

HIV AND AIDS REFERENCE MATERIALS FOR THE JUDICIARY IN ZAMBIA



Republic of Zambia



March 2010

This publication was produced by Support to the HIV/AIDS Response in Zambia (SHARe) project for review by the United States Agency for International Development.



Recommended Citation: Support to the HIV/AIDS Response in Zambia (SHARE) project. March 2010. *HIV and AIDS Reference Materials for the Judiciary in Zambia*. Bethesda, MD: SHARE, Abt Associates Inc.

Download: Download copies of SHARE publications at: www.abtassociates.com

Contract/Project No.: 690-A00-04-00250-00

Submitted to: Ngaitila Phiri, CTO
United States Agency for International Development/Zambia



Abt Associates Inc. | 4550 Montgomery Avenue | Suite 800 North
| Bethesda, Maryland 20814 | T. 301.347.5000 | F. 301.913.9061
| www.abtassociates.com



In collaboration with:
JSI Research & Training Institute | Initiatives Inc.

HIV AND AIDS REFERENCE MATERIAL FOR THE JUDICIARY IN ZAMBIA

DISCLAIMER

This document was made possible by the support of the American People through the United States Agency for International Development. The contents of this document are the sole responsibility of the Judiciary and SHARe. The opinions expressed herein do not necessarily reflect the views of the U.S. Agency for International Development

CONTENTS

Acronyms	v
Acknowledgments	vii
Foreword	ix
1. Introduction and Purpose	1
2. Workplace Issues	3
2.1 Hiring: Use of Testing/HIV Status in Hiring Decisions	5
2.2 Disability/Reasonable Accommodation of PLWHA	7
2.3 Confidentiality/Disclosure of HIV and Other Medical Information	9
2.4 Termination: Use of HIV Status as Ground for Termination	11
2.5 Hiv-Related Discrimination in Employment: Burden of Proof, Evidence, Remedies	14
2.6 Occupational HIV Acquisition/Transmission	15
3. Customary Law: Marriage, Divorce, Property, and Inheritance	17
3.1 Conflict Between Customary Law and Constitutional/Statutory Law	17
3.2 Marriage/Divorce	19
3.3 Inheritance/Property Grabbing	21
3.4 Widow Cleansing	23
4. Gender And HIV/AIDS	25
4.1 Gender-Based Violence	26
4.2 Women’s Disproportionate Burden of Caretaking	29
5. Criminal Law And HIV/AIDS	31
5.1 Criminalization of HIV Transmission	33
5.2 Bail and Sentencing	35
6. Courtroom Issues	39
Annex	41
Bibliography	47
Books	47
Cases	47
Laws/Statutes	47

ACRONYMS

AIDS	Acquired Immuno Deficiency Syndrome
ARV	Antiretroviral (drugs)
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
ECOSOC	Committee on Economic, Social and Cultural Rights
HIV	Human Immunodeficiency Virus
LRF	Legal Resources Foundation
NAC	National AIDS Council
PLWHA	Persons Living with HIV/AIDS
SADC	Southern Africa Development Community
SHARe	Support to the HIV/AIDS Response in Zambia
TB	Tuberculosis
UN	United Nations
UNAIDS	Joint United Nations Program on HIV/AIDS
UNGASS	United Nations General Assembly Special Session on HIV/AIDS
UDHR	Universal Declaration of Human Rights
VSU	Victim Support Unit of the Zambia Police Service
WHO	World Health Organization
WILDAF	Women and Law in Development in Africa
ZARAN	Zambia AIDS Law Research and Advocacy Network
ZLDC	Zambia Law Development Commission

ACKNOWLEDGMENTS

The compilation and publication of the HIV and AIDS Reference Material for the Judiciary in Zambia is a significant milestone in Zambia's dispensation of justice in HIV and AIDS-related court cases. Until now, the Zambian judicial system has had no HIV and AIDS reference materials to inform and guide adjudication of cases brought before courts of law. The Support to the HIV/AIDS Response in Zambia (SHARe) project is, therefore, immensely grateful to all stakeholders who committed their invaluable time and resources to the process of compiling this document. SHARe is particularly indebted to the Zambian Judiciary, Zambia AIDS Law Research and Advocacy Network (ZARAN), Zambia Law Development Commission (ZLDC), Law Association of Zambia (LAZ), Legal Resources Foundation (LRF), and Zambia Police Service Victim Support Unit (VSU).



Dr. Mukachilima Chikuba

Chief of Party

Support to the HIV/AIDS Response in Zambia

FOREWORD

HIV and AIDS have affected all segments of the Zambian population. Available statistics regarding the disease are disheartening: HIV prevalence is estimated at 14.3 percent in the 15–49 age group and is higher amongst women (16.1 percent) than amongst men (12.3 percent), indicating the feminisation of the disease. At the close of 2005, there were over 100,000 HIV and AIDS-related deaths. Life expectancy had fallen to 37 years and over 800,000 children were orphaned. By causing the death of breadwinners, HIV and AIDS deepen household poverty in general and household food security in particular. HIV and AIDS have the potential of drastically reversing all the economic gains that Zambia has achieved since attaining independence, and compromising its prospects for fulfilling the UN Millennium Development Goals by 2015.

Zambia has made commendable strides in combating HIV and AIDS through a variety of multi-sectoral interventions. These include the establishment of a Cabinet Committee of Ministers on HIV and AIDS, adoption of the National HIV/AIDS/STI/TB Policy, establishment of the National AIDS Council, and formation of national and sub-national HIV and AIDS intervention and coordination structures. Another significant initiative is the mainstreaming of HIV and AIDS in key national development documents such as the National Development Plan 2006–2010, Poverty Reduction Strategy Paper, National Capacity Building Programme for Good Governance, and the Public Service Reform Programme. There are, however, several factors that compromise interventions against HIV and AIDS. Principal amongst them is the administration of justice in cases involving people living with HIV and AIDS.

The concern is with regard to the inadequate dispensation of legal and constitutional rights for protecting people living with HIV and AIDS from discrimination, unfair treatment, and harassment. More often than not, Zambian courts have been presented with HIV and AIDS-related cases for which they have had no precedents to inform and guide judgment. In most cases, courts have relied on personal interpretations of the law and, consequently, created the potential of worsening the problem of HIV and AIDS. It is therefore important that adjudication of HIV and AIDS-related cases adopts a human rights approach. This is because HIV infection exposes one to potential violations of basic human rights, stigma, discrimination, social exclusion, and violence and deepens poverty. Women and girls are particularly vulnerable to these consequences.

Human rights-related issues include consent for testing, confidentiality, stigma, and discrimination; the special needs of vulnerable groups; and the safety of the blood supply. In the work environment, key issues include hiring, firing, award of benefits, sick leave, disability, occupational HIV transmission, mandatory testing, and confidentiality of HIV test results. There are also increasing cases involving customary law, property rights/inheritance, widow/widower cleansing, gender-based violence, rape, defilement, and willful transmission of HIV, to mention but a few.

Given this background, it is important that judges, magistrates and local court justices at all levels of the judicial system have a full understanding of HIV and AIDS and how they interface with customary and written laws. This is a requirement for applying the law in the fairest possible manner and for avoiding rulings that might exacerbate the burden of living with HIV and AIDS.

To aid this process, this manual has been prepared to inform and guide all levels of the judiciary. The manual provides background material on the constitutional provisions and laws that are relevant to adjudicating HIV and AIDS-related legal issues. It presents important information and guidance in the following key subject areas: workplace issues, customary law, gender and HIV/AIDS, criminal law and HIV/AIDS, and courtroom issues.

I wish to sincerely thank the Support to the HIV/AIDS Response in Zambia (SHARe) project, Zambia AIDS Law Research Advocacy Network (ZARAN), Law Association of Zambia (LAZ), Legal Resources Foundation (LRF), and other cooperating partners for making this publication possible. I have all the confidence that the manual will be a useful resource for informing and guiding our judicature in the administration of justice in HIV and AIDS-related cases in our courts of law.

A handwritten signature in black ink, appearing to read 'Ernest Sakala', written in a cursive style.

Judge Ernest Sakala
The Chief Justice

I. INTRODUCTION AND PURPOSE

The HIV/AIDS epidemic affects every element of the population and virtually every realm of life in Zambia. Judges at all levels are beginning to hear cases that involve HIV and AIDS issues. Therefore, it is important that they have a full understanding of HIV and AIDS, and issues related to it that may bear on cases coming before them so that they may apply the constitution and laws in the fairest possible manner and avoid rulings that may add to the already heavy burdens of stigma and discrimination associated with HIV/AIDS in the country.

The Law can either protect human rights or be a hindrance to the realization of rights.

The Government must ensure that its obligations to guarantee rights and freedoms, and to respect, protect, and fulfill human rights, under national and international law, are respected and guaranteed to all citizens. Litigation attempts, amongst other goals, to hold private citizens and entities, as well as governments, accountable for their action or inaction before an independent body, thus guaranteeing the essential moderation and control of laws through impartial and principled review, or to encourage or compel state action where political will has been lacking.

It would be a mistake to conceive of the role of the judiciary in the exposition, development, and application of the law as limited to judges of the highest courts. In all jurisdictions, the local court justice, magistrate, or judge plays an important role. That notwithstanding, one should note that opportunities for judicial elaboration will differ at different levels of the judicial hierarchy. A judge of the final appellate court will have an important role in applying the Constitution, expounding on basic human rights, striking down legislation as unconstitutional, and keeping the other branches of government in check. Meanwhile, a judicial officer at the local level, such as a magistrate or local court justice, will have much less opportunity to develop and expound new legal principles. He or she will generally be bound to simply apply statute, customary, or common law as elaborated by the higher courts.

It is important to note the inadequacy of reported case law on HIV/AIDS issues in Zambia. However, there is a growing body of unreported case law in Zambia, with some accounts being published in the newspapers.

Lack of reported case law results in large part from the effects of stigma and discrimination – i.e. people's fear of being identified, labeled, and discriminated against outweighs the possible benefits of seeking legal remedies. Judges can help to break down this reluctance by acting as role models of respect, fairness, and non-discrimination so that courts can truly be sources of justice accessible to all.

The response of our courts is crucial to protect the rights of those infected and affected by HIV and AIDS. The Support to the HIV/AIDS Response in Zambia (SHARe) project, together with partners Zambia AIDSLaw Research and Advocacy Network (ZARAN) and Legal Resources Foundation (LRF),

thus undertook to look at the issues of HIV and AIDS and the courts with the goal of producing a compilation of reference materials. This document presents important information and guidance in the following key subjects in which HIV and AIDS affects life, society, and human relations:

- Workplace issues, including hiring/firing, disability/reasonable accommodation, and occupational HIV transmission;
- Customary law, marriage, divorce, property, and inheritance;
- Gender issues, including rape/defilement and burden of family caretaking; and
- Criminal law issues, including criminalisation of HIV transmission, bail/sentencing issues, and mandatory testing.

The discussion of each topic presents the following, first in brief matrix form and then with more detail in subsequent text:

Key issues to be addressed:

- Relevant laws and other instruments, with key provisions and areas open to interpretation/application by judges;
- Actual case law from Zambia and elsewhere in the region and internationally; and
- Principles for judges to consider in addressing these issues.

