

# **Review and Assessment of Laws Affecting HIV/AIDS in Tanzania**

**Summary Booklet**

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This document is presented as a summary of the report based on a study entitled “Review and Assessment of Laws Affecting HIV/AIDS in Tanzania.” The full report, prepared by the Tanzania Women Lawyers Association (TAWLA), responds to a request from the Ministry of Justice and Constitutional Affairs (MOJCA), 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 (USAID) under Contract No. HRN-C-00-00006-00, beginning July 7, 2000. The project is implemented by Futures Group in collaboration with Research Triangle Institute (RTI) and the Centre for Development and Population Activities (CEDPA). The views expressed in this report do not necessarily reflect those of USAID.

The full report contains approximately 120 pages of issues, laws, stakeholders’ comments, TAWLA recommendations, and conclusions. This summary booklet contains summary information on each item included in the report.

The summary booklet is not intended to be comprehensive; however, it does include both TAWLA’s recommended legislative changes and stakeholders’ views. Attention is to be given to the fact that while many issues introduced by stakeholders are covered in the report, not every issue is addressed.

When readers identify a topic of interest, they are encouraged to read the relevant section in the full report. Due to length constraints, references and citations are to be found in the original report, a copy of which can be obtained at the MOJCA.

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## **14. Conclusion**

This booklet has been an attempt to summarize the TAWLA report, which identifies the laws considered impediments to HIV/AIDS prevention and care in Tanzania. The summary booklet also includes the suggested reforms and enactment of those reforms in order to put in place a legal framework that is supportive of HIV/AIDS. Equally important, the stakeholders' comments and views on various issues that generated serious debate during the stakeholders' meetings and workshops have been presented.

### **TAWLA Recommendation**

Provide legal aid services to include counseling so as to identify enforceable rights, review options, and choice of action; provide direct legal services including representation in court.

### **TAWLA Analysis**

- Legal aid enables a person to be counseled, advised, and assisted in many forms, often with preparation of pleadings and sometimes represented in court free of charge.
- Nature and scope of these services depend on the policy and status of the institution concerned. Such institutions include TAWLA, WLAC, and TAMWA.

### ***Stakeholders' Views***

*Stakeholders urged the Tanzania Law Society to set up an AIDS law committee and provide legal services and legal advice to all levels of the community. Also, women's law groups that are in existence are urged to add service for persons with AIDS to the services they provide. Equally important is the need for faculties of law to teach courses and conduct seminars on law and HIV/AIDS, and to create legal clinics so that students under supervision can assist persons living with HIV/AIDS. The faculties are urged to develop publications on law and AIDS that can provide learned and practical commentaries.*

## **1. Background**

There are over 40 million people living with HIV/AIDS worldwide; out of these, over 28 million are in sub-Saharan Africa. In Tanzania alone, there are over two million people infected and living with HIV/AIDS. The government has taken a number of responses since AIDS was first discovered in Tanzania in 1983. In the course of time, it became clear that the pandemic was not just a passing phenomenon, and that future success of the national response depended on the presence of a clear policy and legal framework that would support prevention and care efforts on the ground.

In 2001, the Tanzanian government expressed its commitment in seriously addressing the AIDS epidemic by the formation of the Tanzanian AIDS Commission (TACAIDS), and formation of the National AIDS Policy, which is a comprehensive instrument that provides a framework for leadership and coordination of the national response to the epidemic.

Noting the prevalence of HIV/AIDS as a global problem and its incidence in Tanzania, it is clear that everybody is affected in one way or another by HIV/AIDS. This promulgates the need for a multisectoral response from every ministry. In this light, the Ministry of Justice and Constitutional Affairs (MOJCA) instituted legislative intervention to specifically support HIV/AIDS prevention and care.

Consequently, MOJCA asked the Tanzania Women Lawyers Association (TAWLA) to undertake a review and assessment of laws affecting HIV/AIDS and identify, with recommendations, provisions that need to be changed to better support HIV/AIDS prevention and care in Tanzania. The POLICY Project, with funding from the U.S. Agency for International Development (USAID), supported TAWLA in conducting these activities. MOJCA looks forward to continuing efforts to create a more supportive legal framework to address HIV/AIDS prevention and care in Tanzania.

### Objective of Review and Assessment

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

### TAWLA Recommendation

Provide in law 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.

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### TAWLA Analysis

- So far, legal aid is offered by mostly NGOs.
- Legal situations affect not only women and children, but family members, dependents, and associates as well.

### Methodology

This study was done in four phases. The first phase involved a sensitization workshop on HIV/AIDS, which was held on 1 December, 2000. This workshop brought together participants from NGOs dealing with human rights and offering legal aid services, PLHA (person living with HIV or AIDS) medical practitioners, widows, orphans, donors, and human rights activists. The resolution landed the idea of a study to review and assess the laws affecting HIV/AIDS. 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 was a series of consultative meetings with representatives from the Law Reform Commission, Ministry of Community Development, Women Affairs and Children, Ministry of Health, TAWLA, and other representatives from civil society working in the area of HIV/AIDS.

The fourth and final stage involved a series of meetings. The first meeting, which was held on 14 February, 2003, was with key sector ministries and academic institutions. The objective of that meeting was to present the findings and recommendations of the study and to give inputs to the authors before the intergovernmental meeting. The second meeting was the intergovernmental meeting, which was held on 3 March,

### Support Services: Legal Aid

Legal support services include legal counselling so as to identify enforceable rights and review options and choice of action. Legal support is primarily offered in the private sector and is unaffordable to most people, particularly those burdened or incapacitated by HIV/AIDS.

### **TAWLA Recommendation**

Change discriminatory attitudes through education, legal action, and the media.

### **TAWLA Analysis**

- Some successes on changing discriminatory attitudes and practices against PLHA have been recorded worldwide, some of them in Africa.
- Some countries have adopted positive policies 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 policy guidelines.

### **Support Services: Multisectoral Approach**

The National Policy on HIV/AIDS, 2001 encourages a multisectoral effort to support services to PLHA, widows, and orphans in their communities.

2003. All government ministries attended this meeting, where the report was unanimously adopted without controversy. The final level of phase four was the National Conference, which was held on 26-27 May, 2003, to which all stakeholders from all sectors were invited.

