



# PROTECTION AGAINST GENDER BASED VIOLENCE AND LITIGATION ON HIV RELATED RIGHTS:

A HANDBOOK FOR LAWYERS  
AND ACTIVISTS



*For a Just and Equitable Society*



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The Legal and Human Rights Centre (LHRC), in collaboration with the International Development Law Organisation (IDLO), has been implementing a project under the Determined, Resilient, Empowered, AIDS-Free, Mentored and Safe (DREAMS) partnership, whose goal is to reduce incidences of HIV and manage AIDS cases among Adolescent Girls and Young Women (AGYW) in the highest HIV burden countries, among which is Tanzania. The project, dubbed, 'Integrating Legal Empowerment and Social Accountability for Quality HIV Health Services for Adolescent Girls and Young Women,' currently being implemented in Shinyanga and Kahama Districts in Tanzania, also seeks to address systemic inequalities and obstacles in accessing health services and in protection against GBV.

This handbook, which is one of the tools that will be used to empower lawyers and activists in the protection of rights and holding of service providers to account, is prepared in line with different laws, policies and national plans, including the HIV and AIDS (Prevention and Control) Act of 2008 and other laws governing criminal and civil matters in Tanzania. The aim of this handbook is to equip lawyers and activists with information on how to effectively provide legal services and litigation support on issues relating to HIV and AIDS and GBV. The handbook should be read as a whole together with cited statutes and materials for its full import to be appreciated. It is hoped that the resources provided here will enable lawyers, activists and other legal service providers to offer effective legal assistance to HIV afflicted AGYW, whose rights have been violated, either in the context of being discriminated against (e.g. through denial of services or other entitlements), or in the context of being subjected to GBV. In the end, it is hoped that the AGYW themselves will be empowered to take action for protecting their own rights and standing up for others in like positions, especially those living with HIV and AIDS and also subjected to GBV.

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## LIST OF ABBREVIATIONS



<b>AGYW</b>	Adolescent Girls and Young Women
<b>AIDS</b>	Acquired Immune Deficiency Syndrome
<b>GBV</b>	Gender Based Violence
<b>HIV</b>	Human Immunodeficiency Virus
<b>IDLO</b>	International Development Law Organization
<b>LHRC</b>	Legal and Human Rights Centre
<b>PLHIV</b>	Persons/ People Living with HIV
<b>STIs</b>	Sexually Transmitted Infections
<b>TACAIDS</b>	Tanzania Commission for AIDS
<b>VAC</b>	Violence against Children
<b>VAW</b>	Violence against Women



This handbook seeks to provide information to aid in the realization of rights of AGYW living with HIV and AIDS and also subjected to GBV. Also, the materials here provide guidance for pursuing judicial remedies where violations have occurred. In the end, it is intended that exposure to the materials contained in this handbook will, in addition to enhancing the capacities among lawyers and activists, also empower AGYW to be able to defend their own rights and to hold providers of different HIV and AIDS related services (whether health and justice related) to account. While the handbook sets out the relevant laws and processes for vindicating rights of AGYW in the context of HIV and AIDS and GBV, the practical lessons in it largely derive from experiences had during the implementation of a project called “Integrating Legal Empowerment and Social Accountability for Quality HIV Services for Adolescent Girls and Young Women,” carried out in Shinyanga and Kahama Districts.

The aim of that project was to address obstacles that hinder access to services meant to address the health and rights needs of AGYW. It was a project mounted upon the realization that systemic hurdles make it difficult for AGYW living with HIV to protect their rights and seek redress in cases of violation. The key output therefore was AGYW who were empowered to question excesses or deficiencies in action as far such affected their rights were concerned. The thrust of the project was twin-fold: to empower AGYW to stand up for their rights while in the process, hold service providers socially accountable. The lessons and tools contained in this handbook will hopefully be deployed with that overall goal in mind as applied to communities and populations beyond the project areas.

