in the next five years include:

- State monitoring and enforcement of human rights in the light of HIV/AIDS.
- Amend media laws to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, and the National Policy on HIV/AIDS, 2001, and the views expressed by the stakeholders.
- Codification of international human rights instruments into domestic law.
- Food quality laws to control hazardous food supplements.

8. Legislation Required to Respond to Identified Priority Issues

In order to promote the above-mentioned priorities, the following legislation and regulations need to be amended/addressed as indicated in summary form below (and replicated at Chapter 15, titled TAWLA Recommendations). A more detailed analysis is found in the various chapter discussions.

³⁵ The Immigration Act, 1995

³⁶ The Refugee Act, No. 9 (1998)

Legislation on goods and services

*A. Medical Practitioners and Dentists Ordinance, Cap. 407.*³⁷ Section 9 amended to include HIV/AIDS prevention quality standards for different medical procedures and registration of qualified medical practitioners and dentists to enter and stay in the service of the practice of medicine.

*B. Nurses and Midwives Registration Ordinance, Cap. 325.*³⁸ Amend the legislation to enunciate education, training, registration, enrolment and practice of nursing and midwifery to impact HIV/AIDS prevention and care standards, including prevention of mother-to-child transmission (PMTCT).

*C. The Opticians Act, 1966.*³⁹ Amend the legislation to include provision on quality service for HIV/AIDS prevention and care.

*D. Private Hospitals (Regulations) Act, 1977.*⁴⁰ Consider amendment of S.5 and S.7(2) to include adherence to approved standards for prevention and care of HIV/AIDS as well as apply universal precautions.

*E. Private Health Laboratories Registration Act, No. 10 of 1997.*⁴¹ Because voluntary testing of HIV/AIDS takes place in laboratory services, it is essential that the legislation be amended to enunciate a special provision for setting up quality VCT service. This should take into consideration provision of service by competent laboratory technicians well trained in HIV testing, prevention, and care.

*F. The Health Laboratory Technologists Registration Act, No. 11 of 1997.*⁴² Amendment is needed to make reference to HIV/AIDS testing requirements, pre- and post-test counselling, need for confidentiality, safety precautions, and related issues.

*G. Internationally Notifiable Diseases Act, 1963.*⁴³ The following sections—S.5, S.6(1)–(3), S.7, S.8(1)–(2), and S.11(1)—are not relevant to HIV/AIDS and, therefore, render the legislation redundant. The cited sections contravene UNAIDS standard guidelines and the National Policy on HIV/AIDS as they require detention and isolation of infected persons of a notifiable disease, breach of privacy and confidentiality issues vested in PLHA rights. The above cited sections should be amended to include HIV/AIDS prevention standards commensurate with UNAIDS guidelines and the National Policy on HIV/AIDS, 2001.

H. Pharmaceuticals and Poisons Act, 1978.^{44, 45} Under this act, consumers are protected from purchasing substandard pharmaceutical products (S.27). As such the legislation must be amended

³⁷ Medical Practitioners and Dentists Ordinance, Cap. 407

³⁸ Nurses and Midwives Registration Ordinance, Cap. 325

³⁹ The Opticians Act, 1966

⁴⁰ Private Hospitals (Regulations) Act, 1977

⁴¹ Private Health Laboratories Registration Act, No. 10 of 1997

⁴² The Health Laboratory Technologists Registration Act, No. 11 of 1997

⁴³ Internationally Notifiable Diseases Act, 1963

⁴⁴ Pharmaceuticals and Poisons Act, 1978

⁴⁵ The Tanzania Food, Drug and Cosmetics Act, 2002, came into force 11 March, 2002 to provide for the more efficient and comprehensive provisions for the regulation and control of food, drugs, medical devices, cosmetics, herbal medicines and poisons. This Act repealed the Food (Control of Quality) Act, 1978, and repealed the Pharmaceuticals and Poisons Act, 1978. The Tanzania Food, Drug and Cosmetics Act, 2002,

to include quality supply, manufacture, and use of VCT kits and other reagents needed for HIV testing, including needles, syringes, gloves, etc.

Harmful traditional practices

The new proposed HIV/AIDS legislation should enumerate a section that renders the abolishment of all harmful traditional and customary practices, which place people at risk of acquiring and transmitting HIV/AIDS.

Protection of rights of PLHA, with special focus on prevention of stigmatization and discrimination

A. Employment Ordinance, Cap. 366 of the laws (Revised).⁴⁶

- Medical Examination: S.47 to be amended to state explicitly that HIV/AIDS should not be a condition for medical examination in order for one to qualify for employment.
- Termination of Contract: Amend S.52 to state explicitly that HIV status should not be a determinant condition that warrants termination of employment contracts.
- Care and Welfare: S.100(1). PLHA employees should be accorded equal treatment on medical aid as other employees under S.100(1). The section should be explicitly amended to include an HIV component. If possible, provision of antiretrovirals should be included.
- Burial of Deceased Employee and Dependents: S.102(1) to be amended to give equal treatment to deceased PLHA.

B. The Security of Employment Act 5, 1964.⁴⁷ The legislation to be amended to include a section that stipulates clearly that an employer should not summarily dismiss an employee on grounds of contracting HIV/AIDS if the employee abides by the disciplinary code and the labour laws.

C. Workman's Compensation Ordinance Cap. 263.⁴⁸ Second Schedule and Third Schedule of the Ordinance to be amended to include rights of PLHA on issues relevant to HIV/AIDS injuries suffered in the course of employment (e.g., health care providers who acquire HIV accidentally when attending to patients). Other issues pertain to compensation for injury, requirements as to notice of accident, and eligibility for compensation.

Women, children, and other vulnerable populations

Women

A. Rules 23, 25, 30 of the Local Customary Law (Declaration) (No. 4) Order 1963.⁴⁹

B. The Law of Marriage Act, 1971.⁵⁰ S.13: minimum age requirement for a marriage for female is 15 years. This is an age of a minor and therefore the section should be amended to allow women

should be considered in the context of recommendations made in the report concerning the subjects of food quality and of pharmaceuticals.

⁴⁶ Employment Ordinance, Cap. 366 of the Laws (Revised)

⁴⁷ The Security of Employment Act 5, 1964

⁴⁸ Workman's Compensation Ordinance Cap. 263

⁴⁹ Local Customary Law (Declaration) (No. 4) Order 1963

⁵⁰ The Law of Marriage Act, No. 5 (1971)

to make sound decisions on marriage, especially in the wake of AIDS; they may be vulnerable to HIV infection as they may not apprehend the risk involved.

C. Notice of objection. S.20, S.145 to include HIV situations.

D. Coercion or Fraud. S.151, include HIV/AIDS to reflect the consent of the party being induced by coercion or fraud.

E. Property. Sections 56, 57, 58, 60(a), and 60(b). Although the law seems to offer equal protection to spouses over property rights and status in a marriage, the concept of separate ownership of property between spouses is detrimental to women and serves to lock them into a marriage for economic reasons. Therefore, law mitigates against protection for vulnerability to HIV infection.

Children

There is a need for a unified law to define the age of a minor, which is now lacking, as legislation on children differs on the definition of a child. The Constitution does not make specific reference to children either, but they are generally categorized as “all human beings.”

*A. The Children and Young Person’s Ordinance, Cap 13.*⁵¹ Amend the legislation to include a provision for prevention of HIV transmission and care of children in approved schools.

*B. The Education Act, 1978.*⁵² Amend the legislation to include a provision on the rights of the child to access HIV/AIDS prevention education. Also include standard requirement of the quality of the education on HIV prevention and care provided to children.

*C. Adoption Ordinance, Cap. 335.*⁵³ Amend the legislation to prohibit stigmatization and discrimination of orphans living with HIV/AIDS. Also, ensure care and support of orphans living with HIV/AIDS.

People with Disabilities

*A. Disabled Persons (Employment) Act, 1982.*⁵⁴

*B. Disabled Persons (Care and Maintenance) Act, 1982.*⁵⁵

Both statutes are mute on provisions for HIV prevention and care for disabled people. Amendment is necessary to include such provisions.

Immigrants and Refugees

*A. The Immigration Act, 1995.*⁵⁶ Amend S.10(c)(i) to clearly state that HIV/AIDS should not constitute a condition for prohibiting immigrants.

⁵¹ The Children and Young Person’s Ordinance, Cap 13

⁵² The Education Act, 1978

⁵³ Adoption Ordinance, Cap. 335

⁵⁴ Disabled Persons (Employment) Act, 1982

⁵⁵ Disabled Persons (Care and Maintenance) Act, 1982

⁵⁶ The Immigration Act, 1995

*B. The Refugee Act 1998.*⁵⁷ Amend S.18(2)(c) to address HIV/AIDS issues. This provision empowers the director or settlement officer to give such orders or directives, either orally or in writing, to any asylum seeker or refugee as may be necessary or expedient to ensure that all proper precautions are taken to preserve the health and well being of the asylum seekers or refugees. Also amend S.31 to include importance of HIV/AIDS prevention and care education in refugee camps.

Criminal laws and correctional systems

*A. The Penal Code, Cap. 16.*⁵⁸ Consider amending:

- Chapter XV11: Nuisance and Offences Against Health and Convenience
 - S.179—Act of spreading infections of any disease dangerous to life to include HIV spread.
 - S.170—Common Nuisance to include HIV transmission/spreading
- Chapter XXII: Offences endangering life or health—S.225, S.227, S.228
- Chapter XXIII: Criminal Negligence—S.233(e), S.233(f), S.234
- Chapter XXIV: Assault—S.241

*B. The Sexual Offences (Special Provisions Act), 1998.*⁵⁹ Amend the following sections to reflect HIV/AIDS prevention and care: 131(1), 138B(1), 139(A), 139, 140, 5, 12, 139(a), 139(b), 139(c), 139(d), 139(e), 139(f), 156.

C. Also, amendments made by the legislation

- To S.127 of the Evidence Act, No. 6 (1967),⁶⁰ S.348A,
- To the Criminal Procedure Act No. 9, (1985),⁶¹ as amended by the sexual offences act.

D. Chapter XIX A Murder and Manslaughter S.196e.

*E. Prisons Act, 1967.*⁶² Consider amending the following: S.20(1), S.20(2) (requirement for medical examination of all prisoners), S.20(3) (prevention of the spread of the disease), S.32 (include sexual violence, rape in prison as prison offences in order to prevent HIV transmission), S.21, and S.40.

State monitoring and enforcement of human rights

*Basic Rights and Enforcement Act, 1994.*⁶³ S.10 and S.13 need to be reassessed in the light of HIV/AIDS so the act is useful in addressing infringement of human rights.

Media laws

*The Newspaper Act, 1976*⁶⁴ and *the Broadcasting Services Act, 1993.*⁶⁵ Amend the acts to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, the National Policy on HIV/AIDS, 2001, and the views expressed by the stakeholders

⁵⁷ The Refugee Act, 1998

⁵⁸ The Penal Code, Cap. 16

⁵⁹ The Sexual Offences (Special Provisions) Act, 1998

⁶⁰ The Evidence Act, No. 6 (1967)

⁶¹ The Criminal Procedure Act, No. 9 (1985)

⁶² The Prisons Act, 1967

⁶³ Basic Rights and Enforcement Act, No. 33 (1994)

International human rights instruments

Incorporate international human rights instruments into domestic law. There are the following international human rights instruments:

- International Covenant on Civil and Political Rights (ICCPR)⁶⁶
- International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁷
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶⁸
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁶⁹
- Convention on the Rights of the Child (CRC)⁷⁰

Control of food quality

The Food (Control of Quality) Act, 1978.^{71, 72} Amend the act to control manufacture, supply, and consumption of food supplements dangerous for use by PLHA.

⁶⁴ The Newspaper Act, 1976

⁶⁵ The Broadcasting Services Act, 1993

⁶⁶ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

⁶⁷ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

⁶⁸ Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

⁶⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987.

⁷⁰ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

⁷¹ The Food (Control of Quality) Act, 1978

⁷² The Tanzania Food, Drug and Cosmetics Act, 2002, came into force 11 March, 2002 to provide for the more efficient and comprehensive provisions for the regulation and control of food, drugs, medical devices, cosmetics, herbal medicines and poisons. This Act repealed the Food (Control of Quality) Act, 1978, and repealed the Pharmaceuticals and Poisons Act, 1978. The Tanzania Food, Drug and Cosmetics Act, 2002, should be considered in the context of recommendations made in the report concerning the subjects of food quality and of pharmaceuticals.

Part I: Context

1. Background

1.1 Introduction

This document is concerned about the legislation in Tanzania that affects HIV/AIDS in Tanzania.

1.2 Purpose of the review and assessment

This assessment report responds to a letter request, dated April 3, 2001, to TAWLA from Kulwa S. Massaba, Deputy Attorney General and Permanent Secretary, MOJCA.

Secretary Massaba requests TAWLA, as follows:

...to undertake a review and assessment of Tanzania laws affecting HIV/AIDS and identify with recommendations, provisions that need to be changed to better support HIV/AIDS prevention and care in Tanzania. We understand that the POLICY Project, under the advice and direction of Mr. Lane Porter, with funding from the U.S. Government will support TAWLA in the conduct of these activities to terms of references attached hereto. I look forward to receiving TAWLA's report and to continuing efforts to create a more supportive legal framework to address HIV/AIDS prevention and care in Tanzania.

Thus, pursuant to the request of the POLICY Project, the purpose of this review and assessment is:

- a. To identify laws considered impediments to HIV/AIDS prevention and care.
- b. To suggest law reforms considered necessary to advance HIV/AIDS prevention and care.
- c. To suggest enactment of laws considered necessary to advance HIV/AIDS prevention and care.

1.3 Methodology

This study has been done in four phases. The first phase involved a sensitization workshop on HIV/AIDS, which was held at NIC Training Institute on 1st December, 2000. This workshop brought together participants from NGOs dealing with human rights and offering legal aid services; PLHA medical practitioners dealing with treatment, testing, and counselling of people affected and infected with HIV/AIDS; widows; orphans; donors; human rights activists; and concerned individuals. The resolutions landed the idea of a study to review and assess the laws affecting HIV/AIDS and pointed out many snags in a literature review of local materials, in terms of workshop reports, newspaper articles, and international human rights instruments and guidelines issued by the Joint United Nations Programme on HIV/AIDS (UNAIDS) and other agencies dealing with the subject at hand. The second phase involved identification of the laws relevant to HIV/AIDS in Tanzania. Following their identification the relevant statutes were reviewed and assessed in accordance with international human rights obligations in the context of current issues in Tanzania. The third phase involved a series of consultative meetings. The first such meeting was held at the PPF House, on 23rd June, 2001. It was attended by officials and representatives from the Law Reform Commission, Ministry of Community Development

Women Affairs and Children, Ministry of Health (MOH), TAWLA, PASADA, etc. This workshop examined the outline of the report and the context of the issues to be covered. The second workshop in the series was held at the NIC Training Institute, Mikocheni, on 15th December, 2001. This workshop was attended by representatives from the civil society working in the areas of counselling and support of PLHA as well as advocacy issues. These included TACAIDS, WAMATA, PASADA, TGNP, and TAWLA.

At this particular workshop the consultants made a presentation of the findings. The workshop critically discussed the findings and made recommendations on priorities for law reform both in the short term and long term.

The fourth and final stage involved feedback to the employer, who is the MOJCA on behalf of the government of Tanzania. It has been a three pronged consultation conducted at three levels.

1.3.1 Preparatory meeting

The first level was a preparatory meeting, which was held on 14th February 2003 at the Royal Palm Hotel, Dar es Salaam, that drew participants from key sector ministries and academic institutions. Participants to this preparatory meeting included the President's Office, MOJCA (as host), as well as the ministries of Labour, Youth Development and Culture; Gender, Social Affairs and Children; Education; Health; and faculties of law of the University of Dar es Salaam and the Open University. The objective of that meeting was to have a close look at the report of the study, listen to the presentation of the findings and recommendations, and give inputs to the authors before the intergovernmental meeting was convened with a view to improving it.

1.3.2 Intergovernmental meeting

The second level was the intergovernmental meeting, which was held on 3rd March, 2003 at the Courtyard Hotel, Dar es Salaam. All government ministries were invited to this meeting, which was also hosted by the MOJCA, as well as TAWLA as consultants, and journalists from several media houses in and outside Tanzania. Participants had received copies of the report beforehand and save for occasional substantive contributions, the report was unanimously adopted without controversy. Major discussion centered on whether there should be a single omnibus law or amendment of existing laws to address various HIV/AIDS-related issues. Most participants supported the latter proposition. To mention but a few other areas of discussion, they focused on (i) the extent to which traditions, cultural norms, values and practices, and customary law impede the fight against HIV/AIDS; (ii) proposals for the amendment of the immigration laws to safeguard against HIV/AIDS status being used as a ground for denial of immigration status; and (iii) criminalizing discrimination against HIV/AIDS-positive applicants or employees in employment and recruitment.

1.3.3 National Conference

The third (and final) level of phase four was the National Conference, 26th–27th May, 2003, to which stakeholders from all sectors were invited. This includes all government ministries, NGOs—particularly those working with PLHA—as well as PLHA themselves, and their own support organizations. It was hoped that this process would generate a constructive debate, considered necessary for a meaningful dialogue in society. Equally important, it is hoped that the findings and recommendations arising from this National Conference on the review of the TAWLA report would help to achieve the intended outcome.

The National Conference, which was the third and final level of phase four, invited stakeholders from all sectors, namely, government ministries, NGOs—particularly those working on HIV/AIDS prevention, care, and support services—as well as PLHA support organizations. In summary, participants raised the following major issues of concern during the meeting: (i) whether to adopt a comprehensive law or to amend existing legislations to respond to HIV/AIDS issues, (ii) whether there is a need for mandatory HIV testing in exceptional cases such as employment laws, immigration laws, and prison laws, and (iii) rights of PLHA, orphans, and widows. Participants opined that a good law, which is accessible and widely disseminated, must be in place. There must be efficiency and effectiveness in implementing the law by responsible institutions. As such, we need to have focused education awareness on the law spearheaded by the Minister of Justice and Constitutional Affairs, NGOs, CBOs, government institutions, and the media. Coordination amongst responsible institutions involved in legal affairs and HIV/AIDS is necessary. A point was raised that the rights of orphans and vulnerable children must be promoted.

More information concerning the issues noted above can be found in the subsequent sections of the Report.

1.4 Past Workshops and Meetings

The need for legal reform so as to create a supportive legal environment for HIV/AIDS prevention and care has been identified and voiced by different stakeholders from the mid-1990s when it had become clear that the pandemic was not just a passing phenomenon that can be wished away. This has been voiced at various meetings and workshops. Some of these meetings and workshops have been organized by the government and other institutions. Others have been organized by NGOs and community-based organizations (CBOs).

1.4.1 Issues raised in pre-legal assessment non-TAWLA workshops and meetings

The National AIDS Control Program (NACP), in collaboration with the United Nations Development Program (UNDP), conducted one of the earliest workshops⁷³ on HIV/AIDS in the context of human rights (“NACP Workshop”). The workshop discussed issues pertaining to law, ethics, human rights, and HIV/AIDS. The workshop identified several problems, including the employment rights of employees who are HIV positive so as to protect such workers from unfair termination. It was recommended that employment laws should be amended with particular reference to the Employment Ordinance, Cap.366⁷⁴ and the Security of Employment Act, Cap. 374.⁷⁵ As the epidemic unfolded and more stakeholders took positions in the fight against HIV/AIDS, more legal-specific issues were brought forward advocating legal reforms in the context of HIV/AIDS. Many of these issues were voiced at various workshops where they were viewed as crosscutting as summarized below.

⁷³ See proceedings of “National Workshop on Ethics, Law and Human Rights and HIV/AIDS in Tanzania,” held at the Mbagala Spiritual Centre, Dar es Salaam, 13th - 15th January, 1997.

⁷⁴ The Employment Ordinance Cap. 366 of the Laws (Revised)

⁷⁵ The Security of Employment Act, Cap. 374

Sentiments concerning customs and traditions that result in the spread of HIV were raised at a Sensitization Workshop⁷⁶ on Human and Legal Rights of Women and Children, which recommended among others “repeal or amendment of outdated cultures that cause women and children’s rights violation.” Some scholars⁷⁷ on the subject had also recommended repeal of certain paragraphs of the earlier draft National Policy to add provisions that remedy customary sexual practices that facilitate HIV spread and subordinate women.

Provisions of the inheritance laws that are inconsistent with human rights. This issue came up in the other workshops mentioned earlier on. In addition, another workshop organized by the Tanzania Media Women Association (TAMWA) called for legal reform to address this issue.⁷⁸ The laws recommended for amendment included the Customary Law Declaration Order, 1963;⁷⁹ Islamic Law; The Indian Succession Act, 1865;⁸⁰ and the Law of Marriage Act.⁸¹ The changes advocated by in the workshop resolutions on this topic to be made through law reform included the following:

- The rights of widows and daughters to inherit by change in Rule 5 of the CLDO that designates the administrator of an estate as the eldest brother or father of the deceased.
- Change in Rule 20 to permit daughters to inherit land.
- Modification of the Law of Marriage Act to permit female family members to take custody of children.
- Adoption of the proposals contained in the Report of the Law Reform Commission on the Law of Succession/Inheritance (1995).

1.4.2 Issues raised in TAWLA workshops and meetings

Customs and traditions that result in spread of HIV. Customs and traditions that result in spread of HIV/AIDS was highlighted at the Sensitization Workshop⁸² on HIV/AIDS, organized by TAWLA in collaboration with the POLICY Project of the Futures Group based in the United States, as well as at the previous NACP/UNDP workshop.⁸³

The December 2000 TAWLA Sensitization Workshop recommended:

- Adoption of a National Policy on HIV/AIDS/STDS as well as amendment to the Law of Marriage Act, 1971⁸⁴ so as to outlaw polygamy, which legitimizes multiple sexual partners and to raise the minimum age of marriage.

⁷⁶ See Workshop Resolutions in WAMATA’s Report on “Sensitization Workshop on Human and Legal Rights of Women and Children,” held at the National Social Welfare Training Institute, Dar es Salaam 28th -30th July, 1998, page 7.

⁷⁷ Tugaraza, Maria. 1997. “Women’s Rights and the Women’s Epidemic (Tanzania).” Thesis Prepared in Partial Fulfilment of Master of Laws Degree Course. Washington D.C.: Georgetown University.

⁷⁸ See TAMWA Report on “Women’s Human Rights Awareness Workshop for Members of Parliament,” held at Tanzania Episcopal Conference, Kurasini, Dar es Salaam, 15th - 16th November, 1999.

⁷⁹ Local Customary Law (Declaration) Order 1963

⁸⁰ The Indian Succession Act, 1865

⁸¹ The Law Marriage Act, No. 5 (1971)

⁸² TAWLA. “Report of Sensitization Workshop on HIV/AIDS and its Related Legal Implications.” Dar es Salaam, 1 December, 2001.

⁸³ See Proceedings of a National Workshop on Ethics, Law and Human Rights and HIV/AIDS in Tanzania, held at the Mbagala Spiritual Centre, Dar es Salaam, 13th - 15th January, 1997

⁸⁴ The Law of Marriage Act, No. 5 (1971)

- Amending the Customary Law Declaration Order, 1963⁸⁵ so as to end exoneration of husband's infidelity.
- Changing the marriage laws to criminalize polygamy.
- Enacting a law prohibiting traditional healers from advertising AIDS "cures."
- Aligning the National Policy on HIV/AIDS with Constitutional rights.

Rights of women and girl children. The need to strengthen the rights of the girl child has rightly been identified as a key and long-term strategy for combating and sustaining the fight against wanton spread of HIV in the country.⁸⁶ The TAWLA workshop⁸⁷ advocated amendment of S.13 of the Law of Marriage Act, 1971,⁸⁸ allowing girls to be married at 15 years with parental consent, in which the father is given priority.

Mandatory testing for HIV. Mandatory testing takes place when another requires a person or authority to undergo an HIV test as condition for eligibility to some essential public service or facility such as employment, education, and solemnization of marriage. The problem posed by such practices was discussed at both the NACP Workshop⁸⁹ and WAMATA workshop⁹⁰ noted above. The perpetrators may be some well-meaning institutions like religious bodies or parents who explain that they do so in order to protect their unsuspecting "children" or members of their flock in the congregation. Nevertheless, such precautions result in the violation of the human rights of those tested because the process is involuntary.

To arrest this trend the following amendments to existing law are recommended:

- Amend the Criminal Procedure Act, 1985 so as to prevent doctors from tendering evidence, which is prejudicial to PLHA.
- Amend the Law of Marriage to provide for voluntary premarital testing.
- National Policy to permit mandatory HIV testing in cases of polygamy, widow inheritance, and polyandry.

These recommendations came up now and again at the TAWLA sensitization workshop as well as the second review/stakeholder meeting during this study.

Wilful transmission of HIV. The need for the law to address wilful transmission of HIV has been the outcry of the general public and policymakers alike. The National Policy on HIV/AIDS has decreed punishment for those wilfully transmitting HIV in all its drafts. The reason for such seemingly vindictive stance has emanated from the belief that well-off infected people deliberately seek to infect poor people, mostly women, and/or through them infect the general

⁸⁵ Local Customary Law (Declaration) Order 1963, GN 279 of 1963

⁸⁶ Rwebangira and Tungaraza have argued for incorporation into domestic laws of the international human rights conventions so as to make them accessible and enforceable in local courts and hence ground the human rights discourse into real life experiences of Tanzanians. Other amendments recommended on this issue were geared towards the Constitution particularly the basic rights and duties articles.

⁸⁷ TAWLA Report of Sensitization Workshop on HIV/AIDS and its related Legal implications, Dar es Salaam, 1, December 2001.

⁸⁸ The Law of Marriage Act, No. 5 (1971)

⁸⁹ Proceedings of a National Workshop on Ethics, Law and Human Rights and HIV/AIDS in Tanzania, held at the Mbagala Spiritual Centre, Dar es Salaam, 13th - 15th January, 1997.

⁹⁰ Workshop Resolutions in WAMATA's Report on Sensitization Workshop on Human and Legal Rights of Women and Children, held at the National Social Welfare Training Institute, Dar es Salaam 28th -30th July, 1998, page 7.

public as a way of coping with the stigma that is associated with HIV/AIDS. The Law Reform Commission of Tanzania added its voice to these concerns.

The following recommendations have been made on this issue:

- Amend the Penal Code⁹¹ to change the standard for murder to include deaths taking place after 366 days as HIV-related deaths could take much longer.
- Amend the Evidence Act, 1967⁹² to remove requirement for collaboration of evidence to prove sexual offences.
- Amend the Penal Code⁹³ and Criminal Procedure Act, 1985⁹⁴ to provide for capital punishment for rapists who infect their victims with HIV. This recommendation was from the report of the Law Reform Commission and has been implemented under SOSPA as noted above under Criminal Laws and Correctional Systems.

However, some scholars have recommended repeal of the National Policy on HIV/AIDS and Penal Code⁹⁵ provisions that may criminalize HIV transmission as these could further victimize women that engage in harmful traditional practices that are likely to transmit HIV but do so involuntarily.⁹⁶

Eviction of HIV seropositive tenants. This is another case of discrimination as was the case with termination of employment for HIV-positive employees. Eviction of HIV positive tenants occurs out of ignorance as to how HIV is transmitted and due to the stigma associated with HIV. Many low-cost housing tenants in urban areas live in shared quarters with other tenants in the same house, often with the landlord or landlady also living on the premises. In such conditions occupants often share common facilities such as washrooms and kitchen. Moreover, such occupants tend to fear that their young daughters or even wives may be lured by the infected person and get infected. Such feelings often generate intense pressure on the landlord to evict the HIV-positive tenant.

To remedy this anomaly the NACP workshop on Law, Ethics, and Human Rights recommended that a law be passed to prevent landlords from evicting HIV-positive tenants.

1.4.3 Recommendations made at a series of 2001–2002 TAWLA review meetings and ‘stakeholder’ workshops

In the process of conducting this study, a series of review meetings and workshops was held for the purpose of consultation with stakeholders as an integral part of the assessment.

TAWLA second review meeting. After presentation of the findings on laws and policies and a discussion of the stakeholders’ experiences on the ground, the following priority issues were identified at the TAWLA second review meeting for legal reform both in the short- and long-term, respectively, in order of priority.

⁹¹ The Law of Marriage Act, No. 5 (1971)

⁹² The Evidence Act, No. 6 (1967)

⁹³ The Penal Code, Cap. 16

⁹⁴ Criminal Procedure Act, No. 9 (1985)

⁹⁵ The Penal Code, Cap. 16

⁹⁶ Tugaraza Maria. 1996. “Customary Sexual Practices and the National Policy on HIV/AIDS in Tanzania.” Coursework paper submitted in partial fulfilment of Master of Laws degree Course. Washington D.C.: Georgetown University Law Center.

1. Right to basic services for PLHA, community, and health workers. These aspects include VCT issues. However, it was felt that sufficient local resources are not being invested in the prevention of HIV/AIDS and care of those infected or affected by the pandemic. Thus it was recommended that:

- The right to basic services for PLHA, like medical treatment, efficient and accessible voluntary VCT services, freedom from discrimination, and institutional mechanisms to allow strong local advocacy be put in place immediately;
- Local communities be given a role by way of rights and responsibilities in the monitoring and care of HIV/AIDS victims, including contributions to the AIDS Fund;
- An AIDS Fund be created at the national level from revenue collection and tax relief to employers who support PLHA, such access to antiretroviral drugs as some employers are already reportedly doing; and
- Discrimination be prevented in employment, housing, medical facilities, and education.

2. Wilful transmission was seen as a complex human rights issue, which can be abused and in any case difficult to prove having regard to the investigation facilities required to prove such an offence. Moreover, it was noted that it is an action mandated by the National Policy and is very close to the expectations of the general public on this subject. No specific recommendation was given other than general tortious liability for those who can move it to be an example for others.

3. Harmful traditional practices and property regimes that place women and children in an inferior position socially and economically compared to men. This would entail amendment to and or enactment of the following:

- The Law of Inheritance/Succession
- Law of Marriage—age of marriage, regulation of polygamy, strengthening of mechanisms for division of property
- Tightening of mechanisms under Sexual Offences (Special Provisions) Act, 1998 (SOSPA)
- Enactment of the Child Law

4. Review of the law on pornography to regulate accessibility to sexually explicit audiovisual materials (although, it was noted that this might be harder because of the Internet), further, to prohibit minors from having access to bars and nightclubs.

2. HIV/AIDS in Tanzania

The AIDS epidemic is a global problem, affecting everybody irrespective of national boundaries, age or gender.

Tanzania is one of the Sub-Saharan countries most affected by the epidemic. A total of 14,112 AIDS cases were reported to the National AIDS Control Program (NACP) from 20 regions in the year 2001, resulting into a cumulative total of 144,498 cases from 1983 when the first cases were reported in the country.⁹⁷ Estimating that only 1 in 5 AIDS cases is reported, a total of 71,000 cases are estimated to have occurred in the year 2001 alone and a cumulative total of 722,490 AIDS cases since the beginning of the epidemic in Tanzania.⁹⁸ Most cases fall within the age group 20 – 49 years with highest number of reported cases in the age group 20-34 and 30-39 for females and males respectively. This pattern may change with greater coverage in voluntary counselling and (VCT) coupled with the use of antiretroviral therapy.⁹⁹ This underscores the need to establish more VCT facilities and strengthen their utilization, coupled with strategies aimed at increasing access to antiretroviral therapy.

The main mode of transmission remained heterosexual, accounting for 78% of all cases, mother to child transmission ranking second at 5% and for the remaining cases the mode of transmission were not stated.¹⁰⁰ Of all cases diagnosed during the year 2001, 48% were married, while 32% were single individuals.¹⁰¹ The marital status of the remaining cases were; divorced (6%), separated (5%) and cohabiting (2%). In about 7% of cases, the marital status was not stated. The region with the highest case rate was Mbeya – 156/100,000 and Ruvuma at 84/100,000 population. The region with the lowest case rate was Kigoma at 6.8/100,000.¹⁰²

⁹⁷ The United Republic of Tanzania, Ministry of Health, Tanzania Mainland, National AIDS Control Program, HIV/AIDS/STI Surveillance Report, January – December 2001.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Id.

¹⁰² Id.

3. The United Republic of Tanzania Government Response and Interventions

3.1 Short Term Plan

There have been various national efforts to control the spread of HIV. The Short Term Plan (STP) was prepared and implemented by the Ministry of Health in 1985–1986.

3.2 Medium Term Plans

Further government responses against HIV/AIDS/STDs were implemented through the first Medium Term Plan (MTP I) in 1987–1991 and the second Medium Term Plan (MTP II) in 1992–1996.

3.3 Interim Plan

From 1996–1997, there was an Interim Plan for the formulation of the third Medium Term Plan (MTP III), which started operating in 1998 and will cover the period through 2002. While the initial efforts were mainly implemented by the MOH, over time, there has been gradual involvement of other public sectors, NGOs, and CBOs. The increasing number of actors involved in AIDS prevention and control created problems related to coordination and duplication of efforts. The funding of the activities for prevention and control of the epidemic has been mainly from external donors. Unfortunately, while the magnitude of the problems of the epidemic gathers increasing momentum, the external funding is decreasing progressively.

3.4 National Policy on HIV/AIDS, 2001

Gradually, it became clear that the future success or failure of the national response against HIV/AIDS/STDs would depend on the presence of a clear policy and legal framework that supports prevention and care efforts on the ground. After several draft policies the National AIDS Policy was finally launched in November, 2001.

The National Policy on HIV/AIDS/STDs of 2001¹⁰³ (“the Policy”) is the only comprehensive and promising instrument that provides for a framework for leadership and coordination of the national multisectoral response to the HIV/AIDS epidemic.

The Policy is meant to widen and strengthen the national response against HIV/AIDS/STDs. It is intended to be used by all actors engaged in the national multisectoral efforts to prevent further transmission of HIV and mitigate its socio-economic effects. So far, there have been two attempts to draw the National Policy on HIV/AIDS/STDs.¹⁰⁴ The first is the original draft document commonly referred to as the National Policy on HIV/AIDS/STDs of 1995, which was prepared by the NACP of the Tanzania Mainland and has been the working document for five years. The second is the National Policy on HIV/AIDS,¹⁰⁵ which was launched in November 2001 by the President of the United Republic of Tanzania, His Excellency President Benjamin William Mkapa in Dodoma.

¹⁰³ The National Policy on HIV/AIDS, 2001

¹⁰⁴ Id.

¹⁰⁵ Id.

The Policy contains formulation, by all sectors, of appropriate interventions that will be effective in preventing transmission of HIV/AIDS and other sexually transmitted infections, protecting and supporting vulnerable groups, and mitigating the social and economic impact of HIV/AIDS.

Although the Policy is not a legally enforceable document, it may be highly persuasive in judicial decisions in future because Tanzanian history evinces a tradition of adopting policy documents in enacting new legislation.

The overall goal of the Policy is to provide for a framework for leadership and coordination of the national multisectoral response to the HIV/AIDS epidemic.

3.4.1 *The National Policy content and objectives*

The Policy¹⁰⁶ is divided in ten chapters, which include: background, HIV/AIDS situation, overall goals of the Policy, rights of PLHA and the rights of the public, prevention of HIV through sexual transmission, HIV testing, care for PLHA, research, sectoral roles and financing, and institutional and organizational structure of the Tanzania Commission for AIDS (TACAIDS). The specific objectives of the Policy are as follows:

- To prevent transmission of HIV/AIDS by creating and sustaining an increased awareness of HIV/AIDS through targeted advocacy, information, education, and communication for behaviour change at all levels by all sectors. Also, to prevent further transmission of HIV/AIDS through making blood and blood products safe, promoting safer sex practices and effective treatment of STDs.
- To encourage HIV testing by promoting early diagnosis of HIV infection through voluntary testing with pre-and post-test counselling. Also, to plan for counselling training and accreditation of training programs in Tanzania to ensure that counselling in HIV/AIDS abides by a common code of practice.
- To provide mechanisms for the care of PLHA through counselling, social support services for them and their families, fight stigma, establishment of referral and discharge services linking hospitals and community services, ensure the availability of essential drugs for treatment of opportunistic infections.
- Sectoral roles and financing through strengthening the role of all the sectors, both public and private, to ensure that all stake holders are actively involved in HIV/AIDS work and to provide a framework of coordination and collaboration.
- To participate in HIV/AIDS research, nationally and internationally, and to establish a system to disseminate scientific information resulting from this research while upholding ethics that govern interventions in HIV/AIDS.
- To create a legal framework by enacting a law on HIV/AIDS with a view to establishing multisectoral response to HIV/AIDS, to address legal and ethical issues in HIV/AIDS, and to revise the legal situation of families affected by HIV/AIDS in order to give them access to family property after the death of their parents.

¹⁰⁶ Id.

- To monitor the efforts towards community mobilization for living positively with HIV/AIDS in order to cope with the impact of the epidemic while safeguarding the rights of those infected or affected directly by HIV/AIDS in the community. Also, to identify human rights abuses in HIV/AIDS and to protect PLHA and everyone else in society against all forms of discrimination and social injustice.

3.4.2 Issue areas not covered in the National AIDS Policy

Review of the Policy¹⁰⁷ provisions shows that although the Policy is a big step from makeshift *ad hoc* policy guidelines, it has a few gaps to be filled. These gaps (e.g., people with disabilities, refugees) are more extensively discussed in latter chapters of this report.