The document also addresses HIV-related courtroom issues and the role of judges as educators and models of an appropriate response to HIV and AIDS. An annex describes key laws and legal instruments relevant to a judicial response to HIV/AIDS in Zambia.

2. WORKPLACE ISSUES

HIV and AIDS are workplace issues not only because they affect labor and productivity, but also because the workplace has a vital role to play in the wider struggle to limit the spread and effects of the epidemic and to prevent stigma and discrimination. Discrimination very easily manifests itself in the workplace largely because of the challenges of the employer in managing his/her resources in the 'best' (i.e. most profitable) manner possible, while integrating HIV and AIDS risks into his or her plans and the employees' ability to work for as long as possible in fair and acceptable conditions.

Key workplace issues include discrimination in hiring and firing, disability/reasonable accommodation, and occupational HIV transmission. There is substantial HIV/AIDS-related discrimination in hiring and firing in Zambia. For example, the army requires HIV testing of recruits and excludes HIV-positive people from the service.

KEY ISSUES	RELEVANT LAWS/ INSTRUMENTS	CASE LAW	PRINCIPLES FOR ADDRESSING ISSUES
Hiring: Use of testing/ HIV status in hiring decisions	Employment Act (CAP 268)	No reported Zambian case Regional cases: Hoffman v. South African Airways , Constitutional Court of South Africa, Case CCT 17/00 (2000); 2000 (11) BCLR 1235 (CC); 2001 (1) SA 1 (CC); 2001 (2) SA 68 (w) Haindongo Nghidipohamba Nanditume v. Ministry of Defence , Labour Court, Namibia Case No. 24/98 (2000); Irvin & Johnson v. Trawlers and Line Fishing et al. , South Africa (2002)	Balance rights of employers and employees. HIV status must be clearly related to specific job. Requires evidence of employer's knowledge and intent.
Disability/ reasonable accommodation of PLWHA	Industrial and Labour Relations Act (CAP 269); Persons with Disabilities Act (CAP 65); Zambia National Pension Scheme (CAP 256)	No reported Zambian case	Disability depends on severity of illness; duty to provide medical attention, provide reasonable accommodation.

Confidentiality/ disclosure of HIV and other medical information	Constitution of the Republic of Zambia (CAP No. 1, Article 17)	No reported Zambian case Regional cases: Jansen van Vuuren v. Kruger , South Africa 842(A) 8491 (1993/4); NM and Others v. Smith and Others , Constitutional Court of South Africa (2007); Doe v. City of New York , 2nd Circuit Court (1994)	Limits on privacy right; disclosure must be legally required.
Use of HIV status as grounds for termination	Industrial and Labour Relations Act, Section 108 ("social status")	Zambia Privatisation Agency v. Matale ZR 157 (SC) (1995–97) Ngwira v. Zambia National Insurance Brokers ZR 140 (1993/94) Regional cases: J.A.O. v. Homepark Caterers Ltd , Kenya (2004); Lemo v. Northern Air Maintenance (Pty) Ltd , Industrial Relations Court of Botswana (2004); Monare v. Botswana Ash (Pty) Ltd , Industrial Relations Court of Botswana (2004); Sarah Diau v. Botswana Building Society (BBS) , Industrial Relations Court of Botswana Case No. IC 50/2003 (2003); Zungu v. ET Security Services , South Africa Hoffman v. South African Airways , Constitutional Court of South Africa (2000 and 2001);	Balance rights of employees and employers: termination not warranted unless clearly based on actual inability of employee to perform job requirements. Requires employer's prior knowledge and intent.
HIV-related discrimination in employment	Constitutional prohibitions of discrimination	No reported Zambian case Regional cases: See above under hiring and termination.	Burden of proof lies with plaintiff; need to prove employer's prior knowledge and intent; Remedies: damages, reinstatement with back pay.
Occupational HIV acquisition/ transmission	Workers Compensation Act (Cap 271)	No reported Zambian case	Difficulty of linking HIV transmission/ acquisition to a specific incident.

Note: Refer to bibliography for full case citations, where available.

HIV and AIDS impact the workplace not only by affecting labour and productivity, but also because the workplace plays a vital role in the struggle to limit the spread and effects of the epidemic and to prevent stigma and discrimination against people living with HIV/AIDS (PLWHA). Discrimination easily manifests itself in the workplace because employers wish to manage resources in the ‘best’ (i.e. most profitable) manner possible even while integrating HIV and AIDS risks into workplace plans, and employees wish to work for as long as possible in fair and acceptable conditions.

Key workplace issues include discrimination in hiring and firing, disability/reasonable accommodation, and occupational HIV transmission. There is substantial HIV and AIDS-related discrimination in hiring and firing in Zambia. For example, the Zambia Defence Force, pursuant to its HIV and AIDS Policy of January 2008, requires HIV testing of recruits and does not hire HIV-positive people.

2.1 HIRING: USE OF TESTING/HIV STATUS IN HIRING DECISIONS

RELEVANT LAWS/INSTRUMENTS

Zambia’s Employment Act (CAP 268), Section 34 (1), allows for pre-employment medical examination of candidates for jobs; the medical examination shall relate only to the fitness of the employee to perform the work contracted. However, HIV status is not relevant to an employee’s fitness to undertake work contracted.

CASE LAW

No reported Zambian case.

REGIONAL CASES:

In **Hoffman v. South African Airways**, Constitutional Court of South Africa, Case CCT 17/00 (2000); 2000 (11) BCLR 1235 (CC), 2001(1) SA 1 (CC) and 12001 (2) SA 68 (w), the appellant was refused employment as a cabin attendant on the grounds that he was HIV positive. The Constitutional Court held that this was discriminatory and that, while legitimate commercial requirements are important, they cannot be used to disguise stereotyping and prejudice that have no place in this era of respect for human dignity, compassion, and understanding ubuntu. “People living with HIV have been stigmatized and as one of the most disadvantaged groups in society deserve special protection from our Law”. The Court ordered the reinstatement of Hoffman as a flight attendant and payment of his salary arrears.

Note: The Zambian Army tests recruits and excludes HIV-positive people from service. Several regional cases struck down mandatory testing of prospective employees. Mandatory testing of military recruits has been overturned by a court in Namibia and is under challenge in South Africa.

¹ A Zulu word conveying the recognition of the human worth and respect for dignity of every person.

The Zambia Police Service does not discriminate when it recruits police officers on grounds of their HIV/AIDS status. The recruits who are found to be HIV positive are counseled and given the relevant information on living with HIV/AIDS and required medical support.

In ***Haindongo Nghidipohamba Nanditume v. Ministry of Defence***, Labour Court, Namibia, Case No. LC 24/98 (2000), the court ruled that exclusion of a recruit from the army solely on the basis of HIV status was unfair discrimination under Section 107 of the Labour Act. (Unfortunately, soon after this opinion was issued, a new law was passed that allowed for the exclusion from the army of people with conditions “likely to deteriorate” to the extent that they are unable to perform their training or duties.)

In ***Irvin & Johnson v. Trawlers and Line Fishing Union et al.***, South Africa (2002), the court held that the Employment Equity Act outlawed mandatory HIV testing in the workplace but permitted voluntary and anonymous testing programs.

PRINCIPLES FOR ADDRESSING ISSUE:

Courts need to balance the right of the employer to hire the best candidate for the job and the prospective employee’s right not to be subjected to unwarranted discrimination in hiring.

It is difficult to prove discrimination in hiring – it requires evidence of the employer’s knowledge of the person’s HIV status and the employer’s intent to discriminate on the basis of that status.

Pre-employment medical examination is permitted under the Employment Act (CAP 268) but should only under extremely rare circumstances include HIV testing – that is, only when HIV status is clearly and directly relevant to the candidate’s ability to perform the job requirements. Any prospective employee could develop any other type of serious illness or disability and yet they are not excluded on that basis. Moreover, with the greater availability of antiretroviral drugs (ARVs), many PLWHA can live long and normal lives and be productive workers for a long time.

Therefore, hiring decisions should be based on case-by-case assessments of each applicant’s qualifications and fitness for the particular position being filled, rather than on blanket determination based on any medical status such as being HIV positive. Employers have no right to know the HIV status of their employees unless such knowledge would bear directly on determining the employee’s fitness for a specific job – for example, a job that will require travel to a country that bars admission of HIV-positive people.

Any medical examination undertaken either before employment or thereafter should be solely to determine functional performance and offer a prognosis on the fitness for work of the prospective employee [Section 34 (1) of the Employment Act].

Drawing on World Health Organization (WHO) policy guidelines, ZARAN² argues that employment-related mandatory HIV testing “is counterproductive, irrationally wasteful of scarce resources, imperils the human rights and dignity of the employees and prospective employees”.

MANDATORY TESTING

Does not lead to behavior change;

Can lead to stigma and discrimination;

May drive HIV+ people underground and discourage them from accessing health services;

False-negative HIV tests of people in the “window period” may foster a false sense of security.

2.2 DISABILITY/REASONABLE ACCOMMODATION OF PLWHA

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

The Persons with Disabilities Act, Section 20, requires equal treatment of employees regardless of disability. The Act states: “An employer shall not treat a person with a disability differently from a person without a disability when

- a. advertising for employment;
- b. recruiting persons for employment;
- c. offering terms or conditions of employment;
- d. considering promotion, transferring or training such persons; or
- e. providing any other benefits related to employment”.

It also has been argued that PLWHA could be protected under the Persons with Disabilities Act, Chapter 65

CASE LAW

Unreported in Zambia

PRINCIPLES FOR ADDRESSING ISSUE

The key to using the Persons with Disabilities Act is that HIV status would have to be considered a disability. The Act defines a person with a disability as follows: “A person with a physical, mental or sensory disability, including a visual, hearing or speech functional disability”.

Defining HIV and AIDS as a disability would depend on the severity of illness and stage of disease. There is a tension between

‘Disability’ means any restriction resulting from an impairment or inability to perform any activity in the manner or within the range considered normal for a human being, and would or would not entail the use of supportive or therapeutic devices and auxiliary aids, interpreters, white cane, reading assistants, hearing aids, guide dogs or any other trained animals trained for that purpose.

² AIDSLAW Manual, 1st Edition (2007)

considering HIV infection a disability requiring reasonable accommodation and at the same time considering PLWHA fully able to lead normal lives and be productive workers. Hence the qualification that HIV can only be considered a disability if the disease progresses into AIDS or it becomes so severe that it incapacitates the person.

2.2.1 MEDICAL CARE FOR EMPLOYEES

RELEVANT LAW

Section 43 of the Employment Act, Chapter 268 of the Laws of Zambia, addresses the employer's duty to provide/facilitate medical attention for the employee. It provides that, as agreed under a collective agreement registered under the Industrial and Labour Relations Act (CAP 269), a contract of employment, or the general conditions of service relating to that organisation or institution, an employer may provide an employee with medical attention and medicines and where necessary, transport a worker to a medical institution. For group assurance or life insurance in excess of a certain amount, the person being insured must undergo medical tests, including an HIV test. If the person is found to have any pre-existing medical condition including HIV, he or she may be required to pay a higher premium.