### **The Need for Legal Reform**

During the consultative meetings, major discussion centered on whether there should be a single omnibus law or amendment of existing laws to address various HIV/AIDS-related issues. The majority view was in favor of amending single laws. The ground for this view was 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.

On the other hand, 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. Also, amending various statutes is cumbersome and involves a longer drafting period and legislative process.

Among the main issues that were raised in the stakeholders meetings involved: (i) customs and traditions that result in spread of HIV/AIDS such as polygamy, widow inheritance, and early marriages; (ii) rights of women and girl children need to be strengthened as a key strategy for combating and sustaining the fight against wanton spread of HIV; (iii) mandatory testing for HIV that takes place when a person is required to undergo an HIV test as a condition for eligibility to some essential public service or facility such as employment, education, and solemnization of marriage; (iv) wilful transmission of HIV by the well-off infected people to poor people, especially women, as a way of coping with the stigma that is associated with HIV/AIDS; and (v) the rights of PLHA to basic services including VCT, medical treatment, and freedom from discrimination.

In this regard, the TAWLA report highlights five priority areas that generally need to be addressed within the next *two* years:

- Importance of voluntary counselling and testing (VCT) services as a preventive 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 for orphans.
- Institutionalizing deterrent measures against wilful transmission of HIV.

In addition to the priority areas mentioned above, TAWLA recommends four other priority issues in HIV/AIDS prevention and care that should be the subject of law reform within the next *five* years:

- State monitoring and enforcement of human rights in 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 also in line with the views expressed by the stakeholders.
- Incorporation of international human rights instruments into domestic law.
- Food quality laws to control hazardous food supplements.

### **TAWLA Recommendation**

Amend 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.

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### **TAWLA Analysis**

- Act emphasizes need for accurate dissemination of information, education, and communication.
- Act respects people's cultural values, gender balance, and the rights of a child.
- 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 such that some of the priority issues are blurred.

### **Creating Enabling Environment**

In fighting the AIDS epidemic, it is necessary to create an enabling environment by adopting best practices, especially those proven to be a success in other parts of the world.

### TAWLA Recommendation

Amend the Newspaper Act, 1976 to address HIV/AIDS issues commensurate to international guidelines, the National Policy on HIV/AIDS, 2001 and the views expressed by the stakeholders.

### TAWLA Analysis

- The act does not contain specific provisions that explicitly deal with HIV/AIDS.
- To ensure information safeguards, and protection of PLHA, Part V, and VI of the act are of particular relevance:
  - Part V: offences against the public
  - Part VI: defamation

### Stakeholders' Views

*In the stakeholders' meetings, several issues of concern in respect of the media were raised. One of them is the need to address the rampant breach of confidentiality among the local media and numerous cases of incorrect, stigmatizing, and defamatory reporting of HIV/AIDS matters. The point was made to the effect that, the issue was not so much that of the defects and weaknesses in the laws that are in place, but that of the caliber and quality of the media. Lack of professionalism and clear ethical norms and conduct governing the media operators was cited to be the basic problem.*

### Media: The Broadcasting Services Act, 1993

This act makes provisions for the management and regulation of broadcasting and for other matters related to it. It does not contain specific provisions that deal with HIV/AIDS issues.

## 2. HIV/AIDS in Tanzania

The main mode of transmission remains heterosexual, accounting for 78 percent of all cases, mother-to-child transmission ranking second at five percent. Most cases fall within the age group 20-29 years, with the highest number of reported cases in the age group 20-24 and 30-39 for females and males respectively. It is believed that this pattern may change with greater coverage in voluntary counselling coupled with the use of antiretroviral therapy.

### **3. The United Republic of Tanzania Government Response and Interventions**

- Short Term Plan implemented by the Ministry of Health in 1985-1986
- Medium Term Plans implemented in 1987-1991 and 1992-1996
- Interim Plan from 1996-1997 to formulate the third Medium Term Plan, which started operating in 1998 and will cover the period through 2002
- The National Policy on HIV/AIDS, 2001

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

#### **Media: The Newspaper Act, 1976**

The media is playing a vital role in disseminating HIV/AIDS information and education. However, there have been instances where the media has gone astray in reporting HIV/AIDS issues. It is necessary for the media to disseminate accurate information and education to the public, promote respect for PLHA, and to emphasize a change of attitudes of stigmatization and discrimination.

The Newspaper Act does not contain specific provisions that explicitly deal with HIV/AIDS. It is argued by the TAWLA report that, in the wake of AIDS, the act should directly address HIV/AIDS issues commensurate to international guidelines on HIV/AIDS.

### TAWLA Recommendation

Amend the following sections of the Prisons 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)

### TAWLA Analysis

The legislation raises the following issues:

- Whether medical examination of prisoners may be interpreted to include HIV test 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 virus, e.g., rape, sexual violence, or coercion.

### Stakeholders' Views

*During the intergovernmental and the national conferences, stakeholders raised a concern on the problem of HIV/AIDS transmission among inmates in prisons. It was noted that the authorities were generally not ready to admit that there was such a problem and as such could never accept the advisability of making condoms available to the inmates. It was explained that the reason is that since homosexuality is an offence, provision of condoms to the inmates would be an admission that inmates are committing that offence. 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.*

## 4. Current Legislative Response to HIV/AIDS

Tanzania has made no comprehensive legislative effort to respond to the AIDS epidemic. The one legislative effort is manifested by the amendment of the Infectious Diseases Ordinance, 1921 (Cap. 96). In this amendment, HIV/AIDS was made "an internationally notifiable disease" under Section 15. The objective of this law is 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.

Save for the above-mentioned legislative effort, no further attempt has been made to incorporate HIV/AIDS issues within Tanzanian laws. Statutes enacted before and after the advent of the pandemic and case laws have been silent on the HIV/AIDS issue. As the diversity of the pandemic becomes more apparent, it becomes evident that a comprehensive legislative approach covering different public health aspects of HIV/AIDS is needed.

In this way, a legal framework will be established to support the national policy on HIV/AIDS.