People with disabilities. A crucial issue left out by the Policy is a mechanism for protection of people with disabilities against HIV/AIDS transmission. This calls for the review of the policy and statutory laws to incorporate special provisions that will accommodate the rights of people with disabilities. People with disabilities should be availed of special educational aid and necessary protection measures that will create an enabling environment for them to apprehend protection measures against HIV/AIDS. See Chapter 15 for a discussion of people with disabilities and recommended legislative changes.

Refugees. Another snag reflected in the scope of the Policy is its failure to address HIV/AIDS preventive measures and support services for refugees. Tanzania has been hosting refugees from different neighbouring countries for a long time and is likely to continue for the foreseeable future due to ethnic and economic instability in the region. Refugees and other people living in conflict situations are vulnerable to being infected or transmitting HIV/AIDS. Refugees must be protected by the Policy. See Chapter 15 for a discussion of refugees and recommended legislative changes.

Voluntary testing and safety. The Policy's section on HIV testing does not include care of PLHA, prevention of cross infection between patients and health care providers, and safety of blood in blood transfusions and internal organ transplants. See Chapter 15 for a discussion of voluntary testing and safety and TAWLA-recommended legislative changes.

3.5 Issue Areas that Deserve Special Examination

Some areas of the Policy, due to their special place in the arena of HIV/AIDS prevention and care, deserve special examination. These are HIV testing, blood donor safety, rights of PLHA, management of STDs, prevention of HIV transmission, and gender issues.

¹⁰⁷ Id.

3.5.1 HIV testing and counselling

Chapter 6 of the Policy deals with HIV testing.^{108,109,110} The main objective is to outline the ethical conditions in testing for surveillance of the epidemic, diagnosis, voluntary testing, and research. An entry point for Chapter 6 of the Policy demands standard guidelines for establishing quality VCT services. Standard guidelines for setting up VCT services in Tanzania are not defined anywhere in the Policy, rather, components of VCT such as counselling and HIV testing, are tackled sparingly as separate items. Yet, there is no law that deals with VCT services. The proposed HIV/AIDS Prevention and Control Act will provide provisions for VCT services. By virtue of the Policy, HIV testing is not to be mandatory for any marriage. Individuals intending to get married are free to choose to know their own HIV status and they should notify their partner(s). HIV-infected individuals aware of their being infected who indulge in unprotected sex with other(s), thus putting their partners at risk of HIV infection (without their partners informed consent), shall be punished.

Need for standard criteria, requirement to ensure uniform quality of counselling services. To ensure control of quality VCT service, the following elements must be clearly articulated. Currently, VCT services are provided at public and private hospitals and local NGOs. There has been a tendency of training para-counsellors in workshops and seminars for a few days and then qualifying them for undertaking the vital role of counselling people for HIV testing both before and after testing. There is no standard curriculum for training health counsellors (or any cadre of counsellors for that matter). Thus there are no known professional standards to be insisted upon in law. There is no coordinated record from all institutions that provide these services to ascertain

¹⁰⁸ Section 6 (HIV Testing) subsection 6. 3 (Confidentiality) of The National AIDS Policy is as follows:

“6.3 Confidentiality

All HIV Testing shall be confidential. Nevertheless, public health legislation shall be made to authorize health care professionals to decide on the basis of each individual case and ethical considerations, to inform their patients. Such a decision shall only be made in accordance with the following criteria:

- (i) The HIV-positive person in question has been thoroughly counselled.
- (ii) Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes.
- (iii) The HIV-positive person has refused to notify, or consent to the notification of his/her partner.
- (iv) A real risk of HIV transmission to the partner so exists.
- (v) The HIV-positive person is given reasonable advance notice.
- (vi) Follow-up is provided to ensure support to those involved as may be necessary.”

¹⁰⁹ Section 6 (HIV Testing) subsection 6. 4 (Informed consent) of The National AIDS Policy is as follows:

“6.4. Informed Consent

- (i) Informed consent following adequate counselling shall be obtained from the person to be tested before HIV testing can be done.
- (ii) Hospitalized, ambulatory, semiconscious and unsound mind patients may not be able to give informed consent. Counselling shall involve a close relative or the next of kin in order to obtain the consent before proceeding with diagnostic testing, treatment, and clinical care.”

¹¹⁰ Section 6 (HIV Testing) subsection 6. 5 (Partner Notification) of The National AIDS Policy is as follows:

“6.5 Partner notification

Physicians and other health workers are not allowed to notify or inform any person other than the individual tested of the test results without his or her consent. Counselling shall emphasize the duty to inform sexual partners. In the event of refusal of the person tested to inform any other person, the decision to inform the 3rd party shall adhere to the conditions laid down in s. 3.2(b) on confidentiality. Partners who cannot be involved in the same counselling session with the tested person, shall be persuaded to go for counselling before they can be notified to the tested person’s HIV test results.”

whether people receive adequate pre- and post-test counselling to allow them to live positively and to mitigate the impact of the spread of the epidemic.

Important matters such as confidentiality, informed consent, partner notification and control of wilful transmission of HIV/AIDS may not yield the desired results if there is no proper mechanism for promotion of quality counselling services. Proper counselling service helps people to make rational choices regarding HIV testing as well as rational choices in obliging to the duty of care by refraining from infecting other people in the case of a seropositive diagnosis. It is difficult to attain pre- and post-test counselling services that are confidential if the standard criteria for clarifying the competency of counsellors is not well established. If the competency of counsellors is not clarified it may bear negative results. The tendency of training people for counselling services at a few days' seminars and qualifying them for provision of counselling services, when in actual fact those trainees are para-counsellors, may be instrumental in the spread of AIDS due to low competency for handling such difficult matters. For instance, a counsellor who handles pregnant women needs to be well conversant with Tanzanian culture and complications emanating from emotions and body chemistry of such a client. Save for exceptional circumstances, ownership of pregnancy is not vested in the pregnant woman alone, as such; the choice to be tested for HIV will depend on opinions from the husband and relatives of both sides. If a counsellor's knowledge of the matter is inadequate, he may do more harm to mother and child by lack of skills on how to go about the matter. Such complications call for policy and legal intervention to stipulate clearly standard guidelines required in selecting counsellors for pre- and post-HIV counselling services and to enable effective enforceability of HIV testing issues.

Need for proper coordination of the results amongst institutions. HIV testing is done anonymously. There is no systematic proper coordination of the results amongst institutions; it is difficult to envisage how identity records are documented for purposes of linking an HIV strain of those who transmit the disease intentionally. Conversely, a PLHA with multiple partners and who is unaware of his HIV status may not receive help even if his partners test for HIV because the results may not be linked from one VCT centre to another. One good example is that of VCT service in Canada, whereby an HIV strain from various VCT centres could be linked, and the partners of a PLHA, known as Ssenyonga (an immigrant from Uganda) were identified, leading to his prosecution for wilful transmission of HIV. As promiscuity is rampant in Tanzania, standard guidelines for coordination of anonymous results are necessary as they bear legal implications particularly with regard to tort and wilful transmission.¹¹¹

Need for monitoring and control of manufacturing, sale, importation, and usage of quality materials in HIV testing. The use of quality testing kits and other laboratory reagents is another anomaly in HIV testing. The Policy¹¹² is silent on monitoring and control of manufacturing, sale, importation, and usage of quality materials required in HIV testing. In a poverty stricken country like Tanzania, which is over burdened by corruption, the danger of using poor quality reagents is high if the law does not intervene to regulate quality requirements. A question arises as to which governing body has the mandate to test and approve the quality of testing kits/reagents to be used for HIV tests. Whether the mandate is vested under TACAIDS, the Tanzania Bureau of Standards, or the MOH must be clearly determined.

Accessibility to VCT services. Finally is accessibility to VCT services. The absence of equitable distribution of VCT services in all parts of the country is another problem. Tanzania has a total of

¹¹¹ See TAWLA, Sensitization workshop on HIV/AIDS and its legal implications, December, 1, 2000.

¹¹² The National Policy on HIV/AIDS, 2001

114 districts; of those, only 85 districts have VCT services. This means that in some of the districts people have no access to HIV testing. For HIV prevention and behaviour change to be effective, the Policy must ensure that VCT services are available in all districts.

3.5.2 Donor blood safety

Under Chapter 5, the Policy provides guidelines for prevention of HIV through blood transfusion. It is stipulated under the Policy that transfusion of untested blood by medical practitioners shall constitute a punishable offence.¹¹³ It is hereby opined that to establish a national blood transfusion service to supply screened blood to all health facilities that transfuse blood is not enough in itself; the first intervention in this respect is to determine the level of competency of medical practitioners vested with the mandate of ensuring donor blood safety. The issue is whether Tanzania has competent medical practitioners to handle blood safety issues. Second, the control of reagents needed for safe donor blood screening is necessary, lest expired or low quality reagents are used therefore resulting to false status of the examined blood. Thus, standard guidelines should be established by the Policy¹¹⁴ and the law to ensure quality blood screening thorough quality medical supplies, such as test kits. However, who will be responsible to ensure quality medical supplies—is it TACAIDS, the MOH, or the Tanzania Bureau of Standards? These questions are necessary for determining who will be held accountable for the law to take its course. Having established this, then universally acceptable standards for observing blood safety should be in place.

An issue that needs to be surmounted is how donor blood safety could be determined during the window period of infection. Is there a specified window period between the time when donor blood is screened and the actual time for usage? Whether our country has modern technological devices for such detection leaves a lot to be desired. Is there adequate supply of modern blood screening devices to ensure blood safety in all parts of the country? How much of the government budget is allocated in this respect? Are medical practitioners well conversant in handling donor blood transfusion? Legal intervention is necessary to define approved methods for screening donated blood and to safeguard against transmission of HIV/AIDS through blood transfusion.

Although Tanzanian courts have not faced claims against infected blood transfusion yet, it is foreseeable that such claims may arise in future as the rate of HIV transmission increases. In some of the American courts there have been a growing number of cases seeking compensation on behalf of individuals infected, their subsequently infected sexual partners, and family members of those infected. Claims have been filed against blood banks and physicians. The law has been revolving around statutes of limitations, negligence standards, and probative evidence.¹¹⁵

On the standard of negligence, legislators and courts reason that imposition of strict liability would defeat the important state goal of ensuring a voluntary and inexpensive blood supply. As such, blood suppliers are judged not under a strict liability standard but instead under a negligence standard.¹¹⁶

Proper evidence of negligence has often been a controversial issue. While the failure of hospitals or blood collection agencies to identify and inform infected patients or family members after the fact has been asserted as a basis for liability, failure of physicians to review the risks, benefits,

¹¹³ Paragraph 5.12 (c)

¹¹⁴ The National Policy on HIV/AIDS, 2001

¹¹⁵ See Larry Gostin, HIV/AIDS Litigation in American Courts.

¹¹⁶ Id.

and alternatives to transfusion or to offer the use of autologous or directly donated blood has also been asserted as a failure to obtain informed consent.¹¹⁷

The aforesaid precedent though not binding to our legal system it is of highly persuasive value to our HIV law, which needs to be developed. Our legal review should therefore draw from the American court experiences to reflect the law reform required to handle donor blood safety issues. This of course, must be realistic of what works best in our own local conditions.

3.5.3 Prevention of HIV cross-infection

Whereas the Policy has dealt deeply with prevention of cross-infection between health care providers and patients, traditional birth attendants and pregnant mothers, as well as between service providers and clients of cosmetic saloons, matters relevant to prevention of the same at family and community levels that care for PLHA have not been addressed. Similarly, prevention of cross-infections between patients and traditional healers has not been mentioned at all.

Traditional healers. It is common practice in Tanzania for people to seek treatment of diseases from traditional healers. People also contact traditional healers for cure of psychological and other social economic factors. In such a setting, traditional healers are not registered and the mode of treatment is not legally controlled. Cross-infections of blood and body infections may take place in the course of administering treatment to patients, e.g., having sex with a traditional healer to cure infertility. It is essential that policy and legal interventions that provide for ethical codes of standards directed at prevention of cross-infection of HIV be spelt out. Equally important, there is a strongly felt need for setting up a system of monitoring of traditional birth attendants and traditional healers as most of them are not registered, and control of standards may be difficult to enforce. Moreover, antipoverty law must be enacted to ensure supply of protective gear such as gloves to traditional birth attendants.

Cosmetic saloons. Recent years have experienced mushrooming of cosmetic saloons in every part of the country. Most of the saloons are not registered, and no health care standards are set up to control cross-infections. Characterized by poor facilities and poor quality service, cosmetic saloons can be very instrumental in transmission of HIV, especially in the case of hair treatment, pedicure/manicure service, and facials where unsterilized use of equipment is common. It may be difficult to enforce prevention of cross-infection in such premises unless the Policy and the law set up criteria for registration of saloons and universally acceptable standards for quality service.

Care for PLHA. Chapter 4 of the Policy¹¹⁸ deals with the rights of PLHA. As the number of AIDS patients continues to increase, it is not possible to care for all of them in the existing health care institutions. Family and community members should be educated on how to give best care in a nonstigmatized and nondiscriminatory manner in the home and on proper handling of body fluids.

Two issues are to be considered. First is “nonstigmatization and nondiscrimination,” and second, “proper handling of body fluids.” The first issue has varied implications, depending on the family set up and where the family resides. Many families, especially in urban areas, live in a house with many tenants who rent one or two rooms each. In such a renting set up it is difficult for family members to deal with the problem of stigma as this may be inflicted upon them by a landlord or co-tenants. If family members who give care to PLHA are stigmatized and discriminated against by either the landlord or co-tenants, there is a high risk of shifting negative feelings to the patient.

¹¹⁷ Id.

¹¹⁸ The National Policy on HIV/AIDS, 2001

Stigmatization and discrimination may make care providers shun away from requesting education on prevention of cross-infection. Conversely, a patient may also conceal his HIV status, thus putting care providers at risk of cross-infection. To prevent such a situation from arising it is vital that housing laws be revised to enunciate a provision on nonstigmatization and non-discrimination of PLHA by landlord and co-tenants. Equally significant, a law should be passed to increase community mobilization against stigmatization and discrimination of PLHA.

On the question of proper handling of body fluids of PLHA by caregivers, the Policy and law must specify who should give education that will work because improper education can aggravate the problem by having many family members infected in the process of providing care. The result will be the expansion of tort law seeking for compensation from home-based care education programs. Further, antipoverty law should be enacted to ensure adequate supply of protective gear to family and community members for handling body fluids in home-based care.

3.5.4 Rights of PLHA

The human rights of PLHA have well been tackled under chapter four of the Policy; however, a few issues need uplifting. These are the right to the highest attainable standard of physical and mental health, the right to share in scientific advancement and its benefits, and the right to marry and to found a family.

Right to the highest attainable standard of physical and mental health. The right to the highest attainable standard of physical and mental health depends on many factors, some of which are based on ensuring good supply of drugs to cure opportunistic infections, antiretroviral drugs, good supply of food nutrients and food supplements. Affordable drugs for cure of opportunistic infections are not equitably distributed in all parts of the country. Antiretroviral drugs are very expensive to get, and even if obtained, quality control is doubtful. It has been common for products of food supplements to be sold in the country through various freelance agents without proper control as to safety of these consumed products. Legal intervention is necessary to ensure equitable distribution and safe use of drugs for cure of opportunistic infections, antiretroviral drugs, and food supplements.

Since according to the Policy,¹¹⁹ the right to the highest attainable standard of physical and mental health should be adhered to ensure enforcement of human rights, it is imperative that antipoverty laws be set up so that all PLHA have access to curative drugs for opportunistic infections, antiretroviral drugs, food supplements, as well as good supply of food nutrients at an affordable cost.

Right to share in scientific advancement and its benefits. The right of PLHA to share in scientific advancement and its benefits is crucial. The main snag is how to ensure accessibility of information, especially in rural areas where newspapers are scarce and radio, television, and computer internet services are not available. Worse still, most AIDS service organizations are based in urban areas. If accessibility to information is difficult, one cannot envisage the possibility of reaching scientific advancements and their benefits. Some other products of scientific advancement could be in the form of therapeutic services, treatment of diseases, and protection devices such as gloves and condoms. These are not obtained at an affordable cost. The law must ensure that what is stated in the Policy practically reaches the most needy target group.

¹¹⁹ The National Policy on HIV/AIDS, 2001

Right to marry and to found a family. The right of PLHA to marry and to found a family is a fundamental human right and should be respected.¹²⁰ However, this is a sensitive issue in a poor country like Tanzania. There are many factors to be considered. To many, a problem arises where this right extends to bear children. There is a feeling that unless the right to procreation is backed with accurate information on PMTCT so that couples do not encounter the trauma of having to bear children infected by HIV, the exercise of this right may be counterproductive. Although the Policy addresses the issue of PMTCT at great length under chapter five, there are a lot of factors to be considered in the Tanzanian context. In some Tanzanian communities reproductive health rights are not controlled by couples alone but are also controlled by family members. It is common practice for most of cultural norms in Tanzania to expect newly married couples to bear a child in the first year of their marriage. If a couple fails to bear a child within this period, the wife will face resentment and may face many questions from family members. The human right to marry and found a family must be practiced positively in that children are protected from reckless vertical transmission of HIV. Prevention of vertical transmission is not absolutely effective as only 50 percent of those who use preventive measures are sure to get an HIV-free baby. What percentages of pregnant women living with HIV receive drugs for prevention of vertical transmission? As it has been recently evinced in South Africa, court cases have occurred against the government for the failure to supply drugs for the same.

It must be noted that while the law protects the human rights of one person the same law should not endanger nor violate the human right of another, especially children born with HIV who have no decision in the whole process. Children have their rights protected by the constitution and international law instruments. The same constitution of the United Republic of Tanzania that protects the rights of PLHA protects the rights of children as well. In the case of conflict of rights between PLHA and children born with HIV, which law must prevail?

In Tanzanian circumstances where there is no adequate social security system for free medication, caring for a PLHA is a problem, and most of them live in misery or totally dependent on family members or an NGO/CBO. There is a strongly felt need to be cautious. In so far as this human right for PLHA is enshrined in Tanzanian law, the law on social support services for prevention of vertical transmission must be in place. In areas where such services are scarce, the quality of life of PLHA is very poor, caring for a family of those affected leaves many doubts to relatives of PLHA. If a PLHA dies and leaves behind children living with AIDS, the first person that is responsible for caring for the children is the PLHA's sibling, who generally will have many children of his own. Bearing in mind that the birth rate in Tanzania is high, when is the right to found a family to be controlled? On average according to recent data, Tanzanian families have six children! Are our social conditions conducive to take responsibility? Do children born with HIV live comfortably?¹²¹

Another issue that the Policy¹²² needs to go deeper into is the case of stigmatization and discrimination of PLHA in health care settings. Due to rampant corrupt practices in health care settings, in some instances PLHA are not given medical supplies or are asked for a bribe in order

¹²⁰ See Article 26, Universal Declaration of Human Rights, 10 Dec. 1948, GA Res. 217 A (III), UN Doc. A/810, at 71.

¹²¹ For a general discussion on this subject, United Nations, HIV/AIDS and Human Rights: International Guidelines, New York, and Geneva, 1998.

¹²² The National Policy on HIV/AIDS, 2001

to receive medical care. The Policy and law need to address issues associated with corruption so that PLHA are not agonized with stigmatization and discrimination.¹²³

3.5.5 Voluntary HIV testing

Three legal issues arise under this Policy guideline.

First is in relation to harmful traditional practices, which expose women to HIV/AIDS.

Second is voluntary premarital testing and its application to Section 13 of the Law of Marriage Act, 1971¹²⁴ on the minimum age requirement of marriage. It is stipulated that the minimum age for marriage for a female is fifteen years of age. This age requirement falls within the ambit of an age of a minor and therefore a minor may not be apprehensive of the risk factor involved in engaging into a marriage without undertaking a premarital HIV test. There must therefore be a mechanism in place for protecting the disadvantaged groups of people, especially minors to enable them to make rational choices for their lives.

Third, the freedom vested in choosing to know the partner's HIV status is in a way loose in that it provides a loophole to unscrupulous or unaware characters to deliberately infect their partner, especially women, who quite often have less bargaining powers in sexual matters.

People intending to enter a marriage must be well educated and informed of the risk of contracting HIV and given options. The Policy¹²⁵ and law must stress compulsory educational programs for premarital HIV prevention.

As shown earlier, it is part of Tanzanian culture for relatives to expect newly married couples to bear a child within the first year of marriage. If a couple fails to bear a child, the wife will face resentment from the husband's side. This being the case, people intending to marry without a premarital HIV test must be educated and counselled on the possibility of having an HIV-infected child if proper care is not taken. Reproductive rights in Tanzania are not vested in the couples alone; it is a clan matter. Therefore, the question of PMTCT must be given due weight, should the law maintain voluntary premarital HIV testing.

3.5.6 Management of STDs

The Policy states that STDs shall be targeted for early diagnosis, treatment, prevention, and control because of their role in facilitating HIV/AIDS transmission.

Enactment of antipoverty law is important to ensure that management of STDs goes beyond urban areas to rural areas where government and private sector services are concentrated. STD management services should adequately reach rural areas and the most needy people. Directing government and donor funding in urban areas may render HIV/AIDS interventions futile due to the continuous flow of people from urban to rural areas and the subsequent unsafe sexual interactions that may occur amongst people. The Policy must ensure the spread of financial resources equitably, be it donor funding or government budget, so that STD management is effectively controlled and coordinated countrywide.

¹²³ Testimony by Mr. Myovera, a PLHA member of SHDEPHA+ from Iringa region, presented at the Stigma and Discrimination Seminar for Members of Parliament, Dodoma, 10th November 2001.

¹²⁴ The Law of Marriage Act, No. 5 (1971)

¹²⁵ The National Policy on HIV/AIDS, 2001

3.5.7 Prevention of sexual transmission

The transmission of HIV/AIDS/STDs is known to be associated with certain patterns of sexual transmission behaviour. In particular, an individual's risk of infection increases with the number of sexual partners with whom he or she engages in unprotected sexual intercourse. Prevention, therefore, depends on action aimed at changing the behaviour of those at risk and of preventing the adoption of such behaviour in others. Evidence from other African countries shows that the most effective strategies aim at increasing both public awareness and the provision of specific education and advice to risk groups.

It is of particular importance to note that some of the Tanzanian cultures permit promiscuity when youths attain puberty. Some cultures are open to casual sexual relations even in wedlock. Legal intervention is needed, especially in enunciating HIV prevention education programs with emphasis on safe sexual practices in informal education commonly referred to as *jando* and *unyago*.

3.5.8 Gender issues in relation to HIV/AIDS

By virtue of chapter five of the Policy,¹²⁶ existing inheritance laws shall be reviewed and harmonized. Efforts shall be made to influence customary laws and practices to become gender sensitive. It is opined that while efforts are being made to review the law in this context, it is vital that people be educated on the importance of writing wills. There are legal services that provide legal aid for PLHA, especially in preparing wills, e.g., the Comprehensive Community-Based Rehabilitation in Tanzania (CCBRT). Such services should reach rural areas as well.

¹²⁶ Id.

4. Current Legislative Response to HIV/AIDS

4.1 AIDS Added as an Internationally Notifiable Disease Under Infectious Diseases Ordinance

Some legislative effort has been made to respond to the AIDS epidemic. This effort is manifested in the enactment of the Infectious Diseases Ordinance. The Minister of Health made HIV/AIDS “an internationally notifiable disease” under Section 15 of the Infectious Diseases Ordinance, 1921 (Cap. 96),¹²⁷ when the schedule to the ordinance was amended. The objective of the Ordinance was to prevent the spread of infectious diseases by defining the nature of the illnesses that require notification to medical authorities and by empowering authorities to quarantine areas and regulate the entry into and exit from such areas. Quarantine of areas where HIV has been diagnosed is not a practical AIDS prevention and mitigation strategy. Because all regions in Tanzania have reported HIV cases and because HIV incubation is estimated to take up to ten years, individuals would have to be quarantined within their homes for years throughout the country. Production would fall, public relations would be severely adversely affected, and most importantly, the process would violate the human rights of PLHA. There is therefore a strongly felt need to assess and review existing laws to meet the challenges of the AIDS epidemic.

4.2 No Other Legislative Response

No further attempt has been made so far to incorporate HIV/AIDS issues within Tanzanian laws. As such, all the laws reviewed in this assessment reveal that HIV/AIDS issues have not been addressed by the statutes enacted before and after the advent of the AIDS epidemic. Law amendments and case laws have also been mute on the subject matter. The epidemic continues to shift; by the same token, focus is also shifting from prevention to care of the sick and social support to PLHA and their families.

4.3 Need for Comprehensive HIV/AIDS Law: Proposed Tanzania HIV/AIDS Prevention and Control Act, 2004

As the diversity of the epidemic becomes more apparent, it becomes evident that a comprehensive legislative approach covering different public health aspects of HIV/AIDS is needed (“Tanzania HIV/AIDS Prevention and Control Act of 2004”).

In this way, a legal framework will be established to support the national policy on HIV/AIDS and the gaps in the national policy that were identified earlier in this report. As part of the comprehensive new policy, legislative statutes will have to be reviewed.

¹²⁷ Infectious Diseases Ordinance, 1921 (Cap. 96)

5. Existing Tanzania Legislation and the HIV/AIDS Challenge

Tanzania's legal framework is characterized by a pluralistic legal system bearing testimony to Tanzania's triple heritage, including its ancient traditions, Islamic penetration, and colonial rule. Customary Law and Islam Law operate side by side in many facets of life, their interaction often regulated by statutory law against the backdrop of the changing social economic conditions. These changes are given legal scope by international human rights instruments, guidelines, and suggested standards. Although the latter do not have force of law in Tanzania (because they have not been incorporated into domestic law), they provide a fountain of resource from which domestic laws and court decisions have drawn vision and inspiration. Nevertheless all these systems of law and legal resource are relevant to the prevention and care of HIV/AIDS.

5.1 International human rights instruments

The shortcomings in domestic law notwithstanding, under the auspices of the United Nations, the world community has elaborated a range of internationally binding legal instruments in the field of human rights.¹²⁸ Together, these instruments constitute a formidable armory in the fight against violation of all the commonly recognized categories of human rights, including certain group rights and against invidious discrimination in their enjoyment.¹²⁹ These main instruments among a host of many treaties are:

- International Covenant on Civil and Political Rights (ICCPR);¹³⁰
- International Covenant on Economic, Social and Cultural Rights (CESCR);¹³¹
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);¹³²
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹³³; and
- Convention on the Rights of the Child (CRC).¹³⁴

Tanzania recognizes these international instruments and has ratified the same. However, these international human rights instruments have not been incorporated into domestic laws for them to be legally enforceable.

¹²⁸ O'Flaherty, Michael. 1996. *Human Rights and the UN, Practice Before The Treaty Bodies*. London: Sweet and Maxwell.

¹²⁹ Id.

¹³⁰ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

¹³¹ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

¹³² Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

¹³³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987.

¹³⁴ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

Primarily independent bodies (the Committee/treaty bodies) that, in all but one case, are established pursuant to the provisions of the various instruments undertake international supervision of the implementation by State parties of the rights in the instruments. These are:

- Human Rights Committee;
- Committee on Economic, Social and Cultural Rights;
- Committee on the Elimination of Discrimination Against Women;
- Committee against Torture; and
- Committee on the Rights of the Child.

It is noteworthy that up to now there is no single human rights treaty on HIV/AIDS. Thus we can say that the stigma on HIV/AIDS is prevalent even in the international community and international law. There are various articles in the international law conventions on human rights that may have been used as an intervention strategy for AIDS prevention and mitigation but like the provisions mentioned above, lack legal enforcement in Tanzania. These include: the provision on the right to life enunciated in Article 3 of the Universal Declaration of Human Rights (UDHR)¹³⁵ Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR),¹³⁶ the provision on freedom from inhuman and degrading treatment found in Article 5 of the UDHR, Article 7 of the ICCPR, freedom of opinion and expression found in Article 27.1 of the UDHR, the principles of equality and nondiscrimination stipulated under Article 56 of the United Nations Charter,¹³⁷ Articles 1 and 2 of the UDHR, and Article 3 of the ICCPR. But all these articles can only be invoked in the context of domestic law.

5.2 State Monitoring and Enforcement of Human Rights

The National Policy on HIV/AIDS, 2001 recognizes the need for strong political government leadership in the fight against the epidemic. The Policy¹³⁸ is the blue print and represent the most current national effort geared towards control and management of the rights of the public. The policy¹³⁹ document sets out as its goal to ensure that human rights issues are adhered to.

This being a formal government statement on its promise to the citizenry and the general public at large is a strong political commitment. It should give rise to a positive legal framework that supports a multisectoral response to HIV/AIDS by addressing the anomalies pointed out in the previous chapters. Some of these human rights issues in HIV/AIDS are already provided for in the bill of rights of the 1977 Constitution. It is pertinent to mention here that discrimination on the basis of health status is not specifically provided for under the Bill of Rights. Many stakeholders consider it important to have it added to the constitution by amendment of the Bill of Rights so as to strengthen the crusade against discrimination and stigmatization of PLHA.

Thus the success of the state in monitoring the implementation of these guarantees and undertakings will largely depend on the quality and extent of institutional mechanisms in place. Fortunately, Tanzania is also signatory to many of the relevant international human rights

¹³⁵ Universal Declaration of Human Rights , 10 Dec. 1948, GA Res. 217 A (III), UN Doc. A/810, at 71.

¹³⁶ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

¹³⁷ The Charter of the United Nations, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153.

¹³⁸ The National Policy on HIV/AIDS, 2001

¹³⁹ The National Policy on HIV/AIDS, 2001

instruments as set out earlier. The Basic Rights and Duties Act, 1994¹⁴⁰ (discussed at 5.6) already provides a mechanism for enforcement of the basic rights and duties.

It provides in Section 4:

If any person alleges that any provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.

The rights guaranteed in these articles include equality of all people, equality before the law, right to life, right to dignity, right to personal freedom (S.15), right to privacy and security of his person, freedom of movement, freedom of expression, freedom of worship, freedom of association and assembly with others (S.20), freedom to take part in elections and be elected, right to work, duty to obey the laws of the land, duty to protect public property, duty to defend, secure, and perpetuate the freedom, authority, land, and national unity. Finally, every person has the right to benefit from the basic rights and the results of everyone's discharge of his/her duties to society.

Hence anyone who is aggrieved by the state's failure to deliver or create a conducive environment for enjoyment of these rights and fulfilment of basic duties can petition the High Court for redress.

The criticisms that have been levelled against the efficacy of invoking the Bill of Rights include the modalities for constituting a constitutional court. *Firstly*, a single judge of the High Court has to hear an application from an aggrieved person to determine whether the application is not frivolous, and vexations or adequate remedy is not provided under any law. *Secondly*, once a single judge has adjudged the matter as a constitutional matter and fit for hearing by a constitutional court, the petition would be heard. This would entail the constitution of a Constitutional Court of three judges at one sitting (Section 10 bid).

Thirdly, constitutional proceedings are riddled with complications. Unlike any other proceedings the constitutional petition is to be filed by originating summons. Consequently, very few constitutional claims have been successfully brought before the court.

In the case of individuals afflicted by HIV/AIDS burdened with the fear and concern of the social stigma and discrimination associated with the infection, it is unlikely that Constitutional remedies would be resorted to for at least three reasons.

- Higher publicity generated, by constitutional cases.
- The lengthy process may demand time, which is often not available.
- The financial cost may not be affordable unless legal aid is available.

Fortunately, Tanzania has ratified most of the relevant human rights instruments such as Universal Declaration of Human Rights (UDHR),¹⁴¹ International Covenant on Civil and Political Rights (ICCPR),¹⁴² International Covenant on Economic, Social and Cultural Rights

¹⁴⁰ The Basic Rights Enforcement Act, No. 33 (1994)

¹⁴¹ Universal Declaration of Human Rights, 10 Dec. 1948, GA Res. 217 A (III), UN Doc. A/810, at 71.

¹⁴² International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

(ICESCR),¹⁴³ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),¹⁴⁴ and the Convention on the Rights of the Child (CRC).¹⁴⁵ All these instruments provide for a monitoring mechanism through specialized committees within the system of the United Nations. However, these treaties have not been integrated into Tanzanian law.

The treaty bodies of these instruments monitor state implementation of their obligations under the respective international treaties, except for the UDHR,¹⁴⁶ which being a declaration confers no obligation but a promise and intention to carry out the promises. The ICESCR¹⁴⁷ was adopted on 16th December, 1966 and came into force on 3rd January, 1976. The Committee on Economic, Social and Cultural Rights monitors ICESCR. According to ICESCR Section 16, state parties are required to submit periodic reports on progress made in achieving the observance of the rights recognized in ICESCR.

Likewise, the ICCPR was adopted on 16 December, 1966 and came into force on 16 January 1976. The Human Rights Committee monitors state parties' compliance with the ICCPR.

The Committee on the Elimination of Discrimination against Women monitors the implementation of CEDAW.¹⁴⁸ CEDAW was adopted by the General Assembly on 18 December, 1979 and came into force on 3 December, 1981. The CEDAW Committee of experts meets yearly. State parties are required to submit reports within one year of entry into force and thereafter at least every four years and thereafter whenever the committee requests it.

The CRC¹⁴⁹ is monitored by a committee known as the Committee on the Rights of the Child. It meets once annually. State parties are required to submit a report within two years of entry into force and thereafter within five years.

Thus, the Constitution provides a framework for state monitoring of its performance in protection of human rights through complaints by aggrieved individuals under the Basic Rights Act, 1994. The mechanisms for this eventuality however, may be difficult for individuals suffering from HIV/AIDS acting on their own. Moreover, states are also held accountable by international treaty bodies specialized in the particular human rights instruments.

Both of these mechanisms are opportunities for revisiting human rights issues around HIV/AIDS by the Government, NGOs, CBOs, and other actors.

¹⁴³ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

¹⁴⁴ Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

¹⁴⁵ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

¹⁴⁶ Universal Declaration of Human Rights, 10 Dec. 1948, GA Res. 217 A (III), UN Doc. A/810, at 71.

¹⁴⁷ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

¹⁴⁸ Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

¹⁴⁹ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

The principal United Nations-sponsored human rights treaties include a mechanism whereby state parties must submit periodic reports to international supervisory bodies with regard to their implementation of the human rights provisions in the respective instruments.¹⁵⁰ Depending on the instrument, the reporting period can range from every two to every five years.¹⁵¹ The exercise of drafting a report can itself assist a state in identifying and clarifying the extent of its obligations under the instrument in question. The wide-ranging consultations that are required for drafting a good text also serve to disseminate throughout the apparatus of government and civil society both knowledge of and general sensitivity towards the human rights at issue. The reflection on human rights issues in the context of preparation and examination of a state report can contribute to a general raised consciousness with regard to the human rights perspectives of a range of issues which, might not previously have been considered in such terms. It thus contributes to the development of a human rights culture in which there is an enhanced respect for the dignity of the person.

It is therefore pertinent that the laws of the land should eradicate stigma and discrimination by setting up compulsory educational programs to the general public on the subject matter. Second, law reform is needed to respond to all the challenges that have been revealed above and to ensure that international human rights instruments are codified into domestic laws to effectively assert the rights of PLHA. Necessary steps must be taken to ensure that periodic reports to international supervisory bodies are adhered to.

5.3 Africa Regional Human Rights Instruments

The African Charter on Human and Peoples' Rights (ACHPR)¹⁵² prohibits discriminatory conduct. But, the Charter falls short of protecting women from HIV infection because it calls for the protection of cultural rights. This being the case then customary sexual practices are protected therein, and this may hinder the promotion of women's rights and AIDS prevention.

5.4 Strengthening Democratic Institutions: Advancing the Rule of Law

Existing laws and the proposed new law on prevention and control of HIV/AIDS should conform to the "rule of law". "Rule of law" means strengthening democratic institutions, ensuring the effective and transparent administration of justice, free of corruption, and legislation that can be effectively implemented and enforced. Political leadership is required to ensure effective application of legislation effecting HIV/AIDS challenges. Strong, independent, and efficient legislative, judicial, and administrative institutions are essential to democratic societies such as Tanzania. The effectiveness of HIV/AIDS legislation to advance the public health goals stated in the National Policy on HIV/AIDS, 2001 is directly dependent on the effective implementation of that law. There is no doubt that a legislative framework to address HIV/AIDS is necessary to support the Policy and many good efforts on the ground. However, a serious concern has been raised as to whether we need a single legislation to address HIV/AIDS or rather different legislative moves need to be made sector-wise. The concern is based on the fact that HIV/AIDS is like say, gender, a crosscutting issue that needs to be mainstreamed instead of being done within one special legislation.

¹⁵⁰ Id.

¹⁵¹ Id.

¹⁵² African Charter on Human and Peoples' Rights , 27 June 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), entered into force 21 Oct. 1986.

5.5 The Constitution: Bill of Rights

Pursuant to the Bill of Rights enunciated in the Constitution of the United Republic of Tanzania in 1984,¹⁵³ antidiscrimination principles in relation to one's HIV status are stipulated therein under general provisions. The Bill of Rights recognizes the principle of equality of all human beings and equality before the law. The right to life is enshrined therein. By recognizing antidiscrimination principles human rights of people living with HIV/AIDS are well protected under the Constitution of the united republic of Tanzania. The issue to be considered in this context is enforcement of these human rights to adequately address stigmatization and discrimination of PLHA by communities and in various sectors.