PRINCIPLES FOR ADDRESSING ISSUES

Judges should understand that employers might be reluctant to take out certain types of health insurance for HIV-positive employees because of the high cost of the premium. The question is whether such rate discrimination should be permitted under the law.

2.2.2 PENSIONS

RELEVANT LAW

According to the National Pension Scheme Act (CAP 256), a person qualifies for pension when he or she has attained pensionable age. A person shall qualify for early retirement if he or she is within five years of pensionable age or has made not less than 180 monthly contributions.

PRINCIPLES FOR ADDRESSING ISSUES:

With regard to HIV and AIDS, this requirement may be crucial because a PLWHA may want to take early retirement before reaching the normal pensionable age of 55 years or minimum number of payments. Section 23c of the National Pension Scheme Act provides for what is known as invalidity or early pension. In the context of HIV/AIDS this means that the person would have to be symptomatic, actively ill, or in the terminal stages of AIDS.

2.3 CONFIDENTIALITY/DISCLOSURE OF HIV AND OTHER MEDICAL INFORMATION

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

The Zambian Constitution provides for the protection of privacy. Regionally, the Code on HIV and AIDS and Employment that was recently adopted as the official policy by Southern African Development Community (SADC) countries, emphasizes that “persons with HIV or AIDS should have legal rights to confidentiality about their status in any aspect of their employment”, and that an employee “is under no obligation to inform an employer” of his or her HIV status.

CASE LAW

No reported Zambian case.

REGIONAL AND INTERNATIONAL CASES:

In **Jansen van Vuuren v. Kruger**, South Africa, 842(A) 8491 (1993/4) (also referred to as the McGeary case), the doctor informed a patient that he (the patient) had been found to be HIV positive by an HIV test taken for insurance purposes. The doctor passed on this information to another doctor and dentist. When the patient learnt that his doctor had ignored his right to privacy, he took a legal action.

The Court held “there are in the case of HIV/AIDS special circumstances justifying the protection of confidentiality. Disclosure of a condition has serious personal and social consequences for the patient. He is often isolated and rejected by others which may lead to increased anxiety, depression and psychological conditions which tend to hasten the onset of fully blown AIDS”. The Court upheld a claim for damages for injurious breach of confidentiality.

In **NM and Others v. Smith and Others**, Constitutional Court of South Africa (2007), three HIV-positive women, whose identities had been published in a biography without their prior consent, sued the author of the book, Charlene Smith, the subject of the book, Patricia DeLille, and the publisher, New Africa Books. Smith had obtained a clinical trial report that identified the three women by name. The women had signed limited consent forms for the disclosure of their identities in the clinical trial report but not for further dissemination of their identities.

The Constitutional Court found that the three women’s right to privacy was infringed by the publication of their names, as Smith and Others had intentionally disclosed their names without obtaining consent. The Court also held that the disclosure of the women’s HIV status violated their right to dignity given the stigma and discrimination surrounding HIV and AIDS in South Africa. The Court awarded the three women R35,000 each and ordered that their names be deleted from all unsold copies of the book.

In **Doe v. City of New York**, 2nd Circuit Court (1994), Doe filed a claim against Delta Airlines with the City of New York Commission of Human Rights, claiming that Delta had discriminated against him based on its suspicion of his HIV status. The parties reached a settlement, which included a confidentiality clause stating that Delta and the Commission would not disclose Doe's name in connection with the claim. Despite the confidentiality clause, the Commission issued a press release disclosing the terms of the agreement. Though his name was not disclosed in the press release, Doe claimed that there was sufficient identifying detail to alert his colleagues of his HIV status. Doe challenged the disclosure as a violation of right to privacy.

On appeal, the Circuit Court held that Doe had a constitutional right to privacy regarding his HIV status and that the right was not waived by his bringing a discrimination complaint to the commission. The Court noted that the right to confidentiality of personal medical information is especially important with regards to HIV and AIDS because of the level of stigma attached to it.

PRINCIPLES FOR ADDRESSING ISSUE

The Zambian Constitution provides protection of the right to privacy but this may not extend to privacy of health information. Article 17 of the Constitution refers only to respect for privacy of home and other property. Because living with HIV and AIDS affects a person's most basic sense of identity and security, and respecting the person's privacy and confidentiality of their HIV status provides protection against discrimination and stigmatisation, the scope of this right to privacy should be broadened to include, inter alia, the prohibition of any forced disclosure of personal information or compulsory medical examination and adequately cover the right to informed consent and confidentiality.

The law in Zambia does not require a death certificate to indicate whether a person died of an HIV-related illness. Employers should, therefore, not attempt to find this out. Trustees and administrators of benefit funds may not disclose the identity of a person with HIV to an employer without that person's express and informed consent. HIV status should not be required or reflected on any routine medical or personnel report. Persons with HIV or AIDS have the legal right to confidentiality about their status. This right is a critical one. Without assurances of confidentiality, many individuals will remain unwilling to be tested.

Confidentiality regarding all medical information of an employee or prospective employee must be maintained, unless disclosure is legally required. In any given case, the benefits or potential benefits resulting from use or disclosure should be likely to outweigh the harm or potential harm. If an employee informs an employer of his or her HIV status, this information should not be disclosed to any other employee (including human resources and medical personnel) without that employee's consent; doing so would be a breach of confidentiality. A breach of confidentiality in this respect should be subject to disciplinary measures, which may include dismissal.

Furthermore, the Medical and Allied Professions Act (Cap 297) and the Disciplinary Proceedings (Rules) confer disciplinary powers on the Medical Council of Zambia in relation to professional misconduct and criminal offences committed by a medical practitioner. A medical practitioner has the duty to maintain profession confidentiality and refrain from disclosing voluntarily to any third party information that he has learnt directly or indirectly in his professional relationship with his or her patient. The death of a patient does not absolve the medical practitioner from the obligation of secrecy. A medical practitioner may disclose confidential information if the patient gives express consent or due to a legal requirement to disclose.

Where there is breach of confidentiality, the law should provide for compensation. However, compensation by itself does not remove the negative effects of the breach of confidentiality from the person whose HIV status is unjustly disclosed. The emphasis should be on preventing disclosure and upholding confidentiality. The International Guidelines on HIV and AIDS and Human Rights state that “because of the limits of confidentiality and the difficulties of protecting it in practice, efforts to protect people living with or affected by HIV or AIDS from discrimination need to be strengthened”.

2.4 TERMINATION: USE OF HIV STATUS AS GROUND FOR TERMINATION

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

The Industrial and Labor Relations Act (CAP 269, Article 108) makes dismissal on discriminatory grounds an unfair labor practice. The Act reads as follows:

Section 108

(1) No employer shall terminate the services of an employee or impose any other penalty or disadvantage on any employee, on grounds of race, sex, marital status, religion, political opinion or affiliation, tribal extraction or social status of the employee.

(2) Any employee who has reasonable cause to believe that the employees' services have been terminated or that the employee has suffered any other penalty or disadvantage, or any prospective employee who has reasonable cause to believe that the employee has been discriminated against, on any of the grounds set out in subsection (1) may, within thirty days of the occurrence which gives rise to such belief, lay a complaint before the Court: Provided that the Court may extend the thirty-day period for a further three months after the date on which the complainant has exhausted the administrative channels available to him.

(3) The Court shall, if it finds in favor of the complainant-

- a. Grant to the complainant damages or compensation for loss of employment;
- b. Make an order for re-employment or reinstatement in accordance with the gravity of the circumstances of each case.

CASE LAW

ZAMBIA CASES:

Zambia Privatisation Agency v. Matale, ZR 157 (SC) (1995–97), upheld an employer’s right to terminate employment without reason if there is a termination clause in the employment contract. The Supreme Court of Zambia held that:

“The respondent’s services were terminated in accordance with the terms of a letter dated 8 September 1994. They purported to give a reason in that letter and they paid the respondent the terminal benefit which included three months’ salary in lieu of notice. It was common cause that the contract of employment in the instant case did not provide for termination of employment by notice or pay in lieu of notice. Be that as it may we accept that the relationship here as we said in *Contract Haulage v. Kamayoyo* was that of master and servant. The case before us was not one involving contravention of statutory procedures and disciplinary proceedings. The payment in lieu of notice was a proper and a lawful way of terminating the respondent’s employment on the basis that in the absence of express stipulation every contract of employment is determinable by reasonable notice; see *McClelland v. Northern Ireland General Health Services Board*. In the case of *Lumpa v. Maamba Collieries Ltd* we said, ‘It is the giving of notice or pay in lieu that terminate the employment. A reason is only necessary to justify summary dismissal without notice or pay in lieu’.

In **Ngwira v. Zambia National Insurance Brokers**, ZR 140 (1993/94), social status was said to refer to status in society in general and not in that particular employer’s/employee’s organisation. If the term “other status” were used, this would be all embracing and cover a wider ambit of status including, for our purposes, health status.

PENDING ZAMBIA CASES:

There are a number of cases at various stages in which HIV-related discrimination in termination of employment has been or may be alleged. Below is an example of such a case.

Stanley Kingaipe and Charles Chokolo v. Attorney General 2007/HP/186: Two former Zambia Air Force officers have brought an action against the Zambian Government, alleging that they were discharged from the Air Force on account of their HIV-positive status and that they had been tested against their will and without their consent. The complainants allege discrimination and the infringement of their Constitutional right to personal

liberty and privacy. The matter is in the High Court of Zambia in Livingstone, where the trial has been completed and currently awaiting judgment.

REGIONAL AND INTERNATIONAL CASES:

In **J.A.O. v. Homepark Caterers Ltd.**, Kenya (2004), the court held that an employee’s dismissal due to her being HIV positive constituted “inhuman treatment” and ordered her reinstatement.

In **Lemo v. Northern Air Maintenance (Pty) Ltd**, Industrial Relations Court of Botswana (2004), Lemo, an employee of Northern Aid Maintenance, was dismissed the day after he disclosed his HIV status to his employer. During the final years of his employment, Lemo’s health deteriorated and he had taken all of his annual leave, sick leave, and was repeatedly on unpaid leave. There was a factual dispute as to whether Lemo was terminated due to his HIV status or his frequent absence from work. The Court held that Northern

Air Maintenance dismissed Lemo due to his HIV status. In reaching its decision, the court pointed to the fact that Northern Air Maintenance had tolerated Lemo's frequent absence from work for about three years until they discovered his HIV status where upon he was dismissed. The Court also held that Lemo's dismissal was procedurally unfair as it was not preceded by the appropriate consultation and discussion procedures. The court awarded Lemo compensation equivalent to six months salary.

In **Monare v. Bostwana Ash (Pty) Ltd**, Industrial Relations Court of Bostwana (2004), Monare, who was HIV positive, worked for Bostwana Ash for seven years as a personnel officer in charge of industrial relations. As his medical condition deteriorated, his employment was terminated. Monare sued Bostwana Ash alleging his dismissal was unfair since it was based on his HIV status. The Court held that the termination was substantively fair, but procedurally unfair and awarded Monare compensation accordingly. In reaching its decision, the Court reinforced the principle that an individual's HIV status cannot in itself be a valid ground for termination. However, the Court in this case found that Bostwana Ash did not dismiss Monare due to his HIV status, pointing to the fact that they had been aware of his HIV status for years, and only dismissed Monare after his deteriorating health impacted his work.

