

*Case Report*

# Legal aspects of HIV/AIDS in the sub-region-Kenya

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The emergence and magnitude of HIV / AIDS has therefore raised serious legal and human rights questions. Questions arise in the field of testing for HIV infection and stigmatization of people with AIDS in employment, the insurance industry, social institutions, social security schemes, occupational hazards for health care workers and the adequacy of workmen's compensation for medical and paramedical staff who may be infected with HIV in the course of their employment, to mention but a few examples. In most countries within the sub-region there is little to no legislation dealing with the existence of AIDS or regulating its treatment, the collection and handling of epidemiological information by health authorities, the screening of blood supplies and blood products, donated organs, tissues and so on, the testing for HIV infection, and the reporting of HIV/AIDS cases. This study sought to investigate whether there is any specific law regulating-research involving human subjects.

**Keywords:** HIV/AIDS, human rights, legal aspects, constitution of Kenya 2010, Kenya.

## BACKGROUND

Man has reacted with such panic at the outbreak of HIV /AIDS that his irrational conduct has itself been termed the third epidemic the first and the second being HIV and AIDS respectively. But such reaction is not new as history records similar responses to various epidemics and plagues which have broken out before. For example Grandgor's distemper believed to be a venereal disease during the time of Columbus in the 15th Century evoked such drastic responses from King James IV who issued a proclamation to banish infected persons from Scotland to the island of Frinth.

AIDS was not known to medicine probably until 1981 when it was identified in the US as a distinct syndrome and before 1983 when Sweden enacted the first law ever dealing with AIDS, it was not known to law. Since the Swedish legislation, many states in the world have enacted laws to deal with the AIDS epidemic. In most countries there is little to no legislation dealing with the existence of AIDS or regulating its treatment, the

collection and handling of epidemiological information by health authorities, the screening of blood supplies and blood products, donated organs, tissues and so on, the testing for HIV infection, and the reporting of HIV/AIDS cases.

## Human Rights

Legal aspects of HIV/AIDS in the sub-region and elsewhere revolve heavily around human rights. It is therefore necessary to understand the background of these rights before looking at the situation in the sub-region.

The atrocities of the Nazis against the Jews and other races during World War II gave birth to a strong post-war movement for the international protection of fundamental human rights and freedoms. This spirit was embodied in Article 1 of the United Nations Charter which names as one of its objects the encouragement of respect of such

rights for all regardless of race, sex, language or religion. In Article 56 of that Charter the individual members of the United Nations Organizations have undertaken to take "Joint and separate action" with the Organization to achieve the aims of the Organization. One of these goals is the observance of fundamental human rights and freedoms. The Charter however omitted a definition of these rights and freedoms.

In 1948 however, a document known as the "Universal Declaration of Human Rights and Fundamental Freedoms" was created in which attempts were made to define the rights and freedoms such as the rights to life and liberty of the person, to a fair trial in criminal proceedings, freedom of expression, religion and association. This Declaration is not a treaty but was adopted merely by resolution. Hence it is not a legal instrument capable of binding member states. Kenya has subscribed to this Declaration. The preamble to the WHO constitution states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition". A similar principle is also enunciated in Article 12 of the International Covenant on Economic, Social and Cultural Rights. Contained in the international code of human rights law, are some 40-50 different rights which include among others:-

- The right of life
- The right of health
- The right of liberty and security of the person
- Freedom from inhuman or degrading treatment or punishment and
- The right to work and receive education

## Aspects of Human Rights and HIV/AIDs in the Region

### Rights to Privacy and Confidentiality

The threat to this aspect of human rights is posed by:-  
Mandatory testing for HIV infection.

Compulsory registration of persons who although they have not been tested are thought to be HIV infected.

Disclosure to third parties of test results or of other personal information of an HIV infected person and a person with AIDS.

The making of HIV infection a notifiable disease under the Public Health Act.

Routine screening of those termed as "high risk groups".