## 5. Existing Legal Framework and the HIV/AIDS Challenge

Tanzania's legal framework is characterized by a pluralistic legal system whereby statutory, Islamic, Hindu, and customary laws operate side by side. These regulate the day-to-day lives of citizens and therefore are relevant to the prevention and care of HIV/AIDS. However, they all do not address issues related to HIV/AIDS. Instead, some of the customary rules and practices have been criticized for putting women at a higher risk of HIV/AIDS infection. These include polygamy, female genital mutilation (FGM), widow inheritance, widow cleansing, and wife exchange.

HIV/AIDS has been referred to as a disease of poverty. Discrimination on the basis of health status is not specifically provided for under the Bill of Rights of the Tanzanian 1977 Constitution, although it recognizes the principle of equality of all human beings, equality before the law, and the right to life. Stakeholders in the intergovernmental meeting posed a question as to whether the Constitution should be amended to include health status as a prohibited basis of discrimination. The majority view was that there is no need to include health status as a prohibited basis of discrimination in the Constitution because HIV/AIDS is not a permanent disease. Hence it is not necessary to change the mother law, and a constitutional amendment will provide leeway for all sick people to sue the government for discrimination offences. However, it should be borne in mind that, although the Constitution is the mother law of the country and it does not say anything about discrimination on the basis of health status, it is still possible to change other laws.

Most pieces of legislation were enacted before the HIV/AIDS pandemic; therefore, they do not provide for specific provisions relating to HIV/AIDS. Even the laws that were enacted afterwards do not aim to deliberately create an environment that is supportive to HIV/AIDS prevention and care.

### TAWLA Recommendation

Amendments made 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

### TAWLA Analysis

Under the current law, 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. 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.

### The Prisons Act, 1967

The Prisons Act does not directly focus on HIV/AIDS issues, but it contains provisions that address matters associated with the prevention of the spread of the disease. For example, the law requires every prison to have a responsible medical officer who shall be responsible for the health of all prisoners and shall cause all prisoners to be medically examined at such times as may be prescribed.

### **TAWLA Recommendation**

Amend the following sections of the Sexual Offences Special Provisions Act, 1998, 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.

### **TAWLA Analysis**

By making rape offences liable to punishment and imposing severe punishment to 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.

### **The Criminal Procedure Act, No. 9 (1985)**

Section 196 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. The Penal Code 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 one's death, it is sufficient to establish a murder case against a person who wilfully transmitted HIV to the victim.

Despite the fact that there is yet no single international convention on HIV/AIDS, except for the U.N. Declaration of Commitment on HIV/AIDS, human rights is an important field that can provide guidance when a country is considering different law reforms. There is a range of internationally binding legal and human rights instruments that could be used to fight against violations of rights of PLHAs. These include the following:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child

Although Tanzania has signed and ratified these international instruments, they have not been incorporated into domestic laws for them to be legally enforceable. The success of state monitoring and implementation of the human rights guaranteed in the conventions largely depend on the quality and extent of institutional mechanisms in place to create conducive environment for enjoyment of these rights.

What follows is a presentation of the existing legislation and associated issues of relevance to HIV/AIDS. They are assessed from the HIV/AIDS prevention and care perspective and recommendations for legislative changes are noted.

## 6. Regulation of Goods and Services: Recommended Legislative Changes

In assessing and reviewing laws that are related to HIV/AIDS, TAWLA revisited all public health legislation and regulation of goods and services. Since HIV/AIDS was not in existence when these laws were enacted, there are several issues that are not mentioned in the laws. For example, issues regarding voluntary counselling and testing, breach of confidentiality among health workers, accountability and disciplinary actions for health worker malpractice, the role of traditional healers in HIV/AIDS prevention, and capacity of social workers in addressing counselling issues

### Public Health Legislation Goal

To review and reform public health legislation to ensure that:

- It adequately addresses the public health issues raised by HIV/AIDS.
- The provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS, and that they are consistent with international human rights obligations.

### Medical Practitioners and Dentists Ordinance, Cap. 407

The Medical Practitioners and Dentists Ordinance provides for the establishment of the Medical Council of Tanganyika, which has several functions including registration of medical practitioners and dentists.

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

### TAWLA Recommendation

Consider amending:

- 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), S.233(f), S.234

### TAWLA Analysis

Issues relevant to HIV/AIDS exposure/transmission, though not stated explicitly under the Penal Code, are generally implied under the (above stated) chapters of the Penal Code.

### The Sexual Offences (Special Provisions) Act, 1998

The Sexual Offences (Special Provisions) Act, 1998 aims at protecting women and children against sexual exploitation. Despite the fact that this act seems to be exhaustive in defining rape offences, it suffers some shortcomings in addressing marital rape issues, which are of similar importance especially in the wake of the AIDS epidemic.

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

### The Penal Code, Cap. 16

Though not stated explicitly, issues relevant to HIV/AIDS exposure and transmission are generally implied under the Penal Code. Under Chapter XXVII, the law applies to nuisance and offences against health and convenience. It could be argued that the provisions under this chapter provide for a legal duty on the individuals not to cause common injury to the public. Therefore, the provision can be viewed as calling for partner notification of HIV status and medical practitioners to observe legal duty of not causing common injury in handling blood safety.

Under Chapter XXII, the Penal Code deals with offences endangering life or health wherein any person who unlawfully does grievous harm to another commits an offence. 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.

Further, the transmission of HIV through sexual acts may be termed as offences of assault occasioning actual bodily harm under Chapter XXIV. Negligent transmission through invasive and non-invasive skin penetration in surgical, dental, and cosmetic procedures is deemed a misdemeanor under Chapter XXIII. Chapter XV stipulates offences against morality such as homosexuality and sex work or prostitution. These unprotected sexual acts are amongst factors that lead to exposure/transmission of HIV.

practice of medicine. It is therefore possible for the council to prescribe mandatory HIV/AIDS-friendly standards for different medical procedures.

#### TAWLA Recommendations

Amend Medical Practitioners and Dentists Ordinance, Cap. 407

- Section 9 to include HIV/AIDS prevention quality standards for different medical procedures, registration of qualified medical practitioners and dentists to enter and stay in the service of the practice of medicine.
- Minister for 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.
- Bylaws to provide for disciplinary action for truant practitioners.