In the case of **Sarah Diau v. Botswana Building Society (BBS)**, Industrial Relations Court of Botswana, Case No. IC 50/2003 (2003), a probationary security guard was terminated because she refused to undergo an HIV test as a condition of being permanently employed. The Court held that she was entitled to disobey the instruction to undergo an HIV test as it was "irrational and unreasonable to the extent that such a test could not be said to be related to the inherent requirements of the job". The Court also decided that Diau's right not to be subjected to inhuman and degrading treatment was also infringed. The Court stated that punishing an employee with termination for failing to take an HIV test was "a form of economic death". The Court further decided that the appropriate remedy was to order BBS to reinstate Diau as of January 2004, and to pay her four months of salary as compensation.

In contrast, in **Zungu v. ET Security Services**, South Africa, the Court upheld the dismissal of a security guard with full-blown AIDS on the ground that his condition made it impossible for him to perform his duties.

PRINCIPLES FOR ADDRESSING ISSUE

Many people in Zambia have suffered dismissal due to their HIV status. The difficulty in addressing such incidents is that the reason for the action is often not expressly stated by the employer. As a result, the burden lies on the individual who has been dismissed to prove whether the real reason for dismissal was his/her actual or perceived HIV status.

Again, the key is balancing rights of employees and employers: termination is not warranted unless clearly based on actual inability of the employee to perform requirements of the job – not on concern or assumption that there will be future inability due to illness. Increased

availability of ARV therapy means many people will be able to continue working normally for as long as anyone else. Moreover, any employee could become ill with any other type of disease.

Proving HIV-related discrimination is often challenging, for lack of evidence of the employer's prior knowledge of the employee's HIV status and intent to act on it. Employers are often able to conceal such discrimination by giving pretexts for termination.

It should also be noted that where there is a contract, the employer generally has the right to terminate without giving a reason (termination clause).

2.5 HIV-RELATED DISCRIMINATION IN EMPLOYMENT: BURDEN OF PROOF, EVIDENCE, REMEDIES

RELEVANT LAWS AND INSTRUMENTS

Numerous international and regional covenants, declarations, and regulations bar all forms of discrimination. These instruments recognise the right to work, to free choice of employment, to just and favourable conditions of service and to protection against employment discrimination. Zambia's National HIV/AIDS Policy states that "the government will uphold the international declarations assented to on HIV/AIDS and translate them into strategies suitable to the local government."

However, there are no laws explicitly prohibiting HIV and AIDS-related discrimination in Zambia. The Industrial and Labour Relations Act, Section 5, provides for the rights of employees in the workplace. It seeks to protect workers from various forms of ill-treatment such as unfair dismissal, unjustifiable penalisation, victimization, or discrimination. It has been argued by ZARAN³ and others that the Industrial and Labour Relations Act's prohibition against unfair dismissal or discrimination based on an employee's "social status" (Sections 5 and 108) should apply to HIV and AIDS status. Employees with HIV should be governed by the same contractual obligations as all other employees.

The Zambian Constitution outlaws many types of discrimination but does not specifically mention health status of any kind.

CASE LAW

No reported Zambian case.

REGIONAL CASES:

See above under hiring and termination.

³ Ibid

PRINCIPLES FOR ADDRESSING ISSUE

Although the Industrial and Labour Relations Act may be helpful, it is not adequate to deal with discrimination based on HIV status because it stipulates that the grounds for discrimination must be those set out in section 108(1). HIV status is not one of the grounds listed and there is current case law holding that “social status” does not cover health status. However, there is need for “social status” to be more broadly defined to include discrimination on the basis of health or ‘other’ status. This would provide some measure of protection to PLWHA. The currently restricted meaning of the term is open to abuse by employers.

It is important to observe that the burden of proof of HIV-related discrimination in Zambia lies with plaintiff. In contrast, in South Africa, the Employment Equity Act provides that whenever unfair discrimination is alleged, the employer must establish that it is fair.

There are evidentiary difficulties in that proving discrimination requires establishing the employer’s prior knowledge of the employee’s HIV status and intent to act on that basis.

Remedies: Courts may award damages, and order the employee’s reinstatement with the payment of salary arrears. However, a respondent’s ability to pay the assessed damages may have to be taken into consideration.

2.6 OCCUPATIONAL HIV ACQUISITION/TRANSMISSION

Cases may arise in relation to occupational acquisition of HIV – for example, with health care workers, police officers, prison officers, and others whose work may put them in risky situations regarding HIV. Such cases raise complex issues, including the difficulty of proving the relationship between a particular exposure and the HIV infection. More advanced testing methodologies may allow for more precise determination of the time of infection.

Health care professionals are more susceptible than most members of the population to occupational hazards involving blood and other body fluids. The greatest hazard is associated with occupations that use perforating and cutting instruments, and in which needle pricks may occur. Among medical professionals, surgeons have the highest risk because of their extensive use of needles and perforating instruments in surgical procedures.

There are many issues involved with occupational exposure and infectious diseases. One of the most noteworthy is that while there may be information about many of the high-risk occupations, there is none about the exposure rates or infection rates for anyone employed within any area of law enforcement agencies. Government agencies might say that they have no documented evidence of anyone employed in any area of law enforcement that has ever been exposed to or infected by any infectious disease.

RELEVANT CONSTITUTIONAL/STATUTORY PROVISIONS

The Workers Compensation Act, Chapter 271 of the Laws of Zambia, was enacted to make provision for the compensation of employees for accidents they have and illnesses they contract while working. That is, if a person is infected with HIV in the course of his or her employment the person may be compensated in accordance with the provisions of the Act. The Workers Compensation Act further requires the employer to provide a safe working environment. However, it should be recognised that the Act does not mention HIV/AIDS.

CASE LAW

No reported cases in Zambia

PRINCIPLES FOR ADDRESSING ISSUE

There is evidentiary difficulty in linking HIV transmission/acquisition to a specific incident. Establishing occupational transmission requires verifying that infection did occur while employed and that is the crux of the problem: how can a person verify that exposure occurred when he or she was in active employment when it might take several months or years for signs and symptoms of the infection to manifest themselves. There is a need to show that the person was uninfected prior to the incident and infected afterwards. The timing can be critical – the closer the bracketing of the incident by negative and positive status, the stronger the case for attributing infection to that incident. Moreover, the incident must be shown to have been one in which HIV transmission could actually have occurred. As noted, newer testing technologies may be of assistance in making more precise estimates of the time of infection.

Cases of occupationally acquired HIV infection are usually categorised as either “definite” or “possible”, but the definitions vary slightly from country to country.

There is little variation between countries on what constitutes a “definite case”. A definite case is one for which there is documented evidence of HIV sero conversion (a recorded negative result of a test for anti-HIV followed by a subsequent positive result) associated with a specific occupational exposure to a source of HIV.

3. CUSTOMARY LAW: MARRIAGE, DIVORCE, PROPERTY, AND INHERITANCE

KEY ISSUES	RELEVANT LAWS/ INSTRUMENTS	CASE LAW	PRINCIPLES FOR ADDRESSING ISSUES
Conflicts between Constitution/ statutory law and customary law	Constitution, Art 23; Subordinate Court Act (CAP 28, section 16); Local Courts Act (CAP 29, section 12(1))	None	Constitution and statutory law take precedence over customary law
Marriage/ Divorce	Marriage Act; Penal Code (defilement); Matrimonial Causes Act	Several cases seeking divorce based on spouse's HIV status before the Local Courts (the Local Court decisions are based on Customary Law)	HIV status/lobola (bride price) not grounds for granting/ denying divorce. State of marriage/possibility of reconciliation takes precedence
Inheritance/ property grabbing	Intestate Succession Act; Local Courts Act; Wills and Administration of Testate Estates Act	None	Percentage distribution in Intestate Succession Act normally governs but judges should consider case-specific circumstances
Widow cleansing	None	Widow/widower demands sexual cleansing	Traditional practices should not be allowed to increase HIV risk; recommend non-sexual cleansing

3.1 CONFLICT BETWEEN CUSTOMARY LAW AND CONSTITUTIONAL/STATUTORY LAW

The conflict between customary law and constitutional/statutory law poses serious problems. The Constitution, which is the supreme law of Zambia, contains provisions that may undermine the effect of statutory laws that may be contrary to customary laws. Customary law in Zambia governs many issues of marriage, divorce, property, and inheritance. Cases involving customary law are generally decided by the local courts. The U.N. Common Country Assessment for 2000 noted: "In Zambia, some of the factors contributing to the spread of AIDS are imbedded in customary laws and practices, especially in relation to divorce, adultery, child marriages and defilement."

RELEVANT LAWS/INSTRUMENTS

Article 23 of the Zambian Constitution appears to contradict the anti-discrimination clause in the Bill of Rights by permitting discriminatory laws in such matters as marriage, divorce, and devolution of property upon death based on the application of customary laws “to exclusion of all other laws”. According to some judges, the problem arises from poor drafting of this Constitutional provision that could and should be corrected.

The Subordinate Court Act, Section 16, Chapter 28 of the Laws of Zambia, provides that

“...nothing in this Act shall deprive a Subordinate Court of the right to observe and to enforce the observance of, or shall deprive any person of the benefit of, any African customary law, such African customary law not being repugnant to justice, equity or good conscience, or incompatible, either in terms or by necessary implication, with any written law for the time being in force in Zambia.” Similarly, the Local Courts Act, Chapter 29 of the Laws of Zambia, Section 12(1), states that a local court shall administer “...(a) the African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law.” It may be argued that where customary law is employed to uphold the inequitable or abusive distribution of property it is indeed “repugnant” to, inter alia, the Bill of Rights, Section 11 d, where “It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual... [including the right to]... d) protection for the privacy of his [presumably this is intended to apply to women as well as men] home and other property and from deprivation of property without compensation.”

CASE LAW

No reported cases in Zambia.

HYPOTHETICAL CASE SCENARIOS

See below under particular sub-topics.

PRINCIPLES FOR ADDRESSING ISSUE

Constitutional and statutory law should always take precedence over customary law. Thus, the provisions of the Subordinate Court and Local Court Acts noted above should overrule the apparent Constitutional recognition of the discriminatory application of customary law.

3.2 MARRIAGE/DIVORCE

The jurisdiction of the local courts includes, amongst other things, determining the rights of people not married in a civil ceremony governed by the Marriage Act in respect to property, inheritance, marriage, and divorce. While some urban Zambians are married in civil rites governed by the Marriage Act, which sets out non-discriminatory rules for property division and inheritance, most Zambians are still married under customary law.

A report by Women and Law in Southern Africa noted that the practice of paying lobola under customary law restricts a woman's ability to leave an abusive marriage. Once the lobola has been paid, tradition says that the bride essentially becomes the property of the man and his family. This has also been a contributing factor to early marriages for girls. The report states that the lobola system in which marriage payments are made to the family of the bride also serves to enhance the woman's vulnerability to violence at the hands of her future husband.