Most constitutions in the commonwealth countries guarantee privacy and confidentiality for example; **Article 28** of the Kenyan Constitution 2010 provides as follows: "

**..... Every person has inherent dignity and the right to have that dignity respected and protected...."**Article

**31** of the Kenyan Constitution 2010 provides as follows: "

**..... Every person has the right to**

**privacy....."**There is an important condition to these preamble, namely that "the enjoyment of these rights and freedoms by an individual does not prejudice the rights and freedoms of others or the public interest". Under these articles one may make out a case of human dignity and the right to withhold his or her consent for any surgical operation in medical practice and in any contemplated test for HIV. Apart from the Hippocratic Oath, this section is the foundation on which the doctrine of confidentiality rests. The sub-region takes the position that apart from the rule that no person should be compelled to undergo an HIV test without informed consent-duly obtained after pretest counseling there is great merit in providing that the results should be treated with confidentiality. The rule of confidentiality in medical practice is as old as the Hippocratic Oath and is regarded as one of the cardinal principles of medical ethics. The following instruments either provide a guide or form the basis of legal and ethical rules:

The Codes of Professional Conduct and Discipline issued by respective Medical Boards

The International Code of Medical Ethics - 1949.

The Declaration of Helsinki on Human Experimentation - 1964 and,

Other Statute Law where applicable and relevant. The Rule of Confidentiality, therefore, has a basis in medical ethics as well as a legal foundation. The essence of this rule is that a health care worker should not disclose to a third party information which he or she has obtained in confidence from a patient, except when:

A valid consent has been obtained

The information is required by law

The public interest so dictates

The information is vital for purposes of biomedical research or

It is desirable that the information be passed to relatives;

In the United Kingdom, the case of **X v Y & others [1988] 2 All ER 648**. A journalist obtained confidential records of two doctors who had been diagnosed with AIDS in a health authority but still continued their general practice. The doctors went to court to restrain the publication of the confidential information, which was contained in their hospital records. The defendants published an article titled "Scandal of Doctors with AIDS" referring to doctors practising despite having AIDS and intending to publish a follow up revealing the confidential information in question. After considering the different opinions on the transmissibility of the disease from doctor to patient, the court concluded that the risk of transmission was generally minimal. A permanent injunction was granted against disclosure of the confidential records in question on the ground that the public interest in preserving the confidentiality of hospital records outweighed the public interest in freedom of the press to publish such information.

The breach of medico-ethical rules entails disciplinary action and or/legal sanction under Statute Law. The AIDS epidemic has brought with it a potentially unresolvable conflict between the doctrine of confidentiality and the dictates of public interest, with serious ramifications in particular for the individual and the family. Human rights are threatened with compromise and transgressions. It has been argued that in the interest of public health in cases of HIV infection / AIDS the rule of confidentiality ought to be waived. It has been argued that confidentiality cannot be sustained in a number of cases, such as in relation to:

Counseling the relatives of HIV/AIDS patients.

Community home-based care of AIDS patients.

Exchange of medical ideas among doctors.

Disclosure of HIV status for purposes of travel and life insurance policies,

Notification of HIV cases under the Public Health Act (not made anonymously),

Disclosure of HIV status of a person under compulsion of law, completion of National Hospital Insurance Fund Forms,

The issue of death Certificates in AIDS cases.

In the above cases the rule of confidentiality is by-passed in preference to shared confidentiality.

In agreement with the rejection of mandatory screening without an individual's informed consent, the current ethical health practice in Kenya is to protect an individual's privacy and to maintain the strictest confidentiality concerning his or her medical records. It is recognized that a guarantee of confidentiality is an indispensable condition of encouraging people to seek treatment and thus reduce the spread of sexually transmitted diseases and HIV infection. It has been urged that there are circumstances which may justify breach of the confidentiality rule such as when a person with AIDS persists in unprotected sexual intercourse with his or her partner despite advice and counseling.

### **The Right to Liberty and Security**

Threats to human rights in this field are posed by:-

Compulsory quarantine such as by confinement or isolation in a hospital or a

Hospice.

Compulsory internment in a colony removed from the rest of the society.

The WHO position which is a stand adopted in the region is that "there is no public health rationale to justify isolation or quarantine based solely on the fact that a person is suspected or known to be HIV infected. The modes of transmission are limited (sex, blood, and mother-to-child) and HIV spreads almost entirely through identifiable behaviour and specific actions which are subject to individual control..." In the case of **Midwa v**

**Midwa [2000] 2 EA 453** the husband petitioned for divorce after his wife tested HIV positive and brought proceedings to have his wife vacate their jointly-owned matrimonial home where they were living with their two children on the ground that she posed a grave risk to his life and the life of the children. The wife was ordered to move to the servants quarter. On appeal, the court considered the law of custody and the fact that the wife was still strong and healthy despite being HIV positive for some five years and ordered that the wife be put back in the matrimonial home.