#### TAWLA Analysis

- Need standards for medical procedures.
- Need sanctions for failure to comply with standards.

### Stakeholders' Views

*One of the main issues that were raised by stakeholders is how to make health workers accountable and appropriately disciplined for their malpractice related to HIV/AIDS. Some maintained that the current Medical Practitioners and Dentists Ordinance (Cap. 407), which provides for the establishment of the Medical Council of Tanganyika, read together with the Medical Ethics Document, is an adequate mechanism. The ordinance provides for its powers and procedures for taking disciplinary action against truant practitioners. This view is supported by the fact that doctors can and have been brought*

*to count and disciplined through the Medical Council of Tanganyika for malpractice charges instituted by the aggrieved patients or their relatives and subsequently taken to the court of law. On the other hand, there was the view that there is inadequacy in the present mechanism since the Medical Ethics document and its provisions were not known and inaccessible to the general public, who could make recourse to it to pursue their cases in court.*

*The role of traditional healers in HIV/AIDS prevention was another main topic. Several observations were made that traditional healers are an impediment in the prevention of HIV/AIDS. Although they claim to have a cure (through media advertisements) for HIV/AIDS, contrary to the WHO, who says that there is no cure for the disease. Additionally, traditional healers' actions are not regulated or monitored, and are not accountable in case of malpractice. However, some were of the view that rather than castigating them, there is a need to take traditional healers on board and effectively incorporate them in the fight against the pandemic by intensifying research into their drugs.*

### **Nurses and Midwives Registration Act, Cap. 325**

Nursing and midwifery comprises the largest category of health workers. They play significant roles in health care provision. Since they consistently and directly interact with patients, their education, registration, and practice are of the utmost importance if their contribution to HIV/AIDS care and prevention needs to be strengthened.

The Nurses and Midwives Registration Act (Cap. 325) provides for the education, training, registration, enrolment, and practice of nursing and midwifery. The act also establishes the Nurses and Midwives Council, who has the duty and power to monitor and supervise the proper conduct of nurses and midwives.

### **TAWLA Recommendation**

Amend Refugee Act 1998

- S.18(2)(c) to address HIV/AIDS issues.
- S.31 to include importance of HIV/AIDS prevention and care education in refugee camps.

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### **TAWLA Analysis**

- Refugee Act 1998 S.18(2)(c) 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.
- The law must lend an enabling environment to positive behavioral change by empowering refugees to improve their social and legal status, and by providing them with a participatory role approach in designing and implementing programs.

## **Stakeholders' Views**

*Whether immigration laws should be amended to render HIV/AIDS status a condition to qualify for immigration status triggered an intense discussion. The discussion generated critical viewpoints. Stakeholders challenged the report recommendation to prohibit HIV status as a condition for immigration. It was argued that it was wrong to follow the dictates of the international human rights instruments since they are completely silent on this matter and they are not binding on Tanzania. Also, examples were drawn from other countries that are known to return immigrants when tested HIV/AIDS positive. It was proposed that Tanzania should emulate these countries and spend its meager resources on caring for its own PLHA rather than wasting it on immigrant PLHA who also pose a health risk to our community. Others, however, were of the opinion that refusal of entry for PLHA and mandatory testing would not only negate basic human rights of the immigrants but would also deny Tanzania the much needed skills and investments they bring in.*

### **The Refugee Act, No. 9 (1998)**

Although the Refugee Act (1998) implies under section 18(2)(c) the protection of refugees from HIV/AIDS, in its report TAWLA is of the view that the act needs a more effective provision to address HIV/AIDS issues. Also, the law should stipulate offences related to sexual offences given the risk of gender- and sexual-based violence to which refugees are exposed.

Since the spread of HIV/AIDS within the refugee communities is not limited to sexual transmission alone, prevention education programs, in a language well understood by the refugees, are therefore necessary.

### **TAWLA Recommendations**

Amend Nurses and Midwives Registration Act, Cap. 325, 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.

### **TAWLA Analysis**

- The act provides a good opportunity to impact HIV/AIDS prevention and care standards in that the council, who is charged with the duty to set standards, may include in those standard measures relevant to HIV/AIDS prevention and care, such as nursing facilities friendly to HIV/AIDS victims.
- A case in point is the mother-to-child transmission. 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.

### **The Opticians Act, 1966**

The Opticians Act provides for the registration of opticians and the enrolment of bodies corporate carrying on business as opticians. Although optical appliances and practices are not heavily indicated in HIV/AIDS, the regulatory framework is a useful entry point in setting and upholding standards relevant to HIV/AIDS.

In Tanzania, litigation arising from optical-related infections has not yet taken place. 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.

#### **TAWLA Recommendations**

The Opticians Act, 1966 to be amended in section 6 so as to enunciate education, training, registration, enrolment, and practice of optics to impact HIV/AIDS prevention and care standards.

#### **TAWLA Analysis**

- Optics is an important site of focus in the prevention and care of HIV/AIDS.
- There is need for provisions in law to enunciate standards to education, training, registration, enrolment, and practice of optics to impact HIV/AIDS prevention and care.

#### **Private Hospitals (Regulation) Act, 1977**

The Private Hospitals (Regulation) Act 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. Under the act, the organization approved to provide medical services are to be published yearly in the Gazette and national newspaper. Moreover, 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 services. This makes it possible to monitor hospitals' adherence to approved standards for prevention and care in HIV/AIDS.

## **11. Legislation Impacting Immigration, Refugees: Recommended Legislative Changes**

#### **The Immigration Act, No.7 (1995)**

The Immigration Act, No. 7 (1995) provides for the control of immigration into the United Republic and for matters incidental to or connected with immigration. Under this law, HIV/AIDS status is not a relevant condition for immigration rights in Tanzania. However, there is an ambiguous section that defines infectious disease as an element that constitutes a condition for prohibited immigrants. Prohibited immigrants are defined as those certified by medical practitioner to be suffering from a contagious or infectious disease that makes or would make his or her presence in Tanzania dangerous to the public.