RELEVANT LAWS

The Marriage Act, Chapter 50 of the Laws of Zambia, states that the legal age of marriage is sixteen years. The Penal Code, Chapter 87 of the Laws of Zambia, makes sex with a girl under sixteen a crime punishable by up to life in prison (defilement). However, the Marriage Act does not apply to marriages under customary law, where the age of marriage is considered to be maturity. Maturity is not defined and there is no minimum age set. In some cases, maturity can mean thirteen years old or the onset of menstruation. In practice, especially in rural areas, it is commonplace for girls to be married or expected to have sexual relations before the age of sixteen, and it is virtually unheard of for defilement prosecutions under the penal code to result mainly due to the fact that these incidences are not reported to the relevant authorities.

CASE LAW

Following are case reports from the Local Courts of Zambia that administer customary law only.

CASE 1

Y had accepted that she was HIV positive but her husband refused to accept that he too might be positive. Consequently he refused to get tested and use protection when having sex with her. Y therefore asked the Local Court to grant her a divorce because she feared that she would be at risk for re-infection. The Local Court failed to reconcile the couple and ended up granting the divorce.

CASE 2

X went to the Local Court with a claim that her husband had infected her with HIV and sought a divorce and compensation from him. The basis of her claim was that her husband had been seen with a young lady of questionable reputation and who the whole village

claimed to be HIV positive. The Court dismissed the case because HIV transmission is not a ground for divorce.

CASE 3

Z filed for divorce in the Local Court because she claimed her husband was HIV positive. She wanted the household goods to be divided equally between the couple as property settlement. The Local Court held that HIV-positive status is not a ground for divorce and the case was accordingly dismissed. The couple was ordered to go for testing and counseling and both were found to be HIV positive. Z later returned to petition the court for divorce but this time she claimed that her husband had been abusive towards her. She also claimed that he smoked and drank too much. Z brought witnesses to attest to the abuse charge. Mr. Z agreed that he had beaten his wife on occasion but only because she “did not listen to him and did not show him the proper respect he deserved”. The court found that it was wrong for Z to request a divorce on the basis of HIV. However, since there was evidence of abuse in the marriage, the divorce was granted.

CASE 4

Mr. Y filed for divorce in the Local Court after his wife was found to be HIV positive. Y cited the wife’s HIV status as the major reason for a divorce. He lamented that he could no longer live with her as her positive status was a threat to his own life. The presiding local court justice advised the couple to go for HIV testing and counseling and made it clear that he would not grant the divorce based on the HIV status of an individual.

CASE 5

A 26-year-old woman of Chazanga compound sued for reconciliation in the Local Court after her husband deserted the marital home. He left because she was ill with tuberculosis (TB) and had a miscarriage. The husband was unwilling to take her back because she was HIV positive. In his defence, he stated that she had not informed him of her HIV status. The court advised him to go for a test, which he did and was found to be negative. He told the court that his negative status was an indication that his wife was having extramarital affairs. The court granted the husband the divorce on grounds that it would be unfair to burden an innocent man with looking after a sick woman. In his remarks, the magistrate stated that in many cases women are more faithful than men but in this case the opposite was true. The court granted the divorce and the man was ordered to pay K2.5 million as maintenance.

CASE 6

A Lusaka Local Court granted a divorce to a man who refused to reconcile with his wife because he feared contracting TB. In her statement the wife informed the court that since giving birth in 2000 she was constantly ill, which prompted her husband to chase her from the matrimonial home. She said that her husband told her that his family had agreed that they divorce because her illness was interfering with his busy schedule as a church pastor. She told the court that when she got really sick her husband took her to her parents’

home in Ndola. When she got better she returned home only to be chased away by her father-in-law because according to him, she had bad blood that would contaminate the husband. He also advised her to take the child to Kasisi orphanage to be looked after. Justice Chitembo dissolved the marriage and ordered the man to pay K1.5 million as maintenance.

CASE 7

A woman sought to divorce her husband in the Local Court. The woman was HIV negative and the husband was HIV positive. The husband insisted on having sex with the woman without using a condom but the woman refused as the doctors had advised them to use protection. The Local Court justices advised the couple to follow the doctor's recommendations but the husband alleged that it was a taboo to use condoms in marriage. The court then granted the divorce because the two were not willing to stay together.

PRINCIPLES FOR ADDRESSING ISSUES

The silence on HIV and AIDS remains, because stigma makes it extremely difficult for HIV-positive people to disclose their status. This is fuelled by the fact that many marriages are breaking down because of the HIV status of one or both of the partners. Counseling and referral to testing and other HIV services should be encouraged by the courts when handling marital cases.

HIV status and payment of lobola should not generally be factors considered independently in decisions whether to grant or deny divorces in customary law marriages. Rather, the state of the marriage, the degree of alienation, and the prospects for reconciliation should be the governing factors. Nevertheless, as shown in the case examples, some Local Court justices have granted divorces on the basis of HIV status.

In the case of statute marriages the Matrimonial Causes Act No. 20 of 2007 has clearly stipulated the grounds for divorce and the above problems do not arise.

3.3 INHERITANCE/PROPERTY GRABBING

Nowhere has the conflict between customary and statutory law been as evident as in the question of inheritance. This conflict is compounded by HIV and AIDS, since families often seek to disinherit children orphaned by AIDS and women widowed by AIDS. Inheritance has been governed by both customary and statutory law and is further complicated by diverse traditions amongst Zambia's seventy-three ethnic groups. Still, tradition in most ethnic groups in Zambia and in the region dictates that the deceased man's family retains all inheritance rights. Girls face particular risk of being disinherited following the death of either a father or a husband because girls are often married to older men, and they can be widowed when they are still children.

The practice of the relatives of a deceased man seizing the property from the widow is commonly

known as “property grabbing”. This practice is permitted under African customary law and has potentially dire implications for the widow and children, who may be left destitute, with girls being propelled for survival into professions posing high risk for contracting HIV. Notwithstanding the enactment of the Intestate Succession Act (No. 5 of 1989), widows may be stripped of all the matrimonial property and sometimes even of their children upon the death of their husband. The practice stems from a manipulation of customary laws, which assumes a husband’s sole ownership of matrimonial property and passes such ownership to a male relative of the deceased who is then supposed to assume responsibility for the widow and children (“widow inheritance”).

In practice, “property grabbing” continues to be rampant mainly because the affected people do not report to the police or commence legal action for various reasons, one of them being of witchcraft. The Local Courts mainly administer inheritance in accordance with the percentages (see below) but the onus is on the affected people to report to the relevant authorities if the law is not followed.

RELEVANT LAWS/INSTRUMENTS

The Intestate Succession Act 1989 of Zambia, which covers those who die intestate (without a will), seeks to protect the dependents of the deceased. It is designed to provide for the surviving spouse, children, and other dependents and to protect against the unlawful appropriation of property by relatives. The Act recognises children born out of wedlock for purposes of inheritance, and a 1996 reform of the Act allows inheritance rights for other wives. It states that when someone dies intestate, the deceased’s spouse, children, and other dependents (which could include parents and others who were cared for by the deceased) would receive the following percentages of his estate: 20 percent to the spouse, 20 percent for the father and mother (10 percent each), 50 percent to be shared amongst all children, and 10 percent to be shared amongst other secondary dependents.

The 1989 Wills and Administration of Testate Estates Act of the Laws of Zambia does not apply to land held under customary law, but allows adults of sound mind to write a will to determine how their property will be handled after their death. If the will does not provide for adequate maintenance of a dependent, the court can alter its contents. A major problem is women’s ignorance of the legal protections they have and/or fear of taking advantage of them. Also, many people in Zambia consider writing wills to be bad luck.

In South Africa, the Recognition of Customary Marriages Act provides that after the year 2000, all customary marriages would be based on community property (i.e. equal distribution of property between the spouses).

CASE LAW

No reported Zambian case.

PRINCIPLES FOR ADDRESSING ISSUES

The percentage allocation of inheritance provided in the Intestate Succession Act should govern in all cases where a person died intestate.

3.4 WIDOW CLEANSING

Widow cleansing is a traditional practice to exorcise evil spirits afflicting a widow and stop her suffering bad dreams about her deceased husband. It is accepted under customary law, and normally involves sexual intercourse but can also be done symbolically without sexual contact.

RELEVANT LAWS/INSTRUMENTS

None, except customary law

CASE LAW

X wanted a divorce because her husband had performed the ritual of cleansing with a woman whose husband had died of HIV. The local court refused to grant her the divorce on the basis that cleansing was a custom. The woman appealed to the Local Court Officer who upheld her appeal and granted the divorce.

PRINCIPLES FOR ADDRESSING ISSUES

There are elements of traditional culture directly responsible for the spread of HIV, such as wife inheritance, widow cleansing, property grabbing and child marriages. These issues have to be tackled so that culture does not become a driver for HIV transmission.

Symbolic non-sexual cleansing may be used instead of sexual cleansing. Local court justices and magistrates should, and often do, recommend this alternative.

Local court justices or magistrates and other officials need to forge partnerships with traditional and cultural leaders, such as traditional healers, who play a critical role in community attitudes, behaviors, and support structures.

4. GENDER AND HIV/AIDS

KEY ISSUES	RELEVANT LAWS/ INSTRUMENTS	CASE LAW	PRINCIPLES FOR ADDRESSING ISSUES
Gender-based violence	<ul style="list-style-type: none"> • Penal code (rape, assault, sexual harassment, and defilement); • UN Convention on Elimination of Discrimination Against Women (CEDAW); • Beijing Platform of Action; • Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; • SADC Declaration on Gender and Development 	<p>Rape, assault, sexual harassment, and defilement cases</p> <p>The People v. Amos Chomba (2008) (Unreported)⁴</p> <p>The People v. H Suke (2007/8) (Unreported)⁵</p>	<p>Temporal dimension of HIV infection; need for immediate police assistance, medical care, counseling; sensitization/training on gender issues</p>
Women's disproportionate share of caretaking	<ul style="list-style-type: none"> • UN CEDAW; Beijing Platform; • African Charter on Human and Peoples' Rights on the Rights of Women in Africa; • SADC Declaration on Gender and Development 	<p>None</p>	<p>Knowledge/ awareness of gender effects, gender equity, gender equality</p>

^{4,5} Unreported means that the case has been decided upon but has not been reported in the Law Case Books

Women's greater vulnerability to the effects of HIV and AIDS is a result of their unequal treatment in law, custom, the economy, and the household. People are born female or male but learn to be girls and boys who grow into women and men. This learnt behavior makes up gender identity and determines gender roles. Gender norms influence women's vulnerability to HIV.

In many places, these norms allow men to have more sexual partners than women, and encourage older men to have sexual relations with much younger women. This contributes to higher infection rates amongst young women than young men. Women may want their partners to use condoms (or to abstain from sex altogether), but often lack the power to make them do so. Women are more susceptible than men to HIV infection in any given heterosexual encounter, due to the greater area of mucous membrane exposed during sex in women than in men, the greater quantity of fluids transferred from men to women, the higher viral content in male sexual fluids, and the micro-tears that can occur in vaginal (or rectal) tissue from sexual penetration.

In order to promote the review and change of customary and religious laws and practices that maintain and retain gender inequalities, while bringing them in line with international and regional human rights principles, it is important for judges to address the following gender-related HIV and AIDS issues, amongst others: gender-based violence and women's disproportionate share of family caretaking.