### **The Right of Freedom of Movement**

The right to enter into any state is admittedly confined to nationals of that state and it is absolute. States otherwise have a discretion regarding entry of aliens and this is the basis of making grant of visas conditional upon *HIV Clearance Certificates*. No country in the region under review has made the grant of visas for entry into her territory conditional upon HIV / AIDS clearance.

### **The Right to Work and to Receive Education**

The region has adopted the position of the International Labour Organization and the WHO that:

***"Pre-employment HIV /AIDS screening as part of the assessment of fitness to work is unnecessary and should not be required ..there should be no obligation of the employee to inform the employer regarding his or her HIV /AIDS status. "***

In the entire region it is common for employers to insist on medical examination either before engaging an employee or for determining the issue of retirement on medical grounds. They call upon medical practitioners and others to carry out an examination and expect a report on the basis of which presumably a decision will be made as to whether or not to employ or retire that person. Although the consensus appears to be that in employment matters, no pre-employment HIV testing should be done without the consent of the applicant and HIV status should not be used as part of an assessment of one's fitness to work, the practice on the ground does not bear this out.

A number of people living with AIDS in the region have related their frustrating experiences with employers and prospective employers. In the case of HIV / AIDS, one will readily appreciate the irrational fear of employers to have HIV infected workers in their ranks. To whom does the health care worker owe a professional duty? Should he or she disclose his or her HIV status to the prospective employer who sought his or her opinion when the person examined has withheld his or her consent? The position in the region is that everyone has a right to work his HIV status notwithstanding -- and the employer

need not know the HIV status of the prospective employee. When, however, an existing employee is infirm with disease and incapable of properly performing the tasks required irrespective of whether it is as a result of AIDS, this incapacity should be disclosed to the employer. *Prima facie* this would not amount to a breach of the rule of confidentiality. The following ethical principles appear to have gained acceptance in the region:

Workers who have tested HIV positive and are still strong and healthy should be treated the same as any other worker with regard to opportunities for promotion, training or capacity building.

When a worker finally succumbs to the virus, he or she should be treated like a worker with any other illness and should be provided with medical facilities so long as he or she is still medically fit to work.

With regard to education there is no health policy prohibiting children infected with HIV from attending school as it is recognized that HIV is not spread through routine contacts in schools.

### **The Right to Social Security**

The region subscribes to Convention NO 102 of the International Labour Organization concerning minimum standards of social security (28th June 1952) which provides that any given state must provide benefits in respect of at least three of the following:- Medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivorship;

### **Rights to Marry and Found a Family**

All countries in the sub-region recognize this aspect of Human Rights and do not impose any conditions for marriage based on HIV / AIDS zero-status although there are attempts by certain clergy to demand HIV -test results as a condition precedent to solemnizing statutory marriages. However in the case of **Reitmair v Reitmair [2001] LLR 2071 (HCK)**, a woman sought divorce on the ground of cruelty, inter alia because her husband had engaged in illicit liaisons with a woman who had since died of AIDS but had subsequently refused to take an AIDS test. The divorce petition was certified as undefended and the court granted the petitioner the divorce prayed for. Also in **S-T (formerly J) v J [1998] 1 All ER 431** in which a female-to-male transsexual concealed her true gender and married a female, the court observed obiter that if certain matters of health are concealed e.g. AIDS or HIV, a marriage may be voidable or even void for want of capacity.

### **Rights to Liberty**

Except for detention of a person for purposes of his or her mental treatment, 'the Constitution in -the region do not appear to provide any other medical reason for the

deprivation of a person's liberty but the danger of introduction of such legislation is real. It can be argued in cases where AIDS has been criminalised, elsewhere such as where willful infection of others with HIV virus has been made an offence, that a person's liberty may be compromised or curtailed by due process of law. An interesting South African case is **B & others v Minister of Correctional Services [1997] 2 All SA 574** which involved the interpretation of the constitutional right of prisoners, HIV positive in this case, to "adequate medical treatment." The applicants were HIV positive prisoners and had been prescribed anti-viral medication by their doctors.