#### **TAWLA Recommendation**

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

#### **TAWLA Analysis**

- Taken at face value, the provision can be mistakenly construed to encompass HIV/AIDS since it is an infectious health condition.
- Provision should not be construed to mean that HIV/AIDS being an infectious disease is potentially dangerous to the public.
- 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.

## 10. Legislation Impacting Persons with Disabilities: Recommended Legislative Changes

### Disabled Persons (Employment) Act, 1982 and Disabled Persons (Care and Maintenance) Act, 1982

There is no unified law that covers the rights of people with disabilities in Tanzania. The two major pieces of legislation that deal with the rights of people with disabilities are the Disabled Persons (Employment) Act and the Disabled Persons (Care and Maintenance) Act.

The above statutes deal only with employment, care, and maintenance issues, and they do not cover health matters. Therefore, under the current law, it is impossible to safeguard the rights of people with disabilities against the effects of the HIV/AIDS.

#### TAWLA Recommendation

Amend Disabled Persons (Employment) Act, 1982 and Disabled Persons (Care and Maintenance) Act, 1982 to include provisions that recognize HIV as a work-related disability, where it is proved that an employee was infected in the course of his employment.

#### TAWLA Analysis

- Both statutes are mute on provisions for HIV prevention and care for disabled people.
- It is not possible to safeguard the rights of people with disability against the effects of the epidemic on the basis of these laws.

#### TAWLA Recommendations

Amend Private Hospitals (Regulations Act, 1977) 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.

#### TAWLA Analysis

- Overall, the act functions as a regulatory mechanism and ensures that medical services are provided under the care of competent personnel.
- 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.

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

VCT services are of paramount importance as a preventive measure against the spread of HIV/AIDS. Under current public health legislations, issues regarding voluntary counselling and testing are not mentioned. VCT is one of the five areas identified in the TAWLA report that should be subject of law reform in the next two years. In order to ensure quality VCT services, there is a need for both quality laboratories and competent laboratory technicians well trained in HIV testing, prevention, and care.

### **TAWLA Recommendations**

Amend Private Health Laboratories Registration Act, No. 10 of 1997 to enunciate a special provision for setting up quality VCT services, taking into consideration provision of service by competent laboratory technicians well trained in HIV testing, prevention, and care.

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### **TAWLA Analysis**

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.

### **TAWLA Recommendation**

Workmen's Compensation Ordinance, 2nd and 3rd schedules should be amended to include rights of persons living with HIV/AIDS on issues relevant to HIV/AIDS injuries suffered in course of employment.

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### **TAWLA Analysis**

- Workmen's Compensation Ordinance does not focus on HIV/AIDS problems.
- The ordinance needs to be revised to contain the rights of workmen who suffer injuries related to HIV/AIDS transmission in the course of their employment.

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

The Health Laboratory Technologists Registration Act provides for the registration of health laboratory technologists. It establishes a regulatory council known as the Health Laboratory Technologists Council, which is charged with responsibilities, including regulation of standards of conduct and activities of health laboratory technologists.

In view of HIV/AIDS testing standards, one note that the acts do not provide for pre- and post-testing counselling, need for confidentiality, safety precautions, and related issues.

### ***Stakeholders' Views***

*Stakeholders raised a concern that there is a difficulty on how to establish, for compensation purposes, that a doctor, for example, had been infected with HIV virus by a patient in the course of medical duty. Elaborating the procedure normally used, immediate testing of the pricked health worker and the patient, the professionals admitted that it was not full proof since in some cases the pricked health worker could have already contracted HIV through other means.*

The Security of Employment Act restricts the powers of employers to dismiss employees summarily except for breaches of the Disciplinary Code. The act is mute on security of employment in relation to PLHA. Employers should not summarily dismiss an employee on grounds of contacting HIV/AIDS if the employee abides by the Disciplinary Code and other labor laws.

#### **TAWLA Recommendation**

Security of Employment Act, 1964 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 labor laws.

#### **TAWLA Analysis**

- Security of Employment Act, 1964 protects right of every citizen to work.
- 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.

#### **Workmen's Compensation Ordinance, Cap. 263**

The Workmen's Compensation Ordinance, Cap. 263 provides for compensation to workmen for injuries suffered in the course of their employment. The provisions of the ordinance do not address issues relevant to HIV/AIDS injuries suffered in the course of employment.

#### **TAWLA Recommendations**

Amend Health Laboratory Technologists Registration Act, No. 11 of 1997 to make reference to HIV/AIDS testing requirements, pre- and post-test counselling, confidentiality, safety precautions, and related issues.

#### **TAWLA Analysis**

- Act does not make specific reference to HIV/AIDS testing requirements.
- Amendment is needed to make reference to HIV/AIDS testing requirements, pre- and post-test counseling, need for confidentiality, safety precautions, and other related issues.

#### **Stakeholders' Views**

The need for confidentiality. *In the intergovernmental and national conferences, 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 serostatus of their patients was widespread and posed a serious problem to prevention of stigma and discrimination of PLHA. However, it was noted that the problem is how to establish proof of breach by a health worker since a person testing for HIV may undergo a process involving several health workers.*

*It was established that the problem of breach of confidentiality among the health workers arises from the fact that attendants, nurses, and laboratory technicians are not responsible and accountable to the Medical Council of Tanganyika. It was therefore recommended that the law should establish institutions to which health workers shall be responsible and accountable. Also, VCT should take place in an environment*

*that ensures privacy, with only a minimum number of people involved in the process.*

### **The Internationally Notifiable Diseases Act, 1963**

The Internationally Notifiable Diseases Act provides for the minister to declare a country, region, or place as an endemic or infected area if he has reasonable cause to believe the disease exists. The acts also provide for the restriction to leave or enter an infected area unless one has proper permission from the authority. Moreover, the act provides for detention or isolation of an infected person subject to further medical observation and surveillance.

It should be borne in mind that HIV/AIDS is not a disease but a condition that makes an infected person susceptible to certain opportunistic diseases. It is transmitted through specific, manageable behavior. Moreover, it is not practical to restrict inhabitants of a certain area from leaving or entering another area because first, HIV/AIDS has reached almost all parts of the world, and secondly, not everyone who lives in an area where it is prevalent is infected.

### **TAWLA Recommendation**

Employment Ordinance Cap. 366 (revised)

- Care and Welfare S.100(1) 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.