4.1 GENDER-BASED VIOLENCE

Physical, sexual, and emotional violence, which many women experience at some point in their lives, increases their HIV vulnerability in several ways:

- Forced sex can contribute to HIV transmission due to tears and lacerations resulting from the use of force.
- Violence can also prevent women from negotiating safer sex and accessing treatment.
- Fear of violence can prevent women from learning and/or sharing their HIV-positive status.

Many women live under constant threat of rape, sexual assault, and domestic violence. This form of violence is often not punished for various reasons, amongst which is the general perception and acceptance of women's subordinate status. Many African and Zambian institutions still condone this behaviour; for example, "disciplining a wife" is seen as part of the accepted "culture". The law does not recognise marital rape as a crime. Because of this, violence against women and girl children continues and is perpetuated.

Despite protections in international human rights instruments, rape, sexual assault, defilement, and gender-based violence are serious problems in Zambia and elsewhere in Africa. The elements of these sexual crimes are as follows:

- Rape: requires penetration of the penis into the vagina (intercourse);
- Absent penetration, the charge must be indecent assault;
- Defilement: having sexual intercourse with a minor (<16 years old) with or without consent; and
- Absence of intercourse with a minor who has been sexually molested, the charge must be attempted defilement.

Conviction for rape in Zambia carries a life sentence. HIV status of the rapist can either enhance or mitigate the sentence depending on whether the rapist knew they were HIV positive.

The Penal Code does not cover violence occurring in the family nor is the meaning of violence extended beyond physical and sexual to include psychological including:

- a. Battery;
- b. Bride price (lobola) – related violence;
- c. Marital rape;
- d. Female genital mutilation;
- e. Non-spousal violence;
- f. Violence relating to exploitation; and
- g. Forced prostitution.

Some women's groups have called for an expanded definition of rape, stressing the need to restructure the law to provide for circumstances of aggravated rape, which should lead to stiffer penalties. In addition, the law should recognise marital rape, which may be an important vehicle for HIV transmission but which does not exist currently as an offence in Zambian law. They have also called for stiffer, mandatory minimum sentences for acts of gender-based violence. Similarly, these groups have criticized the application of the law on "defilement" as being "grossly inadequate and irrelevant considering the gravity of sexually abusing a young girl".

The lower courts in the Zambian system, local courts and magistrates courts, are subject to restrictions on sentencing. Zambian women's groups have stressed the importance of preventing lower courts from trying offences for which they do not have jurisdiction to impose "deterrent sentences" and from applying customary or civil law to criminal offences, such as defilement, incest, rape, and assault, which should be heard in the magistrate's courts. Women and Law in Development in Africa (WILDAF) reported that families occasionally bring such cases to the lower courts, though they are not designated in the law for that purpose, when they are seeking financial compensation rather than criminal penalties.

Local courts can, however, refer a matter to a magistrate court when it does not have jurisdiction as it only administers customary law or a case can be appealed to a magistrate's court. Depending on the severity of the case, it could then go to the High Court and ultimately to the Supreme Court. Magistrate's courts, however, are also restricted in their authority to impose sentences (depending on the class of magistrate).

A government study revealed that most cases of gender violence, especially those of rape and defilement, are dealt with by the magistrate courts. The findings, however, indicate that there are problems in terms of procedures for eliciting evidence from the victims. There are also problems getting useful data from medical reports.

RELEVANT LAWS/INSTRUMENTS

The United Nations Declaration on Violence Against Women of 1993 defined violence against women as "that violence which results or is likely to result in physical, sexual or psychological harm or suffering to women and children, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or private".

According to this Declaration, violence against women should be understood to encompass but is not be limited to:

- a. Physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in households, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation;
- b. Physical, sexual, and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women, and forced prostitution and;

- c. Physical, sexual, and psychological violence perpetrated or condoned by the state whenever it occurs.

A 1998 Geneva Declaration states that a consensual sexual act in which one partner fails to disclose his or her HIV-positive status becomes rape. This proposition should be considered, although there do not appear to have been any actual cases in Zambia in which this charging escalation has occurred.

In Zambia, it is still the case that the family unit requires protection from the State and gender violence is still considered a moral issue. This notion is compounded by the fact that the Penal Code, Chapter 87 of the Laws of Zambia does not take into account gender-based violence in the private sphere. The Act provides for offences against morality (sexual violence) and physical violence in the public sphere. In South Africa, the Domestic Violence Act provides that having intercourse with any woman against her will is rape.

CASE LAW

The **People v. Amos Chomba** (2008) (unreported): A Livingstone court sentenced a 46-year-old man to 30 years imprisonment with hard labour for defiling an 11-year-old girl. The facts before the court were that on an unknown date the man had unlawful carnal knowledge of a grade-5 pupil at Dambwa Basic School contrary to Section 138 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

In mitigation, the accused asked the court to exercise leniency because, despite being unmarried, he was looking after two of his children and some dependants. In passing judgment Livingstone High Court Judge Roydah Kaoma said she was taking into consideration the age difference between the offender and the child. She said that there was need to pass a sentence that would make the offender know that what he did was a shameful and it has scarred the little girl's life. She also added that the child was no doubt put in danger of contracting HIV.

The **People v. H Suke** (2007/8) (unreported): An HIV-positive man of Choma was sentenced to 20 years simple imprisonment for defiling his 14-year-old niece and infecting her with HIV. Facts before the court were that on unknown dates but in 2005 the accused had carnal knowledge of his niece on several occasions and had been threatening to beat up the girl or the wife if they reported to the police. The niece developed an infection on her genitals and informed her aunt, who took her to the hospital where an examination was done and revealed that the girl had HIV as a result of defilement.

In mitigation, the accused told the court that he was HIV positive and on ARVs, adding that he was also a father of two. In passing judgment, Justice Kaoma said the Court had considered his mitigation and plea for forgiveness but circumstances demanded appropriate punishment.

PRINCIPLES FOR ADDRESSING ISSUES

Research has shown that there are challenges in terms of procedures of eliciting evidence from the victims by the courts. According to court procedures, the victim is expected to prove beyond reasonable doubt that she was raped or defiled by the accused. The victim also has to provide this proof in an open court facing the perpetrator; this aspect of having to narrate what happened is for all intents and purposes a 'second' rape or defilement. In the case of children, some of whom are very young, this is a traumatic experience in that they are not even aware of what has happened to them; in addition, the court environment is intimidating to the victims, especially for children.

It is critical that victims be provided with immediate police assistance, medical attention, ongoing health care, counseling, and support services, especially the provision of ARVs as post-exposure prophylaxis. One of the measures taken by the Zambian government to address the problem of gender violence is the establishment of the Victim Support Unit (VSU) in 1994. The VSU became operational in 1996 as part of the Zambia Police Reform Programme to specifically deal with victims of gender violence and other related crimes. The Police as an enforcement agency are generally the victim's first contact with the justice system. Cases of gender violence are first reported at the nearest police station through the VSU.

The presence of VSU's in most police stations has led to an increase in the willingness of survivors to press charges, and more aggressive prosecution has resulted in more cases being reported and prosecuted. However, silence and fear are still strong in these areas and the reality of enforcement is highly variable, with bias against victims, endemic problems of the criminal justice system, and discrimination and other shortcomings in the customary law. These problems often lead to a failure to investigate, prosecute, and punish offenses involving gender-based violence. As a result, many perpetrators face little disincentive to abuse again.

4.2 WOMEN'S DISPROPORTIONATE BURDEN OF CARETAKING

Women assume the major share of caretaking in the family including for those living with and affected by HIV. Much of the caretaking is unremunerated and is based on the assumption that this is a role that women 'naturally' fill, which only adds to their burdens, in terms of the following:

- Lower socio-economic status;
- Discriminatory laws and customs;
- Limited sexual and reproductive rights; and
- Lack of access to treatment.

RELEVANT LAWS/INSTRUMENTS

Zambia subscribes to a number of international covenants that contain strong language against gender-based discrimination. These include the following: CEDAW; the Beijing Platform of Action; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and the SADC Declaration on Gender and Development.

The Universal Declaration of Human Rights proclaimed in Article 25(2) that motherhood and childhood are entitled to special care and assistance. This recognition of the special vulnerability of women and children at the international level translated into the adoption of special declarations and treaties with specific focus on the rights of women or children. These included the Declaration on the Elimination of Discrimination against Women (1967) and the CEDAW (1979). For children, the United Nations adopted the Declaration of the Rights of Children (1959) and the Convention on the Rights of the Child (1989). These developments were a recognition that, while human rights belonged to all human beings, adults or children, in equal terms, there was need to provide special protection to those members of society with characteristics that make them more vulnerable.

Although it ostensibly bars discrimination based on gender, the Zambian Constitution does not guarantee equality and women's rights. Indeed, the Constitution actually exposes women to various forms of discrimination under cover of customary law. Despite the guarantees for non-discrimination in the Zambian Constitution, customary law and practice place women in subordinate positions, and local courts and customary law are the focus of much discrimination against PLWHA and women. These discriminatory practices increase women's and girls' vulnerability to HIV.

CASE LAW

No reported Zambian case.

PRINCIPLES FOR ADDRESSING ISSUES

The judiciary must have knowledge and awareness of the ways gender affects the outcome of cases, so that they may address gender issues wherever appropriate. The process of creating this knowledge and awareness of – and responsibility for – gender amongst all the judiciary is called “gender mainstreaming”.

Gender equality is the absence of discrimination on the basis of a person's sex in providing opportunities, in allocating resources and benefits, or in access to services.

Gender equity refers to fairness and justice in the distribution of benefits and responsibilities between women and men. The concept recognises that women and men have different needs and powers and that these differences should be identified and addressed to rectify the imbalance between the sexes.

Gender analysis identifies, analyzes, and informs action to address inequalities that arise from the different roles of women and men, or the unequal power relationships between them, and the consequences of these inequalities on their health.

The judiciary must take into account gender issues as it decides cases. Many women and girls do not know their rights, and even when they do, cannot access legal assistance.

The judiciary must also develop and ensure implementation of appropriate sensitisation and training programs of personnel in the delivery of justice and on issues related to gender-based discrimination.

5. CRIMINAL LAW AND HIV/AIDS

KEY ISSUES	RELEVANT LAWS/ INSTRUMENTS	CASE LAW	PRINCIPLES FOR ADDRESSING ISSUES
Criminalization of HIV transmission	No specific law; Public Health Act; Draft National HIV/AIDS policy	No reported Zambian case; Regional (South Africa): Venter v. Nel , South Africa (1997); R v. Mohammed Dica , South African Court of Appeal; R v. Feston Konzani , South African Court of Appeal	Timing of infection, knowledge of status, intent to transmit
Bail/sentencing	No specific provisions	Admitted rapist asks mitigation of sentence based on HIV-positive status; Transmission of sexually transmitted disease is aggravating factor in sentencing.	HIV+ status as aggravating/mitigating factor?
Mandatory testing	No specific law in Zambia; South Africa: Compulsory Testing of Alleged Sexual Offenders Bill	Mandatory testing sought for accused defiler	Power to order testing of accused v. convicted persons; sexual v. other cases; requirement for specific court order

5.1 CRIMINALIZATION OF HIV TRANSMISSION

Criminal sanctions are perceived as having four primary functions:

- i. To incapacitate the offender from harming anyone else during the term of their imprisonment;
- ii. To rehabilitate the offender, enabling him/her to change his future behaviour so as to avoid harming others;
- iii. To impose retribution for wrong doing; and
- iv. To deter the individual offender from engaging in the prohibited conduct in the future.