The materials in the handbook relate to the legal framework as it affects HIV and AIDS related rights. They also address the structure of the law relating to GBV

in the context of HIV and AIDS. The backdrop of the discussion is the extent to which those who provide health and justice services can be more socially accountable both to those who need those services and to the society at large. For this reason, the handbook highlights the relevant law and procedures that have a bearing on the health and justice demands of AGYW living with HIV and those who have been subjected to GBV. The materials are presented in four sections. Section one is an introduction that outlines the state of HIV and AIDS in Tanzania as well as the law that is currently applicable. Section two tackles GBV and its linkage with HIV and AIDS. The third section delineates applicable criminal law processes and their implications on HIV and AIDS while the fourth section looks at the civil law processes as they apply to HIV and AIDS.

# SECTION ONE: HIV AND AIDS, LAW AND RIGHTS OF PLHIV



## 1. Introduction

It is not now in doubt that HIV and AIDS is as much a legal and rights issue as it is a health, social, economic and political one. Many factors surrounding HIV and AIDS evoke human rights concerns. For example, the fact that the major mode of transmission is through sexual intercourse necessarily raises sexual and reproductive health rights questions, such as whether the state can decree that HIV positive persons should not engage in sexual relations, or whether a marriage official can refuse to celebrate a couple's marriage for the reason that they are HIV positive, or are refusing to undergo an HIV test. Moreover, despite the fact that HIV is not a novel condition any longer, societies still stigmatise and discriminate against PLHIV in various ways e.g. restricting travel, denying them educational opportunities, dismissing them from employment and generally subjecting them to different treatment on account only of their HIV status. Also, in view of the serious implications of HIV, a state that fails to allocate sufficient resources for HIV and AIDS-related health services risks running afoul the many human rights instruments that impose just such an obligation. It follows therefore that if Tanzania is to succeed in its response to the problem of HIV and AIDS, it must embrace a human rights-based approach. Anything less than that will merely exacerbate an already bad situation. To what extent has Tanzania done so? To answer this question, one must first appreciate some basic facts about HIV and AIDS in Tanzania.

## **1.1. HIV and AIDS**

HIV on the one hand, and AIDS on the other, are two related but different conditions. HIV is a virus that when introduced into the human blood system, attacks the body's immunity and weakens it completely. When HIV is not managed, it totally decimates the body's immune system to a point that it renders the body incapable of fighting off diseases or infections it would normally fend off.

When this stage is reached, it said that a person has an acquired immune deficiency syndrome, or AIDS. AIDS is in itself not a disease, but a condition where the body's in-built immune system no longer exists, it having been destroyed HIV. The distinction is important because a lack of understanding has often led to misguided action either by government institutions or individuals having the power to make certain decisions. Even though the HIV can be transmitted through the exchange of bodily fluids such as semen and vaginal fluids during sexual intercourse, or through exchange of blood through open wounds and the like, the fact that a person is HIV positive does not by itself render that person a risk to the public. The fear that is often evoked by the discovery that a person is HIV positive is often based on irrational thought. Unfortunately, such lack of discernment afflicts the greater portion of the society and has sometimes even found expression in the law. Fortunately, scientific enlightenment has now made it clear that unless there is an exchange of bodily fluids, chances are minimal that shaking hands with an HIV positive person will expose anyone to infection; or even travelling in the same vehicle; or living in the same house; or sharing utensils; or going to the same school and sitting in the same classroom etc. In fact, it is now very clear that an HIV person can be as productive as any other person in employment positions.

The practice of dismissing employees merely on the ground of their sero-positive status is not supported by science. Indeed, the science of managing HIV is now so advanced that HIV has been reduced to nothing more than a chronic condition requiring life-long interventions, like other conditions such as diabetes and the like

## **1.2. Prevalence of HIV and AIDS**

According to the Joint United Nations Programme on HIV and AIDS (UNAIDS), HIV prevalence in Tanzania is estimated at 4.7%. About 1.4 million Tanzanians were estimated to be living with HIV in 2015, while an estimated 54,000 new infections were projected to occur annually. The Tanzania HIV Impact Survey (THIS), a household-based national survey conducted by the National Bureau of Statistics (NBS) in collaboration with its partners in 2016 and 2017 indicates that prevalence of HIV is highest in Njombe Region, at 11.4%. Other regions with high prevalence rates are Iringa (11.3%) and Mbeya (9.3%), while prevalence in Zanzibar remains below 1%. In Shinyanga Region, where the project is currently being implemented, HIV prevalence is also relatively high, at 5.9%.