In Tanzania, stigma and discrimination of PLHA is evinced in many settings, including PLHA and affected families, media, workplaces, the education sector, the health sector, and religious institutions.¹⁵⁴ Stigma and stigmatization impede HIV/AIDS prevention measures and support services. Breaking the silence on HIV/AIDS becomes a problem as PLHA and affected families live in fear and a state of denial lest families and communities around them know their HIV status. WAMATA has experienced a lot of examples whereby, at a family level or at the homes of PLHA, one finds stigmatization, ostracism and even abandoned PLHA by the families or partners.¹⁵⁵ Such treatment is attributed to religious/cultural moralization related to HIV/AIDS.¹⁵⁶ PLHA are regarded as sinners or witches deserving punishment for their evil deeds.¹⁵⁷ It is understood that PLHA have been experiencing problems with housing both in the public and private sector market.¹⁵⁸ Some have been refused accommodation, evicted, and have experienced other forms of discrimination and harassment.¹⁵⁹ The law of landlord/tenant relationship in Tanzania is ill equipped to assist PLHA.¹⁶⁰ Along the same line, insurance law, the law of unincorporated association and the law of lawyer/client relationship in cases of HIV/AIDS manifest a lacunae in protecting the human rights of PLHA.¹⁶¹ Hence, PLHA live in isolation and cannot access social support services,¹⁶² a factor that infringes upon their constitutional rights.

Various legal instruments in Tanzania exist to safeguard against violation of human rights guaranteed by the constitution. By the amendment of the Government Proceedings Act, 1967,¹⁶³ which required individuals to obtain consent of the Attorney General in order to sue the government for such and other civil violations, an aggrieved person can now sue the government directly by giving a 90 days notice of his intention to sue the government. Other remedies are obtained under the Basic Rights and Enforcement Act, No. 33 (1994)¹⁶⁴ as shown below.

¹⁵³ Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984)

¹⁵⁴ Mbwambo, Dr. Jessey. "Stigma and Discrimination in Different Settings." Presented at the seminar for Members of Parliament, Dodoma, November, 2001.

¹⁵⁵ Mukoyogo, Dr. M. C. 1997. "Law, Ethics, Human Rights and HIV/AIDS Prevention and Control." Presented at the National Workshop on Law, Ethics, Human Rights and HIV/AIDS, Mbagala.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Mwaluko, Prof. G. 2001. "Stigma and Discrimination." Presented at the seminar for Members of Parliament, Dodoma, 10th November.

¹⁶³ Government Proceedings Act, 1967

¹⁶⁴ The Basic Rights and Duties Enforcement Act, No. 33 (1994)

5.6 The Basic Rights and Duties Enforcement Act No. 33 (1994)¹⁶⁵

This is an act to provide for the procedure for enforcement of constitutional basic rights and duties and for related matters. Thus, if any person alleges that any of the provisions of section 12 to 29 of the Constitution has been, is being, or is likely to be contravened in relation to him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.¹⁶⁶ Subject to Section 13 of the act, in making decisions in any suit, if the High Court comes to the conclusion that the basic rights, freedoms, and duties concerned have been unlawfully denied or that grounds exist for their protection by an order, it shall have power to make such orders as shall be necessary and appropriate to secure the applicant the enjoyment of the basic rights, freedoms, and duties conferred or imposed on him under the provisions of Sections 12 to 29 of the Constitution.¹⁶⁷

It has been said that enforceability of constitution in view of the Basic Rights Enforcement Act, 1994 may be difficult in practice. An example is the requirement of a panel of three judges to hear petitions instead of one judge under Section 10. It may be difficult to have three judges in one session.¹⁶⁸ This may be a big obstacle when one considers that a slow case flow of cases is a major problem facing the legal system due to, among other reasons, shortage of judges even in ordinary cases where a judge sits alone.¹⁶⁹ Moreover, the Basic Rights Enforcement Act, 1994 installs a more cumbersome procedure, which is an enigma to the civil procedure in the country, such as the requirement for initiating proceedings by way of originating summons, a procedure that is unknown in the country's civil litigation nor does it add substance to the process other than complicating it.¹⁷⁰ Furthermore, Section 13, instead of declaring an action invalid or unconstitutional, provides that the High Court may have the power to allow Parliament or other legislative authorities to correct any defect in that law or action within a specified period. Hence, its provisions in Sections 10 and 13 of the act need to be reassessed in the light of HIV/AIDS for the act to be useful in addressing infringement of human rights in connection with the scourge.

5.7 Customary Law

S.4 of the Interpretation of Laws Act, No.4 of 1996 defines customary law in the following terms:

Customary law means any rule or body of rules whereby rights and duties are acquired or imposed, established by usage in any African community in Tanzania and accepted by such community in general as having the force of law including any declaration or modification of customary law made or deemed to have been made under section 9A of the Judicature and Application of Laws Ordinance, and references to "native law" or to "native law and custom" shall be similarly construed.

¹⁶⁵ The Basic Rights and Duties Enforcement Act, No. 33 (1994)

¹⁶⁶ S. 4

¹⁶⁷ Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984)

¹⁶⁸ See also Geoffrey Ijumba. "Protection of Human Rights in Relation to HIV/AIDS." Training Manual: Ethical Legal and Human Rights; paper presented at a workshop organised by the Ministry of Justice and Constitutional Affairs and NACP in collaboration with UNDP. Cited in Tungaraza, Maria. 1997. "The AIDS Epidemic and the Rights of Women (Tanzania)." Thesis submitted in partial fulfilment of Master of Laws Degree Course (LLM). Washington, D.C.: Georgetown University.

¹⁶⁹ See Rwebangira, M. K and Abood, I. M. 2001. "A Review of the Legal Sector Reform from a Gender Perspective." Dar es Salaam: Ministry of Justice and Constitutional Affairs and Netherlands Embassy.

¹⁷⁰ See BAWATA v. Attorney General

In Tanzania, Customary Law is codified for about 80 percent of the country's ethnic communities, which follow patrilineal descent.¹⁷¹ For the other 20 percent of Tanzania's diverse ethnic formations, which are traditionally of matrilineal descent, the customary law applicable to them is subject to proof by a party relying on it. It is this Customary Law that has the force of law despite changing social economic conditions and corresponding social practices.

The regime of Customary Law is most prominent in matters of succession/inheritance. According to Section 18 of the Magistrates' Courts Act, 1984, the Primary Court has jurisdiction in proceedings where the law applicable is either Customary or Islamic Law. Since most aspects of Customary and Islamic Law relating to marriage have been modified by statutory law as we shall show below, it is mostly the Customary Law of Succession that remained in the realm of Customary Law.

It has been said that the dominant element of Customary Law in Tanzania whether codified under the Customary Law Declaration Order, 1963¹⁷² or uncoded, is the title to land.

In order to ensure perpetuation of patrilineal dominance, customary land ownership is vested in favour of men against women.¹⁷³ This is stipulated under several rules of the said Customary Law Declaration Order.¹⁷⁴ These rules stipulate that the eldest son of the most senior wife of a deceased would inherit in the first degree and take the biggest share of the inheritance, particularly landed property, on the understanding that he would take over his father's responsibility. The other sons would inherit in the second degree, and the daughter, irrespective of security, would inherit in the third degree. Moreover, under Rule 20, a widow can only inherit if the deceased has left no offspring or male relative.

Drawing from statutory law in the form of the Bill of Rights of the United Republic's Constitution and a number of international human rights ratified by Tanzania, the courts were able to decide that these rules were unconstitutional.¹⁷⁵ Moreover, the Land Act No. 5 and Village Land Act No. 4 of 1999¹⁷⁶ have amended the land laws in such a way that these Customary Law rules have been positively modified. However, this does not mean that cultural attitudes and customary practice, which gives priority to males' needs and aspirations, often at the expenses of women, have changed to match the change in the land laws.

Legally, the application of Customary Law is most prominent in the area of the law of succession for African Christians and general aspects of family law that are not covered by the Law of Marriage Act, 1971.¹⁷⁷ However, in practice, customary law and related cultural norms regulate people's behaviour irrespective of whether such norms have force of law or not. Thus in practice, customary norms take priority over religious norms for the majority of Tanzanians of African descent, who in any case constitute the overwhelming majority of Tanzanians. However, very little is known about customary family law practices and disputes among the Asian community, which is the next largest group. This is because they tend to settle such disputes in their own community institutions and rarely utilize state courts. For example, while adultery is accepted as evidence of breakdown of marriage under S.107(2) of the Law of Marriage Act, 1971, a

¹⁷¹ Customary Law Declaration Order, 1963 G.N. No. 436 of 1963.

¹⁷² Local Customary Law (Declaration) (No. 4) Order, 1963

¹⁷³ Tungaraza, 1990:4

¹⁷⁴ Local Customary Law (Declaration) (No. 4) Order, 1963

¹⁷⁵ See Holaria Pastory, Rukuba Nteme

¹⁷⁶ The Village Land Act, No. 4 (1999)

¹⁷⁷ The Law of Marriage Act, No. 5 (1971)

customary law rule condones infidelity on the part of the husband. It is not a ground of divorce on the part of the husband but for a wife under customary law.

Customary practices and attitudes continue to put women at a higher risk of HIV/AIDS infection. The customary practices identified as putting women at greater risk of contacting HIV/AIDS include polygamy, some types of surrogate motherhood that involve an elderly rich woman marrying a poor young woman to raise seed for her house (*makomona*), widow inheritance, widow cleansing, and wife exchange. The resultant low status of women further manifests itself in their insecurity in marriage, which encourages women to use intravaginal herbs (dry sex) in order to please and retain husbands or lovers in extramarital affairs. Female Genital Mutilation (FGM) is another instance of customary practice. FGM is linked to women's low status in society, and like dry sex, also causes wounds that leave women susceptible to infection. Others are informal education provided in communities that practice rites of passage or initiation ceremonies and generally in homes where the message of women's inferiority and sexual submissiveness socializes women to deny themselves a say in sexual intercourse, and they are therefore unable to insist on safe sex. Failure to bear a son or a husband's infertility creates such insecurity for a wife that many involve themselves with multiple sex partners in the hope of bearing a son and therefore a future heir for the perpetuation of the husband's lineage and wife's guarantee of a share of the inheritance.

We shall see later in this report that a number of these issues have been addressed partially or fully under statutory law. However, the persistence of cultural practices and attitudes, which are inconsistent with the standards that support prevention and care of HIV/AIDS, call for extra legal strategies.

5.8 Islamic Law

Islamic Law is applied to Tanzania by the Judicature and Application of Laws Ordinance, Cap. 453¹⁷⁸ which empowers the courts to apply the rules of Islamic law to Africans who follow Islamic Law in matters of marriage, divorce, guardianship, inheritance, succession, *wakf*, etc. For African Muslims customary law may also apply. The determining factor as between applicability of Customary or Islamic Laws is the intention of the deceased person as to which law he intended to apply to his estate.¹⁷⁹

Islamic Law is founded on the Quran. The general rule is that a Muslim may not dispose of more than one third his estate by will (of the surplus of his estate after payment of funeral expenses and debts). Dispositions of the two thirds of the estate must follow the Islamic principles of intestate succession. Widows are ordained to inherit one eighth of the estate of the deceased husband if they had children with the said deceased husband. Where the widow did not produce issue in the marriage with the deceased, she is entitled to one fourth of his estate on his death. As daughters, Islamic women are ordained to inherit half of what their brothers inherit. The assumption is that the males would take care of the females. However, the complications of modern-day life and ascertainment of exact shares as stipulated in the Quran as well as overlap with Customary Law in practice often leave African Muslim women as vulnerable as their Christian and traditionalist African sisters.

¹⁷⁸ The Judicature and Application of Laws Ordinance, Cap. 453

¹⁷⁹ See the case of *Re The Estate of the late Suleiman Kusundwa* (1965) E.A. 247 – 252

It is to be noted that many aspects of both Customary and Islamic Law relating to marriage have been superseded by the Law of Marriage Act, 1971¹⁸⁰ by virtue of the 2nd Schedule amending the Judicature and Application of Laws Ordinance,¹⁸¹ Section 9(3A), which states:

Notwithstanding the provisions of this Act, the rules of Customary Law and Islamic Law shall not apply in regard to any matter provided for in the Law of Marriage Act, 1971.

5.9 Hindu Law

Hindu Law is applied to Mainland Tanzania by virtue of Section 2(2) of the Judicature and Application of Laws Ordinance, Cap. 453, which adopted English Common and statutes of General Application applicable in England as of 22 July, 1920. Under the provisions of Section 2 of the Indian Acts (Application) Ordinance, Cap. 2 apply to Tanzania Mainland. Thus the Indian Succession Act, 1865 and the Hindu Wills Act, 1870 apply to Tanzania Mainland. So does the Non-Christian Asiatics Ordinance Cap. 112. The latter law, as its title implies, applies to non-Christian Asians. It provides that the law applicable in personal matters is “personal law,” according to one’s religious faith, such as Hindu, Islam, etc.

¹⁸⁰ The Law of Marriage Act, No. 5 (1971)

¹⁸¹ The Judicature and Application of Laws Ordinance, Cap. 453

Part II: Existing Legislation and Recommendations for Change

Most if not all pieces of legislation were enacted before the onslaught of the HIV/AIDS pandemic, and even those that were enacted afterwards do not provide for specific situations aimed at deliberately creating an environment that is supportive to prevention and care of the scourge. This lack of focus may be due to the fact that an appropriate policy framework had not been formulated and agreed upon.

As many or all concerned pieces of legislation were enacted before the outbreak of HIV/AIDS, they do not provide for specific provisions relating to the same. However the provisions can be amended.

Below is a presentation of the existing legislation, and associated issues, of relevance to public health. They are assessed from the HIV/AIDS prevention and care perspective. Recommendations for legislative changes are noted.

6. Regulation of Goods and Services: Recommended Legislative Changes

There is no legislation to regulate the quality, accuracy and availability of HIV tests but there are some administrative guidelines. These guidelines are handed down and administered through the MOH and they are derived from the World Health Organization (WHO)¹⁸² guidelines issued to testing centres around the country by the MOH. There is legislation regarding approval for sale, distribution, and marketing of pharmaceuticals, vaccines, and medical devices only if they are safe and efficacious. This legislation is the Pharmaceuticals and Poisons Act, 1978.¹⁸³ It puts regulatory and monitoring responsibility on the Pharmacy Board, which is discussed separately later in this chapter. However, since the legislation was enacted long before the onset HIV/AIDS, it does not specifically address critical aspects of HIV/AIDS, such as testing kits, condoms, and treatment.

Regarding needles and syringes, the MOH has successfully directed the use of disposable needles and syringes, and this directive is observed by and large in many if not most health facilities, including those owned by the government where patients pay a token contribution for the service.

However, patients of certain illnesses such as tuberculosis and cancer are not required to contribute anything. Tuberculosis is one of the opportunistic diseases associated with HIV/AIDS although not all tuberculosis patients are necessarily HIV positive. What is specific to HIV/AIDS-related medication might be hard to identify because the impairment of the body's immune system may give rise almost to any opportunistic disease. However, some common opportunist diseases include tuberculosis and some forms of skin cancer (carposi sarcoma), mouth ulcers, pneumonia, recurrent attacks of malaria, etc. Only few of these diseases have their medication specifically falling in subsidized schemes, such as elimination or reduced import duty and customs. However, the government in the 2001 Finance Bill removed all taxes on retroviral drugs in addition to other essential medicines. (See Annex 2 for author's note on protection of the blood supply in United States and other jurisdictions).

¹⁸² A sample of these guidelines was obtained from the AMREF VCT Center.

¹⁸³ Pharmaceutical and Poisons Act, 1978

6.1 Legislation Providing Consumers with Protection Against Fraudulent Claims Regarding the Safety and Efficacy of Drugs, Vaccines, and Medical Devices

The Pharmaceuticals and Poisons Act, 1978¹⁸⁴ (discussed later in this chapter) specifically provides consumers with protection against fraudulent claims regarding the safety and efficacy of drugs, vaccines, and medical devices as discussed above. Specifically, Section 26 of the act prohibits preparation and sale of adulterated pharmaceuticals. Occasionally the board announces withdrawal of particular drug due to its non-compliance of some binding standard. This happened recently with specific batches of Fansider, an anti-malaria drug manufactured by a local company, because that batch did not comply with WHO specifications.¹⁸⁵ The anomaly was discovered through the board's routine monitoring by testing samples from the market.

6.2 Legislation Ensuring Accessibility and Free Availability of Prevention Measures

So far there is no legislation that ensures the accessibility and free availability of the following preventive measures: condoms, bleach, and needles and syringes.

Participants to the workshops organized for stakeholders and peer review meetings lamented over lack of information on proper use of condoms. They cited shocking revelations of instances of gross misuse, such as the practice of re-using condoms or use of plastics bags in efforts to adhere to safe sexual practice but without the ability to afford condoms. Such stakeholders have recommended free availability of condoms at least in high-risk institutions such as guesthouses (rampant for cheap, quick, casual sexual encounters).

The fact that quality of condoms in particular is not regulated by legislation has been pointed out repeatedly at many a workshop called to discuss strategies for controlling the spread of HIV/AIDS. There have been complaints of some condoms being substandard, leading to unexpected consequences such as bursting during intercourse. Other complaints were from a workshop organized for juvenile boys in Tanga, which complained that the size of condoms imported into the country was for the use of adult males only because they are too big for the young men. Consequently, this complaint went, it leaves the young males out although the latter are often the target of the use-the-condom campaign. There is therefore no regulation requiring monitoring compliance with the International Condom Standards. However, the Pharmacy Board is charged with the duty of monitoring compliance of the sale of pharmaceutical products and does so regularly including inspection and sample testing. Thus if a condom standard is prescribed by law, there is a big chance that it would be monitored for compliance.

6.3 Medical Practitioners and Dentists Ordinance, Cap. 407¹⁸⁶

The Medical Practitioners and Dentists Ordinance, Cap.407¹⁸⁷ (“Ordinance”) provides for the establishment of the Medical Council of Tanganyika, which has several functions including registration of medical practitioners and dentists and maintaining a register of such practitioners and their qualifications, which is to be published (S.9(a)-(o)). Others are powers and procedures

¹⁸⁴ Pharmaceuticals and Poisons Act, 1978

¹⁸⁵ See The Sunday Observer, 16th December, 2001.

¹⁸⁶ Medical Practitioners and Dentists Ordinance, Cap. 407

¹⁸⁷ The Medical Practitioners and Dentists Ordinance, Cap. 407

for taking disciplinary action against truant practitioners. Moreover, the council has the authority to set the requisite professional qualifications for different levels of practice. Finally, the council has the responsibility and power to prove hospitals therein for the purpose of enabling person's provisions of registration of practitioners in order to gain the experience necessary for a full-fledged registration (S.9(h)).

The Ordinance provides for a monitoring mechanism to ensure that only those individuals who are qualified medical practitioners and dentists enter and stay in the service of the practice of medicine. It is therefore possible for the council or the Minister of Health to prescribe mandatory HIV/AIDS-friendly standards for different medical procedures for medical doctors and dentists; in the event of failure to do so, such practitioner(s) would be liable for disciplinary action.

Recommendations:

- Section 9 to be amended to include HIV/AIDS prevention quality standards for different medical procedures and registration of qualified medical practitioners and dentists to enter and stay in the service of the practice of medicine.
- The Minister of Health to make bylaws prescribing medical-specific mandatory HIV/AIDS standards for different medical procedures for medical doctors and dentists under Section 41 of the Ordinance.
- The bylaws to provide for disciplinary action for truant practitioners.

6.4 Nurses and Midwives Registration Ordinance Cap. 325¹⁸⁸

The Nurses and Midwives Registration Ordinance provides for the education, training, registration, enrolment and practice of nursing and midwifery. Briefly the act establishes the Nurses and Midwives Council with representatives from key health institutions. The council has the duty and power to monitor and supervise the proper conduct of nurses and midwives in the country. This act provides a good opportunity to impact HIV/AIDS prevention and care standards in that the council, which is charged with the duty to set standards, may include in those standards measures relevant to HIV/AIDS prevention and care, such as nursing facilities friendly to HIV/AIDS victims. A case in point is PMTCT. The practice at some referral hospitals in the country has revealed that proper adherence to procedural ethics friendly to prevention of transmission to infants during delivery would avert about 50 percent of mother-to-child transmission of HIV infection. This act repeals the Nurses and Midwives Ordinance No. 63 of 1952.¹⁸⁹

Recommendation: Amendment to the ordinance to enunciate education, training, registration, enrolment, and practice of nursing and midwifery to impact HIV/AIDS prevention and care standards, including PMTCT.

6.5 The Opticians Act, 1966¹⁹⁰

The Opticians Act provides for the registration of opticians and the enrolment of bodies corporate carrying on business as opticians and matter connected therewith. Moreover, it establishes the Optical Council, charged with the responsibility for regulating the practice and conduct of

¹⁸⁸ The Nurses and Midwives Registration Ordinance Cap. 325

¹⁸⁹ The Nurses and Midwives Ordinance, No. 63 (1952)

¹⁹⁰ The Opticians Act, 1966

individual opticians and bodies corporate carrying on the business of opticians. The act also provides for disciplinary machinery as well as creates offences in case of infringement.

Optics is an important site of focus in the prevention and care of HIV/AIDS. In some jurisdictions, litigation arising from optical-related infections is common. In Tanzania such litigation has yet to take place, but the experience of doctors involved in HIV/AIDS research is that there is a slight chance of infection from tears as indeed there is from saliva and other less concentrated body fluids such as sweat. They did not consider it to be a major means of transmission.

Although optical appliances and practices are not heavily indicated in HIV/AIDS, the regulatory framework remains a useful entry point in setting and upholding standards relevant to HIV/AIDS prevention.

Recommendation: The act to be amended so as to enunciate education, training, registration, enrolment and practice of optics to impact HIV/AIDS prevention and care standards, including PMTCT.

6.6 Private Hospitals (Regulation) Act, 1977¹⁹¹

The Private Hospitals (Regulation) Act, 1977 makes provision for restriction of the management of private hospitals to approved organizations to control fees and other charges payable in respect of medical treatment and other services rendered by private hospitals, to regulate scales of emoluments payable to medical practitioners employed at private hospitals, and to make other provisions connected with these matters. The Act¹⁹² was amended by Act No. 26 of 1991 by introducing a private Hospitals Advisory Board and expanding the scope of the duties of the office of the Registrar.

Moreover, the amendment puts more restrictions on the management of private hospitals, emphasizing the need for registration of operators and creating an offence for contravention among others (S.5). Under the act, the organizations approved to provide medical services are to be published yearly in the Gazette and national newspaper (S.7(2)).

The requirement to publish registered organizations makes it possible to monitor hospitals' adherence to approved standards for prevention and care in HIV/AIDS as well as apply universal precautions. The minister responsible for health has discretionary powers to approve organizations owning private hospitals for registration. Among the reasons for refusal of registration is failure to satisfy the minister or the applicant private hospital is not under the charge of a duly recognized medical practitioner.

Overall, the act functions as a regulatory mechanism and ensures that medical services are provided under the care of competent personnel. Moreover, lack of proper equipment is another specified criterion justifying the minister's refusal to approve registration of a private hospital. Thus in these circumstances it is possible to systematize HIV/AIDS-friendly standards as part of the ethics of medical services. Nonetheless, it is possible to regulate such hospitals by holding such medical managers personally accountable under the relevant regulatory law, i.e., the Medical Practitioners and Dentists Ordinance, Cap. 409.¹⁹³

¹⁹¹ Private Hospitals (Regulation) Act, 1977

¹⁹² The Private Hospitals (Regulation) Act, 1977

¹⁹³ The Medical Practitioners and Dentist Ordinance, Cap. 407

Regarding equipment, before the minister can approve the application for registration of a private hospital, he/she must be satisfied that such practitioner has sufficient and efficient equipment to provide medical treatment services. Such sufficient and efficient equipment may include having facilities for disposable needles and syringes, disposal equipment, and incinerator. In some circumstances it may include having facilities for sterilization with a clear institutionalized routine that ensures that sterilization would be done procedurally.

Recommendation: Amendment of S.5 and S.7(2) to include adherence to approved standards for prevention and care of HIV/AIDS as well as apply universal precautions.

6.7 Private Health Laboratories Registration Act, No. 10 (1997)¹⁹⁴

The Private Health Laboratories Registration Act, No. 10 (1977)¹⁹⁵ generally provides for the regulation of registration and management of private health laboratories to be managed by persons approved for that purpose and related matter. It establishes a Private Health Laboratories Board whose mandate includes registration, control, and regulation of private health laboratories within the country. It further gives power to the minister responsible for health to make rules for the better implementation of the provisions of the act, including regulating the staff, premise profile of laboratory investigations, and equipment to be provided at private health laboratories.

Recommendation: Since voluntary testing for HIV/AIDS takes place in laboratory services, it is essential that the legislation be amended to enunciate a special provision for setting up quality VCT services. This should take into consideration provisions of service by competent laboratory technicians well trained in HIV testing, prevention, and care.

6.8 The Health Laboratory Technologists Registration Act, No. 11 (1997)¹⁹⁶

The Health Laboratory Technologists Registration Act, No. 11 (1997)¹⁹⁷ provides for the registration of health laboratory technologists and related matters. It establishes a regulatory council known as the Health Laboratory Technologists Council. The council is charged with many responsibilities, including regulation of standards of conduct and activities of health laboratory technologists, standards and practice of the health laboratory profession, and issuing and cancelling certificates of such professionals in certain circumstances. Moreover, the council is also charged with a duty to advise the government on matters concerning performance of health laboratories and health laboratory technologists.

Both acts do not make specific reference to HIV/AIDS testing requirements, as indeed they do not make to a specific testing of particular infections. However in view of HIV/AIDS testing standards, one notes that the acts do not provide for pre- and post-testing counselling, need for confidentiality, safety precautions, and related issues.

Recommendation: Amendment is needed to make reference to HIV/AIDS testing requirements, pre- and post-test counselling, need for confidentiality, safety precautions, and other related issues.

¹⁹⁴ Private Health Laboratories Registration Act, No. 10 (1997)

¹⁹⁵ Id.

¹⁹⁶ The Health Laboratory Technologists Registration Act, No. 11 (1997)

¹⁹⁷ Id.

6.9 Internationally Notifiable Diseases Act, 1963

Under the Internationally Notifiable Disease Act, 1963¹⁹⁸ the law provides for the minister to declare a country, region, or place within or outside Tanganyika as an endemic or infected area if he has reasonable cause to believe that the disease exists 9s.4(1) and further that such order for declaration should be gazetted in newspapers, but the order shall have effect even if it was not caused to be published (S.4(1) and (2)).

Again S.5 provides for restriction to leave an infected area unless that person purporting to leave such a place has prior permission from the authority. The act provides further for restriction and procedure (where necessary) for entering into Tanganyika from an endemic area. The condition or procedure is that that person should report to the authority, and it provides further that the authority may prohibit the disembarkation of any unimmunised person or any such person (S.6(1)–(3)).

Moreover, S.7 provides for detention or isolation of an infected person, for example that they may be kept under medical observation or surveillance and further that such person should be subject to medical examination (S.8(1) and (2)). Also S.11(1) provides for examination and post-mortem performance for the body of a person who died of a notifiable disease. And if any person contravenes any order of the authority or the provisions of S.5, 6(1), 8, and 11, he shall have committed an offence hence liable on conviction to a fine not exceeding one thousand shillings or to imprisonment.

HIV/AIDS is not a defined disease but a condition that makes an infected individual susceptible to certain opportunistic diseases. Moreover, the mode of infection for the HIV/AIDS condition is transmitted through specific, manageable behaviour. Furthermore, HIV/AIDS is now known to have reached almost every corner of the world. Thus restrictions on inhabitants of infected areas leaving infected areas or on entering the country would not be practicable or desirable let alone helpful. It is not practicable because infected people do often show external symptoms. Secondly, not everyone who lives in an area where HIV/AIDS is prevalent is infected. Infected people can only be identified after a voluntary blood test. For that reason quarantine is not helpful.

Recommendation: S.7, S.8(1)–(2), and S.11(1) are not relevant to HIV/AIDS and, therefore, render the legislation redundant. In the context of HIV/AIDS, these sections contravene UNAIDS standard guidelines and the National Policy on HIV/AIDS, as they require detention and isolation of infected persons of a notifiable disease, breach of privacy and confidentiality issues vested in PLHA rights. The above cited sections should be amended to include HIV/AIDS prevention standards commensurate with UNAIDS guidelines and the National Policy on HIV/AIDS. However, since the sections are still relevant to other contagious diseases prevalent to Tanzania, instead of repealing the sections, the amendment should categorically state that the act shall not apply in relation to HIV infection.

¹⁹⁸ The Internationally Notifiable Diseases act, 1963

6.10 Pharmaceutical and Poisons Act, 1978¹⁹⁹

Under this act, consumers are protected from purchasing substandard pharmaceutical products (S.27). Moreover, vendors of pharmaceutical equipment are charged with the responsibility to sell only safe and quality pharmaceutical products and equipment. In the case of HIV/AIDS, the act has relevance particularly with regard to sale of disposable syringes, needles, and gloves. Since the prescribed health standard requires such equipment to be disposable in the case of syringes and needles, and gloves in some others, sale of used equipment would be an offence contrary to Sections 27 and 28 of this act.

There has not been serious litigation about the regulation of therapeutic goods and services in Tanzania. This paucity of litigation on this very important aspect of public health law may be a result of the absence of a clear policy and statutory provision in the light of HIV/AIDS. However, in some jurisdictions such as the United States, litigation around these issues has been overwhelming. Such litigation has been aimed at protection of the blood supply. The central legal issue has been the liability of blood suppliers and hospitals—standards of negligence and strict liability (See Annex 2 for the discussion of protection of blood supply, with reference to issues and responses in non-Tanzania jurisdictions).

Recommendation: The act provides for protection of consumers from purchasing substandard pharmaceutical products (S.27). As such, the legislation needs to be amended to include quality supply, manufacture, and use of VCT kits and other reagents needed for HIV testing, including needles, syringes, gloves, antiretroviral drugs, etc.

Stakeholders' Views: Intergovernmental and National Conference

Issues regarding accountability of health workers on breach of confidentiality and malpractice were raised. It was observed that breach of confidentiality by health workers on the sero-status of their patients was widespread and posed a serious problem to prevention of stigma and discrimination of PLHA. The problem however, was on how to establish proof of breach by a health worker since a person testing for HIV may undergo a process involving several health workers' treatment (counsellors, ward attendants, nurses, laboratory technicians, doctors, etc.) for pre-test counselling, actual testing of the virus, and post-test counselling, any one of whom could be responsible for leaking the test results. Moreover, in certain cases the PLHA may also divulge his sero-status due to anxiety.

Some medical doctors pointed out during the discussion that current Section 26 of the Medical Practitioners and Dentist Act, read together with the Medical Ethics Document provided an adequate mechanism to deal with malpractice issues. This view was supported by other professionals who informed the conference that indeed doctors could and have been brought to count and disciplined through the Medical Council of Tanganyika on malpractice charges instituted by the aggrieved patients or their relatives and subsequently taken to the court of law if they were not satisfied. It was recommended

¹⁹⁹ The Tanzania Food, Drug and Cosmetics Act, 2002, came into force 11 March, 2002 to provide for the more efficient and comprehensive provisions for the regulation and control of food, drugs, medical devices, cosmetics, herbal medicines and poisons. This Act repealed the Food (Control of Quality) Act, 1978, and repealed the Pharmaceuticals and Poisons Act, 1978. The Tanzania Food, Drug and Cosmetics Act, 2002, should be considered in the context of recommendations made in the report concerning the subjects of food quality and of pharmaceuticals.

that the law should establish institutions to which health workers shall be responsible and accountable. Nurses and ward attendants should be properly trained and be made to take oath of respecting confidentiality. Counsellors should receive proper training. VCT should take place in an environment that ensures privacy and ensures that only a minimum number of people is involved in the process of HIV counselling and testing.

The role of traditional healers in HIV/AIDS prevention was also commented upon. Several observations were made that traditional healers are an impediment in the prevention of HIV/AIDS. Some of them claim to have a cure for HIV/AIDS while WHO says there is no cure to the virus. Traditional healers actions are not regulated, monitored, or controlled. In some cases they have administered injections to PLHA contrary to any acceptable procedure and are not accountable in case of malpractice. There is also a tendency for traditional healers to make sensational and irresponsible advertisement in the media about their ability to cure HIV/AIDS. The conference was however informed that there was a board in existence to register, monitor, and control traditional healers similar to the Medical Association of Tanzania. There is an appropriate act for traditional healers but this law was however seen to be more regulatory than developmental.

7. Legislation Impacting Women: Recommended Legislative Changes

7.1 Tanzania Constitution and Women

The Constitution of the United Republic of Tanzania²⁰⁰ is not discriminatory on its face against women but is discriminatory in practice. Tanzania's development of the culture or customary practices has influenced the Constitution. For example, gender oppressive laws run concurrently with the Bill of Rights enunciated in the Constitution of the United Republic of Tanzania in 1984, even though they appear to be directly contrary to the provisions of the Bill of Rights. This is clearly seen in Article 12 and Article 13 of the Constitution, which provide for the right to equality.

These articles provide:

- Article 12
 - All human beings are born free and are equal.
 - Everyone deserves the respect of recognition and his life to be valued.
- Article 13
 - All people are equal before the law, and have the right, without discrimination of any kind, to be protected and to be accorded equal justice before the law.
 - It is forbidden for any law to be enacted by an authority in the United Republic to impose any condition which is of discriminatory nature or which is obviously to one's disadvantage.

If the constitution provides that all people are equal, then women must be treated equally under the law. Laws that discriminate against women and force them into socioeconomic positions and customary practices that expose them to HIV should be held unconstitutional.

The customary laws and practices discussed in this report are inconsistent with the Constitution's guarantee of equality.

As long as gender discriminatory laws prevail over the Bill of Rights, AIDS prevention and mitigation strategies will be futile. We must therefore make the prevention of HIV through granting genuine gender equality under the Bill of Rights a priority over maintaining discriminatory laws and practices.

The Bill of Rights provides limitation on the rights and freedom of individuals within specific articles.²⁰¹ There are eight limitation clauses in the Bill of Rights that discriminate women's rights. These include Articles 13(3), 14, 16(2), 18(1), 20(1), 20(2), 24(2), and 30(1). These provisions provide for the right to equality, the right to life, the right to freedom of conscience, and the right to own property. Nevertheless, the foregoing provisions render the Bill of Rights meaningless with respect to the guarantee of equal rights to all people because the limitations are subject to the inheritance laws, customary law on refund of bride price, custody of children, and division of matrimonial property laws, all of which are biased against women.

²⁰⁰ Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984)

²⁰¹ See also Maina, Chris Peter. 1990. "Human Rights in Africa." p. 40. Cited in Maria Tungaraza, Op. cit.

Unless these laws are repealed by the legislature or the constitutional limitations are removed so that the discriminatory laws could be struck down by the courts, none of the rights named in the Constitution will be real and meaningful to women. As such the Constitution has so far continued to be a vehicle for women's exposure to HIV.

7.2 International Conventions Promoting Gender Equality

Apart from their human rights being infringed by domestic laws, women cannot enforce their rights under international conventions and therefore remain exposed to HIV infection. Tanzania has shown inclination to gender equality by ratifying various international conventions. These include, the Universal Declaration on Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), The International Convention on Economic, Social and Cultural Rights (ICESCR), The African Charter on Human and Peoples' Rights (ACHPR), The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the United Nations Declaration on Elimination of Violence against Women.²⁰² The fundamental assumption of ratifying the non-discriminatory conventions is that whatever differences exist between sexes should not be made the basis of different treatment.

Article 15 of CEDAW²⁰³ provides:

Traditional attitudes under which women are regarded as subordinate or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence to the physical and mental integrity of women deprives them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying (structural) consequences of these forms of gender based violence help to maintain women in subordinate roles, contribute to their lower level of political participation, and to their lower level of education, skills and work opportunities. The full implementation of the Convention requires that effective measures be taken to overcome these attitudes and practices. States should introduce education and public information programs to help eliminate prejudices, which hinder women's equality.

The foregoing provision may be invoked for the protection of women who practice unsafe customary sexual practices, but human rights lawyers cannot use the provision because it has not been incorporated in domestic law, and therefore it does not have the force of law. As such, customary sexual practices continue to hold women in subordination, depriving them of their inherent human rights enshrined in the conventions.

²⁰² See The United Republic of Tanzania, Policy on Women in Development in Tanzania, Ministry of Community Development and Women Affairs and Children, March 1992, p. 1. See Articles 2, 3 and 16 of the Universal Declaration of Human Rights; Article 2, 3, 4, and 26 of the International Covenant on Civil and Political Rights; Articles 2, 5 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women; Article 2 and 25 of the African Charter on Human and Peoples' Rights.

²⁰³ Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

Article 25 of the UDHR is very important for the protection of widows engaged in customary sexual practices. This provision provides that:

everyone has the right to a standard of living adequate to health and well-being...
and the right to security in the event of widowhood...in circumstances beyond
his control.

Widows who are forced in widow cleansing and widow inheritance at the expense of being exposed to HIV infection may be protected by this provision, but the provision has not yet been incorporated in domestic law and therefore does not have the force of law.