The intentional or reckless transmission of HIV is considered in some jurisdictions to be illegal. Those who do so may be charged with criminal transmission of HIV, murder, manslaughter, attempted murder, or assault. Some countries have enacted laws that expressly criminalise HIV transmission, whereas others use already existing laws.

The enactment of HIV-specific criminal statutes or the strengthening of existing laws to include HIV-specific offences could lead to a clearer definition of what is prohibited rather than leave it to the courts to decide how traditional offences apply to HIV transmission/ exposure. This could also minimize the possibility of the courts over-extending or inappropriately applying the law.

RELEVANT LAWS/INSTRUMENTS

Currently, there is no HIV/AIDS-specific provision in the Zambian criminal law. However, the National HIV/AIDS Policy recommends criminalizing willful HIV transmission, and at least some judges favour this. The Public Health Act, Chapter 291 of the Laws of Zambia provides for restraint of people with contagious diseases such as TB to prevent their transmitting the disease to others. This is prior restraint rather than punishment for having actually transmitted an infection.

In the region, Botswana, Namibia, South Africa, and Zimbabwe have laws requiring harsher sentences for HIV-positive rapists. In Zimbabwe, a new law currently under review by the government threatens a fifteen-year imprisonment for anyone with HIV who has unprotected sex without informing their partner of their status. Swaziland and Zimbabwe have laws criminalizing deliberate HIV transmission.

ZARAN and the AIDS Law Project in South Africa and other human rights organisations hold the opinion that specifically criminalizing HIV transmission might do more harm than good in that such laws make all HIV-positive people potential criminals and could result in driving them underground. Activists have proposed that other existing criminal laws may be used for example murder, attempted murder, or assault. Judges consider that aggravated rape may be the best charge in cases of transmission through forced sexual contact. However, in all cases, a concern is that proof of criminal intent or willfulness is extremely difficult.

CASE LAW

In South Africa, there have been no convictions for deliberately transmitting HIV, but in this civil case, **Venter v. Nel**, South Africa (1997), a woman was awarded damages for being infected through consensual intercourse with a man who knew that he was HIV positive.

In **R v. Mohammed Dica**, the South African Court of Appeal held that a person was reckless if he or she, knowing their HIV-positive status, transmitted HIV to a person who had not been told of the infection. It was not necessary to prove that the transmission had involved an assault. The court acknowledged that there could be a higher standard of disclosure expected of someone in a relationship compared with the “known risks” involved in casual sex.

In *R v. Feston Konzani*, the South African Court of Appeal held that a person accused of recklessly transmitting HIV could only raise the defence of consent where that consent was a “willing” or “conscious” consent. In other words, the court distinguished between “willingly running the risk of transmission” and “willingly consenting to the risk of transmission”. This suggests that consent will only operate as a defence where there has already been prior disclosure of HIV-positive status.

PRINCIPLES FOR ADDRESSING ISSUES

The evidentiary challenges include being able to prove that the defendant knew he was HIV positive and intended to transmit HIV or recklessly disregarded the risk of HIV transmission. Also, it is necessary to show that the victim was HIV negative before the incident occurred and HIV positive after it occurred. The closer the bracketing of the incident with negative and positive tests, the better for the prosecution. Newer testing technologies may be of assistance here.

5.2 BAIL AND SENTENCING

All accused people have a right to apply for bail. However, where the alleged crime is very serious, the law makes it more difficult to obtain bail. The *Zambian Criminal Procedure Code (CPC)*, Chapter 88 of the *Laws of Zambia*, stipulates the conditions for granting bail if a serious criminal offence, such as rape, has been charged. The Act specifies that a person accused of rape cannot obtain bail, unless he can show very good reasons why it is in the interests of justice that it be granted.

In many crimes, such as rape, indecent assault, and defilement, the HIV status of an accused has no bearing on the elements of the crime. Still, the HIV status of a defendant can play a role in the judge’s imposition of a sentence. It may be a mitigating factor, in that the accused is very ill and may be given a shorter sentence on that basis. Inmates with end-stage AIDS may also be given compassionate release from prison. Alternatively, it can be an aggravating factor where the perpetrator’s HIV status renders the crime more serious.

RELEVANT LAWS/INSTRUMENTS

In Zambia there are no specific sentencing provisions related to HIV status. There is a statute limit on the length of sentence that magistrates may impose. In particularly serious cases of rape, indecent assault, or defilement, magistrates may refer the case upwards to the High Court that can impose longer and stiffer sentences.

If the State can show that a person accused of rape knew that he had HIV at the time of the rape, it will be especially hard for him to get bail. If the State can prove that a convicted rapist knew he had HIV at the time of the rape, the rapist will normally receive a life sentence. Absent HIV-positive status, two convictions of rape now carry the possibility of a sentence of life imprisonment. More severe sentences are also provided for in Namibia, Botswana, and Zimbabwe. The use of HIV status as a mitigating factor in sentencing is provided for in Malawi’s *National HIV/AIDS Policy of 2002*.

CASE LAW

No reported Zambian case.

PRINCIPLES FOR ADDRESSING ISSUES

Can HIV be an aggravating or mitigating factor in bail/sentencing? Transmission of HIV or a sexually transmitted disease might be an aggravating factor but terminal or end-stage illness may be a mitigating factor.

5.3 MANDATORY TESTING

An important question is whether the accused or convicted sexual offenders are required to undergo HIV testing. The AIDS Law Project in South Africa has argued that a survivor-centered approach should always be followed. Such an approach may sometimes indicate the mandatory testing of alleged or convicted perpetrators but should place more emphasis on offering post-exposure prophylaxis and other assistance and support to the survivor in a holistic manner. The importance of compulsory testing for sexual offences is to assist the victim to make a decision about whether to take post-exposure prophylaxis to reduce the risk of HIV infection.

The South African Law Commission recommended that a person arrested for having committed a sexual offence should be compelled to have an HIV test, if it is requested by the victim and ordered by the magistrate. Legislation to this effect came into effect in 2003 under the Compulsory Testing of Alleged Sexual Offenders Bill.

RELEVANT LAWS/INSTRUMENTS

Zambia Bill of Rights

CASE LAW

No reported Zambian case.

PRINCIPLES FOR ADDRESSING ISSUES

Mandatory testing of accused, as opposed to convicted, persons raises issues of the accused's rights and the aspect that an accused person is innocent until proven guilty. Accused people are people who have been charged with crimes but who have not yet been found guilty or not guilty. So should an accused person be forced to have an HIV test?

Based on the right to privacy and freedom and security of the body in Zambia's Constitution, an accused person cannot be forced to have an HIV test. However, in the case of a sexual crime, one should be able to apply to the courts to have the accused tested for HIV and the result should be told to the victim if there is a possibility that blood or semen was transferred during the sexual crime or not more than 50 days have passed from the date when the crime took place, and the accused person has been arrested or charged.

Any testing of accused persons should require a specific court order. Testing of a convicted offender may be justified if initiated at the request of the survivor. In any case, an offender may be in the window period and return a false negative result, misleading the survivor to believe she has escaped infection. Repeated testing is necessary to confirm results.

ZARAN suggests that the Zambian Bill of Rights, Section 16, protection from deprivation of property should include blood in its definition of property. Thus, it would be unconstitutional to take a person's blood without consent.

Mandatory testing may be ordered if the results are material to the case itself or important for the determination of sentence or civil damages. When weighing any imposition of mandatory testing, the issue always should be: is there a legitimate purpose that outweighs the possible detriments to the person being tested? ZARAN and most human rights organisations worldwide argue that such situations are extremely rare if indeed they ever occur.

6. COURTROOM ISSUES

The judicial function is typically performed in courts, and sometimes in chambers. It is here that the judge meets citizens involved in cases and their representatives. Some of those citizens will have problems relevant to HIV/AIDS. These will call for sensitive application of statutory law and general legal principles. Before the judge gets to this, he or she will have to know how to conduct a case concerning an infection that is not just an ordinary medical condition.

The topic of HIV and AIDS in the courtroom is particularly sensitive. In part, this is because of its association with death. On the other hand, it is also because the modes of transmission are frequently by sexual intercourse and injecting drug use. The judiciary are members of their communities. They cannot be entirely free from the attitudes, fears, and prejudices of the societies they live in. It behooves the judiciary to be better informed, and especially to so perform their functions as to reduce unnecessary burdens upon those who come before them who are living with HIV/AIDS.

Judges can and should be important educators of citizens by how they address issues of HIV and AIDS in their courts and chambers, always taking care to proclaim and act on the basis of accurate information regarding the disease and its actual modes of transmission. In this way, judges can be role models for the community of an appropriate response to the epidemic. They can also do this by the substance and effect of their judicial decisions and verdicts.

The judiciary should not permit court process to be distorted, invariably to the disadvantage of the litigant. Because of the nature of the sensitive questions that may arise in cases involving HIV and AIDS, it will often be the duty of the judge to provide a measure of confidentiality to the persons involved. This is because it is usually permissible and proper to report court proceedings that are open. However, due to the nature of the sensitive questions that can arise in cases involving HIV and AIDS, it will often be the duty of the judge to afford a measure of confidentiality to the persons involved.

It would be erroneous to close every court proceeding that involved some issue concerning HIV and AIDS, or concerned a person living with the virus. The principal of open justice is fundamental to the role of the Judiciary. On the other hand, the need to protect confidentiality and personal privacy can be secured by judicial court in appropriate cases, forbidding the naming of those who are infected. In the case of *X v. Y*, **2 All ER 648 (1988)**, the English Court of Appeal considered the public interest exception in relation to the disclosure of information about a person's HIV status. An injunction was sought to prevent a newspaper from publishing the names of two doctors infected with HIV who were working in a particular hospital. The newspaper had obtained information from confidential hospital records. The Court held that the public interest in preserving the confidentiality of hospital records outweighed the public interest in the freedom of the press to publish the information, because PLWHA must not be deterred from seeking appropriate testing and treatment.

The principle of open justice is pivotal to the role of the judiciary. It is the duty of the courts to balance the public interest in protecting confidential information against the public interest which favours the litigant.

Another important factor to be considered in cases involving HIV and AIDS is the need for urgency in delivering the judicial decision. Particularly for people at an advanced stage of AIDS, unless judges become proactive and take control of litigation, the litigant may be improperly denied a right or remedy, and such loss may prove irreparable

.

ANNEX

This annex provides information on international and Zambian national legal instruments with relevance to adjudication of cases involving HIV/AIDS issues.

INTERNATIONAL LEGAL INSTRUMENTS

Human rights are freedoms established by custom or international agreement that impose standards of conduct on all nations. Human rights are distinct from civil liberties, which are freedoms established by the law of a particular state and applied by that state in its own jurisdiction.

The key human rights document and the cornerstone of the modern human rights movement is the Universal Declaration of Human Rights (UDHR). It is a non-binding common inspirational document, by and for governments, about what rights should exist for all people everywhere. The UDHR was adopted by the U.N. General Assembly on December 10, 1948.