The survey also shows that there were approximately 81,000 new cases of HIV annually among adults in the age category of 15 to 64 years with prevalence rates being higher among females (6.5%) than males (3.5%). For the purposes of ACYW, the figures reported for 15-24 year olds must be noted. According to the survey:

Prevalence among 15 to 24 year olds is 1.4 percent (2.1 percent among females and 0.6 percent among males).

The disparity in HIV prevalence between males and females is most pronounced among younger adults, with women in age groups 15 to 19, 20 to 24, 25 to 29, 30 to 34 and 35 to 39 all having prevalence more than double that of males in the same age groups.

The Third National Multi-sectoral Strategic Framework for HIV & AIDS (2013-2017) contains a comprehensive picture of HIV in Tanzania. It points out that the spread of HIV is influenced by existing behavioural, socio-cultural and biomedical factors. Behavioural factors are identified as: multiple unprotected sexual relations; inter or cross generational sexual relations; early sexual debut; transactional sex; alcohol abuse; low levels and inconsistent use of condoms; and unprotected penetrative heterosexual anal intercourse. The socio-economic factors include: stigma and discrimination; mobility and migration; gender inequalities; income inequality and poverty. Biomedical factors are identified as: low levels of voluntary medical male circumcision (VMMC) uptake; low coverage of quality assured blood transfusions; unsafe medical injections; prevalence of sexually transmitted infections (STI); mother to child transmission of HIV; high levels of discordance; and low level of knowledge of HIV sero-status.

### **1.3. Tanzania's Response to HIV and AIDS**

Tanzania has exhibited a strong political commitment and leadership in responding to the HIV crisis. In the year 2000, the Government established the Tanzania Commission for AIDS (TACAIDS), which was mandated to provide strategic leadership and coordinate and strengthen efforts by different stakeholders in the fight against HIV and AIDS. In 2001, the Government adopted a National Policy on HIV and AIDS and also set up the National HIV and AIDS Control Programme. In 2008, the HIV and AIDS (Prevention and Control) Act was enacted to complement the National Policy on HIV and AIDS.

The Government has also employed a multi-sectoral approach in the fight against HIV and AIDS, which has helped increase participation and improve interventions, as seen through the 2013 adoption of the Third National Multi-Sectoral Strategic Framework for HIV and AIDS (2013/14 – 2017/18). The Government continues to work with local and international partners, including CSOs and foreign agencies, to mitigate the impact and spread of HIV in Tanzania

## **1.4. The applicable legal framework on HIV and AIDS**

### **1.4.1. National laws**

#### **a. The Constitution of the United Republic of Tanzania, 1977.**

Even though the Constitution does not specifically mention HIV status as one of the prohibited grounds of discrimination, it is clear that subjecting a person to a different treatment on account of their HIV status will violate many of the rights espoused by the bill of rights. The general non-discrimination prohibition in Articles 12 and 13 of the Constitution will necessarily extend to PLHIV as people whom the law and everyone else should treat equally without their being subjected to different treatment on the ground of their HIV status. The Article 14 call for respect for the right to life of every person shields PLHIV from wanton threats to their life in both direct and indirect forms. Moreover, the guarantees on personal privacy under Article 16 are a formidable bulwark against violation of confidentiality rights of PLHIV. The freedom ensured under Article 15 is a basis for individual choice, ensuring that any person has the capacity to make and own their decision, especially when read in tandem with the Article 17 right to freedom of movement. The right to information and the freedom to express oneself enables the free exchange of information, including information regarding health and health choices that can be made by PLHIV.

The right to work, assured under Article 22 is of importance for PLHIV since quite often, they are denied opportunities merely on account of their status, notwithstanding the settled fact that mere infection with HIV does not render a person incapable of meeting work-related obligations even if that involves performance of physical work. It is fairly apparent that the failure to mention HIV in the Constitution does not deprive the Constitution power to spread its reach to cover situations where PLHIV are faced with violations of their rights. The Constitution can be interpreted in objectively broad terms..