7.3 Property and Inheritance Laws Favour Men, Discriminate and Disempower Women

It has often been said that HIV is a disease of poverty. This reality is amply reflected with regard to women in Tanzania. Women form the bulk of the poor population, and they are also the majority of those infected with HIV/AIDS irrespective of marital status. It has been said elsewhere that women's vulnerability to HIV infection arises from their low social status. The factors that contribute to women's poverty are many and are not the subject of this study. However, what needs to be said is the fact that the legal framework of the country does not support women's efforts to move out of a poverty circle.²⁰⁴ Perhaps the most devastating property law regime is discriminatory laws of inheritance that deprive women of ownership and/or access to land, on which they largely depend for their living.

The law governing succession in Tanzania (mainland) is diverse as are its communities. There are four competing legal systems with which a deceased's estate may be administered, especially when one dies intestate. These systems of law are Statute Law, Customary Law, Islamic Law, and Hindu Law, as explained at the beginning of this study.

7.3.1 Indian Succession Act of 1865

Statutory law is general law found in a statute. The pertinent statute law is the Indian Succession Act of 1865, which was made applicable to Tanzania by the Indian Acts (Application) Ordinance, Cap. 2. By virtue of S.24, a man is considered to die intestate with respect to all property concerning which he has failed to make a testamentary disposition, which is capable of taking effect. Where the intestate has left a widow, but also has left any lineal descendants, one-third of his property shall belong to his widow and the remaining two-thirds shall go to his lineal descendants. The husband who survives his wife has the same rights in respect of her property if she dies intestate as the widow has in respect of her husband's property if he dies intestate. Statute law does not pose much problem in terms of gender as it offers equal treatment between husband and a wife. By contrast, customary law on inheritance was discriminatory towards women and left women with little if any means of living at all.²⁰⁵ Oppressive laws under Customary Law in relation to land have been repealed by the Village Land Act, 1998 and the Land Act, 1999 which stipulate for equitable distribution of land.

²⁰⁴ See Rwebangira, Magdalena K. 1996. "The Legal Status of Women and Poverty in Tanzania." Uppsala: Scandinavian Institute of African Studies.

²⁰⁵ Local Customary Law (Declaration) (No. 4) Order, 1963, Rules, 20, 27 and 31

7.3.2 *The Village Land Act, 1998*

The fundamental principles of National Land Policy, which are the objective of the Village Land Act, 1998,²⁰⁶ are, among others, to facilitate an equitable distribution of and access to land by all citizens²⁰⁷ and to enable all citizens to participate in decision making on matters connected with their occupation or use of land.²⁰⁸ Pursuant to the act, a customary right of occupancy is in every respect of equal status and effect to a granted right of occupancy and shall be governed by customary law in respect of any dealings, including intestate succession between persons residing in or occupying and using land. Any rule of customary law which denies a woman the right to acquire, hold, deal with, transmit or receive by will or by gift or by any other means any interest in land for the reason only that she is a woman, shall be void and inoperative and shall not be given effect to by any village council or village assembly or any other person or body exercising any authority over village land or in any court or other body before which a matter concerning village land is brought for adjudication or determination.²⁰⁹ Notwithstanding the provisions of the Judicature and Application of Law Ordinance, no act of the Parliament of the United Kingdom referred to in that ordinance shall apply to land held for a customary right of occupancy or otherwise governed by customary law.

7.3.3 *The Land Act, 1999*

The Land Act, 1999²¹⁰ provides for the basic law in relation to land other than the village land, the management of land, settlement of disputes and related matters. Subject to the fundamental principles of the national land policy enunciated therein, all land in Tanzania is public land vested in the president as trustee on behalf of all citizens. Amongst the objectives of the act is to facilitate an equitable distribution of and access to land by all citizens, inter alia, to enable all citizens to participate in decision making on matters connected with their occupation or use of land. Of particular significance, the objective of the act is to promote the right of every woman to acquire, hold, use, and deal with land to the same extent and subject to the same restrictions be treated as a right of any man.

Despite the fact that the above-mentioned Acts have attempted to provide equal status on land ownership gender-wise, a few questions arise.

7.3.4 *Local Customary (Property Inheritance) Law (Declaration) (No. 4) Order, 1963*

The extent to which land ownership could alleviate poverty on the part of women considering that inheritance laws other than land ownership continue to favour men. For instance, pursuant to Rule 30 of the Local Customary Law (Declaration) (No. 4) Order, 1963,²¹¹ the person who inherits in the first degree is the first heir and gets a bigger share than any of the other heirs. Rule 23 stipulates that those inheriting in the second degree will each get a share of the property that is bigger than heirs in the third degree. Under Rule 25, normally the first son is in the first degree, other sons are in the second degree, and daughters are in the third degree. This being the case, it is discernible that once women are granted land ownership it may be difficult for them to develop the land, as means of production will have been granted to men who are in the first and second

²⁰⁶ The Village Land Act, 1998

²⁰⁷ S. 3 (1) (c)

²⁰⁸ S. 3 (1) (h)

²⁰⁹ S. 20 (2)

²¹⁰ The Land Act, 1999

²¹¹ Local Customary Law (Declaration) (No. 4) Order, 1963

degree of ownership. The second question is whether banking laws allow women to put land as collateral for obtaining a loan to enable them to develop the inheritable land. If the answers to these questions are on the negative then women's dependency on men for survival will persist and the gates for HIV vulnerability will widen even further.

Recommendation: Review for modification, Rule 30 of the Local Customary Law (Declaration) (No. 4) Order 1963; also Rule 23 and 25 of the same.

7.4 Gender-based Inheritance Shares

7.4.1 Quran Surat-I-Baqaro (S.II), Surat Nisaa (S. iv) and Surat-I-Maida (S.v)

The second question is in relation to Islamic law as it is linked with the Mohammedan beliefs in that it is embodied in the Quran Surat-I-Baqaro (S.II), Surat Nisaa (S. iv), and Surat-I-Maida (S.v) and is in no way influenced by the changes in the society. There are fixed and unfixed shares of inheritance, which are gender-based. While daughters are entitled to half shares, sons are entitled to whole shares and widows to one-eighth shares of the total estate of the deceased irrespective of their contribution or number. Where the degree of relationship to the deceased is equal then the male member takes double the share of the female member. How are women in this context protected by the property reform laws given that Islamic law is gender biased?

Stakeholders' Views: National Conference

As a follow up of the National Conference for review of TAWLA document, it is crucial to point out that the National Muslim Council of Tanzania, commonly known as BAKWATA, submitted its position to TAWLA consultants that, in matters of inheritance laws relating to Islamic matters, the HIV/AIDS proposed law must respect the Holy Quran and that this contention is not debatable.

7.5 'Property Grabbing'

7.5.1 Rule 66A of the Local Customary Law (Declaration) Order 1963, GN. 279 of 1963

The third challenge is in relation to property grabbing whereby widows are harmed by their deceased husband's relatives who take property that may rightly be for the widows. Rule 66A of the Local Customary Law (Declaration) Order 1963, GN. 279 of 1963²¹² spells out the rights of the widow in the matrimonial home. It states, in part, that the widow may claim her right to reside with her issue in a house of the deceased's kinsfolk.

In Scolastica Benedict v. Martin Benedict, the Court of Appeal 1993 TLR 1 CA it was held by the Court of Appeal that the widow was not entitled to reside in the matrimonial house, rather she had to move to an inferior house, which according to the decision of the clan council and the administrators, was the share of inheritance of the adult daughter of the deceased and the appellant. The Court of Appeal is the highest court of the land and its decisions on subordinate courts and on the High Court.

Law reform in this context must conform with UNAIDS International Guidelines on HIV/AIDS, which require antidiscrimination and protective laws to be enacted to reduce human rights

²¹² Local Customary Law (Declaration) Order 1963, GN. 279 of 1963

violations against women in the context of HIV/AIDS so as to reduce vulnerability of women to infection by HIV and to the impact of HIV/AIDS.

Recommendation: This law and other customary law rules should be reviewed and reformed to ensure equality of women regarding property and marital relations so that discriminatory limitations are removed on rights to residence in the matrimonial home even after the death of a spouse and to inherit landed property.

7.6 The Law of Marriage Act, 1971 and Application Exposes Women to HIV Vulnerability

The Law of Marriage Act, 1971²¹³ regulates the law relating to marriage, personal, and property rights as between husband and wife, separation, divorce, and other matrimonial relief and other matters connected therewith and incidental thereto. The act has several provisions that expose women to HIV vulnerability for a number of reasons.

Marriage has been defined as the voluntary union of a man and a woman intended to last for their joint lives. These are of two kinds. Those that are monogamous or are intended to be monogamous and those that are polygamous or are potentially polygamous. Both kinds of marriages may be converted either way by a declaration made by the husband and the wife, that they each, of their own free will, agree to conversion. The law stipulates restrictions on marriage, of particular relevance in this context include age requirement, free will, and requirement of consent.

7.6.1 Minimum Age²¹⁴

A minimum age requirement for a marriage is eighteen years for a male and fifteen years for a female.²¹⁵ No marriage shall be contracted except with the consent, freely and voluntarily given, by each of the parties thereto. Consent shall not be held to have been freely or voluntarily given if the party who purported to give it was influenced by coercion or fraud, was mistaken as to the nature of the ceremony, or was suffering from any mental disorder or mental defect, whether permanent or temporary, so as not fully to appreciate the nature of the ceremony. A female who has not attained the apparent age of eighteen years shall be required, before marrying, to obtain the consent of her father, or if her father is dead, of her mother, or if both her father and mother are dead, of the person who is her guardian. If all of those persons are dead, the girl shall not require consent. These provisions do not seem to protect the girl child from HIV vulnerability because the minimum stipulated age falls within the ambit of the age of a minor.

It is doubtful whether before attaining the age of majority a girl child can make sound choices, especially given the complexities brought up by the advent of the epidemic. A fact that cannot be underestimated is that most of the communities are not aware of the existence of HIV VCT services; therefore, the question of premarital testing for HIV is not considered, and people intending to marry are not well informed so as to request for HIV status of their partners. Moreover, the National Policy on HIV/AIDS encourages voluntary premarital testing. However, it prohibits premarital mandatory testing. As such, with limited life skills and awareness, there is

²¹³ The Law of Marriage Act, No. 5 (1971)

²¹⁴ Recommendations to amend the law so as to raise the minimum age of marriage to 18 years have been made and further action is awaiting cabinet approval before a bill can be prepared and tabled in Parliament.

²¹⁵ S. 13.

a danger that a female under eighteen years may not enter into a marriage voluntarily because the element of consent is questionable.

Stakeholders' Views: National Conference

As for the minimum age of marriage in the context of HIV/AIDS law, BAKWATA submitted its position to TAWLA after the National Conference that the proposed law should conform to Islamic law subject to the Holy Quran, which spells out that for girls, minimum age of marriage is reached when a girl attains puberty.

7.6.2 Notice of Objection

Any person may give notice to the registrar or registration officer to whom the notice of intention was given on the ground that he or she is aware of the facts, which, under the provisions of the act, constitute an impediment to the intended marriage. Whether facts which constitute an impediment to the intended marriage may be interpreted to cover nondisclosure of HIV status leaves a lot to be desired due to the confidentiality and privacy rights accorded to PLHA. Secondly, the act states in part that, where a man married by a polygamous marriage has given notice of an intended marriage, his wife or, if he has more than one wife, any of his wives may give notice of objection to the registrar or registration officer to whom the notice of intention was given, on the ground that the intended wife is of notorious bad character or is suffering from an infectious or otherwise communicable disease or is likely to introduce grave discord into the household.

A question to be ascertained here is whether 'notorious bad character' encompasses risky behaviour as well, and what constitutes risky behaviour as far as HIV transmission is concerned. Is this determined by multiple partners or protected sexual practice? Does infectious or communicable disease cover HIV/AIDS? How are spouses in a polygamous marriage or a person instituting the objection to prove existence of HIV as an infectious or communicable disease because medical ethics require nondisclosure of one's seroprevalence status. These questions, however, do not negate the fact there are instances where one's HIV status may be known, but this is not an effective safeguard mechanism because it may operate more on speculation rather than accuracy. It may also operate to the detriment of the person providing notice of objection because emanating from S.145 any person who, when giving notice of objection to an intended marriage under S.20, makes any false statement shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years, provided that it shall be good defence to a charge under this section that the person charged had reasonable grounds for believing the statement to be true.²¹⁶ What amounts to 'reasonable grounds for believing the statement to be true' is an obstacle to be surmounted.

It is essential to note that the infectious and communicable disease qualification placed on notice of objection is limited to polygamous marriages only and does not extend to cover monogamous marriages. This qualification lags behind health and social changes since the AIDS epidemic is not selective; it affects people equally and is 100 percent fatal.

Stakeholders' Views: National Conference

BAKWATA submitted its position that the Holy Quran recognizes polygamous marriages under paragraph 3 of the Surati nnisaa. It was observed that the said law was created by

²¹⁶ S. 145.

the almighty God and it is only the almighty God that can amend it. Further, BAKWATA stresses that the major cause for transmitting HIV is through casual sex, as such, the law should tackle moral norms of behaviour change by emphasizing abstinence before marriage.

7.6.3 Coercion or Fraud

Any person who is a party to a ceremony purporting to be a marriage knowing or having reason to believe that the consent of the other party was induced by any coercion or fraud shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding three years.²¹⁷ Since neither the law nor the policy imposes a strict duty on partner notification of HIV status, it is difficult for a person who is infected by the other due to omission of discharging a duty of partner notification to invoke this section on account of fraud element. This section may not provide shelter against women's vulnerability to HIV, especially with regard to minimum age requirement, because a minor cannot require detailed personal information of an intended spouse due to limited level of analyzing substantive issues. There is a strongly felt need for the law of marriage to state explicitly the requirement of partner notification and failure to do so may amount to fraud. Be as it may, complex issues might arise in that HIV testing is not mandatory and an accused person may not have known his/her status or his/her partners. It may therefore be difficult to prove beyond reasonable doubt that the accused is the one who caused the actual infection bearing in mind that there are many modes of HIV transmission.

7.6.4 Voidable Marriages

A marriage is said to be voidable if among other factors, either party was suffering from venereal disease in a communicable form. There exists a correlation between venereal diseases and HIV transmission. Since HIV may be transmitted through sexual intercourse, it is crucial to ascertain whether HIV falls within the ambit of venereal diseases. If the answer is on the negative, what should be the profile of a marriage where one of the spouses is found to be HIV positive or having AIDS at the time of marriage?

7.6.5 Separation and Divorce

Any married person may petition the court for a decree of separation or divorce on the ground that his or her marriage has broken down, but no decree of divorce shall be granted unless the court is satisfied that the breakdown is irreparable. Adultery committed by the respondent, particularly when more than one act of adultery has been committed or when adulterous association is continued despite protest, or sexual perversion on the part of the respondent may be acceptable evidence to the court that marriage has broken down, but proof of any such matter shall not entitle a party as of right to a decree.

7.6.6 Property Rights and Marital Status

Property ownership in the Law of Marriage Act, No. 5 (1971)²¹⁸ is based upon the concept of "separate ownership of property" between spouses.²¹⁹ Section 58 provides:

²¹⁷ S. 151.

²¹⁸ The Law of Marriage Act, No. 5 (1971)

²¹⁹ The United Republic of Tanzania, The Law Reform Commission of Tanzania, Report of the Commission on Law of Marriage Act, 1971 (no.5 of 1971). Presented to the Minister for Justice and Constitutional Affairs, Dar es Salaam, April 1994, p. 7. Cited in Tunganaza, Maria. 1997. "The AIDS Epidemic and the

Subject to the provisions of section 59 and to any agreement to the contrary that the parties may make, a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring, holding and disposing of any property.

Thus under this “separate property system,” whatever property a husband or wife owns before or acquires after marriage remains his or her solely owned property. As far as ownership of such property is concerned, marriage changes nothing.

According to the law, a married woman has the same right as has a man to acquire, hold and dispose of property, whether movable or immovable, and the same right to contract, the same right to sue, and the same ability to be sued in contract or in tort or otherwise.²²⁰ Subject to the express provision of any law, where a man has two or more wives they shall as such, enjoy equal rights, be subject to equal liabilities and have equal status in law.²²¹ Thus, a marriage does not operate to change the ownership of any property to which either the husband or the wife may be entitled or to prevent either the husband or the wife from acquiring holding and disposing of any property.²²²

Similarly, Section 60 of the Law of Marriage Act, No. 5 (1971)²²³ provides that where during the subsistence of marriage, any property is acquired:

- in the name of the husband or of the wife, there shall be a rebuttable presumption that the property belongs absolutely to that person, to the exclusion of his or her spouse; and
- in the names of the husband and wife jointly, there shall be a rebuttable presumption that their beneficial interests therein are equal.

Such a separate property system is detrimental to women and serves to lock them into marriage for economic reasons. First, because of inheritance laws, as described in section 2.1, women are far less likely than men to acquire property by inheritance; moreover, in most cases women are full-time housewives and have no independent source of income or property. Essentially the woman is working to run the household and free the man to make money and acquire property. Yet all of the property so acquired will be considered solely his if the marriage were to dissolve. In such a case, the woman would have no resources with which to begin a new life upon divorce. Thus women are often forced, economically, to remain in undesirable marriages.

One of the recommendations of the new act would be to amend the Law of Marriage Act, 1971²²⁴ to be more comprehensive. A recommendation should be to include inheritance of property after separation/divorce due to knowledge of a partner’s HIV/AIDS status.

The language of some of the marital property law is sufficiently ambiguous so that it need not be interpreted in a manner that is so discriminatory toward women and the type of contributions they make to the household.

Rights of Women (Tanzania).” Thesis submitted in partial fulfilment of Master of Laws Degree Course (LLM). Washington, D.C.: Georgetown University.

²²⁰ S.56.

²²¹ S.57.

²²² S.58.

²²³ The Law of Marriage Act, No. 5 (1971)

²²⁴ The Law of Marriage Act, No. 5 (1971)

For example, Section 114 of the Law of Marriage Act, No. 5 (1971),²²⁵ provides:

- The Court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of any assets acquired by them during the marriage by their joint efforts or to order the sale of any such asset and the division between the parties of the proceeds of sale (emphasis ours).
- In exercising the power conferred by sub-section (1) the Court shall have regard
 - (a) to the custom of the community to which the parties belong;
 - (b) to the extent of the contributions made by each party in money, property, or work towards the acquiring of the assets.
- For the purposes of this section, reference to assets acquired during marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint effort (emphasis ours).

There are several terms in the Law of Marriage Act, No. 5 (1971)²²⁶ that are not defined. These include “joint efforts,” “contribution,” and “work”. How these terms are defined greatly affect how women are affected by the matrimonial property regime. Prior to 1983, judges interpreted these terms in different cases differently.

These interpretations largely fell into two categories: the “conservative” or “narrow” view and the “progressive” or “broad” view.²²⁷

An example of the *conservative interpretation* is found in the case of Zawadi Abdallah v. Ibrahim Iddi.²²⁸ There, a High Court judge, supporting a decision of the lower court, stated that:

I share his opinion that under Section 114 the housework of a wife and looking after children are not to be equated with the husband’s work for the purpose of evaluating contributions to marital property. I hold as he did that such domestic services are not to be taken into consideration when the court is exercising its powers under the section. ... it is not written into Section 114 that a wife’s marital status and duties should per se make her a partner in the husband’s economic enterprise or gains ... if the legislature has intended that domestic services performed by a wife be regarded as contributions and joint effort it would have said so in a language clear and plain.²²⁹

Representative of the *progressive position* is the case of Rukia Diwani Konzi, v. Abdallah Issa Kihanya,²³⁰ where the court stated:

²²⁵ Id.

²²⁶ Id.

²²⁷ The United Republic of Tanzania, The Law Reform Commission of Tanzania, Report of the Commission on Law of Marriage Act, No. 5 (1971). Presented to the Minister for Justice and Constitutional Affairs, Dar es Salaam, April 1994, p.10.

²²⁸ (Civil Appeal) No. 10, (1980) unreported.

²²⁹ Id. p. 11.

²³⁰ (Matrimonial Cause) No. 6 (1977) unreported.

There is a school of thought which says that domestic services a housewife renders do not count when it comes to acquisition and therefore the subsequent possible division, of matrimonial assets ... I find this view too narrow and conservative and I must confess my inability to subscribe to it.²³¹

These conflicting decisions of the High Court represent the split of authority on the interpretation in Section 114 of “joint efforts” and “contribution.” Lower courts were free to choose either interpretation leaving to the whim of presiding magistrate whether he or she wished to compensate the estranged wife or not.

In 1983, the Court of Appeal *settled the conflict*, adopting the progressive interpretation. The court stated in Bi Hawa Mohamed v. Ally Sefu:²³²

... We are satisfied that the narrow view is wrong and the broad view is correct. ... the argument that the broad view of the law amounts in effect to judicial legislation is not supportable since the court is not making or introducing a new rule in a blank or gray area of social relations but is interpreting existing statutory provisions – that is the words “the joint efforts” and “the contributions made by each party in money, property or work towards the acquiring of the assets” used under Section 114.²³³

Though the courts seem to have settled the conflict, the law needs to come to a strong conclusion on how to protect women and enable them to be protected from HIV/AIDS and not be trapped in a marriage that puts them at risk to HIV/AIDS. The new act will recommend amendment to this law that discussed HIV/AIDS as also having economic ramifications affecting women.

The language of some of the marital property law is sufficiently ambiguous so that it need not be interpreted in a manner that is so discriminatory toward women and the type of contributions they make to the household.

While the Court of Appeal’s interpretation of “joint effort” and “contribution” sounds promising, there exists still a loophole in Section 114, which allows courts to completely deny a woman any share of the marital property.

Section 114(2)(a) provides that “In exercising the power conferred by subsection (1), the court shall have regard to the custom of the community to which the parties belong.”

In many communities a wife is never entitled to any share of the family property, regardless of how that property was acquired. This is especially the case where the wife is perceived to have caused the breakdown of the marriage. While some courts have held that a woman should not lose her right to a share of matrimonial assets simply because she caused the breakdown of the marriage, the Court of Appeal in Bi Hawa’s Case, stated that:

there may be cases where a wife’s misbehaviour may amount to failure to contribute towards the welfare of the family and thus failure to contribute

²³¹ Id.

²³² Id.

²³³ Id., p.12

towards the acquisition of matrimonial or family assets; but this has to be decided in accordance with the facts of each individual case.²³⁴

These laws cause women to be economically disadvantaged and therefore force them to stay in marriages even where their husband is engaging in sexual behaviour that put the wives at risk of contracting HIV.

It is hereby submitted that customary sexual practices militate against safe sex and jeopardize women's lives by exposing them to HIV infection.

Recommendations:

- **Minimum Age:** Under S.13 the minimum age requirement for a marriage for girls is 15 years. The section should be amended to raise the age to 18 years because 15 is an age of a minor. The amendment will allow women to make sound decisions on marriage especially in the wake of HIV/AIDS. Such girls may be vulnerable to HIV infection as they may not apprehend the risk involved.
- **Notice of Objection:** Amend Sections 20 and 145 on Notice of Objection and criminal liability for giving wrong information respectively, to include HIV situations.
- **Coercion or Fraud:** Amend S.151 on offence for being a party to a ceremony knowing that the consent of one of the parties was obtained by fraud or coercion, to include HIV/AIDS.

²³⁴Id. p. 13.

8. Legislation Impacting Children: Recommended Legislative Changes

There is no unified law that deals with the rights of a child. Those rights are articulated in the Constitution of the United Republic of Tanzania²³⁵ and various statutes, which include the Penal Code,²³⁶ the Criminal Procedure Act,²³⁷ the Evidence Act,²³⁸ the National Education Act,²³⁹ the Children and Young Persons Act,²⁴⁰ the Employment Ordinance,²⁴¹ the Law of Marriage Act, and the Corporal Punishment Act.²⁴² Evinced from the foregoing statutes, there is no consensus as to the definition of a child. Every legislation defines a child to serve its objectives. For instance, by the virtue of the Children and Young Persons Act,²⁴³ a child is a person under the age of twelve years and a young person is between twelve and sixteen years of age.²⁴⁴ Under the Criminal Procedure Act,²⁴⁵ a child is a person who has not attained the age of sixteen.²⁴⁶ Pursuant to the Corporal Punishment Ordinance,²⁴⁷ a juvenile is under the age of sixteen years.²⁴⁸

There are efforts to enact a unified law of the child and the age of 18 has been recommended to be adopted in conformity with the Covenant of the Rights of the Child (CRC),²⁴⁹ which Tanzania ratified in 1990.

Save for the Penal Code, Cap. 16²⁵⁰ and the Sexual Offences (Special Provisions) Act, 1998,²⁵¹ which contain general provisions that protect children from sexual abuse and from infectious diseases, none of these statutes specifically focus on the rights of the child living with HIV/AIDS, nor do they protect the child from being infected by HIV/AIDS.

8.1 Tanzania Constitution and Children

The rights of the child are guaranteed under the Bill of Rights of the Constitution of the United Republic of Tanzania.²⁵² Amongst those rights is the right to life whereby the Constitution provides that:

²³⁵ Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984)

²³⁶ The Penal Code, Cap. 16

²³⁷ The Criminal Procedure Act, No. 9 (1985)

²³⁸ The Evidence Act, No. 6 (1967)

²³⁹ The National Education Act, 1978

²⁴⁰ The Children and Young Persons Ordinance, Cap 13

²⁴¹ Employment Ordinance, Cap 366 of the Laws (Revised)

²⁴² The Corporal Punishment Ordinance Cap. 17; See also Bahroon Said Amin. 1996. "Legal Protection of The Rights of Children Who are Living With or Affected by HIV/AIDS." Presented in the Training Manual "Ethical, Legal, and Human Rights Challenges in Relation to HIV/AIDS Prevention and Control." Ministry of Justice and Constitutional Affairs and National AIDS Control Programme with Support of UNDP.

²⁴³ The Children and Young Persons Act, 1985

²⁴⁴ S. 2

²⁴⁵ The Criminal Procedure Act, No. 9 (1985)

²⁴⁶ S. 2

²⁴⁷ The Corporal Punishment Ordinance, Cap. 17 of the Revised Laws in Tanzania

²⁴⁸ S. 2

²⁴⁹ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

²⁵⁰ The Penal Code, Cap. 16

²⁵¹ The Sexual Offences (Special Provisions) Act, 1998

²⁵² Constitution (fifth) (Amendment) Act, 1984 (Act No. 15 of 1984)

Everyone has the right to life and to receive from the society protection of his person in accordance with the law.²⁵³

Though the Constitution does not make specific reference to children, all human rights guaranteed under the Constitution apply equally to all people. Thus, human rights are also children's rights. Equality of all human beings is also recognized as a fundamental principle of human rights.²⁵⁴

Since everyone has the right to life and to receive from the society protection of his person in accordance with the law, this right protects inter alia, the right to protection of life against HIV/AIDS. This being the case, children should be granted protection to ensure that their lives are not ruined by HIV/AIDS. Any form of discrimination is prohibited under the Constitution,²⁵⁵ and all people are granted equality and protection before the law.²⁵⁶

The aforementioned human rights should apply to all children alike, including street children who are indeed the most vulnerable to HIV/AIDS by virtue of their lifestyle. Educational and rehabilitation programs must be strengthened to safeguard street children against infection, and for those who are already infected, counselling programs must be established to enable them to live positively.

8.2 International Conventions Protecting Children

All international human rights instruments protect the rights of a child.²⁵⁷ The Convention on the Rights of the Child (CRC)²⁵⁸ establishes specific rights of the child. The rights of the child protected under these international human rights instruments are relevant to HIV prevention and care. The United Republic of Tanzania takes cognizance of these rights and is a signatory of all these conventions. The only handicap suffered insofar as enforceability of the rights is concerned is that no attempts have been taken to codify them in domestic laws.

The CRC²⁵⁹ establishes an international definition of the child as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."²⁶⁰ The convention reaffirms that children are entitled to many of the rights that protect adults (e.g., the right to life, non-discrimination, integrity of the person, liberty and security, privacy, asylum, expression, association and assembly, education, and health), in addition to particular rights for children established by the convention.²⁶¹

The human rights of children under international instruments are relevant to HIV/AIDS prevention, care, and support for children, such as freedom from trafficking, prostitution, sexual

²⁵³ Article 14

²⁵⁴ Article 12

²⁵⁵ Article 3(4)

²⁵⁶ Article 13 (1)

²⁵⁷ Universal Declaration of Human Rights , 10 Dec. 1948, GA Res. 217 A (III), UN Doc. A/810, at 71; International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

²⁵⁸ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

²⁵⁹ Id

²⁶⁰ Article 1

²⁶¹ See Human Rights, HIV/AIDS and Human Rights, International Guidelines, UNAIDS, 1998, p. 43

exploitation, and sexual abuse since sexual violence against children, among other things, increases their vulnerability to HIV/AIDS. The freedom to seek, receive, and impart information and ideas of all kinds and the right to education provide children with the right to give and receive all HIV-related information needed to avoid infection and to cope with their status, if infected. The right to special protection and assistance if deprived of his or her family environment, including alternative care and protection in adoption, in particular protects children if they are orphaned by HIV/AIDS. The right of disabled children to a full and decent life and to special care and the rights to abolition of traditional practices that are prejudicial to the health of children, such as early marriage, FGM, denial of equal sustenance and inheritance for girls are also highly relevant in the context of HIV/AIDS. Under the convention, the right to non-discrimination and privacy for children living with HIV/AIDS and finally the right of children to be actors in their own development and to express opinions and have them taken into account in making decisions about their lives should empower children to be involved in the design and implementation of HIV-related programs for children.²⁶²

8.3 Laws Concerning Health of Children

8.3.1 *The Children and Young Persons Ordinance, Cap. 13*²⁶³

The Children and Young Persons Ordinance²⁶⁴ is an ordinance relating to children and young persons and provides for the reception of approved schools. Pursuant to the ordinance, a “child” is a person under the age of twelve years and a “young person” means a person who is twelve years of age or upwards and under the age of sixteen years.

A district court, when hearing charges against children or young persons shall, if practicable, unless the child or young person is charged jointly with any other person not being a child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held. The ordinance protects children and young persons from sentencing to imprisonment.²⁶⁵ Thus, where a child or young person is convicted of an offence punishable with imprisonment, the court may order that he/she be committed to custody to an approved school.²⁶⁶ The minister may establish schools or may declare any school or institution to be an approved school for the purposes of this ordinance.²⁶⁷ Having stated the aforesaid, unlike the Prisons Act, 1967,²⁶⁸ the Children and Young Persons Ordinance, Cap. 13²⁶⁹ does not mention how the right to health will be protected when the child or young person is in the custody of the approved school. Further, it is not indicated how children and young persons will be protected from HIV infection or how they will be cared for in case they are diagnosed as HIV positive. The ordinance also falls short of stating how children and young persons will be protected from sexual exploitation and unprotected sex. Sexual practices are known to be rampant in prisons. Whether sexual acts are not practiced in approved schools is not clear, but it is an open secret that such schools are very few. There is only one such school in Dar es Salaam. Consequently, most juvenile prisoners are kept with adults, which exposes them to sexual abuse because of their young age and physical vulnerability.

²⁶² Id.

²⁶³ The Children and Young Persons Ordinance, Cap. 13

²⁶⁴ The Children and Young Persons Ordinance, Cap. 13

²⁶⁵ S. 22

²⁶⁶ S. 24

²⁶⁷ S. 26

²⁶⁸ The Prisons Act, 1967

²⁶⁹ The Children and Young Persons Ordinance, Cap. 13

8.3.2 *The Education Act, 1978*²⁷⁰

The Education Act, 1978²⁷¹ is an act to repeal and replace the Education Act, 1969 and to provide for the better development of the system of national education. Although the act does not refer to the right of the child concerning access to HIV/AIDS prevention education, there is no indication that the child is barred from receiving the said education. The act provides explicitly that, subject to the national policy on national education and other national plans and priorities appropriately specified from time to time, every citizen of the United Republic shall be entitled to receive such category, nature, and level of national education as his ability may permit him.²⁷² So far the Ministry of Education has HIV/AIDS curricula in place that provide pupils with life skills necessary for prevention of HIV/AIDS transmission. What is required of the law is to make clear provisions for the right of the child in respect to HIV/AIDS/STDs prevention and the quality of education that will be relayed to children while respecting Tanzanian cultural values that are not harmful to health.

Stakeholders View: National Conference

It was observed by BAKWATA that TAWLA recommendations on HIV/AIDS education to in-school and out-of-school children should conform to religious teachings.

8.3.3 *Adoption Ordinance, Cap. 335*²⁷³

The Adoption Ordinance, Cap. 335²⁷⁴ is a statute to make further provisions for the adoption of infants and for matters connected therewith. Subject to the provisions of the ordinance,²⁷⁵ the court may, upon an application made in the prescribed manner, make an order authorizing an applicant to adopt an infant.²⁷⁶ An adoption order shall not be made in any case, except with the consent of every person who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant.²⁷⁷ The court may dispense with any consent required under the ordinance²⁷⁸ if it is satisfied, in case of a parent or guardian of the infant, that he has abandoned, neglected, or persistently ill-treated the infant;²⁷⁹ in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused to contribute;²⁸⁰ and in any case that the person whose consent is required cannot be found or is incapable of giving his consent, or that his consent is unreasonably withheld.²⁸¹

An issue arises as to whether the law condones notification to the applicant of HIV status of the child before the applicant adopts the child. This issue is based on the ground that if the child was ill-treated prior to adoption he should not suffer another trauma of abandonment, neglect, or

²⁷⁰ The Education Act, 1978

²⁷¹ The Education Act, 1978

²⁷² S. 56 (1)

²⁷³ The Adoption Ordinance, Cap. 335

²⁷⁴ The Adoption Ordinance, Cap. 335

²⁷⁵ Id.

²⁷⁶ S. 3 (1)

²⁷⁷ S. 4 (4)(a)

²⁷⁸ Op. cit. note 223

²⁷⁹ S. 5 (1)(a)

²⁸⁰ S. 5 (1)(b)

²⁸¹ S. 5 (1)(c)

persistent ill-treatment even after being adopted in the case where the applicant does not wish to adopt a seropositive child. Care and maintenance of such children may be expensive, especially in respect of treatment of opportunistic diseases, provision of nutrients needed by the body and antiretroviral drugs. Needless to say, the stigma and discrimination attached to PLHA may be traumatic to the person/family adopting the child. Although all children are entitled to equal protection by the law, our society is not well sensitized against stigmatization of and discrimination against PLHA. The ordinance should be carefully tailored to create an enabling environment that will provide quality life for children living with HIV/AIDS. As it stands now, the ordinance does not have any specific provisions that cater for the rights of the adopted child who is living with HIV/AIDS.

However, many families in Tanzania have “adopted” children whose parents have died of AIDS. But this “adoption” has been informal and therefore not recognized by law. Almost always such children are distributed within the extended family. Some of these children inherit from their deceased parents. Others do not for different reasons, which may not be relevant here. Suffice it to say that when there is property, it goes to the adopting family in trust. But often there is no formalization of such relationships, and the “adopted” children do not acquire legal and enforceable rights in the “adopting” family. Thus the adopting parents may not be compelled by an order of court to pay maintenance or school necessities for such “adopted” children. In actual fact, such children often live on the charity of several relatives and friends of the slain parents although they may formally be under the supervision of one or several families. Overall this is in the best interests of such children because parents are often overburdened with the care of their own children and other dependents.

The law of custody of children further forces women into high risk sexual behaviour, because children belong to the father, and in order to protect the welfare of children most women are forced to stay in a marriage, even if the husband’s lifestyle renders them vulnerable to HIV.

8.3.4 Local Customary Law (Declaration) Order 1963

Rule 175 of the Local Customary Law (Declaration) Order 1963, G.N. 279 of 1963²⁸² provides that children who are born to persons married to one another belong to the father. The term “father” is used to mean a recognized husband of the children’s mother. As noted at the beginning of this report, Customary and Islamic Law have been superseded by the Law of Marriage Act, No. 5 (1971)²⁸³ on matters provided for in the latter. Yet customary norms and attitudes continue to shape the lives of people and influence their choices. In fact the Law of Marriage Act takes on board these norms when it comes to sensitive cultural matters such as the control of children and division of assets at the end of marriage.

There is a rebuttable presumption that custody of a child below the age of seven years would be better off with the mother. It states:

S.125(3) of the Law of Marriage Act, 1971, provides that: There shall be a rebuttable presumption that it is for the good of an infant below the age of seven years to be with his or her mother.

In comparison with the patriarchal rule 175 above, this provision is an improvement and should help women to have custody of their infant children even if they have to leave their husbands or

²⁸² Local Customary Law (Declaration) Order 1963, G.N. 279 of 1963

²⁸³ The Law of Marriage Act, No. 5 (1971)

partners. But in practice, this provision has been taken to mean when children are older than seven, they cannot be in the custody of their mothers. A study conducted in 1989 found that routinely fathers who contest for the custody of their children get it. The courts tended to rely more the parent's economic ability than on the caring ability, both of which tendencies favour fathers against mothers and supports patriarchy as enshrined in Rule 175.²⁸⁴ This does not help women much because as a general practice once the child is seven years of age, the father takes custody of the child from the mother if father and mother are divorced. Thus women who want to continue to live with their children are trapped in marriage.²⁸⁵

Recommendations:

- Unified Law of the Child: There is a need for a unified law that, among others, would define the age of a minor, which is now lacking as various pieces of legislation on children differ on the definition of a child. The Constitution does not make specific reference to children either, but they are generally categorized as “all human beings.”
- The Children and Young Person's Ordinance, Cap 13: Amend the legislation to include a provision for prevention of HIV transmission and care of children in approved schools.
- The Education Act, 1978: Amend the legislation to include a provision on the rights of the child to access HIV/AIDS prevention education, and a standard requirement of the quality of the education on HIV prevention and care provided to children.
- Adoption Ordinance, Cap. 335: Amend the legislation to prohibit stigmatization and discrimination of orphans living with HIV/AIDS. Also, ensure care and support of orphans.