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### **TAWLA Analysis**

- Medical expenses for treating opportunistic infections have increased. Employers have to meet these expenses in discharging their duty to observe human rights of PLHA.
- This duty should be met and no employer should terminate PLHA employment contract to evade providing medical treatment.

### ***Stakeholders' Views***

*At the National Conference, the stakeholders raised a concern on discrimination against HIV/AIDS-affected employees practiced by health insurance institutions including the government's National Health Insurance Fund. Their services are limited to certain diseases and drugs. In other personal health insurance, it was observed that one has to test for HIV/AIDS and is obliged to pay higher premiums if found positive.*

### **Security of Employment Act, 1964**

According to the ILO, HIV status should not be a condition of continued employment. Any routine medical testing carried out on a regular basis for workers should not include mandatory HIV testing.

### ***Stakeholders' Views***

*It was observed that it is common knowledge and normal practice that some people are retrenched because they had been proved to be HIV/AIDS positive. It is further noted, with regret, that such people had been screened without their knowledge or consent contrary to the ILO regulations, which does not allow people to be screened without their knowledge.*

### **Employment Ordinance, Cap. 366 of the Laws (Revised): Care and Welfare**

One of the direct costs of AIDS is expenditure for medical care. The Employment Ordinance provides that every employer shall at his own expense provide for his employees and members of their families medical aid in accordance with such scale as may be prescribed. Since AIDS increases ones' vulnerability to opportunistic infections, expenditures for medical expenses increase substantially. However, employers have to meet these expenses in discharging their duty to observe the human rights of PLHA.

The ILO asserts that HIV testing should not be required as a condition of eligibility for health insurance and that insurance companies should not require HIV testing before agreeing to provide coverage for a given workplace.

### **TAWLA Recommendations**

Internationally Notifiable Diseases Act, 1963

- S.5, S.6(1)–(3), S.7, S.8(1)–(2), S.11(1) should be amended to include HIV/AIDS prevention standards commensurate with UNAIDS guidelines and the National Policy on HIV/AIDS.
- However, because 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 should not apply to persons in relation to HIV infection.

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### **TAWLA Analysis**

S.5, S.6(1)–(3), S.7, S.8(1)–(2), S.11(1) are not relevant to HIV/AIDS and they 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.

### **Pharmaceutical and Poisons Act, 1978**

Under the Pharmaceutical and Poisons Act, the consumers are protected from purchasing substandard pharmaceutical products. Vendors of pharmaceutical equipment are charged with the responsibility to sell only safe and quality pharmaceutical products and equipment. This law is of particular importance to HIV/AIDS with regard to sale of disposable syringes, needles, and gloves. Since these need to be disposable, sale of used equipment would be an offence.

In other jurisdictions, such as the United States, there has been a lot of litigation around these issues in terms of legal norms such as strict liability and standards of negligence.

### **TAWLA Recommendations**

Amend Pharmaceuticals and Poisons Act, 1978 to include quality supply, manufacture, and use of quality VCT kits and other reagents needed for HIV testing, including needles, syringes, gloves, etc.

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### **TAWLA Analysis**

- 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.

*It was also observed that there is a bias towards formal sector in the discussion of HIV/AIDS and employment, despite the reality that more people are employed in the informal sector than the formal sector, and that they too suffer equally from the stigma.*

### **Employment Ordinance, Cap. 366 of the Laws (Revised): Termination of Contract**

The rights of employment and an acceptable standard of living are identified by UNAIDS as fundamental human rights. In this regard, unless an individual is unable to continue to perform the duties for which she or he was employed to do, an employee shall not have his or her employment terminated based solely on his or her HIV/AIDS status. Also, employers shall not use the HIV/AIDS status of an employee as a criterion to identify or influence the selection of employees for retrenchment.

### **TAWLA Recommendation**

Amend Employment Ordinance, Cap. 366 (revised) S.52 to state explicitly that HIV status should not be a determinant condition that warrants termination of employment contracts.

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### **TAWLA Analysis**

- PLHA at some stage are vulnerable to opportunistic infections.
- Employers should not 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.

### TAWLA Recommendation

Employment Ordinance, Cap. 366 (revised) 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.

### TAWLA Analysis

- The provisions of the ordinance are of general application and have not been amended to cover the rights of PLHA.
- 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.

### Stakeholders' Views

*Mandatory testing in employment was one of the main issues discussed in the national conference. One view was that certain jobs such as army officers require roundly fit personnel, and therefore mandatory testing is necessary to screen out PLHA. This assertion was sharply contested by several participants. It was explained that there is a distinction between HIV, which is a virus, and AIDS, which is a disease, and that testing positive does not mean dying immediately. Therefore, PLHA may live for many years in good health and performing their duties normally. Furthermore, it was emphasized that denying employment to PLHA was not only discriminatory but also denying the person's family sustenance and denying the nation the contribution of the PLHA special skills.*

## 7. Legislation Impacting Women: Recommended Legislative Changes

The Constitution of the United Republic of Tanzania provides in Article 12 and 13 that all human beings are born free and are equal and that everyone deserves the respect of recognition and his life to be valued. Under the Constitution, 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. Therefore, it is forbidden for any law to be enacted by any authority to impose any condition that is of discriminatory nature.

According to the Constitution, women must therefore be treated equally under the law. However, Tanzanian culture and customary practices have influenced the law, and consequently, gender-oppressive laws coexist with the Bill of Rights enunciated in the Constitution. It is argued in the TAWLA report that laws that discriminate against women and force them into socioeconomic positions and customary practices that expose them to HIV should be held unconstitutional.

International human rights law such as CEDAW, of which Tanzania is a signatory, provides that all traditional attitudes under which women are regarded as subordinate or as having stereotyped roles perpetuate widespread practices involving violence or coercion and that they should be abolished. However, the full implementation of this convention and many others requires the government to take appropriate measures including domestic legislation, education, and public information programs to help eliminate prejudices, which hinder women's equality. In Tanzania, human rights lawyers cannot use the convention provisions because it has not been incorporated in domestic law.