**b. The HIV and AIDS (Prevention and Control) Act, 2008**

This law, which was enacted to implement the National HIV & AIDS Policy of 2001, creates a general obligation on every person, institution and organisation in Tanzania to:

- i. promote public awareness on causes, modes of transmission, consequences, prevention and control of HIV and AIDS;
- ii. reduce: (i) the spread of HIV and AIDS; (ii) prevalence of STIs in the population; (iii) adverse effects of HIV and AIDS;
- iii. protect rights of the orphans by (i) providing health care and social services; (ii) prohibiting compulsory HIV testing unless provided for under this Act; (iii) fighting stigma and discrimination;
- iv. discourage negative traditions and usages which may enhance HIV and AIDS spread in the community;
- v. promote all traditions and usages which may reduce the transmission and prevalence of the infection in the community;
- vi. increase access, care and support to persons living with HIV and AIDS from community or health care facilities..

The Act elaborates on substantive rights claimable by PLHIV and establishes an institutional framework for protection of those rights. Some of the substantive rights include the following:

- vii. The right not to be discriminated against or subjected to stigma on account of one's real or perceived HIV status (sections 28, 29, 30, 31, 32)
- viii. The right to consent to an HIV test and not be compelled to undergo one (section 15)
- ix. The right to access counselling services appurtenant to testing for HIV (section 13)
- x. The right to confidentiality over one's test results and health condition (sections 16, 17 and 18)
- xi. The right to basic health services (section 19)
- xii. The right to the highest attainable standard of health and treatment for opportunistic infections (section 33)

An important aspect of the response to HIV and AIDS has to do with the regime of offenses created under the HIV and AIDS (Prevention and Control) Act. Some of the relevant offences include:

***Offences related to Stigma and Discrimination:*** A violation of the provisions barring stigma and discrimination attracts criminal consequences under section 32 of the Act. An offender shall be liable to a fine of not less than two million shillings or to imprisonment for a term not exceeding one year or both.

***Offences related to Confidentiality:*** Section 46 makes it an offence to breach confidentiality requirements under the Act or to unlawfully disclose information of someone on their health condition. A conviction attracts a fine of between a half to a million shillings and a prison

sentence

**Offences related to the spreading of HIV:** The Act, in section 47, makes it an offence punishable by imprisonment of between five and ten years for anyone to intentionally transmit HIV to another person.

**Breach of safety procedures:** This is an offence under section 48 of the Act and attracts a fine of between two hundred and five hundred thousand shillings, or a prison term of between three and six months if the offender is an individual. If the offender is a health care facility, it shall be liable to a fine of between three and five million shillings.

### **c. Relevant institutions**

- The Ministry of Health has overall responsibility of implementing the Act but also, inter alia, the duty of:
  - i. formulating and disseminating education programmes on HIV and AIDS;
  - ii. preventing and controlling of spread of sexually transmitted infections including through the provision of condoms;
  - iii. providing treatment and other HIV related services including antiretroviral therapy to pregnant mothers;
  - iv. developing regulations on various aspects of HIV and AIDS; and
  - v. devising measures for monitoring the spread of HIV infections.
- The National HIV and AIDS Research and Fellowship Committee has the overall mandate of overseeing research on HIV and AIDS
- The Tanzania Commission for AIDS (TACAIDS), which is established under the Tanzania Commission for AIDS Act, works with the Ministry and other organs to implement a specific mandate on HIV and AIDS. Among the functions specified under section 5 of its Act include:
  - i. formulating policy guidelines on response to the crisis of HIV and

- AIDS and a response to its effects;
- ii. developing a strategic framework for planning of all HIV and control programmes;
  - iii. Fostering collaborations and linkages among stakeholders and coordination of all prevention and control programmes;
  - iv. mobilizing resources;
  - v. information dissemination and advocacy;
  - vi. monitoring and evaluation;
  - vii. facilitating and promoting efforts at finding a cure;
  - viii. protecting the human and communal rights of PLHIV;
  - ix. advising the government on all matters relating to prevention and control of HIV; and
  - x. supervising all activities related to prevention and control.