²⁸⁴ See Rwebangira, M.K “Women Seeking Redress in Courts Of Law in Tanzania;” and Rwebangira, M.K “The Legal Status of Women in Tanzania in Kabeberi-Macharia;” Women, Law, Customs and Practices in East Africa: Laying the Foundation.

²⁸⁵ Tungaraza, Maria B. 1997. “The AIDS Epidemic and the Rights of Women (Tanzania)” Thesis submitted in partial fulfilment of Master of Laws Degree Course (LLM). Washington, D.C.: Georgetown University.

9. Legislation Impacting PLHA: Recommended Legislative Changes

9.1 Background: Changing Discriminatory Attitudes through Education, Legal Action, and the Media

9.1.1 Best practices

Some success stories on changing discriminatory practices against PLHA have been recorded worldwide, some of them in Africa. Some countries have embarked on positive policy formulation as a means of addressing HIV/AIDS-related discrimination. Tanzania has had a component of relating gender relations in its HIV/AIDS education campaign in its policy guidelines.²⁸⁶ The policy further encourages criminalization of the wilful spread of HIV/AIDS.²⁸⁷ Some countries have enacted laws protecting the rights of PLHA. Such countries include Guatemala, which prohibits the administration of blood tests as a requirement to obtain goods and services, access to education, or medical treatment. Under this law blood test results are strictly confidential and discrimination of PLHA is prohibited. Zimbabwe has a program involving commercial sex workers, distribution of condoms, and home-based care in a province severely affected by the pandemic. Likewise, the Russian Federation issued an order instituting special centres for children and pregnant women who are HIV positive in 1999. In 1995 Hong Kong passed the Disability Bill, which bans compulsory testing for HIV/AIDS. In a similar move, the Government of Bolivia in 1996 adopted regulations delineating the rights and duties of healthy, infected, and sick persons. This regulation also established compulsory counselling in all cases of testing and the confidentiality of results. Moreover, discrimination in public services and facilities on the basis of HIV/AIDS is barred.²⁸⁸

9.1.2 Support services intended under Tanzania National Policy

The National Policy on HIV/AIDS²⁸⁹ encourages a multisectoral effort to provide support services to PLHA, widows, and orphans in their communities. The main objective of the policy in this regard is stated to be to provide the legal and social framework for the provision of care and support for those affected by HIV/AIDS, particularly widows and orphans, in mitigating impact of HIV/AIDS. Specifically, the National Policy on HIV/AIDS²⁹⁰ undertakes as follows:

- To promote community sensitization on prevailing laws pertaining to the rights of dependants, care and support of PLHA, widows, and orphans.
- Government to ensure that the policies of all sectors address the rights of surviving dependants.
- To give necessary support and protection to orphans and children in special institutions, including street children and those with disabilities that are at risk of HIV/AIDS infection.
- Both central government and local councils as well as the community to support sibling headed households in a children's rights-friendly manner so as to minimize the impact of HIV/AIDS on their lives.

²⁸⁶ See the draft AIDS Policy, 1995.

²⁸⁷ See the NAP, page 24

²⁸⁸ See the Center For Reproductive Law and Policy, Reproductive Rights, 2000: Moving Forward page 32-36.

²⁸⁹ The National Policy on HIV/AIDS, 2001

²⁹⁰ Id.

An orphan is defined, within the context of the AIDS scourge in Tanzania, as a child between the ages 0–15 years who has lost both parents.²⁹¹

9.1.3 Legal support services

Legal support services include legal counselling so to identify enforceable rights, review options, and choice of action. Legal support is primarily offered in the private sector and is ostensibly unaffordable to most people, particularly those burdened or incapacitated by HIV/AIDS. Such needy people are best served through legal aid. In Tanzania, legal aid is mostly offered by NGOs. Legal aid enables a person to be counselled, advised, and assisted in many forms, often with preparation of pleadings and sometimes represented in court free of charge. The nature and scope of these services depend on the policy and status of the institution concerned. Most legal aid institutions offer their services to women and children. Such institutions include TAWLA, Women's Legal Aid Center (WLAC), Tanzania Media Women Association (TAMWA), and Envirocare, all based in the capital of Dar es Salaam. However, some of these organizations have outreach branches, affiliations with upcountry-based NGOs, and mobile clinics. The few organizations based outside of Dar es Salaam include the Lake Zone Women Lawyers and Kilimanjaro Women's Education and Consultancy.

We know that PLHA are not only women and children. Moreover, they are not the only ones impacted by the pandemic. There are legal situations affecting family members, dependants, and associates on account of HIV/AIDS. To all those who are neither women nor children, the option of legal aid is narrowed down by the paucity of facilities. The few NGOs offering gender-neutral legal aid services include the Tanganyika Law Society (TLS), the National Bar Association and the Legal and Human Rights Center (LHRC). Although the TLS has membership all over Tanzania, the center of activity for both organizations remains in Dar es Salaam. The Faculty of Law at the University of Dar es Salaam has a legal aid program, but it has been inactive in the past few years.

9.2 Employment Laws

It is imperative to state at the outset that all the employment legislation examined herein was enacted before the advent of the AIDS epidemic. The legislation provides equal rights to all people. Nevertheless, some changes in the law are necessary to respond to the call for protecting and respecting the right to work for PLHA because some of the provisions of the legislations, if not interpreted cautiously, may militate against enforceability of these rights. Issues emanating from the right to work, such as contract and security of employment, workmen's compensation, severance allowance, and sick leave benefits, are critically examined below.

9.3 Employment Ordinance, Cap. 366 of the Laws (Revised)²⁹²

The Employment Ordinance, Cap. 366 of the Laws²⁹³ (hereafter referred to as the Ordinance) is an old statute enacted during the colonial era. It amends and consolidates the law relating to labour and regulates conditions of employment for employers and employees. The provisions of the Ordinance apply to departments of government; public, local, and native authorities, and all persons in employment thereof; and all persons in the service of the Crown in the territory, in the

²⁹¹ NAP, 2001 pages 28-29.

²⁹² The Employment Ordinance, Cap. 366 of the Laws (Revised)

²⁹³ The Employment Ordinance, Cap. 366 of the Laws (Revised)

same manner as if they were private employers or employees, as the case may be.²⁹⁴ However, the Ordinance does not apply in relation to the following persons: persons in the naval, military, or air services of the Crown (other than locally engaged civilian employees); members of the Tanganyika Police Force; and Members of the Tanganyika Prison Service.

The Governor in Council may by order in the Gazette exempt any public authority or class of public authorities or any person or class of persons from the operation of this Ordinance or of any provision thereof or of any regulation or order made therein.²⁹⁵

With regard to its general application, the Ordinance provides that no person shall employ any employee and no employee shall be employed under any contract of service except in accordance with the provisions of this Ordinance. Contracts of service may be oral or written contracts.²⁹⁶ On the face of it, the Ordinance does not seem to be discriminatory of PLHA; however, there are a few provisions that require medical examination as a prerequisite condition for employment and may therefore provide loopholes for discrimination against PLHA as shown below.

9.3.1 Medical examination

Save for oral contracts, the Ordinance requires that every employee who enters into a written contract to be examined by a medical officer.²⁹⁷ Wherever it is practicable the employee shall be medically examined and a certificate issued before the attestation of the contract.²⁹⁸ Where it is not possible for the employee to be medically examined before the attestation of the contract, the attesting officer shall endorse the contract to that effect and the employee shall be examined at the earliest possible opportunity.²⁹⁹ Any employee who has been rejected after such examination as is herein before mentioned as physically unfit for the work contemplated by the proposed contract shall be returned to the place of engagement at the expense of the employer or of the recruiter who recruited him, should the employee wish to return.³⁰⁰ If any employer or recruiter shall not within a reasonable time return any employee to the place of engagement, any administrative or labour officer may return such employee to the place of engagement, and any expenses incurred thereby shall be recoverable as a civil debt from the employer or from the recruiter who recruited him.³⁰¹

The aforesaid raise a few issues regarding the rights of PLHA. The provisions of the Ordinance are of general application and have not been amended to cover the rights of people PLHA. As HIV/AIDS is a health condition, which in the long run becomes prone to opportunistic infections, if the law does not intervene to spell out the rights of PLHA, out of sheer ignorance employers may be tempted to include HIV within the scope of medical examination and therefore deem the condition as physically unfit for work. Given that HIV stays in the body long before one becomes unfit for work, obviously the foregoing provisions are not relevant to HIV/AIDS cases and are not in line with the UNAIDS guidelines which require informed consent for HIV test.

This foregoing does not, however, ignore UNAIDS guidelines on the recognition of the right to work and to just and favourable conditions of work. Thus, the right to work entails the right to

²⁹⁴ S. 1(2).

²⁹⁵ S. 1 (3).

²⁹⁶ S. 15 (1).

²⁹⁷ S. 47 (1).

²⁹⁸ S. 47 (2).

²⁹⁹ S. 47 (3).

³⁰⁰ S. 47 (4).

³⁰¹ S. 47 (5).

every person to access to employment without any precondition except the necessary occupational qualifications. It is therefore indisputable that recruitment in certain job conditions such as the army or fire-fighter may involve exceptional necessary occupational qualifications of which voluntary testing for HIV/AIDS needs to be treated with scrutiny.

Employment laws should take cognizance of the UNAIDS guidelines that as with any other illness, PLHA should be provided with reasonable accommodation to be able to continue working as long as possible and, when no longer able to work, be given equal access to existing sickness and disability schemes. The applicant or employee should not be required to disclose his or her HIV status to the employer nor in connection with his or her access to workers' compensation, pension benefits, and health insurance schemes. States' obligations to prevent all forms of discrimination in the workplace, including on the grounds of HIV/AIDS, should extend to the private sector.

In order to conform with HIV/AIDS and human rights international guidelines, the proposed HIV/AIDS employment laws should be mindful of the fact that as part of favourable conditions of work, all employees have the right to safe and healthy working conditions. "In the vast majority of occupations and occupational settings, work does not involve a risk of acquiring or transmitting HIV between workers, from worker to client, or from client to worker." However, where a possibility of transmission does exist in the workplace, such as health care settings, states should take measures to minimize the risk of transmission. In particular, workers in the health sector must be properly trained in universal precautions for avoidance of transmission of infection and be supplied with the means to implement such procedures.

Stakeholders' Views: National Conference

At the National Conference for review of the TAWLA report, participants recommended that the TAWLA report should consider proposing a provision in the employment ordinance that would address mandatory HIV/AIDS testing, for example, in recruitment in the military force, based on the nature of work, which requires physical fitness.

Another issue that was raised during the National Conference was whether in specific cases such as in surgery, there is a legal duty on the surgeon to notify a patient that he is HIV positive to accord a patient the right to make sound choices to consider the risk of transmission posed to his life. Participants received this suggestion with mixed feelings as some of them pointed out that this would infringe medical doctors' and surgeons' right to privacy, whereas others positively supported the view.

9.3.2 Termination of contract

HIV status shall not be a determinant condition that warrants termination of employment contracts. There are three circumstances under which a contract of employment shall be terminated. First is by the expiry of the term for which the contract of employment was made.³⁰² Second is the death of the employee before the expiry of the term for which the contract was made.³⁰³ Third, if owing to sickness or accident the employee is unable to fulfil the contract, the contract may be determined with the consent of an administrative officer or labour officer subject to conditions safeguarding the right of the employee to any wages earned, any deposited wages due to him, any compensation due to him in respect of accident or disease, and his right to

³⁰² S. 51 (1) (a).

³⁰³ S. 51 (1) (b).

repatriation.³⁰⁴ In determining termination of contract due to illness, the administrative officer or labour officer must satisfy himself that the employee has freely consented to the agreement, that his consent has not been obtained by coercion or undue influence or as the result of misrepresentation or mistake, and that all monetary liabilities between the parties have been settled.³⁰⁵ This being the case, the fact that PLHA at some stage are vulnerable to opportunistic infections employers should not use this loophole to terminate contracts on account of illness. Where an illness determines termination of employment contract, PLHA should be given equal treatment with other employees who are not affected with the virus. This is in line with UNAIDS guidelines that provide equal rights to work for PLHA.

9.3.3 Care and welfare

The Ordinance provides that every employer shall at his own expense provide for his employees and members of their families living with them medical aid in accordance with such scale as may be prescribed.³⁰⁶ However, in so far as the provision of such medical aid for the members of the employee's family is concerned, this obligation shall only extend to cases where the employee and his family are resident on the employer's property with the knowledge and consent of the employer.³⁰⁷ Any employer who fails to comply with any of this provision shall commit an offence against this Ordinance.³⁰⁸

A fact that cannot be simply ignored in the wake of AIDS is that medical expenses for treating opportunistic infections have increased. Employers have to meet these expenses in discharging their duty to observe the human rights of PLHA. This duty should be met and no employer should terminate a PLHA employment contract to evade providing medical treatment. Of particular interest is whether the development of law in relation to the rights of PLHA should be expanded to encompass provision of antiretroviral drugs to situations where employees, at their own volition, decide to come out in the open and disclose their status. Since by virtue of the Ordinance the employers have to provide for medical treatment of the employee's family as well, this implies that all members of the employee's family who are seropositive will have the right to be provided with antiretroviral drugs. As these drugs are very expensive, the law needs to devise a mechanism to deal with this issue appropriately.

It should be noted as stated above that employers are obliged to pay for medical treatment for employees who reside on employer's property. This provision leaves a lot to be desired as to whether the material conditions to date provide an enabling environment for employees to live on employers' properties. The Ordinance came in force in 1956 and should be treated with caution when determining the rights of PLHA so that these rights are met accurately. The gap between the time when the Ordinance came in force and the prevailing HIV/AIDS conditions need to be bridged for optimum results.

9.3.4 Burial of deceased employee and dependants

Every employer is required to provide decent interment for any employee resident at a place of employment and for any member of his family living with him dying during a period of

³⁰⁴ S. 52.

³⁰⁵ S. 52 (2) (a) and (b).

³⁰⁶ S. 100 (1).

³⁰⁷ Id.

³⁰⁸ S. 100 (2).

employment unless a relative or friend undertakes such duty.³⁰⁹ Any employer who fails to comply with this provision shall commit an offence against this Ordinance and shall be liable upon conviction to a fine not exceeding two thousand shillings.³¹⁰

The AIDS epidemic has led to the proliferation of burial expenses as many lives are continuously lost until a cure is found. However burdensome it may be to the employers to cater for burial expenses of employees and their family members, equal treatment should be given to all deceased employees alike without discrimination as to their HIV status. The Ordinance seems to be lagging behind time in terms of the fine of two thousand shillings placed on an employer who fails to abide by the law because it is not realistic.

9.4 The Security of Employment Act, 1964³¹¹

The Security of Employment Act, 1964³¹² provides for the establishment of Workers' Committees in certain businesses and undertakings to restrict the powers of employers to dismiss employees summarily and otherwise in relation to the discipline of employees, to provide for payment of additional compensation on the occasion of the termination of employment except in specified circumstances, to amend the law relating to employment and severance allowance, and for matters connected therewith and incidental thereto.

The act protects the right of every citizen to work, and although not explicitly stated, this right applies equally to PLHA. Save for the breaches of the Disciplinary Code, and subject to the conditions prescribed under the act, no employer shall summarily dismiss any employee.³¹³ Thus, an employer should not summarily dismiss an employee on grounds of contracting HIV/AIDS if the employee abides by the Disciplinary Code and labour laws. When an employer proposes to terminate the employment of any employee, he shall inform the employee of the circumstances in and on account of which such employees' employment is being terminated.³¹⁴ An employee who has been notified of his employer's intention to terminate his employment or whose employment has been terminated by his employer, and who claims the statutory compensation, may report the matter to the committee or, if there is no committee or the committee is suspended, to the local representative of the union.³¹⁵ No claims for compensation to employee may arise where the termination of employment was caused by the absence from work on account of illness beyond the time permitted by any law or regulation or by any collective agreement or contract of service under which he is entitled to sickness benefits from his employer.³¹⁶ PLHA are therefore implicitly required to observe sick leaves commensurate to labour laws short of which will be disqualified from claims for compensation in case their contract of employment is terminated.

Conclusively, the act is mute on security of employment in relation to PLHA as it is of general application. In order to oblige employers to observe human rights of PLHA, it is important that the act be revised to explicitly protect those rights.

³⁰⁹ S. 102 (1).

³¹⁰ S. 102 (2).

³¹¹ The Security of Employment Act, 1964

³¹² The Security of Employment Act, 1964

³¹³ S. 19 (a).

³¹⁴ S. 37.

³¹⁵ S. 38(1)(a).

³¹⁶ S. 39 (2) (i).

9.5 The Regulations of Terms of Employment (Entitlement of Benefits) Order 1968³¹⁷

Pursuant to the G. N. 452 of 30th December, 1968, the government set forth minimum terms of fringe benefits, which in this context include, inter alia, issues related to paid sick leave. As opportunistic infections are common in AIDS cases, issues related to the right of paid sick leave gain particular importance at work places.

The order provides for three circumstances under which an employee qualifies for sick leave:

- The employee must have completed at least three months' continuous employment with the same employer;
- The illness must be certified by a registered Medical Practitioner, a Medical Officer, or any other suitably qualified person who may be acceptable to the employer; and
- The illness must not be the result of the employee's own negligence or gross misconduct.

An employee who falls sick is required to make every effort to notify his employer at once, and the employer should, if possible, issue him with a sick sheet. The employee shall be liable to disciplinary action under relevant provisions of the Security of Employment Act, 1964³¹⁸ if he fails to produce medical certificates in support of an alleged illness.

An employee who has served up to three years service is entitled to one month's full pay of sick leave, followed by one month's half pay. Where an employee has served four to six years service, he or she is entitled to a sick leave with one month's full pay and subsequent one and a half months' pay. Over seven years of service an employee is entitled to one month's full pay, followed by two months' half pay. The sick leave applies equally to PLHA.

9.6 Workmen's Compensation Ordinance, Cap. 263³¹⁹

The Workmen's Compensation Ordinance, Cap. 263³²⁰ (hereafter referred to as the Ordinance) provide for compensation to workmen for injuries suffered in the course of their employment. Pursuant to the Ordinance, the expression 'workman' means any person who has, either before or after the commencement of the ordinance, entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour or otherwise; whether the contract is express or implied, is oral or in writing; whether the remuneration is calculated by time or by work done; and whether by the day, week, month, or any longer period.³²¹

The following persons are however excepted from the definition of 'workman':³²²

- any person employed otherwise than by way of manual labor whose earnings exceed sixteen thousand eight hundred shillings a year;
- a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, not being a person employed for the purposes of any game or recreation and engaged or paid through a club;

³¹⁷ The Regulations of Terms of Employment (Entitlement of Benefits) Order 1968

³¹⁸ The Security of Employment Act, 1964

³¹⁹ The Workman's Compensation Ordinance, Cap. 263

³²⁰ The Workmen's Compensation Ordinance, Cap. 263

³²¹ S. 2 (1).

³²² Id.

- an outworker;
- a tribute;
- a member of the employer's family dwelling in the employer's house or the cartilage thereof; or
- any class of persons whom the Governor in Council may by order declare not to be workmen for the purposes of the Ordinance.

Although the rights of PLHA in respect of workmen's compensation are not excepted from the scope of application of the Ordinance, the provisions of the Ordinance do not address issues relevant to HIV/AIDS injuries suffered in the course of employment.³²³ Thus, in attempting to draft laws of relevant application to HIV/AIDS compensatory matters, a few complications may be experienced in determining HIV/AIDS infection arising in the course of employment.

The most crucial problem is to establish a linkage of actual infection that arose in the course of employment. Most of the people in Tanzania have not established a culture of going for a voluntary test for HIV infection. Given the nature of the injury it will be discerned that HIV/AIDS develops through various stages before a workman knows that he is infected. This being the case, proving injury of HIV infection in the course of employment may be a problem. This should be distinguished from the issue as to whether exposure to transmission is a determinant factor of HIV infection, because by virtue of the law, injury which warrants workman's compensation must have been suffered in the course of employment and not otherwise.

Another problem is one of ascertaining as to what stage of HIV status should one lodge claims for compensation and which specific compensation should be claimed. It is clear that HIV infection in itself is a permanent injury as there is no cure. It may also at some stage be termed as a partial incapacity in the case of opportunistic infections such as tuberculosis, meningitis, or paralysis, and in its final stage may be a total incapacity due to fully blown AIDS condition which results in a permanent bed-ridden state. It may take many years before one qualifies to claim specific compensation. As shown below, one good example is to test the provisions of the Ordinance, which provide for compensation for injury to get a clear reflection of the problems that may arise in drafting legislation for workman's compensation that will take into account specific compensation claims arising out of HIV/AIDS issues.

9.6.1 Compensation for injury

The Ordinance provides five circumstances that justify compensation for injury, namely:

- employer's liability for compensation for death or incapacity resulting from accident;
- compensation in fatal cases;
- compensation in the case of permanent total incapacity;
- compensation in the case of permanent partial incapacity; and
- compensation in the case of temporary incapacity.

It is uncommon for death or permanent incapacity to occur immediately after HIV transmission as it takes a long time before one becomes fully blown with AIDS, followed by incapacitation and the ultimate death. Unless the employee keeps records of the period of infection and the employer is aware of it, then the employee may lodge claims in accordance with the development of his

³²³ See Second Schedule and Third Schedule of the Ordinance.

physical conditions in case of permanent incapacity or death. Enforceability of this provision may pose problems given the nature of HIV/AIDS condition and its stages of development.

Like compensation for accidents that cause death, enforceability of provisions for injuries in fatal cases that cause death is difficult in HIV/AIDS cases unless infection is followed by a fatal opportunistic illness that causes death immediately, which is very uncommon.

The Ordinance provides that where permanent total incapacity results from the injury, the amount of compensation shall be a sum equal to forty-eight months' earnings,³²⁴ provided that in no case shall the amount of compensation in respect of permanent total incapacity be neither greater than 34,000 shillings nor less than 2,000 shillings. It is also provided that where an injury results in permanent total incapacity of such a nature that the injured workman must have constant help of another person, additional compensation shall be paid amounting to one quarter of the amount which is otherwise payable under this section.³²⁵ It is indisputable that HIV infection leads to a permanent condition of incurable infection, at which some stage one becomes totally incapacitated and therefore qualifying for compensation. The law needs to be improved to appropriately accommodate HIV/AIDS health conditions, and the compensatory amount should be realistic given the nature of the injury suffered. The compensatory amount stipulated in the Ordinance lags behind socioeconomic conditions of the country. Employers should be made to pay realistic figures of compensation as well as provision of antiretroviral drugs as a package of compensation. The figures should tally with the prevailing economy to enable PLHA live positively.

By virtue of the Ordinance, where temporary incapacity, whether total or partial, results from the injury, the compensation shall be the periodical payments hereinafter mentioned payable at such intervals as may be agreed upon or as the court may order, or a lump sum calculated accordingly having regard to the probable duration, and probable changes to the degree, of the incapacity. Such periodical payments shall be a monthly payment of half the difference between the monthly earnings that he was earning at the time of the accident and the monthly earnings that he is earning or is capable of earning in some suitable employment or business after the accident, provided that:³²⁶

- no periodical payment under the provisions of this section shall be at a higher rate than five hundred and forty shillings a month;
- neither the aggregate of the periodical payments for the lump sum payable under the provisions of this subsection shall exceed the lump sum which would be payable in respect of the same degree of incapacity under the provisions of subsection (1) of Section 7 or Section 8, as the case may be, if the incapacity were permanent;
- the period covered by hospitalization or absence from duty certified necessary by a medical practitioner shall be regarded as a period of temporary total incapacity irrespective of the outcome of the injury and any period subsequent thereto but preceding final assessment of disability shall be regarded as a period of temporary partial incapacity, both periods being continuous with each other, variations in payments notwithstanding, and the maximum duration of periodical payments under this section shall not exceed 96 months;

³²⁴ S. 7 (1)

³²⁵ S. 7 (2)

³²⁶ S. 9 (1).

- in the event of death or permanent incapacity following after temporary incapacity, no deduction shall be made from the lump sum payable under Section 6, 7, or 8 by reason of periodical payments or a lump sum payment having been made under this section.

The time frame for lodging claims for compensation for temporary incapacity needs to be well scrutinized in HIV/AIDS cases, and the linkage between temporary incapacity and HIV/AIDS infection needs to be well defined. The compensatory amount needs to be revised.

9.6.2 Requirements as to notice of accident and claim for compensation

Proceedings for the recovery under the Ordinance of compensation for an injury shall not be maintainable unless notice of the accident in the prescribed form has been given by or on behalf of the workman as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury or, in the case of death, within six months from the time of death.³²⁷

A problem arises here because of the time frame for notice of accident and claim for compensation. The window period for determining HIV infection is three to six months. In case one has reasonable grounds to suspect that he has been infected in some of the obvious cases, such as a surgeon who accidentally contracts HIV in the course of conducting surgery, it may be practical to give notice of accident within six months. In some other cases it may not be easy to determine infection unless one starts developing symptoms and relating them to his work condition. For instance, it is quite common for housekeeping employees in hotels and guest houses to encounter recklessly disposed used condoms and needles which expose body fluids susceptible to HIV/AIDS infection. Another example is that in accordance with the Tanzanian culture of washing the deceased's body before burial, it is common for mortuary attendants or embalmers to be exposed to HIV infection from the body fluids of the deceased while washing the deceased's body. Employees working under such premises may be infected and may take some time before they realize having been infected. At what stages of HIV infection should they be required to give notice of accident and claim for compensation?

Conclusively, as mentioned before, the Workmen's Compensation Ordinance³²⁸ does not focus on HIV/AIDS problems and needs to be revised to contain the rights of workmen who suffer injuries related to HIV/AIDS transmission in the course of their employment.

Stakeholders' Views: National Conference

An issue was raised during the National Conference for review of the TAWLA report, on how health workers could establish grounds for a claim for compensation for HIV infection acquired in the course of performing a medical duty since, in some cases, the health worker may have contracted HIV through other means.

9.7 Severance Allowance Act, 1962³²⁹

The Severance Allowance Act, 1962³³⁰ provides for the payment of allowances to employees on the termination of their employment in certain circumstances. The act treats all employees

³²⁷ S. 13

³²⁸ The Workman's Compensation Ordinance, Cap. 263

³²⁹ The Severance Allowance Act, 1962

equally, and there are no provisions of the act that seem to imply discrimination against PLHA. This notwithstanding, like all labour laws, the act is of general application and does not mention circumstances surrounding HIV/AIDS related issues.

There are however, a few provisions related to health conditions that may affect the rights of PLHA for various reasons. For instance, it is stated in the act that where the employment is lawfully terminated by the employee, or the employee contract of service expires and he refuses to renew the same on account of his incapacity due to illness, the employer shall pay to the employee a severance allowance. Caution should be taken so that PLHA do not invoke this provision simply because of fear of stigmatization in the workplace unless they are incapacitated by illness. The status of HIV does not render one incapacitated to work. HIV is a health condition whereby a person is physically fit to lead a normal life, and therefore his termination of contract of employment may not justifiably fall under the ambit of circumstance in which severance allowance is payable under the act. For avoidance of doubts, the act declares that where an employee who is not incapacitated by reason of illness gives notice to terminate or terminates any oral contract of service or informs his employer that he does not intend to enter into a further contract of service, the employer shall not be liable to pay any severance allowance to or in respect of that employee, unless he dies before the notice or the current contract of service.

Where, on the cessation of any employee's employment, an employer pays to the employee or to a dependant (within the meaning of that term in the Workmen's Compensation Ordinance³³¹) any compensation under the Workmen's Compensation Ordinance³³² on account of the death or permanent total incapacity of the employee, the employer shall be exempt from liability to pay severance allowance to or in respect of such employee.

There is a need for enunciating specific provisions in the act³³³ that will address HIV/AIDS issue with great precision.

Recommendations on Protection of Rights of PLHA with special focus on prevention of stigmatization and discrimination:

- Employment Ordinance, Cap. 366 of the laws (Revised)
 - Medical Examination: S.47 to be amended to state explicitly that HIV/AIDS should not be a condition for one to qualify for employment and an offence be created for breach of this condition.
 - Termination of Contract: Amend S.52 to state explicitly that HIV status should not be a determinant condition that warrants termination of employment contracts.
 - Care and Welfare: S.100(1) PLHA employees should be accorded equal treatment on medical aid as other employees under S. 100 (1). The section should be explicitly amended to include an HIV component. If possible, provision of antiretrovirals should be included. An offence be created for discriminatory treatment of employees on the basis of one's HIV status.
 - Burial of Deceased Employee and Dependents: S.102(1) to be amended to give equal treatment to deceased PLHA.
- The Security of Employment Act, 1964
 - The legislation to be amended to include a section that stipulates clearly that an

³³⁰ The Severance Allowance Act, 1962

³³¹ The Workman's Compensation Ordinance, Cap. 263

³³² Id.

³³³ The Severance Allowance Act, 1962

employer should not summarily dismiss an employee on grounds of contracting HIV/AIDS if the employee abides by the disciplinary code and the labour laws.

- Workman's Compensation Ordinance Cap. 263
 - The Second and Third schedule of the Ordinance should be amended to include rights of PLHA on issues relevant to HIV/AIDS injuries suffered in the course of employment (e.g., health care providers who acquire HIV while attending to patient care). Other issues pertain to compensation for injury, requirements as to notice of accident, and eligibility for compensation.

10. Legislation Impacting Persons with Disabilities: Recommended Legislative Changes

The rights of people with disabilities are not covered under a unified legislation; they are, however, spelt out in several pieces of legislation that provide for various situations relevant to people with disabilities. Two major statutes directly deal with the rights of people with disabilities, namely: the Disabled Persons (Employment) Act, 1982³³⁴ and the Disabled Persons (Care and Maintenance) Act, 1982.³³⁵

The above pieces of legislation protect various rights of people with disabilities on employment, care, and maintenance issues. Despite this attempt, the law is not exhaustive because health matters are not referred to and the statutes are silent on HIV/AIDS/STDs preventive issues. Consequently, it is impossible to safeguard the rights of people with disabilities against the effects of the epidemic on the basis of these laws. There are no provisions that explicitly or by implication provide for protection against transmission of diseases dangerous to life. Likewise, rights of people with disabilities who are also infected with HIV/AIDS are not stipulated. It is essential that the law be revised to enunciate provisions on HIV/AIDS/STDs prevention that will protect people with disabilities against HIV transmission and safeguard the rights of those infected with the virus.

Another important issue to be considered is whether legislation should be extended to cover the rights of PLHA who have been physically disabled by the disease. It is indisputable that fully blown AIDS is a health condition that may in some instances lead to physical disability. Such disability has far-reaching implications on various issues affecting the rights of PLHA. For instance, issues related to employment rights, which if invoked under the Disabled Persons (Employment) Act,³³⁶ may be enforceable.

Recommendation on the Disabled Persons (Employment) Act, 1982 and the Disabled Persons (Care and Maintenance) Act, 1982: Both statutes are mute on provisions for HIV prevention and care for disabled people. Amendment is necessary to include such provisions, which recognize HIV as a work-related disability where it is proved that an employee was infected in the course of his employment.

³³⁴ The Disabled Persons (Employment) Act, 1982

³³⁵ The Disabled Persons (Care and Maintenance) Act, 1982

³³⁶ The Disabled Persons (Employment) Act, 1982

11. Legislation Impacting Immigration, Refugees: Recommended Legislative Changes

The following major statutes govern the immigration and refugee laws:

11.1 The Immigration Act, No. 7 (1995)³³⁷

The Immigration Act, No. 7 (1995)³³⁸ is an act to repeal the Immigration Act, 1972 and the Immigration Control Decree of Zanzibar and to enact in one law provisions for the control of immigration into the United Republic and for matters incidental to or connected with immigration.

The act is silent on HIV/AIDS issues, and it may be said that HIV/AIDS status is not a relevant condition for immigration rights in Tanzania. However, the only ambiguous provision is Section 10(c)(i), which defines infectious disease as an element that constitutes a condition for prohibited immigrants. The expression “prohibited immigrant” means, according to the act, any person who, if he seeks to enter Tanzania is, or if he has entered Tanzania was at the time of his entry, a person who is certified by a medical practitioner to be suffering from a contagious or infectious disease that makes or would make his presence in Tanzania dangerous to the public. Taken on face value, the provision can be mistakenly construed to encompass HIV/AIDS since it is an infectious health condition. Nevertheless, this provision should not be construed to mean that HIV/AIDS, being an infectious disease, is potentially dangerous to the public. Under normal circumstances HIV/AIDS status alone does not render a person dangerous to the public; rather, a PLHA seeking immigration rights becomes dangerous to public when, after his entry in the country, he wilfully transmits the virus. What is required of the law is to state explicitly that a person should not be denied entry in Tanzania on grounds of HIV/AIDS status. Accordingly, in order to protect the public from being victims of wilful transmission of the virus, the law should create an offence for any person who, upon entering the country, wilfully transmits HIV/AIDS. Similar situations have occurred in other countries, illustrated below are such examples:

In Sweden in 1998, in a case that received virtually no international attention, an HIV positive Iranian immigrant was wanted in connection with having sex with what was reported to be more than 100 women. Police had raided the man’s apartment in connection with a rape charge and discovered a notebook containing the names of 200 Swedish women with notations on their sexual performances. Police published the man’s name and photograph in violation of laws protecting privacy. Swedish law provides a one to ten year sentence for knowingly infecting others with HIV.³³⁹

A Finnish court sentenced an American to 14 years in prison for 17 counts of attempted manslaughter when he was determined to have had unprotected sex even though he knew that he had HIV. Prosecutors charged that he had sex with more than 100 women. Five of them turned out to be HIV positive. The sentence was one of the harshest, short of life, that could have been imposed under Finnish law.³⁴⁰

³³⁷ The Immigration Act, No. 7 (1995)

³³⁸ The Immigration Act, No. 7 (1995)

³³⁹ See Thomas Shevroy, Op.Cit.

³⁴⁰ Id.

Stakeholders' Views: Intergovernmental Meeting and National Conference

During stakeholders meetings for review of the TAWLA document, immigration law was another controversial area that raised opposing views, the majority supporting the opinion that HIV/AIDS should be made a condition for one to qualify for immigration status. It was observed by stakeholders that several countries, for example, West Germany, Russia, Cuba, and India, are exercising mandatory testing of HIV to people who apply for migrant status. It was suggested that Tanzania should replicate those laws to save its meager resources for caring for its own PLHA rather than waste resources to immigrants who pose a health risk to our community.

Nevertheless, other stakeholders were of the opinion that refusal of entry for PLHA and mandatory testing would not only negate basic human rights of the migrants but would also deny Tanzania the much needed skills and investments they bring in. It was observed that the spread of HIV, unlike other infectious diseases, does not pose an immediate infection through air, water, food, etc. Additionally, Tanzania has neither resources nor facilities to carry out mandatory testing for all immigrants.

11.2 The Refugee Act, No. 9 (1998)³⁴¹

Protection of refugees from HIV/AIDS may be implied under Section 18(2)(c) of the Refugee Act, No. 9 (1998).³⁴² This provision empowers the director or settlement officer to give such orders or directions, either orally or in writing, to any asylum seeker or refugee as may be necessary or expedient to ensure that all proper precautions are taken to preserve the health and well being of the asylum seekers or refugees. The act needs a more effective provision to address HIV/AIDS issues.

Further, the act stipulates for offences against peace and good order and those that violate lawful order, but fails to address sexual offences. Given the risk of gender- and sexual-based violence to which refugees are exposed, it is quite reasonable to presume that unprotected sexual practices are common amongst the refugee population. The law should stipulate offences related to all these issues.

The spread of HIV/AIDS within refugee communities is not limited to sexual transmission alone; use of unsterilized needles both for medical treatment and illegal drug use cannot be ruled out. HIV/AIDS prevention education programs are therefore necessary in refugee camps and settlements. These education programs must be designed in the language best understood by refugees and must address all modes of transmission. By virtue of the fact that the act recognizes the importance of education for refugees, HIV/AIDS prevention programs may well be enshrined within the ambit of education provision.³⁴³

The law must lend an enabling environment to positive behavioural change by empowering refugees to improve their social and legal status and by providing them with a participatory role approach to designing and implementing programs. A major snag is poverty as most of the refugee programs depend on external donor funding.

³⁴¹ The Refugee Act, No. 9 (1998)

³⁴² The Refugees Act, No. 9 (1998)

³⁴³ S. 31.

Recommendations:

- The Immigration Act, 1995.
 - Amend S.10(c)(i) to clearly state that HIV/AIDS should not constitute a condition for prohibiting immigrants.
- The Refugee Act 1998.
 - Amend S.18(2)(c) to address HIV/AIDS issues. This provision empowers the director or settlement officer to give such orders or directives, either orally or in writing, to any asylum seeker or refugee as may be necessary or expedient to ensure that all proper precautions are taken to preserve the health and well being of the asylum seekers or refugees.
 - Also amend S.31 to include importance of HIV/AIDS prevention and care education in refugee camps.