The public hospitals to which they were sent for treatment only treated opportunistic infections arising from the HIV condition and prescribed anti-viral drugs for patients at a more advanced stage of the disease. The court held that due to the specific constitutional right of prisoners to adequate medical treatment, the state owed them a higher duty of care than it held to general citizens. Thus, since the state had not conclusively shown that it could not afford to treat the applicants, the court ordered that they should be provided with the prescribed anti-viral therapy so long as this treatment was prescribed on medical grounds. The sub-region does not subscribe to criminalization of AIDS despite the fact that newspapers have reported cases of people infected with HIV willfully infecting others.

### **Women and Children**

It is generally recognised that women and children tend to be of a lower economic and social status a position in society that makes them vulnerable to HIV infection. The need to focus attention on their situation in as far as HIV / AIDS is concerned was underscored by two important international instruments to which most countries in the region subscribe, namely:-

The Paris declaration on women and children and the Acquired Immunodeficiency Syndrome (AIDS) made in Paris in November 1989 (The Paris Declaration) and The Agenda item 19-of-the Forty-Third World Health Assembly (WHA. 43:10) held in Vienna in May 1990.

### **Termination of Pregnancies on Grounds of HIV-Infection**

One of the modes in which HIV is transmitted is from mother to child. The legal question posed is whether or not a pregnant mother who is HIV seropositive should be compelled by law to terminate her pregnancy. The regional position, as in many jurisdiction is that abortion is a criminal offence permissible only in cases in which the woman's health is in serious jeopardy, this is also provided under **Article 26 of the Kenyan Constitution**.

HIV infection per se is not a medical ground for termination of pregnancy. Again the practice on the ground appears to be different.

### **Sterilisation and HIV/AIDS**

In the region, voluntary sterilisation appears acceptable not by express legislation but by implication from the silence of the Law on the subject. The question vis-a-vis AIDS is whether or not there should be compulsory sterilisation of HIV seropositive men and women to prevent future pregnancies and avoid the birth to HIV positive babies. But it is recognised that this procedure does not contribute to the control of the spread of HIV-infection as it does not impede the emission of semen.

### **Condom Access and Use**

Today condom access and use is part and parcel of the right to health and even potentially right to life. Health workers recommend condom use but the religious group usually discourage condom use. However no law exists which can be relied on to prevent any agent from advising against condom use. Perhaps as a question of ethics and practical reality, these groups may need to change their position on condoms.

### **Research**

Most countries have not laid down any specific law regulating-research involving human subjects. In view of the mushrooming research in AIDS it is highly probable that ethical considerations are ignored. In the region, there is no specific legislation providing for sanctions against those who may carry out research on AIDS without clearance from the National Ethical Review Committees. In contrast, Kenya has not had too much HIV/AIDS-related litigation. There was the case of **Kenya AIDS Society v Arthur Obel [1997] LLR 598 (CAK)** where the plaintiffs sought a temporary injunction to stop the defendant, a medical doctor and professor in clinical pharmacology, from selling or offering for sale the drug „Pearl Omega“. The injunction was sought on the ground that the drug was ineffective against AIDS but was merely being used to milk AIDS-sufferers of their money. The injunction was refused and the appeal against the refusal dismissed. The court held that the plaintiff had not made out a prima facie case with probability of success because even if it could show that the laws regarding research, manufacture and distribution of drugs were not complied with, it would still be required to prove actual loss to it and its members arising from that failure. The court further noted that even were a prima facie case established, damages would in any case be an adequate remedy.

In the foregoing, there is urgent need for such legislation to avoid possible abuse of human rights. In cases of prophylaxis and vaccine trial the subject must give consent after proper briefing. There is also an urgent need to address the issue of those falsely claiming to have found a cure and thus misleading and financially exploiting the public. Laws to deal with "quacks" should be made in the interests of the infected who are very gullible because they are desperate.

### **Cultural Practices**

Most people in the region are polygamous married, a fact which militates against the spread of the virus because of the number of sexual partners involved. It also generates debate on the relationships of the wives **inter se** where one of the wives or the husband is HIV seropositive or has AIDS. Polygamy is a way of founding a family and indeed is a foundation of many African families. It may be destroyed by the presence of AIDS. Thought must be given to ways of regulating the conduct of those in a polygamous union in view of the right to marry and found a family. Similar issues are encountered in the practices of wife-sharing and widow inheritance.

Cultural practices die hard and education and conscientization are best able to deal with them as opposed to law. There are other cultural practices such as wife sharing, group sex, traditional circumcision, scarification and others which may promote the spread of HIV. Those practices/customs which encourage HIV infection should be targeted in order to avoid conflict with the cultures of the affected communities.

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