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

HIV/AIDS have been referred to as a disease of poverty. In Tanzania, women form the bulk of the poor population, and they are also the majority of those infected with the disease. It is clear that oftentimes women's vulnerability to HIV arises from their low social and economic status in society. The legal framework of the country does not support women's efforts to move out of the poverty circle. This can be evidenced by discriminatory laws of inheritance that deprive women ownership of property such as land which they largely depend on for their living.

Writing of wills is not a common practice in Tanzania. When one dies intestate, there are four legal systems with which the deceased estate may be administered. These are Statutory Law, Customary Law, Islamic Law, and Hindu Law.

Under the Indian Succession Act, which is the statute governing succession, when a man dies intestate, i.e., when he has failed to make a testamentary disposition of his property which is capable of taking effect, and if he has left a widow and 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. Therefore, statutory law offers equal treatment between husband and wife.

Customary law on inheritance in relation to land was discriminatory until the enactment of the Village Land Act of 1998 and the Land Act of 1999. Under the first law, 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. Similarly, the Land Act promotes the right of every woman to acquire, hold, use, and deal with land to the same extent and subject to the same restrictions as men.

## **9. Legislation Impacting PLHA: Recommended Legislative Changes**

### **Employment Ordinance, Cap. 366 of the Laws (Revised): Medical Examination**

All the employment legislation in Tanzania was enacted before the advent of the AIDS epidemic. However, employment laws need to be nondiscriminatory against HIV/AIDS positive job applicants.

The Employment Ordinance requires that every employee who enters into a written contract to be examined by a medical officer. It further provides that wherever it is practicable the employee shall be medically examined and a certificate issued before the attestation of the contract. This law raises a few issues regarding the rights of PLHA. Given the fact that HIV stays in the body long before one becomes unfit for work, the law is not relevant to HIV/AIDS cases. Also, the requirement is against the UNAIDS guidelines, which require consent for HIV test. It also infringes the right to work, since the right to work entails the right of every person to access to employment without any precondition, except for the necessary occupational qualifications.

When a child or young person is convicted of an offence punishable with imprisonment, the court may order that he or she be committed to custody to an approved school.

Of relevance to HIV/AIDS care and prevention is the fact that the ordinance does not indicate 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. Also, the ordinance does not indicate how children and young persons will be protected from sexual exploitation and unprotected sex, which might expose them to HIV/AIDS.

#### **TAWLA Recommendation**

Amend the Children and Young Persons Ordinance, Cap. 13, to include a provision for prevention of HIV transmission and care of children in approved schools.

#### **TAWLA Analysis**

Ordinance does not provide:

- How the right to health will be protected when the child or young person is in the custody of the approved school.
- How children and young persons will be protected from HIV infection, or how they will be cared for in case they are diagnosed to be HIV positive.
- How children and young persons will be protected from sexual exploitation and unprotected sex.

However, other inheritance laws, other than those dealing with land ownership, continue to favor men. Under the Local Customary (Property Inheritance) Law (Declaration) (No. 4) Order, 1963, the person who inherits in the first degree is the first heir and gets a bigger share than any other heirs. Normally the first son is in the first degree and daughters fall under the third degree.

On the other hand, under the Islamic law, there are fixed and unfixed shares of inheritance, which are gender based. In this system, while sons are entitled to whole shares, daughters are entitled to half shares.

#### **TAWLA Recommendation**

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

#### **TAWLA Analysis**

Both Customary law and Islamic law as applied to women contributes to poverty and therefore increases women's vulnerability to HIV/AIDS.

#### ***Stakeholders' Views***

*Responding to the gender-based inheritance shares, the National Muslim Council of Tanzania, BAKWATA, submitted its position to TAWLA consultants asserting 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.*

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

Customary law governing the ownership, control, and reallocation of matrimonial property were developed and shaped by social relations under which men dominated women. Under customary law, women were perpetual minors without proprietary capacity, thus married women were under the total guardianship of their husbands.

Property grabbing upon the death of a husband has existed for a long time in most regions in Tanzania. The practice is done by greedy relatives of the deceased immediately after his death. The deceased relatives seek to inherit the deceased's property and take it away with no regard to the guaranteed customary duty and responsibility associated with the deceased's role as husband and father.

In the wake of HIV/AIDS, the public needs to be educated on the importance of having their wills in place in order to safeguard their properties for the benefit of widows and orphans, and to reduce incidents of property grabbing.

The Adoption Ordinance is a statute that regulates adoption of infants and other matters related to adoption. The TAWLA report raises an issue as to whether the law condones notification to the applicant (the person seeking to adopt a child) of HIV status of the child before the applicant adopts the child. The issue is based on the ground that, if the child was ill treated prior to adoption, he or she should not suffer another trauma of abandonment, neglect, or persistent ill-treatment in the case where the applicant does not wish to adopt a seropositive child.

**TAWLA Recommendation**

Amend Adoption Ordinance, Cap. 335, to prohibit stigmatization and discrimination of orphans living with HIV/AIDS; ensure care and support of orphans.

**TAWLA Analysis**

- 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.

**Children and Young Persons Ordinance, Cap. 13**

The Children and Young Persons Ordinance is an ordinance relating to children and young persons and provides for the reception of approved schools. Under the ordinance, a child is a person under the age of 12 while a young person means a person who is between 12 and 16 years.

Children also have the right to education, including the right to receive information about HIV, such as information on how to avoid infection and to cope with their status, if infected.

### **Unified Legal Protection of Children from HIV/AIDS**

For the reasons stated above, TAWLA recommends a unified law of the child 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.

#### **TAWLA Recommendation**

Enact unified law on child to include a single definition of “child,” and a focus on protection of children with HIV/AIDS and from HIV/AIDS.

#### **TAWLA Analysis**

- There is no current law that specifically focuses on rights of children living with HIV/AIDS.
- There is no current law that adequately protects children from being infected by HIV/AIDS.

### **Adoption Ordinance, Cap. 335**

Orphans, as children deprived of a family environment, have the right to special protection and assistance, including alternative care and protection in adoption. However, it is common in Tanzania for families to informally “adopt” children of deceased relatives who have died of AIDS. Basically, these orphans live on the charity of several relatives and friends.