12. Legislation Impacting Criminal Justice and Correctional Systems: Recommended Legislative Changes

The following pieces of legislation have been assessed to evaluate how criminal laws and correctional systems are equipped or may be invoked to prevent the spread of HIV/AIDS in Tanzania:

- The Penal Code, Cap. 16³⁴⁴
- The Sexual Offences (Special Provisions) Act, 1998³⁴⁵
- The Prisons Act, 1967³⁴⁶
- The Criminal Procedure Act, 1985³⁴⁷
- The Evidence Act, 1967³⁴⁸

These enactments generally address issues related to health, prevention of spread of a disease, offences that endanger life or cause bodily harm, and sexual offences that may be of relevant application to prevention of HIV/AIDS transmission issues.

To make it more effective, the Penal Code must be well equipped with provisions that explicitly refer to HIV/AIDS issues. Having studied court decisions and arguments that were put forth, there are reasons to believe that Tanzania can come up with a comprehensive legislation on HIV/AIDS transmission offences.

So far, Tanzanian courts have not adjudicated on HIV/AIDS issues. In examining case law, this legal review has cited other countries' court decisions of particular relevance to the provisions of Tanzanian statutes. These court decisions will help to show the direction in which HIV/AIDS law is heading should the pertinent legislation be invoked in determining criminal and correctional system issues. Although not legally binding in Tanzanian courts, cases show judicial trends.

Since court decisions from the cited cases are not legally binding to Tanzania's legal system, they are of particular relevance in this context on the grounds that they are generally considered to be of highly persuasive effect. Although these cases are not well known in the Tanzanian legal system and public health law, they do add value to the review of Tanzanian law. For ease of reference, the cases are included in Annex 4, to which reference is made in the following commentary.

12.1 The Penal Code Cap. 16³⁴⁹

Issues relevant to HIV/AIDS exposure/transmission, though not stated explicitly under the Penal Code, are generally implied under the following chapters:

³⁴⁴ The Penal Code, Cap. 16

³⁴⁵ The Sexual Offences (Special Provisions) Act, 1998

³⁴⁶ The Prisons Act, 1967

³⁴⁷ The Criminal Procedure Act, No. 9 (1985)

³⁴⁸ The Evidence Act, No. 6 (1967) (Revised)

³⁴⁹ The Penal Code, Cap. 16

Chapter XVII. Nuisance and offences against health and convenience

Chapter XVII of the Penal Code³⁵⁰ applies to nuisance and offences against health and convenience.³⁵¹ Whereas Section 179 provides for *negligent acts* likely to spread infection, Section 170 provides for an *offence of common nuisance* by omission of discharging a legal duty thereby causing common injury.³⁵²

Negligent act likely to spread infection. S.179 of the Tanzania Penal Code³⁵³ specifically deems an offence the act of spreading infection of any disease dangerous to life. It states that:

Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanour.

Although the provision does not explicitly mention HIV/AIDS infection, it is of general application; therefore, situations of HIV/AIDS transmission are relevantly implied therein. It contains two specific elements: first is an element of a criminally negligent manner of a person who does an act knowingly or has reason to believe to be likely to spread the infection of any disease; second is an element of the consequential bodily harm he caused. Reference to jurisprudence on other jurisdictions is considered useful at this point. (See discussion of Regina v. Mercer (Canada) in Annex 4).

Common nuisance. S.170 of the Penal Code³⁵⁴ provides that:

Any person who does an act not authorized by law or omits to discharge a legal duty and thereby causes any common injury or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a “common nuisance”, and is liable to imprisonment for one year.

The provision states further that,

It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences.

By virtue of the foregoing provision, it could be argued that the provision provides for a legal duty on the individuals not to cause common injury to the public in the exercise of common rights. The provision could be viewed in the following situations. First, it calls for partner notification of HIV status in the case of sexual relationship so that one does not cause common injury to another. The second situation may apply to medical practitioners as well to observe their legal duty of not causing common injury in handling blood safety in case of administering a blood

³⁵⁰ The Penal Code, Cap. 16

³⁵¹ Sections 179 and 170.

³⁵² Cited in Tungaraza, Maria. 1996. “Customary Sexual Practices and the national Policy on HIV/AIDS.” Washington, D.C.: Georgetown University.

³⁵³ The Penal Code, Cap. 16

³⁵⁴ Id.

transfusion, to ensure sterilization of medical equipment when attending patients, and to ensure safety of the transplant of internal organs (See discussion of Regina v. Ssenyonga (Canada) in Annex 4).

In rebutting the charge of common nuisance, the court held that the accused did not offer himself to the general public. The evidence tendered was of sexual relationships with specific individuals with whom the accused had apparently developed an attachment over time. It is a fact that the complainants were members of the public, but it could not be accepted, from a legal perspective, that they represented the community as a whole.

The above court decision could be distinguished from the Penal Code in that under the Penal Code,³⁵⁵ Ssenyonga would have been convicted on the charge of common nuisance. The grounds for conviction being that it is immaterial under S.170 that the act or omission complained of is convenient to a larger public than it inconveniences.

Chapter XXII. Offences endangering life or health

Chapter XXII of the Penal Code³⁵⁶ deals with offences endangering life or health wherein any person who unlawfully does grievous harm to another commits an offence. It is stated that:

Any person who unlawfully does grievous harm to another is guilty of a felony, and is liable to imprisonment for seven years.³⁵⁷

What constitutes grievous bodily harm has been defined under Section 5 of the Penal Code³⁵⁸ as any harm that amounts to a maim or dangerous harm, seriously or permanently injures health or is likely to injure health, or extends to permanent disfigurement or to any permanent serious injury or to any external organ, member, or sense. (See discussion of R v. Seuri (Canada); R. v. Mercer (Canada) in Annex 4).

Distinguishing this case from Gilbert v. R., it is discernible that if the court arrives at a decision different from the doctor's testimony on whether HIV caused grievous bodily harm, there is a likely danger of arriving at unjust decisions. The question of grievous bodily harm depends on the stage when the charge was brought because some other factors may have accelerated bodily harm. Hence, seropositive women with infants who are HIV positive may face undue course of justice if grievous bodily harm is aggravated by blood transfusion or some other external factors, such as unsterilized needles or syringes used when providing medical care to the child.

HIV may be viewed as a noxious thing which when administered to or caused to be taken by any person endangers life and causes some grievous harm. Any person who unlawfully and with intent to injure or annoy another causes any poison or noxious thing to be administered to, or taken by, any person, and thereby endangers his life, or does him some grievous harm, is guilty of a felony and is liable to imprisonment for fourteen years.³⁵⁹

It is stipulated further that any person who unlawfully wounds another or unlawfully and with intent to injure or annoy any person, causes any poison or other noxious thing to be administered

³⁵⁵ The Penal Code, Cap. 16

³⁵⁶ Id.

³⁵⁷ Section 225

³⁵⁸ Section 5

³⁵⁹ Section 227

to, or taken by any person, is guilty of a misdemeanour, and is liable to imprisonment for three years.³⁶⁰

Chapter XXIV. Assault

Under the Penal Code,³⁶¹ the transmission of HIV through sexual acts may be termed as offences of assault occasioning actual bodily harm. Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour, and is liable to imprisonment for five years.³⁶² (See discussion of R v. Ssenyonga in Annex 4).

Chapter XXIII. Criminal recklessness and negligence

The risk of HIV transmissions through routine use of surgical, dental, and skin piercing instrument exists. Unsterilized dental, surgical and cosmetic instruments and equipment pose a very definite risk that can be reduced by proper sterilization.

The position of the law in cases involving transmission of HIV through invasive and non-invasive skin penetration in surgical, dental, and cosmetic procedures is well defined under the Penal Code.³⁶³ The law provides that:

Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person gives medical or surgical treatment to any person whom he has undertaken to treat is guilty of a misdemeanour.³⁶⁴

Therefore, surgical and dental practitioners who do not ensure sterilization of their surgical equipment and cause transmission of HIV/STI or other diseases to patients are liable for punishment. A case of similar charges has been tested in Louisiana Appeals Court (See R. v. Schmidt and State v. Caine in Annex 4).

Examining the foregoing case (R. v. Schmidt) within the context of Section 233(e) of the Penal Code,³⁶⁵ it is clearly discernible that the case fits well therein; the only distinction is that, whereas Section 233(e) of the Penal Code³⁶⁶ deems the offence a misdemeanour, the Louisiana Appeals Court held conviction on charges of attempted second degree murder.

Traditional birth attendants, traditional healers who conduct circumcision and FGM, beauty clinicians, hair saloon owners, jewellers who perform ear piercing, tattoo decorators, and illegal drug users may pose a high risk of HIV transmission by using unsterilized equipment. Use of unsterilized equipment, which endangers human life, is liable to punishment. It is provided under the Penal Code that:

Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any other person dispenses, supplies, sells, administers,

³⁶⁰ Section 228

³⁶¹ The Penal Code, Cap. 16

³⁶² Section 241.

³⁶³ The Penal Code, Cap. 16

³⁶⁴ Section 233 (e).

³⁶⁵ The Penal Code, Cap. 16

³⁶⁶ The Penal Code, Cap. 16

or gives away any medicine or poisonous or dangerous matter is guilty of a misdemeanour.³⁶⁷

As such, any person who unlawfully does any act, or omits to do any act which it is his duty to do, not being an act or omission specified in the preceding section, by which act or omission harm is caused to any person, is guilty of a misdemeanour and is liable to imprisonment for six months.³⁶⁸

Since breach of the pertinent legal provision is a misdemeanour offence, the provision is not an effective intervention strategy for the prevention of the spread of AIDS, compared to the fatal injury the breach causes to the body. For the foregoing provision to be effective, a tougher punishment needs to be imposed.

Section 233(e) of the Penal Code³⁶⁹ differs with the UNAIDS guidelines, especially on the grounds of legalizing safe use of needles and syringes for illegal drug users. According to UNAIDS International Guidelines on HIV/AIDS and Human Rights, criminal law should not be an impediment to measures taken by states to reduce the risk of HIV transmission among injecting drug users and to provide HIV-related care and treatment for injecting drug users. Criminal law should be reviewed to consider the authorization or legalization and promotion of needle and syringe exchange programmes. It is hereby asserted that Tanzania is currently waging a war against illegal drug use; as such, the question of legalizing sterilized needles and syringes for safe injecting of illegal drug users does not arise. This fact may contravene Tanzanian norms and values.

Chapter XV. Offences against morality

Unprotected sexual acts are amongst factors that lead to exposure/transmission of HIV. By virtue of specific offences against morality, the Penal Code³⁷⁰ prohibits specific sexual activities between consenting adults in private, such as homosexuality and sex work or prostitution. This being the law, issues such as whether the legislation regulates occupational health and safety in the sex industry to require safer sex practices, or evidentiary immunity for carrying condoms do not arise. Likewise, HIV/AIDS legal issues associated with safe sexual practices in brothels or homosexuality do not arise. Whereas brothels are prohibited under Section 148, homosexuality is deemed a felony under Section 157. Quite apart from the Penal Code,³⁷¹ it is an abomination by virtue of Tanzanian cultural norms to advocate for such issues. Although the UNAIDS International Guidelines on HIV/AIDS and Human Rights provide that criminal law prohibiting sexual acts (including adultery, sodomy, fornication, and commercial sexual encounters) between consenting adults in private should be reviewed with the aim of repeal and should not be allowed to impede provisions of HIV/AIDS prevention and care services, it is important to note that this guideline is not in line with Tanzanian values and norms.

As shown below, some of the sexual offences under the Penal Code³⁷² have been repealed or amended by the Sexual Offences (Special Provisions) Act, 1998. These offences include rape, sexual exploitation of children, and procurement for prostitution.

³⁶⁷ Section 233 (f).

³⁶⁸ Section 234.

³⁶⁹ The Penal Code, Cap. 16

³⁷⁰ The Penal Code, Cap. 16

³⁷¹ The Penal Code, Cap. 16

³⁷² The Penal Code, Cap. 16

The Sexual Offences (Special Provisions) Act, 1998

The Sexual Offences (Special Provisions) Act, 1998³⁷³ aims at protecting women and children against sexual exploitation. By making rape offences liable to punishment and imposing severe punishment for offences of sexual exploitation of children, trafficking of person, procurement for prostitution, and procuring defilement, the legislation to some extent has provided for a protection mechanism to women and children against sexual abuse and exploitation, which puts them at risk of being infected by HIV. It is important to note, however, that in rape cases, court decisions have tended to distinguish between an act of rape and an act of transmitting HIV. On the latter, courts have looked more on intent. Hence, these issues should be carefully scrutinized when enacting legislation on HIV/AIDS related to sexual offences.

The offence of rape. By making rape offences liable to life imprisonment³⁷⁴ and by imposing severe punishment to offences of sexual exploitation of children,³⁷⁵ trafficking of person,³⁷⁶ procurement for prostitution,³⁷⁷ and procuring defilement,³⁷⁸ the legislation to some extent has provided for a protection mechanism to women and children against sexual abuse and exploitation, which puts them at risk of being infected by HIV.

Thus, it is an offence for a male person to rape a girl or woman.³⁷⁹ The legislation provides for five circumstances under which a male person commits the offence of rape if he has sexual intercourse with a girl or woman. A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions:

- Not being his wife, or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;
- With her consent where the consent has been obtained by the use of force, threats, or intimidation or by putting her in fear of death or of hurt or while she is in unlawful detention;
- With her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by any drugs, matter, or thing, administered to her by the man or by some other person unless proved that there was prior consent between the two;
- With her consent when the man knows that he is not her husband, and that her consent is given because she has been made to believe that he is another man to whom, she is, or believes herself to be, lawfully married;
- With or without her consent when she is under eighteen years of age, unless the woman is his wife who is fifteen or more years of age and is not separated from the man.

The offence of rape is not only limited to the above mentioned circumstances but also extends to include the following circumstances. Whoever being a person in a position of authority, management, or on the staff of a remand home; management or staff of a hospital; or traditional

³⁷³ The Sexual Offences (Special Provisions) Act, 1998

³⁷⁴ Section 131 (1).

³⁷⁵ Section 138B (1).

³⁷⁶ Section 139A.

³⁷⁷ Section 139 and 139A.

³⁷⁸ Section 140.

³⁷⁹ Section 5.

healer or religious leader who takes advantage of his position and commits rape is liable to imprisonment for life.

Despite the fact that the act seems to be exhaustive in defining rape offences, it suffers some shortcomings in addressing marital rape issues. In the wake of the AIDS epidemic, an offence of marital rape should have been included to allow a woman to require safer sex practices where a male spouse is engaged in risky unprotected sexual behaviour. In particular, an individual's risk of infection increases with the number of sexual partners with whom he engages in unprotected sexual intercourse or illegal drug use by needle and syringe exchange.

Procurator for prostitution. The Sexual Offences (Special Provisions) Act, 1998³⁸⁰ does not condone procurator for prostitution.³⁸¹ Procurator for prostitution of any person of whatever age, whether with or without his consent, to become a prostitute within or outside the United Republic, is prohibited.³⁸² Similarly, the legislation does not countenance procurator of any person under eighteen years of age, whether with or without his consent, with a view to the facilitation of prohibited sexual intercourse with any person outside the United Republic.³⁸³ It is also an offence for any person to procure or attempt to procure any person of whatever age to leave the United Republic, whether with or without his consent, with intent that that person may become the inmate of, or frequent a brothel elsewhere.³⁸⁴ Any person who brings, or attempts to bring, into the United Republic any person under 18 years of age with a view to prohibited sexual intercourse with any other person, inside or outside the United Republic, commits the offence of procurator.³⁸⁵ The law also protects any person of whatever age from being procured, whether with or without the consent of that person, to leave his usual place of abode in the United Republic, that place not being a brothel, with intent that that person may for the purposes of prostitution become the inmate of, or frequent, a brothel within or outside the United Republic.³⁸⁶ Finally, procurator for prostitution is said to have been committed if a person detains any person without the consent of that person in any brothel or other premises with a view to prohibited sexual intercourse or sexual abuse of that person.³⁸⁷

Any person who commits the offence of procurator is liable on conviction to imprisonment for a term of not less than ten years and not exceeding twenty years or to a fine of not less than one hundred thousand shillings and not exceeding three hundred thousand shillings or to both the fine and imprisonment.

Inter alia, indecent assault of a boy under the age of 14 or 15 years is a felony and an offence liable for life imprisonment.³⁸⁸

The Sexual Offences (Special Provisions) Act, 1998³⁸⁹ has played an important role in amending the Criminal Procedure Act, 1985³⁹⁰ and the Evidence Act, 1967.³⁹¹ These amendments have

³⁸⁰ The Sexual Offences (Special Provisions) Act, 1998

³⁸¹ Section 12.

³⁸² Section 139 (a)

³⁸³ Section 139 (b)

³⁸⁴ Section 139 (c)

³⁸⁵ Section 139 (d)

³⁸⁶ Section 139 (e)

³⁸⁷ Section 139 (f)

³⁸⁸ Section 156

³⁸⁹ The Sexual Offences (Special Provisions) Act, 1998

³⁹⁰ The Criminal Procedure Act, No. 9 (1985)

³⁹¹ Section 127 of the Evidence Act, No.6 (1967). Section 348A, Criminal Procedure Act, No. 9 (1985).

helped in reducing stigma of sexual offence victims in that the court shall receive the evidence of all witnesses in trials involving sexual offences in camera, and the evidence and witnesses involved in these proceedings shall not be published by or in any newspaper or other media.³⁹²

Chapter XIXA. Murder and manslaughter

S.196 of the Penal Code³⁹³ provides that:

Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Pursuant to the Penal Code,³⁹⁴ malice aforethought is deemed to be established by evidence proving that the act or omission causing death will probably cause the death of or grievous harm to some person, although such knowledge is accomplished by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused. However, a person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death. Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done. When the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased. As well, a person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living. A person is also deemed to have caused death of another if by any act or omission he hastens the death of a person suffering under any disease or injury apart from such act or omission would have caused death.

Although it takes about ten years for a person infected with HIV to be fully blown with AIDS, the same rate of progression is assumed in Tanzania, and it may be shorter due to the higher exposure to endemic disease, poor nutrition, and reduced accessibility to effective medical care. This being the case, it is possible that a person may die within a year and a day after the last sexual intercourse with the person infected with HIV. Due to high mortality rate of children in Tanzania, women who have unprotected sexual intercourse knowing that they have HIV may be charged for murder if their children die within a year and a day due to vertical transmission of HIV.

The Penal Code³⁹⁵ covers a broad area of cause of death, such that it is not necessary for a victim to have died from only one cause; rather, if HIV infection hastens his death, it is sufficient to establish a case of murder against a person who wilfully transmitted HIV to the victim.

For a charge of murder to be sustained, it has to be established beyond reasonable doubt that the accused caused the death of the victim.

In Seuri v. R. (see Annex 4), the court established that presumption of murder has long been repealed. No such pre-emption exists in East African statutes or practice of courts. There is no other way a state prosecutor could establish beyond reasonable doubt that the victim's cause of death is a result of HIV infection transmitted by the accused unless he collaborates his evidence

³⁹² Section 348A, Criminal Procedure Act as amended by the Sexual Offences (Special Provisions) Act, 1998.

³⁹³ The Penal Code, Cap. 16

³⁹⁴ The Penal Code, Cap. 16

³⁹⁵ The Penal Code, Cap. 16

with the health authorities. Although this may seem as a deterrent measure to the spread of HIV, it may have adverse negative impacts. It will only criminalize people who access hospitals for medical care and agree to be tested for HIV. Those are only a few. As such, this may scare people from going to the hospital, and HIV surveillance by the NACP would be curtailed. (See Seuri v. R. in Annex 4).

12.2. The Criminal Procedure Act, No. 9 (1985)³⁹⁶

In a trial before a subordinate court, any document purporting to be a report signed by a medical witness upon any purely medical or surgical matter shall be receivable in evidence.³⁹⁷ Since proof of HIV infection relies on medical evidence, a few issues may arise:

- Whether our health sector is equipped with the relevant technology/instruments for the detection of HIV strains to ascertain with accuracy the nature of transmission.
- What levels in the health system have competent medical officers to ascertain with accuracy the nature of transmission.

Unless these issues are clearly determined, any attempts to invoke the law in order to prevent the proliferation of the epidemic will prove futile.

Finding answers to these questions may indicate the efficacy or lack of it in the health system capable of pursuing and punishing those who deliberately infect others which the Tanzanian public cries out for. In reality it may be very difficult to prove a case against a person accused of infecting another with HIV because the technology is simply not accessible to most health facilities in the country.

12.3 Correctional Systems: The Prisons Act, 1967³⁹⁸

Stakeholders' Views:

As we proceed in this part it is of particular importance to mention outright that prison laws raised hot discussion amongst participants in all the stakeholders meetings, to wit, Workgroup Preparatory Meeting, Intergovernmental Meeting, and the National Conference in which no consensus was reached on whether to adopt voluntary or mandatory testing and segregation of HIV-positive prisoners as a means of controlling the spread of HIV/AIDS. The MOJCA made a stand that it will come up with a position. Below are TAWLA views.

The Prisons Act, 1967³⁹⁹ does not directly focus on HIV/AIDS issues, but it contains provisions that address matters associated with the prevention of the spread of disease generally. Hitherto, HIV/AIDS prevention and care services in prisons are implied from these general provisions. The law requires every prison to have a responsible medical officer who shall be responsible for the health of all prisoners in prison and shall cause all prisoners to be medically examined at such times as may be prescribed.⁴⁰⁰ Thus, a medical officer may, whether or not a prisoner consents thereto, take or cause to be taken such action (including the forcible feeding, inoculation,

³⁹⁶ The Criminal Procedure Act, No. 9 (1985)

³⁹⁷ Section 240

³⁹⁸ The Prisons Act, 1967

³⁹⁹ The Prisons Act, 1967

⁴⁰⁰ S. 20(1), S. 20 (2)

vaccination, and any other treatment of the prisoner, whether of the like nature or otherwise) as he may consider necessary to safeguard or restore the health of the prisoner or to prevent the spread of the disease.⁴⁰¹

The legislation raises the following issues:

- Whether medical examination of prisoners may be interpreted to include HIV testing as well
- Whether pre- and post-test counselling services are available
- Whether the act provides for confidentiality of prisoners' medical and/or personal information, including HIV status
- How the act provides for protection of prisoners from involuntary acts that may transmit HIV, e.g., rape, sexual violence, or coercion

As can be seen from the wording of the Prisons Act, such issues are vested in the medical officers' prerogative to decide which medical examination or actions he considers necessary to take in order to restore the health of the prisoner or to prevent the spread of diseases. Thus, necessary elements required for HIV testing such as voluntary and informed consent and availability of pre- and post-test counselling services is immaterial. The legislation is mute on confidentiality of prisoners' medical information, including HIV status. This is probably covered under medical practitioners' ethics.

The Prisons Act should be strengthened to address HIV/AIDS issues explicitly.

Protection of prisoners from involuntary acts that may transmit HIV virus, e.g., rape, sexual violence, or coercion, is inferred under Section 42, which subjects every prisoner to prison discipline and regulation during the whole time of his imprisonment, whether he is or is not within the precinct of any prison. Protection from sexual violence is also implied under provisions that cover offences by prisoners; however, it is left to the minister to prescribe what acts or omissions by prisoners shall be deemed prison offences and may prescribe which of such offences shall be minor prison offences and which shall be major prison offences.⁴⁰² Apart from the Prisons Act, protection of prisoners from HIV transmission through sexual offences falls, among others, under the ambit of the Penal Code and the Sexual Offences Special Provisions Act, 1998. Presumably, when exercising his powers under S.32, the minister may act commensurate with this legislation when defining prison offences.

The medical officer is required to examine every prisoner on admission and prior to discharge and record the state of health of the prisoner and such other particulars as may be prescribed. Until so examined, every prisoner on admission shall, so far as is possible, be kept apart from other prisoners.⁴⁰³ This provision raises an issue as to whether the legislation may require segregation of prisoners based on their HIV status. The legislation does not seem to require segregation of prisoners because of their HIV status because the only instance that requires segregation of a prisoner is based on maintaining good order and discipline of the prison.⁴⁰⁴

⁴⁰¹ S. 20(3)

⁴⁰² Section 32

⁴⁰³ Section 21

⁴⁰⁴ Section 40

The United States AIDS Litigation Project⁴⁰⁵ published the results of its examination of 469 legal cases related to HIV/AIDS at federal, state, and local levels.⁴⁰⁶ Sixty-four cases, the second largest single category, concerned HIV/AIDS and prisons issues and were brought by prisoners, their representatives, or by prison officers. The cases raise questions of accommodation, HIV testing, the adequacy of medical treatment, failure to provide social, recreational, and rehabilitative programs, and the inadequacy of nutritional services.⁴⁰⁷

The complexity of the issues and divergence of viewpoints involved in the cases are demonstrated by the outcomes sought by litigants. On the one hand, prisoners have argued for compulsory screening and the segregation of HIV seropositive inmates. Legal action is commonly precipitated by fear about casual contact with HIV-infected prisoners and concerns about assaults. To date, these prisoner suits have been rejected by the judiciary on the grounds that evidence demonstrated neither a real risk of transmission nor a diminution of risk were segregation and mandatory testing to be introduced. Applying and distinguishing this legal position to the conditions in Tanzanian prisons where rape, sexual violence, or coercion and other offences against immorality are common, it is quite vivid that a real risk of transmission is demonstrated. Perhaps segregation can be adopted as a measure for HIV/AIDS prevention pending solution for the root cause of the problem.

The Prisons Act provides for non-discriminatory access to facilities and privileges for HIV-positive prisoners. This fact is inferred from Part V of the Prisons Act, which deals with medical issues. Thus, treatment and care services for seropositive prisoners are stipulated therein, though under provisions of general application.⁴⁰⁸ It is further stated that every prisoner sentenced to imprisonment and detained in prison shall, subject to the provisions of the Prisons Act and subject to any special order of the court, be treated.⁴⁰⁹ All prisoners prior to being removed to any other prison shall be examined by the medical officer and no prisoner shall be so removed unless the medical officer certifies that he is free from any illness rendering him unfit for removal.⁴¹⁰

The legislation provides for remission of part of the sentence of a convicted prisoner on grounds of health conditions wherein, on the recommendation of the commissioner, the president may grant a remission on the grounds of permanent ill health.⁴¹¹ However, a question to be prompted is at what stage of HIV/AIDS should a prisoner be deemed to be of permanent ill health to qualify for remission of part of the sentence? Perhaps testing positive for HIV would be a good reason to remit the prison sentence of an inmate. However, this could invite corrupt practices as real infected are not released but others with the right connection who may not be infected are released. There is a real danger of bogging down the criminal correctional system unless elaborate measures are institutionalized through parole boards.

In conclusion, having stated what the law is in so far as the question of protection of prisoners against HIV transmission and support services for those infected is concerned, it may seem logical to examine the following elements to come up with the most realistic legal instrument that may effectively prevent the epidemic in prison.

⁴⁰⁵ Gostin, Porter, Sandomire, DHHS, 1990

⁴⁰⁶ Norberry, Jennifer. 1991. "HIV/AIDS: Prisons and the Law." Australian Institute of Criminology.

⁴⁰⁷ Id.

⁴⁰⁸ See the preceding paragraph in this context and section 20 (3)

⁴⁰⁹ Section 61

⁴¹⁰ Section 60

⁴¹¹ Section 50

The seroprevalence rate in prisons needs to be determined with transparency and accuracy. There is a strongly felt need for exposing patterns of sexual behaviour in prison in order to work out a legal protection mechanism against HIV transmission resulting out of sexual offences such as rape, sexual violence, or coercion.

A fact that cannot be underestimated is that the HIV/AIDS seroprevalence rate in Tanzanian prisons is very high. Sexual violence is rampant, as well as sexual manipulation caused by harsh living conditions. Before coming up with any reforms on the Prisons Act, it is important to weigh out the benefits of nonsegregation of prisoners living with HIV/AIDS against the risk of infection posed to prisoners who are HIV negative. It may be argued by HIV-positive prisoners that segregation could aggravate re-infection of those already infected since sexual violence offenders may not refrain from such acts by the mere act of segregation, unless the prison system comes up with separate accommodation arrangement for every prisoner which is not realistic given the poverty realities. In a rough situation as that of Tanzanian prisons, applying human rights against HIV mandatory testing of prisoners may be a breach of the human right that the law purports to protect, given the material condition of what actually happens, and not what ought to happen.

The law must adequately address the factors that lead to sexual violence. It may well be that prisoners do not have recreational facilities, adequate diet requirements, and rehabilitative programs and are therefore forced into the game of survival for the fittest purposes. The root cause of the problem must be dealt with squarely by establishing recreational and rehabilitative facilities within prisons, increasing healthy and adequate diet, and reducing congestion.

Data of intravenous drug use need to be exposed to prevent unsterilized needle and syringe exchanges/accidental piercing.

A strong correlation between STDs and HIV transmission exists; as such, availability of data on management of STDs in prison will help to assess the deterrent effect of legislation that deal with sexual offences in prison and what needs to be done to meet the legal challenges associated with the AIDS epidemic.

Availability of quality HIV testing services needs to be assessed.

Availability of information and education facilities for promotion of awareness of the prisoner community about HIV/AIDS/STD problems to a level where all are familiar, as a responsibility/duty, with the facts about HIV transmission should be examined.

The knowledge, attitude, and practice of prisoners to the level where individuals are able to assess their own risk and make decisions that protect them from transmission and about testing and counselling need to be assessed.

UNAIDS International Guidelines on HIV/AIDS and Human Rights⁴¹² state that prison authorities should take all necessary measures, including adequate staffing, effective surveillance, and appropriate disciplinary measures to protect prisoners from rape, sexual violence, and coercion. This guideline is implied under S.42 of the act. The guidelines further state that prison authorities should also provide prisoners (and prison staff, as appropriate) with access to HIV-related prevention information, education, VCT, means of prevention (condoms, bleach, and clean injection equipment), treatment and care, and voluntary participation in HIV-related clinical

⁴¹² HR/PUB/98/1 Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Program on HIV/AIDS, United Nations, New York and Geneva, 1998.

trials; as well as ensure confidentiality; and prohibit mandatory testing, segregation, and denial of access to prison facilities, privileges, and release programs for HIV-positive prisoners.

Compassionate early release of prisoners living with AIDS should be considered. As far as this part of the guideline is concerned, the supply of condoms to female inmates poses no problem as it will work towards mitigating the impact of the epidemic in prison. The question of supplying condoms and clean injection equipment in prisons to male inmates raises concern since this implies an element of homosexuality and of illegal intravenous drug use, which contravene the laws of the land. Supply of clean injection equipment for medical treatment purposes is supported, but for intravenous illegal drug usage it is not condoned.

The use of the criminal justice system to combat the spread of HIV/ AIDS is viewed with caution in the context of HIV/AIDS. While states are encouraged to reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations, they are also cautioned against possible misuse of the same system by undermining collective public responsibility and/or targeting vulnerable groups. With that caution in mind, the amendments below are recommended.

Recommendations:

- The Penal Code - Cap. 16
 - Chapter XVII: Nuisance and Offences Against Health and Convenience
 - S.179—Act of spreading infections of any disease dangerous to life to include HIV spread.
 - S.170—Common Nuisance to include HIV transmission/spreading
 - Chapter XXII: Offences endangering life or health—S.225, S.227, S.228
 - Chapter XXIV: Assault—S.241
 - Chapter XXIII: Criminal Negligence—S.233(e), S.233(f), S.234
- The Sexual Offences Special Provisions Act, 1998
 - Amend the following sections to reflect HIV/AIDS prevention and care: 131(1), 138B(1), 139(A), 139, 140, 5, 12, 139(a), 139(b), 139(c), 139(d), 139(e), 139(f), 156
- Amendments made by the legislation to S.127 of the Evidence Act, S.348A, Criminal Procedure Act, as amended by the Sexual Offences Special Provisions Act, 1998.
- Chapter XIX A Murder and Manslaughter: S.196
- Prisoners Act, 1967
 - S.20(1), S.20(2) (requirement for medical examination of all prisoners), S.20 (3) (prevention of the spread of the disease), S.32 (include sexual violence, rape in prison as prison offences in order to prevent HIV transmission)

13. Media, Enabling Environment, Support Services: Recommended Legislative Changes

13.1 Media

The media has played a vital role in disseminating HIV/AIDS information and education in Tanzania. In order to fight the epidemic with efficacy, dissemination of accurate information and education to the public is necessary. Equally important is the promotion of respect for PLHA and emphasis on change of attitudes of stigmatization and discrimination. This notwithstanding, there have been instances where the media have gone astray in reporting HIV/AIDS issues. The current campaign geared at watering down the importance of using condoms as a protective measure by allegation that condoms have pores that absorb bodily fluids is a good example. Similarly, the media have developed a tendency of publishing testimonies of PLHA given at closed forum without permission, thus creating discriminatory attitudes by the public towards PLHA who tendered the testimony. Whether media laws have set any standards for tackling HIV/AIDS-related issues is a question that needs to be examined critically.

13.1.1 The Newspaper Act, 1976⁴¹³

The Newspaper Act, 1976⁴¹⁴ is an act to repeal and replace the Newspaper Ordinance and to amend the Penal Code. The act does not contain specific provisions that explicitly deal with HIV/AIDS. For the purposes of safeguarding dissemination of accurate information on HIV/AIDS issues and also the protection of the rights of PLHA, Part V and VI of the act may be of particular relevance. The former deals with offences against the public, whereas the latter covers issues pertaining to defamation. For instance, publication of false news likely to cause fear and alarm to the general public is prohibited.⁴¹⁵ This provision may help to curb situations such as false propaganda for pro-life products, which inflicted fear to the general public on usage of condoms. Provisions on defamation matters may help to control stigmatization and discriminatory attitudes towards PLHA.

In the wake of AIDS the act should directly address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS and human rights while bearing in mind what works best in the prevailing material conditions of our society.

13.1.2 The Broadcasting Services Act, 1993⁴¹⁶

The Broadcasting Services Act, 1993⁴¹⁷ is an act to make provisions for the management and regulation of broadcasting and for other matters related to it. The Act does not contain specific provisions that deal with HIV/AIDS issues. There are provisions of general application that may be relevant to HIV/AIDS, especially on coordination and supervision of broadcasting.⁴¹⁸ The act emphasizes the accurate dissemination of information, education, and communication.⁴¹⁹ Moreover the act respects people's cultural values, gender balance, and the rights of a child.⁴²⁰

⁴¹³ The Newspaper Act, 1976

⁴¹⁴ The Newspaper Act, 1976

⁴¹⁵ S. 36

⁴¹⁶ The Broadcasting Services Act, 1993

⁴¹⁷ The Broadcasting Services Act, 1993

⁴¹⁸ Part IV.

⁴¹⁹ S. 13(3).

⁴²⁰ S. 13 (3)(c), 13(3)(d)

This is an entry point on breaking the silence about AIDS. What is required of the law is to set priority on pressing issues so that they are well coordinated. Now there are so many media programs on HIV/AIDS that some of the priority issues are blurred.

Recommendations: Amend the cited media legislation to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, the National Policy on HIV/AIDS, 2001, and the views expressed by the stakeholders.

13.2 Creating an Enabling Environment

Changing discriminatory attitudes through education, legal action, and the media: Meeting the challenge—Best Practices. Some success stories on changing discriminatory practices against PLHA have been recorded worldwide, some of them in Africa. Some countries have embarked on positive policy formulation as a means of addressing HIV/AIDS-related discrimination. Tanzania has had a component of relating gender relations in its HIV/AIDS education campaign in its policy guidelines.⁴²¹ The policy further encourages criminalization of wilful spread of HIV/AIDS.⁴²² Some countries have enacted laws protecting the rights of PLHA. Such countries include Guatemala, which prohibits the administration of blood tests as a requirement to obtain goods and services, access to education or medical treatment. Under this law blood test results are strictly confidential and discrimination of PLHA is prohibited. Zimbabwe has a program involving commercial sex workers, distribution of condoms, and home-based care in a province severely affected by the pandemic. Likewise the Russian Federation issued an order instituting special centres for children and pregnant women who are HIV positive in 1999. In 1995 Hong Kong passed the Disability Bill, which bans compulsory testing for HIV/AIDS. In a similar move, the Government of Bolivia in 1996 adopted regulations delineating the rights and duties of healthy, infected, and sick persons. This regulation also established compulsory counselling in all cases of testing and the confidentiality of results. Moreover, discrimination in public services and facilities on the basis of HIV/AIDS is barred.⁴²³

13.3 Support Services, Priorities

13.3.1 Multisectoral approach

The National Policy on HIV/AIDS, 2001⁴²⁴ encourages a multisectoral effort to provide support services to PLHA, widows, and orphans in their communities. The main objective of the policy in this regard is stated to be to provide the legal and social framework for the provision of care and support for those affected by HIV/AIDS, particularly widows and orphans, in mitigating impact of HIV/AIDS. Specifically, the National Policy on HIV/AIDS, 2001⁴²⁵ undertakes as follows:

- To promote community sensitization on prevailing laws pertaining to the rights of dependants, care and support of PLHA, widows, and orphans.
- Government to ensure that the policies of all sectors address the rights of surviving dependants.