#### **d. Complaints**

Under section 51, any complaint against contravention of any provision of the Act may be lodged in writing to: the secretary to the village, ward, district or urban AIDS committees as the case may be; or to the police station; or to the owner, manager or the incharge of a health care facility concerned; or to the employer. This would not preclude other legal remedies that may be sought through ordinary civil law processes.

#### **1.4.2. International and regional Instruments**

There are various international and regional legal standards that Tanzania has subscribed to and which have direct or indirect impact on the issue of HIV and AIDS and can be used to define rights and remedy violations of the rights of AGYW in the rubric of HIV and AIDS.

**a. *Obligations under international instruments***

The Universal Declaration of Human Rights (UDHR): Sets out the fundamental human rights that are to be universally protected and states that all human beings are born free and equal in dignity and justice. It has influenced the development of other international instruments that specifically protect HIV related human rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR): Recognizes the right to the enjoyment of the highest attainable standard of physical and mental health at Article 12.

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW): Obligates states to work towards elimination of discrimination against women, including in health care settings. Specific to HIV and AIDS, General Recommendation No. 15 calls for the avoidance of discrimination against women in national strategies for the prevention and control of AIDS. General Recommendation No 24 in turn elaborates on women's right to health as provided for in Article 12 of CEDAW.

The International Covenant on Civil and Political rights (ICCPR): Sets out a number of provisions that have relevance specifically in the case of women. These would include: the right to marry and found a family (Article 23); the right to privacy (Article 17); freedom of expression and information (Article 19); freedom of assembly and association (Article 22); freedom of movement (Article 12); the right to liberty and security of person (Article 9); and freedom from cruel, inhuman and degrading treatment or punishment (Article 9).

The Convention on the Rights of Persons with Disabilities (CRPD): This

convention is premised on the ideal that those living with disabilities have the capacity to make decisions on various aspects of their lives, including health. They must therefore not be discriminated against for the reason of their disability.

The Convention on the Rights of the Child (CRC): Provides for the protection of children generally and has specific mention of HIV and AIDS. Thus children must be protected from exposure to HIV and must be provided with education on sex and HIV. Those orphaned by HIV must be accorded special protection. The Convention has further been elaborated in General Comment No 3 with respect to the question of HIV and AIDS and the rights of the child.

***b. Obligations under regional instruments***

The African Charter on Human and Peoples Rights: This sets the foundation for human rights in Africa and obligates states to promote and protect human and people's rights and freedoms taking into account the importance traditionally attached to those rights and freedoms in Africa. Protocol to the African Charter on Human and Peoples Rights on the Rights of women of Africa (Maputo Protocol): This instrument signed by Tanzania in 2003 and ratified in 2007, recognizes the relationship between women's human rights and HIV.

Article 14(1) thereof seeks to promote and protect women's sexual and reproductive health rights. These include the right to self protection and to be protected against sexually transmitted infections, including HIV and AIDS, and the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, in accordance with internationally recognised standards and best practices. The African Charter on the Rights and Welfare of the Child: signed in 1998 and ratified in 2003,

this instrument protects the rights of children to best attainable standard of mental, physical and spiritual health. Children must be provided with food, water and must access healthcare services.

East African Community HIV and AIDS (Prevention and Management) Act, 2012: signed by President Jakaya Mrisho Kikwete on 15 December 2014 two years after it had been passed on 20 April 2012 by the East African Legislative Assembly, this instrument provides for the prevention and management of HIV and AIDS and the protection and promotion of human rights of persons living with or affected by HIV.

- c. ***Other international standards:*** the Sustainable Development Goals
- The Sustainable Development Goals (SDGs) provide useful pointers on the targets that need to be worked on in the wider context of health and HIV and AIDS and can be used to further clarify the state's obligations. For instance, Goal 3, the overarching goal on health issues, seeks to ensure healthy lives and promote well-being for all at all ages. Target 3, of Goal 3, seeks to end the epidemics of AIDS, tuberculosis, malaria and neglected tropical diseases, and to combat hepatitis, waterborne diseases and other communicable diseases. The Joint UN Programme on HIV/AIDS (UNAIDS) 2016–2021 strategy to fast track the end of AIDS is premised on the SDGs, particularly the ones related to health.