#### **TAWLA Recommendation**

- Review and reform of Rule 66A Local Customary Law (Declaration) Order, GN. 279 of 1963.
- Law reform to conform to international human rights standards under treaties Tanzania has signed.

#### **TAWLA Analysis**

- Review and reform will 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.
- 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 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.

### **The Law of Marriage Act, 1971: Property Rights and Marital Status**

The Law of Marriage Act, which is a law that regulates marriage, personal, and property rights between husband and wife, has several provisions that expose women to HIV vulnerability for a number of reasons. Under the act, property ownership is based upon the concept of “separate ownership property” between spouses. This means that a marriage shall not operate to change the ownership of any property to which either the husband or the wife may be entitled to. Therefore, whatever property a husband or wife owns before or acquires after the wedding remains his or her solely owned property.

Moreover, the act 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.

Another significant issue as far as the Law of Marriage Act is concerned is that the language used is ambiguous and therefore can be interpreted in a manner that is discriminatory towards women. This is especially with regard to the type of contributions women make to the household. Several terms, such as “joint efforts,” “contribution,” and “work,” are not defined by the act. When these terms are defined by a conservative interpretation rather than progressive interpretation, they have a negative effect on women’s matrimonial property rights.

## **8. Legislation Impacting Children: Recommended Legislative Changes**

The rights of a child are articulated in the Constitution of the United Republic of Tanzania, the Penal Code, the Criminal Procedure Act, the Evidence Act, the National Education Act, the Children and Young Persons Act, the Employment Ordinance, the Law of Marriage Act, and the Corporal Punishment Act.

First of all, there is no unified law that deals with children’s rights, and secondly, each of the above-mentioned laws defines a child to serve its objectives. The definitions run from age 12 to 18. However, there is an ongoing effort to enact a unified law of the child and age 18 had been recommended to be adopted since it conforms to the Covenant of the Rights of the Child (CRC). Thirdly, save from the Penal Code and the Sexual Offences (Special Provisions) Act, which contains general provisions that protect children from sexual abuse and from infectious diseases, none of the above 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.

Although the Constitution of the United Republic does not specifically mention children, under it, everyone has the right to life and all people are granted equality and protection before the law. Therefore, since children are people, these rights are also children’s rights. This being the case, children should be granted protection to ensure that their lives are not ruined by HIV/AIDS.

The rights of a child enunciated in the international human rights conventions, specifically the Convention on the Rights of a Child, are relevant to HIV prevention and care. Rights such as freedom from trafficking, prostitution, sexual exploitation, and sexual abuse, are relevant since sexual violence against children, among other things, increases their vulnerability to HIV/AIDS.

### **TAWLA Recommendation**

Amend Law of Marriage Act, Sections 20 and 145, on notice of objection and criminal liability for giving wrong information respectively, to include HIV situations.

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### **TAWLA Analysis**

A question to be ascertained here is whether “notorious bad character” encompasses risky behavior, as well as what constitutes risky behavior as far as HIV transmission is concerned.

### **TAWLA Recommendation**

Amend the Law of Marriage Act, 1971 to be more comprehensive and include equal rights on the division of matrimonial property after separation or divorce due to knowledge of a partner’s HIV/AIDS status.

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### **TAWLA Analysis**

Problems with the current law:

- “Separate” ownership of property system is detrimental to women, as property acquired in marriage is often considered that of the husband.
- In many communities, the wife is never entitled to any share of the family property, regardless how it was acquired.
- This law causes women to be economically disadvantaged and forces them to stay in marriages, even when the husband engages in sexual behavior that puts his wife at risk.

### **The Law of Marriage Act: Minimum Age**

According to the Law of Marriage Act, the age requirement for marriage is 18 years for a male and 15 years for a female. A marriage shall be contracted with the consent, freely and voluntarily given by both parties. Under this law, a female who has not attained the age of 18 shall be required to obtain the consent of her father, mother or a guardian before marrying. Clearly the law does not protect the girl child from HIV vulnerability because the minimum age of 15 falls under the age of a minor in Tanzania.

### **TAWLA Recommendation**

Raise the minimum marriage age for women to 18 years.

### **TAWLA Analysis**

- It is doubtful that a girl child, with limited life skills, can make sound choices.
- People intending to marry are not well informed on HIV/AIDS.
- Young females under 18 may not enter marriage voluntarily.

### **Stakeholders' Views**

*The report's recommendation to raise the minimum marriage age to 18 generated heated discussion in the stakeholders' meetings. Among the opposing views was the worry that doing so would expose unmarried girls to more sexual activity and greater HIV/AIDS risks. Therefore, it was argued that it is better to marry girls off quickly to save them from the disease. However, the majority supported the report's recommendation by asserting that a girl before attaining 18 years is not ready anatomically and physiologically to be married and become a mother. These girls also could not enter into contact such as a marriage contract. Also, experiences from Uganda indicate that raising minimum marriage age to 18 years has contributed significantly in the fight against HIV/AIDS.*

*As for the minimum age of marriage in the context of HIV/AIDS law, BAKWATA submitted its position to TAWLA asserting 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.*

### **The Law of Marriage Act: Notice of Objection**

Under the law of marriage, any person may give a notice of objection 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. The question that arises is whether facts that constitute an impediment to the intended marriage may be interpreted to cover disclosure of HIV status, which is something that will infringe the rights of PLHA to confidentiality and privacy.

Secondly, the act provides that, where a man married by polygamous marriage has given notice of intention to marry, his wife or wives may give notice of objection on the ground that the intended wife is of "notorious bad character" or is suffering from an infectious or communicable disease or is likely to introduce grave discord into the household. The infectious and communicable disease qualification is limited to polygamous marriages and does not extend to cover monogamous marriages. TAWLA argues that the qualification lags behind health and social changes since the AIDS epidemic is not selective.

Other questions that arise from this provision include, whether "notorious bad character" encompasses risky behavior? And what constitutes risky behavior as far as HIV transmission is concerned.

The law also provides that, any person who, when giving notice of objection to an intended marriage, makes any false statement shall be guilty of an offence unless she or he had reasonable grounds for believing the statement to be true. What amounts to "reasonable grounds for believing the statement to be true" is according to the report, an obstacle to be surmounted.