⁴²¹ See the draft AIDS Policy, 1995.

⁴²² See the NAP, page 24

⁴²³ See the Center for Reproductive Law and Policy, Reproductive Rights, 2000: Moving Forward page 32-36.

⁴²⁴ The National Policy on HIV/AIDS, 2001

⁴²⁵ The National Policy on HIV/AIDS, 2001

- To give necessary support and protection to orphans and children in special institutions, including street children and those with disabilities that are at risk of HIV/AIDS infection.
- Both central government and local councils as well as the community to support sibling-headed households, in a children's rights-friendly manner so as to minimize the impact of HIV/AIDS on their lives.

An orphan is defined, within the context of the AIDS scourge in Tanzania, as a child between the ages 0–15 years who has lost both parents.⁴²⁶

13.3.2 Legal support services

Legal support services include legal counselling so as to identify enforceable rights and review options and choice of action. As a general rule, legal support is primarily offered in the private sector and is ostensibly unaffordable to most people, particularly those burdened or incapacitated by HIV/AIDS. Such needy people are best served through legal aid. So far legal aid is offered by mostly NGOs. Legal aid enables a person to be counselled, advised, and assisted in many forms, often with preparation of pleadings and sometimes represented in court free of charge.

The nature and scope of these services depend on the policy and status of the institution concerned. Suffice it to say that most institutions are offering these services to women and children. Such institutions include TAWLA, WLAC, TAMWA, and Envirocare, all based in the commercial and *defecto* capital of Dar es Salaam. However, some of these have outreach stations up-country in the form of branches, and affiliations with up-country-based NGOs and CBOs while others conduct mobile clinics. The few organizations based outside of Dar es Salaam include the Lake Zone Women Lawyers and Kilimanjaro Women's Education and Consultancy.

We know that PLHA are not women and children alone. Moreover, they are not the only ones impacted by the pandemic. There are legal situations affecting family members, dependants, and associates on account of HIV/AIDS. To all those who are neither women nor children, the option of legal aid is narrowed down by the paucity of facilities. This is because there are even fewer NGOs offering gender neutral legal aid services. These include the TLS, the National Bar Association, and the LHRC. Although the TLS has membership all over the country in Mainland Tanzania, the center of activity for both organizations remains in Dar es Salaam. The Faculty of Law at the University of Dar es Salaam has a legal aid program, but it has been inactive in the past few years.

Priorities for legal reform. The need for legal reform so as to create a supportive legal environment for HIV/AIDS prevention and care has been identified and voiced by different stakeholders from mid-1990s when it had become clear that the pandemic was not just a passing phenomenon that can be wished away. This has been voiced at various meetings and workshops. Some of such meetings and workshops had been organized by the government and institutions. Others had been organized by NGOs and CBOs.

⁴²⁶ NAP, 2001 pages 28-29.

Part III: Conclusion, Recommendations, Annexes

14. Conclusion

This report has been an attempt to identify the laws considered impediments to HIV/AIDS prevention and care and to suggest reforms and enactment of those reforms in order to put in place a legal framework that is supportive of HIV/AIDS. In doing so, the study proceeded from the human rights perspective.

The study explores the various categories of laws, policies, government action, and strategies. In the process a number of studies, bylaws, policies, and guidelines have been identified and the gaps pointed out. The study has been a participatory process with stakeholder participation at different levels through meetings and workshops. More such meetings are envisioned before a final report is submitted and a draft bill of the HIV/AIDS Prevention and Control Act, 2004 can be proposed for tabling in Parliament. It is hoped that the process has and will continue to generate a debate necessary to bring about a meaningful dialogue on the issues raised.

The study makes several recommendations for land reform. Moreover, the study identifies priority issue areas, which it places in two categories. The first category is for immediate action. The second category is for later action. Those issues considered priority for enactment into law **within the next two years** include:

- The importance of VCT services as a measure against the spread of HIV/AIDS;
- Combating harmful traditional practices against women;
- Protection of the rights of PLHA, including prevention of stigma and discrimination and treatment;
- Strengthening the status and property rights of women, children, and other vulnerable populations; and
- Revisiting the Criminal Laws and Corrections systems in a manner that is supportive of HIV/AIDS prevention and care but also sensitive to human rights.

The second category of priorities identified for action **over a five-year period** include:

- State monitoring and enforcement of human rights in the light of HIV;
- Amendments to media laws to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, the National Policy on HIV/AIDS, 2001,⁴²⁷ and the view expressed by the stakeholders;
- Codification of international human rights instruments in domestic law;
- Food quality laws to control hazardous food supplements; and
- Creation of an HIV/AIDS support fund from public revenue.

⁴²⁷ The National Policy on HIV/AIDS, 2001

15. TAWLA Recommendations

The following recommendations are made by TAWLA pursuant to paragraph 3.7, attachment 1 of TAWLA's scope of work, which required identification and analysis of three to five priority issues in HIV/AIDS prevention and care that should be the subject of law reform within the next two years. (Note: See subsequent pages in this chapter for required identification and analysis of three to five priority issues in HIV/AIDS prevention and care that should be the subject of law reform within the next five years.)

Two-year priority issue areas in HIV/AIDS prevention and care that should be the subject of law reform within the next two years are listed below.

First, these priority issues have been identified by taking due consideration of the issues projected under the November 3, 2001 speech by honorable president Benjamin William Mkapa, President of the United Republic of Tanzania, made during the launch of the National Policy on HIV/AIDS.

Second, priority areas for law reform on HIV/AIDS were raised at the National Assembly Seminar on Facts about AIDS and Stigmatization and Discrimination of PLHA, for the Members of Parliament of the United Republic of Tanzania.

Third, other issues were raised at the stakeholders meeting for the review of the laws affecting HIV/AIDS, held in December 2001.

Arising from the aforesaid, the following priority issues were identified:

- Importance of VCT service as a prevention measure against the spread of HIV/AIDS.
- Abolition of customs and traditional practices that make individuals vulnerable to HIV transmission.
- Protection of the rights of PLHA with special focus on prevention of stigmatization and discrimination of PLHA in various settings, including the review of employment laws.
- Protection of the rights of women, children, and other vulnerable groups against vulnerability to HIV infection, including care for orphans.
- Prevention of wilful transmission of HIV.

15.1 Specific Issues of Law Reform, Within the Next Two Years

15.1.1 Importance of VCT service as a prevention measure against the spread of HIV/AIDS

It is important to consider amending public health legislation and therapeutic goods and services regulations to conform to provision of quality VCT service. As shown elsewhere in this review, quality VCT services may help to control the spread of AIDS and various legal implications arising there from.

Specifically, the following amendments to public health legislation seem warranting:

A. *Medical Practitioners and Dentists Ordinance, Cap. 407.*⁴²⁸

- Section 9 amended to include HIV/AIDS prevention quality standards for different medical procedures and registration of qualified medical practitioners and dentists to enter and stay in the service of the practice of medicine.

⁴²⁸ The Medical Practitioners and Dentists Ordinance, Cap. 407

- The minister of Health to make bylaws prescribing medical-specific mandatory HIV/AIDS standards for different medical procedures for medical doctors and dentists under Section 41 of the ordinance.
- The bylaws to provide for disciplinary action for truant practitioners.

*B. Nurses and Midwives Registration Ordinance, Cap. 325.*⁴²⁹ Amendment to the ordinance to enunciate education, training, registration, enrolment, and practice of nursing and midwifery to impact HIV/AIDS prevention and care standards, including PMTCT during delivery.

*C. The Opticians Act, 1966.*⁴³⁰ The act to be amended to as to enunciate education, training registration, enrolment and practice of nursing and midwifery to impact HIV/AIDS prevention and care standards.

*D. Private Hospitals (Regulations) Act, 1977.*⁴³¹ Amendment of S.5 and S.7(2) to include adherence to approved standards for prevention and care of HIV/AIDS as well as to apply universal precautions.

*E. Private Health Laboratories Registration Act, No 10 of 1997.*⁴³² Since voluntary testing of HIV/AIDS takes place in laboratory services, it is essential that the legislation be amended to enunciate a special provision for setting up quality VCT service. This should take into consideration provision of service by competent laboratory technicians well trained in HIV testing, prevention, and care.

*F. The Health Laboratory Technologists Registration Act, No. 11 of 1997.*⁴³³ Amendment is needed to make reference to HIV/AIDS testing requirements, pre- and post-test counselling, need for confidentiality, safety precautions, and related issues.

*G. Internationally Notifiable Diseases Act, 1963.*⁴³⁴ S.7, S.8(1)–(2), S.11(1) are not relevant to HIV/AIDS and therefore render the legislation redundant. In the context of HIV/AIDS, these sections contravene UNAIDS standard guidelines and the National Policy on HIV/AIDS, 2001 as they require detention and isolation of infected persons of a notifiable disease, breach of privacy and confidentiality issues vested in PLHA rights.

The above cited sections should be amended to include HIV/AIDS prevention standards commensurate with UNAIDS guidelines and the National Policy on HIV/AIDS, 2001.⁴³⁵ However, since the sections are still relevant to other contagious diseases prevalent in Tanzania, instead of repealing the sections, the amendment should categorically state that the act shall not apply to persons in relation to HIV infection.

*H. Pharmaceuticals and Poisons Act, 1978.*⁴³⁶ The act provides that consumers are protected from purchasing substandard pharmaceutical products (S.27). As such, the legislation needs to be amended to include quality supply, manufacture, and use of VCT kits and other reagents needed for HIV testing, including needles, syringes, gloves, etc.

⁴²⁹ The Nurses and Midwives Registration Ordinance, Cap. 325

⁴³⁰ The Opticians Act, 1966

⁴³¹ The Private Hospitals (Regulations) Act, 1977

⁴³² The Private Health Laboratories Registration Act, No 10 of 1997

⁴³³ The Health Laboratory Technologists Registration Act, No. 11 of 1997

⁴³⁴ The Internationally Notifiable Diseases Act, 1963

⁴³⁵ The National Policy on HIV/AIDS, 2001

⁴³⁶ The Pharmaceuticals and Poisons Act, 1978

15.1.2 Harmful traditional practices

The new proposed HIV/AIDS legislation should enumerate a section that renders the abolition of all harmful traditional and customary practices that place people at risk of acquiring and transmitting HIV/AIDS.

15.1.3 Protection of rights of PLHA, with special focus on prevention of stigmatization and discrimination

A. Employment Ordinance, Cap. 366 of the Laws (Revised).⁴³⁷

- Medical Examination: S.47 to be amended to state explicitly that HIV/AIDS should not be a condition for medical examination in order for one to qualify for employment.
- Termination of Contract: Amend S. 52 to state explicitly that HIV status should not be a determinant condition that warrants termination of employment contracts.
- Care and Welfare: S.100(1). PLHA employees should be accorded equal treatment on medical aid as other employees under S.100 (1). The section should be explicitly amended to include an HIV component. If possible, provision of antiretrovirals should be included.
- Burial of Deceased Employee and Dependants: S.102(1) to be amended to give equal treatment to deceased The rights of PLHA.

B. The Security of Employment Act, 1964.⁴³⁸ The legislation to be amended to include a section that stipulates clearly that an employer should not summarily dismiss an employee on grounds of contracting HIV/AIDS if the employee abides by the disciplinary code and the labor laws.

C. Workman's Compensation Ordinance Cap. 263.⁴³⁹ Second and third schedule of the ordinance to be amended to include rights of PLHA on issues relevant to HIV/AIDS injuries suffered in the course of employment (e.g., health care providers who acquire HIV accidentally when attending to patients.). Other issues pertain to compensation for injury, requirements as to notice of accident, and eligibility for compensation.

15.1.4. Women, children, and other vulnerable populations

Women

A. Inheritance Law, Customary Law. Review and modification of Rules 23, 25, and 30 of the Local Customary Law (Declaration) (No. 4) order1963.⁴⁴⁰

B. Rule 66A of the Local Customary Law (Declaration) Order 1963, GN. 279 of 1963.⁴⁴¹ This law and other customary law rules should be reviewed and reformed to ensure equality of women regarding property and marital relations so that discriminatory limitations are removed on rights to residence in the matrimonial home even after the death of a spouse and the right to inherit landed property.

⁴³⁷ Employment Ordinance, Cap. 366 of the Laws (Revised)

⁴³⁸ The Security of Employment Act, 1964

⁴³⁹ Workman's Compensation Ordinance, Cap. 263

⁴⁴⁰ Local Customary Law (Declaration) (No. 4) order 1963

⁴⁴¹ Local Customary Law (Declaration) Order 1963, GN. 279 of 1963

*C. The Law of Marriage Act, No. 5 (1971).*⁴⁴²

- Minimum Age: Under S.13 the minimum age requirement for marriage for girls is 15 years. The section should be amended to raise the age to 18 years because 15 is an age of a minor. Such girls may be vulnerable to HIV infection as they may not apprehend the risk involved.
- Notice of Objection: Amend Sections 20 and 145 on notice of objection and criminal liability for giving wrong information to include HIV situations.
- Coercion of Fraud: Amend S.151 on offence for being a party to a ceremony knowing that the consent of one of the parties was obtained by fraud or coercion, to include HIV/AIDS.

Children

Unified law of the child: There is a need for a unified law, which among others would define the age of a minor, which is now lacking as various pieces of legislation on children differ on the definition of a child. The constitution does not make specific reference to children either, but they are generally categorized as “all human beings”.

*A. The Children and Young Persons Ordinance, Cap. 13.*⁴⁴³ Amend the legislation to include a provision for prevention of HIV transmission and care of children in approved schools.

*B. The Education Act, 1978.*⁴⁴⁴ Amend the legislation to include a provision on the right of the child to access HIV/AIDS prevention education and standard requirements of the quality of the education on HIV prevention and care provided to children.

*C. Adoption Ordinance, Cap 335.*⁴⁴⁵

D. Orphans living with HIV/AIDS. Amend the legislation to prohibit stigmatization and discrimination of orphans living with HIV/AIDS and ensure care and support.

People with disabilities

*A. Disabled Persons (Employment) Act, 1982*⁴⁴⁶

*B. Disabled Persons (Care and Maintenance) Act, 1982*⁴⁴⁷

Both statutes are mute on provisions for HIV prevention and care for disabled people. Amendment is necessary to include such provisions, which recognize HIV as a work-related disability where it is proved that employee was infected in the course of his employment.

Immigrants and Refugees

*A. The Immigration Act, 1995.*⁴⁴⁸ Amend S.10(c)(i) to clearly state that HIV/AIDS should not constitute a condition for prohibiting immigrants.

⁴⁴² The Law of Marriage Act, No. 5 (1971)

⁴⁴³ The Children and Young Persons Ordinance, Cap. 13

⁴⁴⁴ The Education Act, 1978

⁴⁴⁵ The Adoption Ordinance, Cap 335

⁴⁴⁶ The Disabled Persons (Employment) Act, 1982

⁴⁴⁷ The Disabled Persons (Care and Maintenance) Act, 1982

⁴⁴⁸ The Immigration Act, 1995

*B. The Refugees Act, 1998.*⁴⁴⁹ Amend S.18(2)(c) to address HIV/AIDS issues. This provision empowers the director or settlement officer to give such orders or directives, either orally or in writing, to any asylum seeker or refugee as may be necessary or expedient to ensure that all proper precautions are taken to preserve the health and well being of the asylum seekers or refugees. Also amend S.31 to include importance of HIV/AIDS prevention and care education in refugee camps.

15.1.5 Legislation Impacting Criminal Justice and Correctional Systems

The use of the criminal justice system to combat the spread of HIV/AIDS is viewed with caution in the context of HIV/AIDS. While states are encouraged to reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations, they are also cautioned against possible misuse of the same system by undermining collective public responsibility and/or targeting vulnerable groups. With that caution in mind, the following amendments are recommended.

*A. The Penal Code, Cap 16.*⁴⁵⁰

- **Chapter XVII:** Nuisance and Offences Against Health and Convenience
 - S.179 Act of spreading infections of any disease dangerous to life to include HIV spread.
 - S.170 Common Nuisance to include HIV transmission/spreading
- **Chapter XXII:** Offences endangering life or health S.225, 227 & 228.
- **Chapter XXIV:** Assault S. 241
- **Chapter XXIII:** Criminal Negligence S. 233(e), 233(f) S.234

*B. The Sexual Offences (Special Provisions) Act, 1998.*⁴⁵¹ Amend the following sections to reflect HIV/AIDS prevention and care: 131(1), 138B(1), 139, 140, 5 12, 129(a), 139(b), 139(c), 139(d), 139(e), 139(f), 156.

Amendments made by the legislation S.127 of the Evidence Act,⁴⁵² S.348A, Criminal Procedure Act, as amended by the Sexual Offences (Special Provisions) Act, 1998.⁴⁵³

*C. Chapter XIX: Murder and Manslaughter S.196 of Penal Code, Cap. 16;*⁴⁵⁴ *Prisons Act, 1967.*⁴⁵⁵ Amend the following:

- S.20(1), S.20(2) (requirement for medical examination of all prisoners), S.20(3) (prevention of the spread of the disease).
- S.32 (include sexual violence, rape in prison as prison offences murder to prevent HIV transmission) S.21, S.40.

⁴⁴⁹ The Refugees Act, 1998

⁴⁵⁰ The Penal Code, Cap 16

⁴⁵¹ The Sexual Offences (Special Provisions) Act, 1998

⁴⁵² The Evidence Act, No. 6 (1967)

⁴⁵³ The Sexual Offences (Special Provisions) Act, 1998

⁴⁵⁴ The Penal Code, Cap. 16

⁴⁵⁵ The Prisons Act, 1967

15.2 Priority Issue Areas in HIV/AIDS Prevention and Care that Should Be the Subject of Law Reform Within the Next Five Years

TAWLA identification and analysis of three to five priority issues in HIV/AIDS prevention and care that should be the subject of law reform within the next five years follows:

- State monitoring and enforcement of human rights in the light of HIV.
- Amendment of media laws to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, the National Policy on HIV/AIDS, 2001, and the views expressed by the stakeholders.
- Codification of international human rights instruments in domestic law.
- Food quality laws to control hazardous food supplements.
- Creation of an HIV/AIDS support fund from public revenue.

15.2.1 State monitoring and enforcement of human rights

A. The Constitution of the United Republic of Tanzania: The Bill of Rights. The constitutional amendment of 2000 by Act No. 3 of 2000 has finally prohibited discrimination on the basis of gender.⁴⁵⁶ This amendment has therefore made prohibition against gender discrimination part of the Bill of Rights. Nonetheless, these progressive provisions exist side by side with various pieces of legislation which discriminate against women. These include inheritance systems and customary law. Although the Basic Rights and Duties Enforcement Act, 1994 provides for a mechanism whereby aggrieved citizens can invoke the constitution to challenge violation of their basic rights, the process is cumbersome and inaccessible for most Tanzanians, especially women, who form the bulk of the poor. Women are also the most vulnerable group to HIV infection.

*B. The Basic Rights and Duties Enforcement Act, 1994.*⁴⁵⁷ S.10 and S.13 need to be reassessed in the light of HIV/AIDS so the act is useful in addressing infringement of the human rights. The requirement of three judges to convene a constitutional court when there is an acute shortage of judges causes inordinate delay before a constitutional case can get going. Moreover, Section 13(2) gave the High Court discretion where it is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional, to allow the public authority such as government or the Parliament to rectify the violation. This disregards the needs of the person who is suffering who may need urgent redress. Consequently, such laxity and insensitivity may not be an incentive for a person affected by HIV or a PLHA.

15.2.2 Media laws

*A. The Newspaper Act, 1976.*⁴⁵⁸

*B. Broadcasting Services Act, 1993.*⁴⁵⁹

Amend the Newspaper Act, 1976 and the Broadcasting Services Act, 1993 to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, the National Policy on HIV/AIDS, 2001, and the views expressed by the stakeholders. The acts should be amended to prohibit unauthorized publication of confidential information regarding PLHA.

⁴⁵⁶ See article 13(5) as amended by Act No. 15 of 1984.

⁴⁵⁷ The Basic Rights and Duties Enforcement Act, 1994

⁴⁵⁸ The Newspaper Act, 1976

⁴⁵⁹ The Broadcasting Services Act, 1993

15.2.3 *International human rights instruments*

Consider codification of the international human rights instruments into domestic law. There are the following international human rights instruments:

- International Covenant on Civil and Political Rights (ICCPR), 1966⁴⁶⁰
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966⁴⁶¹
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979⁴⁶²
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁴⁶³
- Convention on the Rights of Child (CRC), 1989⁴⁶⁴

Under the existing law, to incorporate the human rights instruments into domestic law requires the government to present to Parliament all the laws that are inconsistent with the international human instruments for amendment, furthermore, for Parliament to pass the required amendment.

15.2.4 *The Control of Food Quality*

A. *The Food (Control of Quality) Act, 1978.*⁴⁶⁵ Amend the act to control manufacture, supply, and consumption of food supplements dangerous for use by PLHA.

⁴⁶⁰ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

⁴⁶¹ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

⁴⁶² Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

⁴⁶³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987.

⁴⁶⁴ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

⁴⁶⁵ The Food (Control of Quality) Act, 1978

Annexes

Annex 1: Authors' Note on Harmful Sexual Practices

The spread of HIV infection in Tanzania is not random. Rather, it follows the paths laid down by customary laws and sexual practices. These practices individually and taken together make women especially vulnerable to AIDS by depriving them of the will or ability to protect themselves against it. Sexual practices such as polygamy, *mokamona* marriage (marriages for the purposes of getting a surrogate mother), widow inheritance, widow cleansing, wife exchange, FGM, and dry sex militate against HIV prevention because they involve multiple sexual partners, and the most vulnerable to infection are women.⁴⁶⁶

1. Polygamy

Polygamy is the practice of men marrying more than one spouse at a time in purported exercise of the right of plural marriage and therefore involves multiple sexual partners. Polygamy is recognized under S.10 of the Law of Marriage Act, 1971, which provides that:

Marriages shall be of two kinds, that is to say:

- (a) those that are monogamous or are intended to be monogamous; and
- (b) those that are polygamous or are potentially polygamous.

S.9(3) defines a polygamous marriage as “a union in which the husband may during the subsistence of the marriage be married to or marry another woman or women.”

One out of every three married women aged 40 years and over has a polygamous husband, and one third of the husbands end up in polygamy by the time they are 40 years old.⁴⁶⁷ Thus, since polygamy involves more multiple sexual partners, female spouses in this practice have a higher risk of HIV infection.

2. Mokamona

Mokamona or *nyumba ntofu* is a practice of marriage for the purposes of surrogacy between a sonless house represented by a married woman or a widow and a woman, usually a girl, who is used as a surrogate mother to procure a son.⁴⁶⁸ In Tanzania, sons are considered to be more valuable than daughters because under inheritance laws, sons are the main heir of the family's property and are therefore a security when parents are of old age. Thus, a sonless house pays bride price to the parents of the surrogate woman and the latter becomes the wife who has to conceive either by having sex with any man or a chosen suitor. The child then belongs to the house that paid the bride price. In order to obscure the identity of the blood-related father, many sonless houses prefer that the surrogate women sleep with multiple men. This practice of

⁴⁶⁶ Tungaraza, Maria B. 1997. “The AIDS Epidemic and the Rights of Women (Tanzania).” Thesis submitted in partial fulfilment of Master of Laws Degree Course (LLM). Washington, D.C.: Georgetown University.

⁴⁶⁷ Mamfua, Pelad Paschal. 1982. “Polygamy in Tanzania, its Determinants and Effects on Fertility.” U-M-I- Dissertation Information Service. p. 38. Cited in Maria Tungaraza; Id.

⁴⁶⁸ Rwezaura, Balthazar Aloyse. 1985. “Traditional Family Law and Change in Tanzania.” p. 143.

requiring the women to have multiple partners essentially forces them into prostitution.⁴⁶⁹ But even more important, it increases their vulnerability to HIV infection.

3. Widow Inheritance

Widow inheritance, or liverate (a term from the Biblical Book of Leviticus), connotes a customary practice in which upon the death of her husband the widow is inherited by one of deceased's brothers or male relatives. The purpose is to perpetuate the family of the dead brother so that it is not wiped from the face of the earth.⁴⁷⁰

Widow inheritance is widespread in Tanzania and, in the wake of HIV, is risky to the widow in case the widow inheritor is infected with HIV. By the same token, widow inheritance is risky to the widow inheritor and his wives because the widow's deceased husband may have died of AIDS, meaning that the widow may also be HIV positive.

4. Widow Cleansing

Widow cleansing is a sexual ritual aimed at cleansing a widow from bad omen following her husband's death. To be cleansed, a widow must have sexual intercourse with another or others, depending on the specific practices of the tribe concerned. The act of cleansing puts the widow at risk for contracting HIV or for infecting the cleansers if she herself had previously contracted HIV, perhaps from her dead husband. In cases where the widower cleanses widows, he too may be infected and may infect many other widows in that village. Finally, if the infected widows are inherited, then their new co-wives in the case of a polygamous marriage will also be infected.⁴⁷¹

5. Wife Exchange

Wife exchange is an extra-marital sexual ritual in which husbands exchange wives for sexual pleasure. This practice is common in northeastern Tanzania and induces women to have sexual intercourse with their husbands' peers. As the practice involves multiple sexual partners, it increases the chances of women acquiring HIV and vertically transmitting it to their children or if they are already infected, transmitting it to others.

6. Female Genital Mutilation (FGM)

FGM is practiced in six of the twenty regions of Tanzania.⁴⁷² This practice is done in a crude manner by old women to young women usually ten to twelve years of age, and constitutes perhaps the cruelest form of abuse of a woman's body. Tools used for circumcising the girls are often not properly sterilized. Among others, the main hazards associated with the practice include heavy bleeding sometimes resulting in death, severe local and general infection, risk of infertility or barrenness, formation of scar tissue and tightening of the muscles of the sex organs limiting passage of urine and menstrual blood, and obstructed painful labor at childbirth.⁴⁷³ Others include loss of control over urination (vesco vagina fistulae or VVF), loss of normal sexual function and consequent unsatisfying sexual relationships, high risk of acquiring blood-

⁴⁶⁹ Id., p. 145. Cited in Maria Tungaraza; id.

⁴⁷⁰ Mukoyogo, M.C. 1995. "Lead Paper on Legal and Ethical Issues." Presented at National Aids Policy Workshop organized by the NACP, Dar es Salaam, p. 27.

⁴⁷¹ See Maria Tungaraza, Op.cit note 87.

⁴⁷² Op. cit., note 4, p. 125.

⁴⁷³ Pan African News Agency, March 1997.

transmitted diseases, and feelings of incompleteness, anxiety, depression, and frigidity.⁴⁷⁴ Finally, if one girl being circumcised is infected with HIV, there is a danger of infecting the other girls with HIV during the circumcision ritual. This practice thus places young girls at high risk of contracting HIV.⁴⁷⁵

There are some tribes in the country that circumcise girls as part of a ritual in which girls are taught what it means to be a woman. Although this practice clearly causes many dangerous health hazards, including exposing young women to HIV, controversy remains as to whether it should be stopped. While many people advocate that circumcision of girls should stop due to the health hazards, others still argue that the teaching should continue. To change these attitudes, more education is necessary about the risks inherent in the practice. One roadblock to education is that there are no data on the number of girls who have been circumcised in Tanzania and the effects this practice has had on them.

7. Dry Sex

It is natural for the vagina of a sexually aroused woman to get wet. Dry sex is a practice in which women use moisture-absorbing agents to absorb vaginal fluids and tighten the vagina, creating a “virgin-like state” and thereby enhancing sexual pleasure for men.⁴⁷⁶ A preference for a dry, tight vagina during sexual intercourse, commonly known as ‘dry sex’, has been identified in several Central and Southern African countries including Zaire, Zambia, Malawi, South Africa and Zimbabwe.⁴⁷⁷ This practice is also found in Tanzania although there are no specific data on the percentage of the population exercising this practice. Most drying-agents are herbs made from pounded tree barks and root, which women insert directly into their vaginas to absorb moisture.⁴⁷⁸ Other drying agents include baboon urine, which is inserted in the vagina.⁴⁷⁹ Yet other agents are mixed with porridge and taken orally or by making cuts on the inner thighs or other parts of the body and rubbing a powdered form of the agent into these cuts.⁴⁸⁰

Because some men prefer the feeling of sex with virgins, they expect their wives to produce the same sensations. Women regardless of their age, marital status, or education, therefore commonly use vaginal drying agents.⁴⁸¹ Since it is common for older men to marry younger wives or to have sexual relationships with young women, older wives use vaginal herbs so that their vaginas feel younger in order to compete with younger women for their husband’s sexual interest. A study done in Zimbabwe suggests that women practice dry sex as a result of economic and cultural subordination, which puts several wives or potential wives in competition for the love of one man. Gathered from the Zimbabwe study, the following are quotes from women explaining why they practice dry sex:

“If a man goes away, he’ll come home even if he has other girlfriends while he is away” (Bulawayo); “The man will experience character changes. He will show you his salary and how

⁴⁷⁴ Id.

⁴⁷⁵ See Maria Tungaraza, Op.cit. note 87

⁴⁷⁶ Cinic, Diane *et al.* “Dry Sex in Zimbabwe and Implications for Condom Use.” *Soc. Sci. Med.* 42(1): 91. Cited in Maria Tungaraza; Op. cit. note 87

⁴⁷⁷ Id.

⁴⁷⁸ Id., p. 93.

⁴⁷⁹ Id., p. 93.

⁴⁸⁰ Id.

⁴⁸¹ Id., p. 94.

he spent it and expressing his love for you” (Mutare); “If a man goes out drinking beer, he won’t think of anyone but you” (Kariba).⁴⁸²

Such use of herbs to enhance men’s sexual pleasure have been used since time immemorial, but in the wake of AIDS, women who insert moisture-absorbing herbs into their vaginas in the belief that this increases sexual pleasure expose themselves not only to the risk of cervical cancer but also to increased risk of HIV infection. Vaginal drying herbs kill certain vaginal bacteria known as lactobacilli.⁴⁸³ Lactobacilli are known to fight infections, including the HIV virus, which causes AIDS. Studies have shown that women with less lactobacillus are at higher risk of HIV infection and also at risk for becoming infertile.⁴⁸⁴

Vaginal drying agents have a negative effect for women who want to practice safe sex because they cause condom breakage and cause the cuts made in the body to insert herbs to allow the HIV to pass directly into the blood stream.⁴⁸⁵

⁴⁸² Id.

⁴⁸³ Latig, Prof. Ahmad, Director of AIDS Clinic Trials Group, University of Zimbabwe. October 16, 1996. “Vaginal Herbs Increases Risk of AIDS and Cancer.” Panafican News Agency.

⁴⁸⁴ Id.

⁴⁸⁵ See Maria Tungaraza op. cit. note 87.

Annex 2: Authors' note on Protection of the Blood Supply In United States and Other Jurisdictions

1. Liability of Blood Suppliers and Hospitals: Standards of Negligence and Strict Liability

Prior to wide-scale screening of blood supply, blood or blood-product transfusions constituted one of the principal modes of HIV transmission.⁴⁸⁶ A vast number of cases seeking compensation on behalf of individuals infected, their subsequently infected sexual partners, and the family members of those infected, have been the result. These claims have been filed against blood banks, hospitals, and physicians. The results in these cases vary widely, often depending on state law such as statutes of limitations, negligence standards, and probative evidence.

For policy reasons, blood and blood products are deemed provision of a service, subject to liability on a negligence or fault basis, rather than a product, subject to “strict liability” without evidence fault or negligence. Legislatures and courts reason that imposition of strict liability would defeat the important state goal of insuring a voluntary and inexpensive blood supply.⁴⁸⁷

Blood suppliers, therefore, are judged not under a strict liability standard, but instead under a negligence standard (i.e., the ordinary level of prudence used by blood suppliers in the same or similar circumstances).⁴⁸⁸

What constitutes proper evidence of negligence has been frequently disputed. Generally, if exposure occurred prior to the standard practice of screening donated blood in early 1985, the supplier is not negligent, simply because there was no accepted means to detect HIV and prevent contamination. The industry standard, however, has not been accepted by all courts as definitive. Some courts allow plaintiffs to present expert testimony that the industry's ordinary standard of care was inadequate and that other safety standards should have been introduced, such as surrogate testing for other blood-borne infections, such as hepatitis B, more stringent donor selection, and the option of autologous or directed donation, in which the patient or a friend or family member, donates blood prior to elective surgery. Failure of hospitals or blood collection agencies to identify and inform infected patients or family members after the fact (“look-back” notification) has also been asserted as a basis for liability (61,62,63,64). Additionally, failure of physicians to review the risks, benefits, and alternatives to transfusion, or to offer the use of autologous or directly donated blood has also been asserted as a failure to obtain an informed consent.⁴⁸⁹

2. Discovery of the Donor's Identity

In attempting to prove that infected blood was collected negligently, plaintiffs often seek information directly from the donor regarding the actual collection practices. Blood suppliers generally oppose disclosing identifying information regarding donors, citing the need to maintain confidentiality. In resolving these disputes, judges balance the plaintiff's need for the information, the state's in the administration of justice against the donor's privacy, the blood bank's guarantees of confidentiality, and maintenance of a voluntary blood supply. Many courts

⁴⁸⁶ Jenner, RK. 1995. “Transfusion-Associated AIDS.” Washington D.C.: Lawyers & Judges.

⁴⁸⁷ <http://www.ama-assn.org/special/hiv/library/readroom/other98/alpl.htm>.

⁴⁸⁸ Ricky Ray Hemophilia Relief Fund Act, 105th Cong., 1st Sess. (1997).

⁴⁸⁹ <http://www.ama-assn.org/special/hiv/library/readroom/other98/alpl.htm>.

find the balance to favour disclosure, particularly when the donor is deceased. Not uncommonly, courts allow limited discovery of the donor's testimony but prohibit revealing the identity of the donor.

3. Hemophilia, Clotting Factors, and AIDS

Numerous persons with hemophilia have filed individual suits against the manufacturers of clotting factors. These cases raise fascinating legal questions concerning a "market-share theory of liability" (i.e., to sue all the manufacturers and to collect from each according to its proportion of the market) and the "learned intermediary" defense (i.e., to place responsibility on the hematologist rather than the blood supplier). In perhaps the most significant ruling, the Seventh Circuit Court of Appeal denied class action status for the litigation of factor claims, with the result that claimants are now seeking a negotiated settlement with the manufacturers or compensation approved by Congress.

Annex 3: Authors' Note on Tortious Liability

Tortious liability arises from the breach of duty primarily fixed by law. It is a duty towards persons generally, and its breach is repressible by an action for unliquidated damages. In customary marriage practices spouses have a duty of care to ensure that they do not infect their spouses with HIV.⁴⁹⁰ Civil litigation in interspousal transmission of HIV is unprecedented in Tanzania. Since American courts have decided cases of this nature, this section shall adopt the decisions to ascertain redress for affected women in Tanzania.⁴⁹¹ American courts have drawn an analogy from sexual transmission of venereal diseases to decide civil suits on sexual transmission of HIV. Civil litigation is not uncommon in Tanzania. Generally, sexual transmission of venereal diseases is invoked to verify adultery as a ground for divorce. In American courts, traditionally, actions brought for transmission of venereal disease are based upon one or more of the three causes of action in tort. To wit, fraudulent misrepresentation, battery, and negligence.

1. Fraudulent Misrepresentation

A case of action in fraud for sexual transmission of HIV requires the plaintiff to prove that, (1) the defendant made false representation; (2) he knew that the representation was false or did not have sufficient knowledge to make it; (3) he intended to induce the plaintiff to act or refrain from action in reliance upon misrepresentation; (4) the plaintiff justifiably relied upon the misrepresentation; and (5) the plaintiff suffered damages from such reliance.

Case law has applied these elements in a cause of action on fraud for interspousal infection of venereal disease. *Maharam v. Maharam* evinces this fact. In *Maharam v. Maharam*, plaintiff brought an action in fraud against her husband for his infecting her with genital herpes. The plaintiff stated:

... husband knew or should have known that he had contracted a venereal disease, that he had affirmative duty to disclose his condition to his wife, but failed to do so, and that he intentionally misrepresented his condition to her, causing her contract an incurable, debilitating, and painful disease.

The court held that the plaintiff's cause of action was well founded and "the thirty-one year marital relationship gave rise to an affirmative 'legal duty to speak,' and the allegation that the husband failed to disclose his condition adequately states a cause of action.... (in) fraud."

Thus, in order to make a prima facie case on fraudulent misrepresentation, a wife in customary marriage practice who has been infected with HIV must prove the existence of the aforesaid factor constituting fraud. She must reinforce her assertion by citing the *Maharam* case. The only distinction is that the *Maharam* case was a monogamous marriage whereas the latter is a polygamous marriage. Both apply the same principle of law.

Mokamona and widow inheritance may present the most difficult situation on a cause of action for fraudulent misrepresentation for sexual transmission of HIV. This is because while *mokamona* involves promiscuity, a widow would have been cleansed by two men involved in high-risk behaviour before being inherited by another husband. Therefore, establishing a causation linkage may be difficult.⁴⁹² But, a *mokamona* wife has strong grounds to sue the family that married her

⁴⁹⁰ Maria Tungaraza; Op.cit.

⁴⁹¹ Id.