Some of the strategies adopted by UNAIDS, and relevant to AGYW, are those that are meant to ensure that:

- i. Children, adolescents and adults living with HIV access testing, know their status and are immediately offered and sustained on affordable quality treatment.
- ii. New HIV infections among children are eliminated and their

mothers' health and well being is sustained.

- iii. Young people, especially young women and adolescent girls, access combination prevention services and are empowered to protect themselves from HIV.
- iv. Women and men practise and promote healthy gender norms, and work together to end gender-based sexual and intimate partner violence.
- v. Punitive laws, policies, practices, stigma and discrimination that block effective responses to HIV are removed (e.g. overly broad criminalization of HIV transmission, travel restrictions, mandatory testing and those that block key populations' access to services).
- vi. AIDS response is fully funded and efficiently implemented based on reliable strategic information.
- vii. People-centred HIV and health services are integrated in the context of stronger systems for health (e.g. HIV-sensitive universal health coverage schemes are implemented).

## **1.5. The policy framework**

The major policy response has been through the National Policy on HIV & AIDS, adopted in September 2001. Its overall goal is 'to provide for a framework for leadership and coordination of the national multi-sectoral response to the HIV & AIDS epidemic.' The policy has decidedly assumed a HRBA in dealing with HIV and AIDS. Many of the principles it enunciates have informed the legal and institutional response to HIV and AIDS in Tanzania. For instance, it emphasizes respect for the dignity of PLHIV, non-discrimination, elimination of stigma, voluntary testing and counselling, confidentiality, respect for individual rights and so on. The National Health Policy 2017 on the other hand is the general health policy framework with overarching implications on the provision

of health services across the board and which may be brought to bear on the HIV and AIDS crisis. Other relevant policy guidelines include: The Standard Treatment Guidelines and National Essential Medicines List, Tanzania Mainland; the National HIV Prevention Operational Plan (2016-2018); the National Policy Guidelines for Collaborative TB/HIV activities; and the National Guidelines for the Clinical Management of HIV & AIDS, all of which have implications on HIV and AIDS services.



## 2. Introduction

### 2.1. GBV

Gender Based Violence (GBV) entails any act that results in bodily, psychological, sexual and economic harm to somebody, just because they are female or male. These acts inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. The incidence of GBV, more likely than not, precipitates higher prevalence of HIV. GBV has been shown to be a key factor in the spread of HIV among women and girls. HIV is higher among women who are routinely subjected to physical violence, rape and other forms of sexual violence. It is also possible that the incidence of HIV in a relationship might be a factor in the occurrence of GBV, hence spawning a vicious cycle in which women are generally on the receiving end. Aside from the physical and psychological hurt that is inflicted on the person of the victim, GBV has serious deleterious consequences on the family as well. It perpetuates break-up of family unity, creates a hostile social environment, denies children the opportunity to grow in conditions of stability, leads to divorce or separation and ultimately to maladjusted minors. This in turn has a spin-off effect on the community and the nation at large, since huge amounts of resources have to be devoted to deal with GBV and its consequences, resources which might have been utilized on other social investments. While no comprehensive law on GBV exists, a number of legal provisions can be invoked to deal with incidents of GBV, chief among which is the Penal Code. The Constitution may be brought to bear in the context of its broad non-discrimination clauses.

## 2.2. Types of GBV

**Physical Violence:** These are acts that inflict injury or pain on the body of a person with examples being beatings, physical assault, burning of body parts, pulling of hair, pushing and shoving, twisting of a body part, grabbing, punching, pinning a person on the ground and hitting a person with a sharp object.

**Psychological violence:** Are acts or words calculated to inflict emotional or psychological harm or pain. Examples include insults or insulting or humiliating comments, threats or intimidation, harassment, public humiliation, threatening to expose a secret, invasion of privacy, death threat, extreme jealousy, and threats to take children away.