A number of international human rights treaties exist that further elaborate the rights set out in the UDHR, including:

- The International Covenant on Civil and Political Rights
- The Covenant on Economic, Social, and Cultural Rights
- The Convention on the Elimination of All Forms of Racial Discrimination
- The Convention on the Elimination of All Forms of Discrimination Against Women
- The Convention on the Rights of the Child

These documents are legally binding to states that sign them, laying out obligations such as periodic submission of reports on their compliance with the substantive provisions of the texts to international monitoring bodies.

International human rights law does not address HIV and AIDS directly, but protections against abuses associated with HIV and AIDS are included in numerous international conventions. In 1998, UNAIDS issued “HIV and AIDS and Human Rights: International Guidelines,” which provide a roadmap for governments seeking to incorporate human rights protections related to HIV and AIDS into national law. The guidelines cover a range of issues, including the need for legislation to address public health issues related to HIV and AIDS, reviewing and reforming criminal laws to ensure they are consistent with international obligations and do not target vulnerable groups, protection against discrimination, and eliminating violence against women, including harmful traditional practices, sexual abuse, and exploitation. In June 2001, the U.N. General Assembly Special

Session (UNGASS) on HIV/AIDS issued a Declaration of Commitment on HIV/AIDS that included strong language on the need to integrate the rights of women and girls into the global struggle against HIV/AIDS.

Rights-based approaches are comprehensive in their consideration of the full range of indivisible, interdependent, and interrelated rights: civil, cultural, economic, political, and social. This calls for a development framework with sectors that mirror internationally guaranteed rights, thus covering, for example, health, education, housing, justice administration, personal security, and political participation. A rights-based approach is based on international human rights standards and operationally directed to promoting and protecting human rights.

Specific human rights include the right to personal liberty and due process of law to freedom of thought, expression, religion, organisation, and movement; to freedom from discrimination on the basis of race, religion, age, language, and sex; to basic education; to employment; and to property. Human rights laws have been defined by international conventions, by treaties, and by organisations, particularly the United Nations. These laws prohibit practices such as torture, slavery, summary execution without trial, and arbitrary detention or exile.

Zambia is a party to many major U.N. human rights treaties as well as the African Charter on Human and People's Rights. Zambia signed the African Charter on the Rights and Welfare of the Child in 1992, but has not ratified it. By ratifying international human rights instruments, Zambia commits itself to protecting a broad range of civil, political, economic, and social rights that if enforced would protect the rights of persons directly or indirectly affected by AIDS.

In 1985, Zambia ratified the Convention for the Elimination of Discrimination Against Women (CEDAW), which calls upon public authorities and institutions to "pursue a policy of eliminating [sex] discrimination". In 1997, Zambia signed the Gender and Development Declaration of the Southern African Development Community (SADC), in which the Government pledged to "take urgent measures to prevent and deal with the increasing levels of violence against women and children". Still, most efforts to address gender violence emanate not from the Government but from nongovernmental organizations and other civil society groups. Although the Government has made progress in reforming statutory law by removing overtly discriminatory laws such as The Deceased Brother's Widow's Marriage Act, Chapter 57 of the Laws of Zambia, discrimination against women continues under customary law in particular and is legitimized by statutory law in the Local Courts Act, Chapter 54 of the Laws of Zambia.

The Convention on the Rights of the Child (CRC) contains provisions to protect children from abuse and exploitation. Article 2 requires states to take all appropriate measures to ensure that children are protected from discrimination. Article 19 requires state parties

to take all appropriate measures to protect children from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”. Article 24 recognises the right of children to enjoy “the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health”. Article 32 recognises the right of children “to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”. Article 34 requires states to undertake to protect children “from all forms of sexual exploitation and sexual abuse”, and in particular take all appropriate measures to prevent:

- “(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices”.

According to the Committee on Economic, Social and Cultural Rights (ECOSOC), the independent panel of experts that monitors rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR), the right to the enjoyment of the highest attainable standard of health includes the right to information and education concerning prevailing health problems, their prevention and their control. The CRC specifically requires states parties “[to] ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health”. ECOSOC, recognising the importance of access to information, interprets the right to health to include the “right to seek, receive and impart information concerning health issues”

REGIONAL INSTRUMENTS

The SADC Code on HIV/AIDS and Employment (to which Zambia is a signatory) states that “persons with HIV or AIDS should have legal rights to confidentiality about their status in any aspect of their employment.”

NATIONAL LAW

Zambian Constitution, Bill of Rights, and Statutory law

Zambia’s Laws comprise the Constitution, Acts of Parliament, and statutory instruments, which are generally issued by members of the Cabinet.

The current Bill of Rights forms Part III of the 1991 Constitution (Articles 11 to 32). It begins with a general declaration of the rights every person in Zambia is entitled to regardless of race, place of origin, political opinions, colour, creed, or sex. The following rights and freedoms are guaranteed:

- Life;
- Personal liberty;
- Protection from slavery and forced labour;
- Protection from torture, or inhuman or degrading punishment or other like treatment;
- Protection from deprivation of property;
- Protection for privacy of home and other property;
- Protection of the law;
- Freedom of conscience;
- Freedom of expression, assembly and association;
- Freedom of movement; and
- Protection from discrimination on the ground of race, tribe, sex, place of origin, marital status, political opinions, colour, or creed; and protection of young persons from exploitation. Article 23, Freedom from Discrimination, makes no mention of HIV/AIDS or any health status.⁶

The enjoyment of these rights is made subject to a number of limitations such as respect for the rights and freedoms of others and the public interest. In addition to these two general limitations that apply to all the guaranteed rights, most of the protected rights contain numerous derogation clauses. The format adopted is that the right is first protected in broad terms. A succeeding article then qualifies it by outlining circumstances in which that right may be derogated from.

The drafting technique of the Zambian Bill of Rights is in marked contrast to the American Bill of Rights, which outlines individual rights and freedoms broadly without qualifying them. For example, the 1st Amendment provides that: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Zambian law integrates the two legal systems: customary law, based on pre-colonial legal systems as interpreted by the colonial “native courts,” known as Local Courts today; and statutory law, much of it still inherited from the pre-independence era, but modified and extended by legislation adopted by the Zambian Parliament since 1964.

⁶ It is important to note that the South African Bill of Rights, which outlaws unfair discrimination on the basis of “disability,” has been held by the Courts to include HIV status.

There are three broad categories of laws in Zambia, namely:

1. Anti-discriminatory and protective laws (i.e. laws relating to guarantees and freedoms, equality of legal status, privacy and confidentiality, codes of practice and ethical research and rights of workers in the workplace) such as Constitution of Zambia Act, Employment Act, Industrial and Labour Relations Act, Minimum Wages and Conditions of Employment Act, and Factories Act.

The Zambian Employment Act is silent on HIV and AIDS-related discrimination in employment in contrast to South Africa's Employment Equity Act, which explicitly outlaws HIV and AIDS-related employment discrimination. Indeed, there is no Zambian law that explicitly outlaws or even mentions HIV and AIDS-related discrimination in any sphere of life.

2. Regulatory laws and correctional laws and systems (i.e. criminal law, public health laws and regulations, laws targeting prisons and mental asylums, as well as 'relations' laws) such as the Penal Code Act, Civil Procedure Code Act, National Health Services Act, Medical Examination of Young Persons (Underground Work) Act, Pneumoconiosis Act, Deceased Brother's Widow's Marriage Act, Births and Deaths Registration Act, Prisons Act, Mental Disorders Act, Matrimonial Causes Act, and Adoption Act.

The Zambian Penal Code prohibits rape, incest, and "defilement" (sex with a girl under age sixteen) as well as neglect or desertion of children by a parent or guardian. It also outlaws offenses endangering life or health, unlawful compulsory labour, and assaults causing bodily harm. In addition, the Juvenile Act of 1956 provides for care and protection of children; Section 46 also prohibits cruelty to children by parents or guardians.

3. Structure and legal process laws (Institutional, Administrative and Legal Process laws pertaining to procedural requirements to the process of law review and reform, due process, and/or accessibility to legal redress and institutional responsibilities) such as National Pensions and Savings Authority, HIV and AIDS Policy, Insurance Act, and State Proceedings Act.

Property and inheritance issues may be governed by customary law and/or constitutional/statutory law. The Intestate Succession Act, enacted in 1989 provides for the equitable distribution of property when an individual dies intestate (accounting for more than 90% of deaths in Zambia).

BIBLIOGRAPHY

BOOKS

Zambia AIDS Law Research and Advocacy Network (ZARAN). 2007. AIDS Law Manual. Lusaka.

Canadian HIV/AIDS Legal Network and Joint United Nations Programme on HIV/AIDS (UNAIDS). 2006. Courting Rules: Case Studies in Litigating of Human Rights of People Living with HIV. Geneva.

CASES

Doe v. City of New York, 2nd Circuit Court (1994)

J.A.O. v. Home Park Caterers Kenya (2004)

Haindongo Nghidipohamba Nanditume v. the Ministry of Defence, Labour Court, Namibia (2000)

Hoffman v. South African Airways, 2001 (1) SA 1 (CC)

Hoffman v. South African Airways, 2001 (2) SA (W)

Irvin & Johnson v. Trawlers, South Africa (2002)

Jansen van Vuuren v. Kruger, SA 842 (A) 8491 (1993/4)

Lemo v. Northern Air Maintenance (PTY), Industrial Court (2004)

Monare v. Botswana Ash (Pty) Ltd, Industrial Court (2004)

NM and Others v. Smith and Others, South Africa Constitutional Court (2007)

Ngwira v. Zambia National Insurance Brokers, ZR 140 (1993/94)

R v. Feston Konzani, South Africa

R v. Mohammed Dica, South Africa

Sarah Diau v. Botswana Building Society, Industrial Court, Botswana (2003)

Stanley Kingaibe & Charles Chokolo v. AG2007/HP/186 (unreported)

The People v. Amos Chomba (2008) (unreported)

The People v. H Suke (2007/8) (unreported)

X v. Y, 2 All ER 648 (1988)

Venter v. Nel, South Africa (1996)

Zambia Privatisation Agency v. Matala, ZR 157 (SC) (1995-7)

Zungu v. ET Security Services, South Africa

LAWS/STATUTES

Constitution of Zambia, Chapter 1 of the Laws of Zambia;

Criminal Procedure Code Act, Chapter 88 of the Laws of Zambia;

Employment Act, Chapter 268 of the Laws of Zambia

High Court Act, Chapter 27 of the Laws of Zambia

Industrial and Labour Relations Act, Chapter 269 of the Laws of Zambia
Intestate Succession Act, Chapter 59 of the Laws of Zambia
Local Courts Act, Chapter 29 of the Laws of Zambia
National Pensions Scheme Act, Chapter 256 of the Laws of Zambia
Marriage Act, Chapter 50 of the Laws of Zambia
Medical and Allied Professions Act, Chapter 297 of the Laws of Zambia
The Penal Code Act, Chapter 87 of the Laws of Zambia
The Subordinates Court Act, Chapter 25 of the Laws of Zambia
The Supreme Court Act. Chapter 25 of the Laws of Zambia
Wills and Administration of Testate Act, Chapter 60 of the Laws of Zambia
Workers Compensation Act, Chapter 271 of the Laws of Zambia