⁴⁹² Id.

for claim of relief.⁴⁹³ She must prove that there was an implied statement at the time of marriage that sexual intercourse was safe. She must assert her argument by proving that the family knew that the representation was false or did not have sufficient knowledge to make it. She must further adduce that the defendant intended to induce her to act upon representation, and that she justifiably relied upon the misrepresentation and suffered damage from such reliance.

The *mokamona* wife could also sue the state for damages by virtue of tortious vicarious liability.⁴⁹⁴ She must prove that customary law, which condones *mokamona* implicitly, misrepresented the safety of promiscuous sexual intercourse and induced her to act upon the representation, whereupon she suffered damages.⁴⁹⁵

The widow on the other hand may have recourse of suing the state because unprotected sexual intercourse will have taken place by three men successively within two window periods, hence making it difficult to establish causation. She has strong grounds to sue the government for damages because first, the policy does not require mandatory premarital testing, knowing the high risk of sexual patterns of the Tanzanian culture.⁴⁹⁶ Second, the state condones customary law, which sanctifies the high-risk behaviour.⁴⁹⁷ On account of these facts, the state implicitly made a fraudulent representation of the safety of sexual practice in widow inheritance; she suffered damages acting on the representation.

2. Battery

A cause of action on battery arises from intent to cause harmful or offensive contact. The case of State v. Lankford decided on a cause for battery arising out of an STD. In his case the plaintiff brought a cause of action on battery against her husband for infecting her with syphilis and for not informing her that he had syphilis prior to engaging in sexual intercourse. The court held that by failing to disclose his known disease to his wife, it could infer the requisite intent from actual results of infecting her.

In all forms of customary marriages therefore, courts should infer the requisite intent from the defendant's failure to disclose his AIDS condition where he had actual knowledge that he had the disease and engaged in sexual intercourse.

3. Negligence

Negligence has been defined as a conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm. In order to establish a cause of action in negligence a plaintiff must establish four elements: (1) a legal duty or obligation of care on the part of the defendant; (2) a breach of that duty by the defendant; (3) a reasonable close causal connection between the defendant's conduct and the plaintiff's injury, namely proximate cause; and (4) actual damage or loss to the plaintiff.

Duty is defined as a legal obligation to conform to a particular standard of conduct toward another. There are many factors that courts take into account to determine whether the defendant had a duty of care towards the plaintiff. These factors are: (1) ability to foresee harm to the

⁴⁹³ Id.

⁴⁹⁴ Id.

⁴⁹⁵ Id.

⁴⁹⁶ Id.

⁴⁹⁷ Id.

plaintiff; (2) degree of certainty; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for the breach; and (7) availability costs and prevalence of insurance for the risk involved.

Case law has applied these factors to establish duty of care of the defendant towards the plaintiff. In Crowell v. Crowell, the court recognized a duty to protect another against an STD. In this case the court held the defendant liable under negligence theory for infecting his wife with a venereal disease.

As such, wives in customary marriage practices must be encouraged to seek redress because this is the only way they could empower themselves economically and sustain living with HIV without infecting others. Although a question may arise as to value of damages since the state is poverty stricken, the answer to this would be that men have inheritable properties such as land and cattle, which they use to insubordinate women. Such property could be used to pay damages. Since the life span of the person infected with HIV is ten years or more, women could use compensated properties to start income-generating activities to improve their living standard. The mode of paying out the loan before death could be worked out by expert opinion.

4. Negligent Transmission and Customary Sexual Rituals

The purpose of this section is to establish that in order to conform to the standard of care required by the law to protect others from HIV infection, the law must eradicate sexual practices of widow cleansing and wife exchange. Failure to honor this recommendation would risk not only the sexual partner's lives, but also infants' lives through vertical transmission. Therefore, should one fail to disclose his HIV status, a widow or wives involved in wife exchange rituals may obtain redress under the theory of tort of fraud, battery, negligence, and emotional distress.

5. Widow Cleansing

As shown in the preceding sections, a widow is compelled to sexual cleansing by customary practices. Therefore, a duty to disclose arises under the law of tort for the widower to disclose to the widow his HIV status prior to sexual intercourse. However, it is more likely that a widower may not know whether he is seropositive or not. But, due to the fact that as a widower he has to cleanse widows, this places him at high-risk behaviour of contracting HIV. Should a widow contract HIV in the course of the cleansing rituals, it may be difficult for her to establish a prima facie case on tortious liability against the widower on fraud, battery, negligence, and emotional distress, because she was also cleansed by a stranger within the widow period. This being the case, the only recourse available to her would be to sue the state because the state condones customary practice that endangered her life and failed to abide by the duty of care to enact law that eradicates such harmful practice. The widow must assert that this breach of duty was the actual cause of transmission of HIV to her.

The widow also has a strong case against the state on fraud, battery, negligence, and emotional distress, especially considering that a stranger who cleansed her in the second instance may be difficult to trace. The customary ritual of widow cleansing compelled the widow to discreetly entice the stranger to have sexual intercourse with her so as to exorcise evil spirits; as a result she contracted HIV.

6. Wife Exchange Ritual

A wife who contracts HIV as a result of customary sexual ritual of wife exchange may have a cause of action for claim of relief under a tort theory of fraudulent misrepresentation, battery and negligence. However, since the sexual pattern is based on multiple partners, she may sue all her seropositive sexual partners jointly. The custom is based on male dominance over women such that men exchange wives for sexual pleasure. Therefore, all men who had sexual intercourse with the plaintiff are liable if it is proven that they have the same strain of HIV. The plaintiff has to prove all the elements in every cause of action as shown above. She may also sue the state for damages under the same principles analyzed above.

The plaintiff may also establish a prima facie case against the state for vicarious liability because lacunae existing in the law opened the gates for negligent transmission by blessing the practice without taking due care for prevention.

Annex 4: Criminal Laws and Correctional System—Various court decisions from other countries that are of particular relevance to the provisions of Tanzanian statutes

1. Re: Penal Code, Cap 16, Chapter XVII, Nuisance and Offences Against Health and Convenience

Negligent act likely to spread infection

In Regina v. Mercer, the accused pleaded guilty of criminal negligence for transmitting HIV and thereby causing bodily harm contrary to S.221 of the Canadian Criminal Code and breach of the undertaking. Because he had been identified as a partner of a person who had tested HIV positive, the accused was contacted by the medical officer of health and advised that he should assume that he was a carrier of the virus and that he should not engage in unprotected sexual activity. At this time, the accused also supplied a blood sample, which later confirmed that he was HIV positive. Notwithstanding the medical officer's advice, the accused had unprotected sex with a 16-year-old girl and assured her there was no need to use a condom when she asked him whether he should. The girl was later diagnosed as being HIV positive. The accused also engaged in unprotected sexual intercourse on two occasions with a 22-year-old single mother of an infant son. Before engaging in sexual intercourse, this woman specifically asked the accused whether there was any reason why he should not use a condom, and he assured her that it was unnecessary. This woman, as well, was subsequently diagnosed as being HIV positive.

The trial judge sentenced the accused to a total of 30 months' imprisonment. The court held that the accused incurred criminal liability not because of his actions in infecting the two victims but because of the criminally negligent manner in which he did it and the consequential bodily harm he caused. Punishing the accused for spreading HIV would be a gross oversimplification of the problem and would lead to a distortion of the accused's culpability.

Consequently, the decision in Mercer falls squarely within the ambit of S.179 of the Penal Code.

Quite apart from the Canadian court decisions, by April 1998, 28 states in the United States of America had passed laws making it a crime for someone with HIV to knowingly expose someone else to the infection through sexual or other kinds of contact. The states are: Alabama, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Washington.⁴⁹⁸ Some of these states such as Missouri have had criminal transmission laws on the books for more than ten years. In 1997, several states enacted tougher penalties for knowingly infecting or exposing people to the virus. Florida, New Jersey, and Washington State also raised the stakes for intentional exposure or transmission. In April 1998, the Iowa legislature for the first time approved a bill making it a felony for a person who tests positive with HIV to engage in "intimate contact" with other persons. A person who was convicted of such activity could receive a prison sentence of up to 25 years.⁴⁹⁹

⁴⁹⁸ See Thomas Shevroy, HIV Transmission and the Criminal Law; Dept. of Politics, Ithaca College, Ithaca, NY 14850.

⁴⁹⁹ Id.

In some cases, wilful transmission of HIV has been challenged on grounds of constitutional issues.⁵⁰⁰ The case State of Louisiana v. Salvador Andrew Gambrella involved a defendant who was notified that he was HIV positive after donating plasma in June 1989. At a point after he had been appraised that he was positive, Gambrella started having a sexual relationship with an 18-year-old woman the he had, for several months, been dating. Unaware that the victim was HIV positive but concerned about pregnancy, the woman demanded that Gambrella wear a condom. After she became pregnant as the result of condom failing, she stopped requiring Gambrella to wear one. The couple lived together from before the baby's birth until February of 1991. Eventually, a routine blood test revealed that she was HIV positive. Since her then boyfriend was HIV negative, she reasoned that the defendant had infected her.

The infected woman testified that she had never been told that Gambrella was positive for HIV and that he had specifically told her that he was a blood donor and had never been rejected for giving blood. The defendant, however, maintained that he had told the victim that he was HIV positive soon after they started dating.

The defendant was tried and convicted under a Louisiana statute, which stated that "No person shall intentionally expose another to any acquired immunity deficiency syndrome (AIDS) virus through sexual contact without the knowing and lawful consent of the victim." He was sentenced to ten years at hard labor, without possible parole. Gambrella challenged the conviction on several grounds. First, his attorney contended that the state had illegally obtained his medical test results in the case because they did not secure a court's permission to examine them until after they had both requested and secured them. Questions of confidentiality have, of course, been important to HIV discourse from the beginning. But courts have been generally unsympathetic to honoring confidentiality claims in criminal cases. In this case, the court rejected the challenge via application of a simple balancing test. The "state's interest in prosecuting the defendant for his violation of the criminal statute outweighed defendant's interest in maintaining the confidentiality of his test results." Moreover, the court gave short shrift to the defendant's claims that his Fourth Amendment rights had been violated. The court's reasoning was that the material would "inevitably have been seized by law enforcement personnel in a constitutional manner."

Gambrella also challenged the law on the grounds that the terms "sexual contact" and "knowing consent" were vague. He further argued that the statute confused HIV infection with actual AIDS and thus did not properly define the nature of the sanctioned behaviour. The law was also challenged as a violation of the "right to privacy," on the grounds that it prevented HIV-positive individuals from exercising their rights to engage in sexual activities. All the challenges were summarily rejected by the state court.

Common nuisance

In Regina v. Ssenyonga, the Ontario court acquitted the accused on three counts of committing a common nuisance and thereby endangering lives, safety, and health of the public by having unprotected sexual intercourse with each of the three complainants, knowing that he carried HIV and intentionally withholding the information from the complainants, contrary to S.180 of the Canadian Criminal Code.

⁵⁰⁰ See Thomas Shevroy, HIV Transmission and the Criminal Law, Dept. of Politics, Ithaca College, Ithaca, NY 14850.

2. Re: Offences Endangering Life or Health

In R. v. Seuri the court held that, “it is not for the medical officer to decide whether the harm is grievous harm. This is the duty of the court.” In the wake of AIDS, it is difficult to ascertain how the court may arrive at a different conclusion from the medical officer’s testimony, since accurate determination of the harm caused by HIV in the body relies on the medical testimony by the medical officer.

In R. v. Mercer, the accused was charged with criminal negligence for transmitting HIV and thereby causing bodily harm contrary to S.222 of the Canadian Penal Code. The court held that Mr. Mercer incurred criminal liability not because of his actions in infecting the two young women with the virus alone but because of the criminally negligent manner in which he did it and the consequential bodily harm, which he accused. Against this background, the decision turned to assess the adequacy of the sentences for conduct. The first step in this process was analysis of the gravity of the consequences emanating from these crimes and the degree of Mr. Mercer’s culpability. Therefore, in ascertaining the gravity of the consequences, the court relied on expert witness of Dr. Ian Bowmer, who gave expert evidence relating to the development and consequences of AIDS. Dr. Bowmer was for that matter a professor of medicine at Memorial University and a provincial consultant on infectious diseases. He had presented papers at national and international conferences on the subject of his testimony. Dr. Bowmer’s evidence attested to the reality of untimely deaths for both women and lives of misery and anguish in their contracted life span.

3. Re: Penal Code, Cap 16, Chapter XXII Assault

In Regina v. Ssenyonga, the accused was charged with three counts of aggravated sexual assault. The evidence adduced during the Crown’s case indicated that the accused had infected the three complainants with HIV as a result of having unprotected sexual intercourse with them. There was evidence that the accused knew at the time that he was infected with the virus.

The court held that the evidence indicated that the complainants would not have consented to having sexual intercourse with the accused had they known that he was infected with HIV. The evidence was indisputable, however, that they did consent to the application of the force inherent in the acts of sexual intercourse, which force was not in itself excessive or dangerous. The presence of the virus does not alter the conclusion that they consented to the application of force. The criminal law is not based on the principle of informed consent.

Further, the consent was not vitiated by fraud. Fraud sufficient to vitiate consent must relate to the nature and quality of the act. In this case, the accused was under absolutely no misapprehension as to the nature of the acts in which they were engaging. They were fully aware that they were consenting to participate in acts of sexual intercourse with the accused. Nothing the accused said or did induced them to believe otherwise. The purpose of the assault provision is to control the nonconsensual direct or indirect application of force by one person to another. The law of assault is too blunt an instrument to control the spread of the AIDS virus.

4. Re: Penal Code, Cap 16, Chapter XXIII: Criminal Recklessness and Negligence

In Louisiana v. Schmidt, the defendant Dr. Schmidt had a long-running extramarital affair with Janice Trahan. As a result of her commitment to Dr. Schmidt, Ms. Trahan divorced her first

husband. Dr. Schmidt also agreed to divorce his wife but never followed through with this promise by filing divorce proceedings against her. Convinced that he would not do so, Ms. Trahan broke things off a second time but continued to communicate with Dr. Schmidt. He also continued to administer an ongoing series of B 12 injections to Ms. Trahan. One of the injections given to her by Dr. Schmidt was described by her as “more painful” than others, and it was after this injection that her health seemed to deteriorate. Five months afterward she tested positive for her infection, and she learned that she had contracted hepatitis C, an extremely serious form of the disease.

Dr. Schmidt was eventually charged with intentionally injecting Ms. Trahan with the HIV virus, although he was not charged with injecting the hepatitis C virus. During the course of the trial it became evident that Dr. Schmidt had drawn a blood sample from two patients—LL and DM—without following the usual procedures. Both samples were taken in the office. Entries were made in each case that two samples were drawn from each, but there were no corresponding receipts as to the test results regarding the second samples in each case. LL suffered from hepatitis C, and DM was HIV positive. This circumstantial evidence was also supported during the trial with DNA evidence that became the focal point of the appeal.

The state employed the services of a physician at the Baylor College of Medicine. The lab used a “phylogenetic” analysis to conclude that the HIV discovered in Ms. Trahan was “closely related” to that found in DM. The admissibility of this conclusion that the samples were “closely related” was challenged on appeal. While the use of DNA was well established in Louisiana, its use to establish the similarities of viral infections was without precedent. The Louisiana Appeals Court ultimately upheld Schmidt’s conviction on charges of attempted second-degree murder.

In State v. Caine, the defendant was convicted of robbing a convenience store, taking a carton of cigarettes, and then stabbing one of the employees, Wanda Fitzgerald, with a syringe filled with clear fluid while shouting, “I’ll give you AIDS.” The syringe itself was never actually found nor entered into evidence in the trial, so it was not determined whether there was an actual threat of transmission, although it was determined that Caine was indeed HIV positive. Three months after the incident, Fitzgerald still tested negative for the virus, making it seem increasingly unlikely that the contents of the syringe posed a threat to her life. Still, Caine was convicted of attempted second-degree murder, presumably based upon his intent at the time. He was sentenced to fifty years in prison as a habitual offender. On appeal, Caine’s attorney argued that intent to kill, a requirement for a conviction on a second-degree murder charge, had not been demonstrated. The court showed little sympathy for this position, and allowed intent to rest on the fact that Caine was HIV positive, addicted to drugs, and that the probabilities would be high that Fitzgerald would be infected if the needle that pierced her skin was laced with the virus, an at least somewhat tenuous “chain of causation”.

5. Re: Penal Code, Cap 16, Chapter XIXA: Murder and Manslaughter

In examining experiences of other countries where criminalization of deliberate transmission of HIV/AIDS has attempted murder charges, State of Oregon v. Hinkhouse is a good illustration. This was the first case in Oregon State to involve a criminal prosecution in such cases. Here multiple counts of attempted murder and first degree assault were brought against a defendant who argued that there was failure of evidence demonstrating that he had intended to cause serious bodily injury or kill his victim. Hinkhouse learned that he was HIV positive in 1989. At that time, he had an on-again-off-again sexual relationship with a 15-year-old girl. During the relationship, the defendant refused to wear condoms. In November 1990, Hinkhouse told his probation officer that he was HIV positive. The protection officer warned him not to have unprotected sex.

Hinkhouse was reportedly told that if he had infected anyone that would be considered murder, by Carol.

In 1992, Hinkhouse was taken into custody on a parole violation and he and Carol continued to have conversation about HIV. Hinkhouse, however, continued to have sex with a number of women and apparently bragged about it. Taken in another parole violation, as a condition of his release he signed an agreement not to have unsupervised sexual contact with anyone without his parole officer's permission. Still, he continued to have sexual relations with a number of women, in some cases refusing to wear a condom, and in each case refusing to disclose his HIV status. He in fact specifically denied his positive status on at least one occasion. He was even reported to have stated at one point that he was going to "go out and spread."

The court was unsympathetic to Hinkhouse's claims that he did not intend to harm or kill anyone, stating, that the defendant engaged in a "persistent pattern of recruiting sexual partners," "consistently concealed or lied about his HIV status," "refused to wear condoms," engaged in "rough and violent intercourse," and "told at least one person that he intended to spread the disease to others by such conducts." The court also took the fact that the defendant wore condoms when having sex with his fiancée as evidence that he distinguished between women he cared about and those he didn't, and that he intended to harm those with whom he had no caring relationship. The appeals court upheld the trial court's determination that the defendant had acted "deliberately to cause his victims serious bodily injury and death."

Tennessee v. Pipkin (1998) is a good example of sentence enhancement. In this case Lee Pipkin was sentenced to 105 years in prison upon being convicted of "especially aggravated kidnapping" and five counts of child rape. Pipkin's attorney objected that his sentence was "enhanced" on the rape charges, even though he did not know of his positive status until the day before he was sentenced. The state Court of Criminal Appeals ruled that the HIV status was appropriate to consider as a factor in sentence "enhancement" along with other factors that had been taken into account.

In Mississippi, Theodus Lindsay was sentenced to fifteen years in prison for armed robbery. His lawyers claimed that this amounted to a sentence of life imprisonment, given that he was HIV positive. The court rejected that claim on the grounds that (a) he never proved that his life expectancy was approximately ten years, as he claimed, and that (b) life expectancy was not necessarily taken into account in sentencing determinations.⁵⁰¹

⁵⁰¹ Thomas Shevroy, HIV transmission and Criminal Law, Op.cit.

Annex 5: Proposed Tanzania HIV/AIDS Prevention and Control Act of 2004: Draft Outline

Below is an illustration of a proposed comprehensive legislation of the Tanzania HIV/AIDS Prevention and Control Act of 2004. It is crucial to mention that this proposed legislation borrows from the Philippines law. However, in drafting the final annotated draft, examples from other countries' legislations may be referred to, and most importantly Tanzania will come up with its own legislation that best suits our environment.

TAWLA's proposition for a comprehensive law is based on the fact that it is more practical and easier to reference for legal practitioners and members of the general public to address various HIV/AIDS issues by referring to a comprehensive law. If amendments of various pieces of legislations are preferred to a comprehensive law, it may be difficult to address some of the issues since it may take long to search and identify which particular piece of legislation deals with a matter to be addressed and may cause conflict of laws. Secondly, amending various statutes is cumbersome and involves a longer drafting period and legislative process, whereas drafting a comprehensive legislation will take a shorter time, a shorter legislative process, and is cost effective.

Stakeholders' Views: Intergovernmental Meeting and National Conference on whether to adopt a comprehensive law or to amend existing pieces of legislations

In the stakeholders meeting for review of TAWLA report there were two opposing views on whether to adopt a comprehensive law on HIV/AIDS or to amend existing laws to respond to pressing HIV/AIDS issues from time to time. The majority view was in favor of amending single laws. The grounds for this view were that HIV/AIDS is a health condition, and like other epidemics is not of permanent existence; as such, a precedent should not be set for enactment of comprehensive laws whenever a new epidemic erupts. Moreover, since the epidemic is not of a permanent phenomenon, a comprehensive law is likely to be superfluous and redundant when HIV/AIDS is no longer an issue. It was observed further that in enacting an omnibus law, it is most probable that it may not capture all important issues and is bound to have lacunae. It was also observed that there is a need for amending different pieces of legislations from time to time which can be enforced and conform to the National Policy on HIV/AIDS, 2001 guidelines. Thus, for the foregoing reasons participants unanimously recommended amendment of various pieces of legislation as opposed to a comprehensive law.

Draft Outline

Section 1. Title - This Act shall be known as the "Tanzania AIDS Prevention and Control Act of 2004"

Section 2. Declaration of Policies

Section 3. Definition of Terms

PART I: EDUCATION AND INFORMATION

Section 4. HIV/AIDS Education in Schools

Section 5. HIV/AIDS Information as a Health Service

Section 6. HIV/AIDS Education in the Workplace

Section 7. HIV/AIDS Education for Tanzanians Going Abroad

Section 8. Information Campaign for Tourist and Transients
Section 9. HIV/AIDS Education in the Communities
Section 10: Information on Prophylactics
Section 11: Penalties for Misleading Information

PART II: SAFE PRACTICES AND PROCEDURES

Section 12. Requirement on the Donation of Blood, Tissue, or Organ
Section 13. Guidelines on Surgical and Similar Procedures
Section 14. Penalties for Unsafe Practices and Procedures

PART III: TESTING, SCREENING AND COUSELING

Section 15. Consent as a Requisite for HIV Testing
Section 16. Prohibitions on Compulsory HIV Testing
Section 17. Exception to the Prohibition on Compulsory Testing
Section 18. Anonymous HIV Testing
Section 19. Accreditation of HIV Testing Centers standards.
Section 20. Pre-test and Post-test Counselling
Section 21. Support for HIV Testing Centers

PART IV:HEALTH AND SUPPORT SERVICES

Section 22. Hospital-Based Services
Section 23. Community-Based
Section 24. Livelihood Programs and Trainings
Section 25. Control of Sexually Transmitted
Section 26. Insurance for Person with HIV

PART V: MONITORING

Section 27. Monitoring Program
Section 28. Reporting Procedures
Section 29. Contact Tracing

PART VI: CONFIDENTIALITY

Section 30. Medical Confidentiality
Section 31. Exceptions to the Mandate of Confidentiality
Section 32. Release of HIV/AIDS Test Results -
Section 33. Penalties for Violations of Confidentiality
Section 34. Disclosure to Sexual Partners

PART VII: ANTI-STIGMATIZATION AND DISCRIMINATORY ACTS AND POLICIES

Section 35. Discrimination in the Workplace
Section 36. Discrimination in Schools –
Section 37. Restriction on Travel and Habitation
Section 38. Inhibition from Public Service
Section 39. Exclusion from Credit and Insurance Services
Section 40. Discrimination in Hospitals and Health Institutions
Section 41. Denial of Burial Services –
Section 42. Penalties of Discriminatory Acts and Policies

PART VIII MISCELLANEOUS PROVISIONS

Section 43. Implementing Rules and Regulations
Section 44. Separability Clause

Section 45. Amendment Clause
Section 46. Repealing Clause
Section 47. Incorporation Clause
Section 48. Effectivity

Section 49: Amendment Clause

The following laws are amended:

*A. Medical Practitioners and Dentists Ordinance, Cap. 407.*⁵⁰² Section 9 amended to include HIV/AIDS prevention quality standards for different medical procedures and registration of qualified medical practitioners and dentists to enter and stay in the service of the practice of medicine.

*B. Nurses and Midwives Registration Ordinance, Cap. 325.*⁵⁰³ Amended to enunciate education, training, registration, enrolment, and practice of nursing and midwifery to impact HIV/AIDS prevention and care standards, including PMTCT.

*C. The Opticians Act, 1966.*⁵⁰⁴ Amended to include provision on quality service for HIV/AIDS prevention and care.

*D. Private Hospitals (Regulations) Act, 1977.*⁵⁰⁵ S.5 and S.7(2) to include adherence to approved standards for prevention and care of HIV/AIDS as well as apply universal precautions.

*E. Private Health Laboratories Registration Act, No. 10 (1997).*⁵⁰⁶ Amended to enunciate a special provision for setting up quality VCT service, taking into consideration provision of service by competent laboratory technicians well trained in HIV testing, prevention, and care.

*F. The Health Laboratory Technologists Registration Act, No. 11 (1997).*⁵⁰⁷ Amendment to make reference to HIV/AIDS testing requirements, pre- and post-test counselling, need for confidentiality, safety precautions, and related issues.

*H. Pharmaceuticals and Poisons Act, 1978.*⁵⁰⁸ Amendment to include quality supply, manufacture, and use of VCT kits and other reagents needed for HIV testing, including needles, syringes, gloves, etc.

*I. Employment Ordinance, Cap. 366 of the Laws (Revised).*⁵⁰⁹

- Medical Examination: S.47 to be amended to state explicitly that HIV/AIDS should not be a condition for medical examination in order for one to qualify for employment.
- Termination of Contract: Amend S.52 to state explicitly that HIV status should not be a determinant condition that warrants termination of employment contracts.

⁵⁰² The Medical Practitioners and Dentists Ordinance, Cap. 407

⁵⁰³ The Nurses and Midwives Registration Ordinance, Cap. 325

⁵⁰⁴ The Opticians Act, 1966

⁵⁰⁵ The Private Hospitals (Regulations) Act, 1977

⁵⁰⁶ The Private Health Laboratories Registration Act, No. 10 (1997)

⁵⁰⁷ The Health Laboratory Technologists Registration Act, No. 11 (1997)

⁵⁰⁸ The Pharmaceuticals and Poisons Act, 1978

⁵⁰⁹ The Employment Ordinance, Cap. 366 of the Laws (Revised)

- Care and Welfare: S.100(1). PLHA employees should be accorded equal treatment on medical aid as other employees under S.100(1). The section should be explicitly amended to include an HIV component. If possible, provision of antiretrovirals should be included.
- Burial of Deceased Employee and Dependents: S.102(1) to be amended to give equal treatment to deceased PLHA.

*J. The Security of Employment Act No. 5 (1964).*⁵¹⁰ Amended to include a section that stipulates clearly that an employer should not summarily dismiss an employee on grounds of contracting HIV/AIDS if the employee abides by the disciplinary code and the labor laws.

*K. Workman's Compensation Ordinance Cap. 263.*⁵¹¹ Second Schedule and Third Schedule of the ordinance amended to include rights of PLHA on issues relevant to HIV/AIDS injuries suffered in the course of employment, e.g.,

- a) health care providers who acquire HIV accidentally when attending to patients; and
- b) compensation for injury, requirements as to notice of accident, and eligibility for compensation.

*L. Rules 23, 25, 30 of the Local Customary Law (Declaration) (No. 4) Order 1963.*⁵¹²

*M. Rule 66A of the Local Customary Law (Declaration) Order 1963, GN. 279 of 1963.*⁵¹³ To ensure equality of women regarding property and marital relations and access to employment and economic opportunity so that discriminatory limitations are removed on rights to own and inherit property, enter into contracts and marriage, obtain credit and finance, initiate separation or divorce, equitably share assets upon divorce or separation, and retain custody of children.

*N. The Law of Marriage Act, No. 5 (1971).*⁵¹⁴

- Amended to allow women to make sound decisions on marriage, especially in the wake of AIDS; they may be vulnerable to HIV infection as they may not apprehend the risk involved.
- Notice of objection: S.20, S.145 amended to include HIV situations.
- Coercion or Fraud: S.151 amended to include HIV/AIDS to reflect the consent of the party being induced by coercion or fraud.
- Property: Sections 56, 57, 58, 60(a), and 60(b). Although the law seems to offer equal protection to spouses over property rights and status in a marriage, the concept of separate ownership of property between spouses is detrimental to women and serves to lock them into a marriage for economic reasons. Therefore, law mitigates against protection for vulnerability to HIV infection.

O. Children. Adopt unified law to define the age of a minor.

P. Age of Minor Law. There is a need for a unified law to define the age of a minor, which is now lacking as legislations of children differ on the definition of a child. The Constitution does not make specific reference to children either, but they are generally categorized as “all human beings.”

⁵¹⁰ The Security of Employment Act No. 5 (1964)

⁵¹¹ Workman's Compensation Ordinance, Cap. 263

⁵¹² Local Customary Law (Declaration) (No. 4) Order 1963

⁵¹³ Local Customary Law (Declaration) Order 1963, GN. 279 of 1963

⁵¹⁴ The Law of Marriage Act, No. 5 (1971)

*Q. The Children and Young Person's Ordinance, Cap 13.*⁵¹⁵ Amend the legislation to include a provision for prevention of HIV transmission and care of children in approved schools.

*R. The Education Act, 1978.*⁵¹⁶ Amend the legislation a) to include a provision on the rights of the child to access HIV/AIDS prevention education; and b) to include standard requirement of the quality of the education on HIV prevention and care provided to children.

*S. Adoption Ordinance, Cap. 335.*⁵¹⁷ Amend the legislation a) to prohibit stigmatization and discrimination of orphans living with HIV/AIDS; and b) to ensure care and support of orphans living with HIV/AIDS.

*T. Disabled Persons (Employment) Act, 1982 and Disabled Persons (Care and Maintenance) Act, 1982.*⁵¹⁸ Amend both statutes to include provisions for HIV prevention and care for disabled people.

*U. The Immigration Act, No. 7 (1995).*⁵¹⁹ Amend S.10(c)(i) to clearly state that HIV/AIDS should not constitute a condition for prohibiting immigrants.

*V. The Refugee Act, No. 9 (1998).*⁵²⁰ Amend S.18(2)(c) to a) expressly address HIV/AIDS issues in the scope of the powers given the director or settlement officer; and b) give such orders or directives, either orally or in writing, to any asylum seeker or refugee as may be necessary or expedient to ensure that all proper precautions are taken to preserve the health and well being of the asylum seekers or refugees, including those with HIV or AIDS.

Amend S.31 to include importance of HIV/AIDS prevention and care education in refugee camps.

*W. The Penal Code, Cap. 16.*⁵²¹ Amend:

- Chapter XVII: Nuisance and Offences Against Health and Convenience S.179—Act of spreading infections of any disease dangerous to life to include HIV spread.
- Chapter XVII: Nuisance and Offences Against Health and Convenience S.179b, S.170—Common Nuisance to include HIV transmission/spreading
- Chapter XXII: Offences endangering life or health—S.225, S.227, S.228
- Chapter XXIV: Assault—S.241
- Chapter XXIII: Criminal Negligence—S.233(e), S.233(f), S. 234

*X. The Sexual Offences (Special Provisions) Act, 1998.*⁵²²

- Amend the following sections to reflect HIV/AIDS prevention and care: 131(1), 138B(1), 139(A), 139, 140, 5, 12, 139(a), 139(b), 139(c), 139(d), 139(e), 139(f), and 156.

⁵¹⁵ The Children and Young Person's Ordinance, Cap 13

⁵¹⁶ The Education Act, 1978

⁵¹⁷ Adoption Ordinance, Cap. 335

⁵¹⁸ The Disabled Persons (Employment) Act, 1982 and The Disabled Persons (Care and Maintenance) Act, 1982

⁵¹⁹ The Immigration Act, No. 7 (1995)

⁵²⁰ The Refugee Act, No. 9 (1998)

⁵²¹ The Penal Code, Cap. 16

⁵²² The Sexual Offences (Special Provisions) Act, 1998

- Amend legislation to S.127 of the Evidence Act, S.348A, and the Criminal Procedure Act, as amended by the sexual offences act.

*Y. Prisons Act, 1967.*⁵²³ Amend S.20(1), S.20(2) (requirement for medical examination of all prisoners), S.20(3) (prevention of the spread of the disease), S.32 (include sexual violence, rape in prison as prison offences in order to prevent HIV transmission), S.21, S.40.

*Z. Basic Rights and Enforcement Act, No. 33 (1994).*⁵²⁴ S.10 and S.13 need to be reassessed in the light of HIV/AIDS so the act is useful in addressing infringement of the human rights of PLHA

*AA. Newspaper Act, 1976*⁵²⁵ *and the Broadcasting Services Act, 1993.*⁵²⁶ Amend Newspaper Act, 1976⁵²⁷ and the Broadcasting Services Act, 1993⁵²⁸ to address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS, the National Policy on HIV/AIDS, 2001,⁵²⁹ and the views expressed by the stakeholders.

*AB. The Food (Control of Quality) Act, 1978.*⁵³⁰ Amend the act to control manufacture, supply and consumption of food supplements dangerous for use by PLHA. Reconcile with the Food, Drug and Cosmetics Act, 2002.

Section 50. Repealing Clause

The following sections of laws are repealed:

*Internationally Notifiable Diseases Act, 1963.*⁵³¹ The following sections—S.5, S.6(1)–(3), S.7, S.8(1)–(2), and S.11(1)—are not relevant to HIV/AIDS and therefore render the legislation redundant. The cited sections contravene UNAIDS standard guidelines and the National Policy on HIV/AIDS, 2001⁵³² as they require detention and isolation of infected persons of a notifiable disease, breach of privacy and confidentiality issues vested in PLHA rights. The above cited sections should be amended to include HIV/AIDS prevention standards commensurate with UNAIDS guidelines and the National Policy on HIV/AIDS, 2001.⁵³³

Section 51. Incorporation Clause

The following international human rights treaties are to be incorporated into domestic law:

- International Covenant on Civil and Political Rights⁵³⁴
- International Covenant on Economic, Social and Cultural Rights⁵³⁵

⁵²³ The Prisons Act, 1967

⁵²⁴ The Basic Rights and Enforcement Act, No. 33 (1994)

⁵²⁵ The Newspaper Act, 1976

⁵²⁶ The Broadcasting Services Act, 1993

⁵²⁷ The Newspaper Act, 1976

⁵²⁸ The Broadcasting Services Act, 1993

⁵²⁹ The National Policy on HIV/AIDS, 2001

⁵³⁰ The Food (Control of Quality) Act, 1978

⁵³¹ The Internationally Notifiable Diseases Act, 1963

⁵³² Id.

⁵³³ Id.

⁵³⁴ International Covenant on Civil and Political Rights, 16 Dec. 1966, 999 UNTS 171, entered into force 23 Mar. 1976.

- Convention on the Elimination of All Forms of Discrimination against Women⁵³⁶
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵³⁷
- Convention on the Rights of the Child⁵³⁸

⁵³⁵ International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, 993 UNTS 3, entered into force 3 Jan. 1976.

⁵³⁶ Convention on the Elimination of All Forms of Discrimination Against Women, 18 Dec. 1979, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46 at 193, UN Doc. A/34/46, entered into force 3 Sept. 1981.

⁵³⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, GA Res. 39/46, annex, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1984), entered into force 26 June 1987. Tanzania has not ratified this Treaty and as such would have to ratify it before any incorporation into domestic law can take place.

⁵³⁸ Convention on the Rights of the Child, 20 Nov. 1989, GA Res. 44/25 (XLIV), UN GAOR, 44th Sess., Supp. No. 49 at 167, UN Doc. A/44/49, entered into force 2 Sept. 1990.

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6. The Criminal Procedure Act, No. 9 (1985)
7. The Disabled Persons (Employment) Act, 1982
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12. The Health Laboratory Technologists Registration Act, No. 11 (1997)
13. The Immigration Act, No. 7 (1995)
14. The Infectious Diseases Ordinance, (Cap. 29), 1921
15. The Judicature and Application of Laws Ordinance, Cap. 453
16. The Land Act, No. 4 (1999)
17. The Law of Marriage Act, No. 5 (1971)
18. The Local Customary Law (Declaration) (No. 4) Order, 1963
19. The Local Customary Law (Declaration) Order 1963, GN 279 of 1963
20. The Medical Practitioners and Dentist Ordinance, Cap. 407
21. The National Education Act, 1978
22. The Newspaper Act, 1976
23. The Nurses and Midwives Ordinance No. 63 (1952)
24. The Nurses and Midwives Registration Ordinance Cap. 325
25. The Opticians Act, 1966
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27. The Pharmaceutical and Poisons Act, 1978
28. The Prisons Act, 1967
29. The Private Hospitals (Regulations) Act, 1977
30. The Private Health Laboratories Registration Act, No. 10 (1997) ?

31. The Probate and Administration Ordinance, Cap. 445
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36. The Sexual Offences (Special Provisions) Act, 1998
37. The Village Land Act, 1998
38. Workmen's Compensation Ordinance, Cap. 263

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1. The National Policy on HIV/AIDS, November, 2001
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1. Charter of the United Nations
2. Universal Declaration of Human Rights
3. International Covenant on Civil and Political Rights
4. International Covenant on Economic, Social and Cultural Rights
5. Convention on the Rights of the Child
6. Convention on the Elimination of All Forms of Discrimination against Women
7. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
8. African Charter on Human and Peoples' Rights

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