**Sexual violence:** These are acts of violence directed against a person's sexuality, and sexual harassment, incest, marital rape, sodomy, human trafficking for sexual exploitation, sexual slavery/exploitation, inserting objects in private parts/genitals, rape and defilement.

**Economic violence:** These are acts meant to deny and control a person's access to finances or a means of livelihood. Economic violence will exist when one party to a relationship is dependent on the other and such dependence is being exploited by one to control behaviour. Examples would include taking away of property, discrimination in accessing economic opportunities, denial of inheritance, denial of educational opportunities, prohibiting a woman from working and so on.

**Cultural violence:** These are acts, often done in the guise of cultural practices, but which are generally violent, and harmful to the victims, often women. Examples include: forced (arranged) marriage of (often) girl children, forced/arrange marriage of very close relatives (often involving a girl being given away to an immediate cousin and the like), widow inheritance, and female genital mutilation.

## **2.3. Linking HIV and AIDS with GBV**

According to the UNAIDS, some of the factors which increase the likelihood of HIV infection among AGYW are acts of violence that occur in the context of gendered social norms, gender inequality and unequal power dynamics between men and women. Violence predisposes women to HIV more acutely since they are the ones who are generally on the receiving end of it. Women and girls subjected to violence are more often than not unable to set the terms of their sexual relations-they cannot for instance insist on safe sex practices and will generally have to go with what their partner dictates. In this state of weakness,

AGYW are in a very vulnerable position insofar as HIV is concerned. Moreover, because women are more likely than not to be blamed for bringing HIV into a relationship, they are likely to be subjected to fits of vengeful anger and violence. For this reason, they are likely to avoid exhibiting overt health seeking behaviour, e.g. using available antiretroviral therapies thus exacerbating their health situation. Social norms work to limit women's capacity to determine the trajectory that their lives should take. Thus, choices as to social life, economic life and cultural practices are not in their hands and they are thus subjected to decisions that consign them to a status of inferiority.

## **2.4. Offences relating to GBV**

### **2.4.1. Rape**

In relation to the offence of rape, section 130 of the Penal Code provides as follows:

1. It is an offence for a male person to rape a girl or a woman.
2. A male person commits the offence of rape if he has sexual intercourse with a girl or woman under circumstances falling under any of the following descriptions:
  - a. not being his wife or being his wife who is separated from him without her consenting to it at the time of the sexual intercourse;

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

Section 130(4) (a) provides that the slightest penetration is sufficient to prove that the offence has occurred. Paragraph (b) thereof dismisses the notion that failure to resist can be evidence of consent. It provides that “evidence of resistance such as physical injuries to the body is not necessary to prove that sexual intercourse took place without consent.”

Generally, the offence of rape attracts fairly severe penalties as set out in section 132(1). A convicted person is “liable to be punished with imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of an amount determined by the court, to the person in respect of whom the offence was committed for the injuries caused to such person.” Where the perpetrator is of age 18 or less, they shall, under subsection (2) be liable to be sentenced to corporal punishment only for a first offence, to imprisonment

for 12 months and corporal punishment for a second time offence, and to life imprisonment for a third and recidivist offence. Under subsection (3), the punishment is life imprisonment if the victim is a girl under ten.

### **2.4.2. Gang rape**

In terms of section 131A (1), where rape is committed by one or more persons in a group of persons, it shall be deemed that each member of the group committing or abetting the rape has committed an offence known as gang rape, and each, shall be liable to imprisonment for life regardless of the role they played in the rape.

### **2.4.3. Attempted Rape**

An attempted rape is, under section 132(1), an offence that attracts a jail term of thirty years to life, with or without corporal punishment. Under subsection (2) thereof, the offence of attempted rape is committed, if with intent to procure prohibited sexual intercourse with any girl or woman, the perpetrator manifests that intention by:

- a. threatening the girl or woman for sexual purposes;
- b. being a person of authority or influence in relation to the girl or woman applying any act of intimidation over for sexual purposes;
- c. making any false representations to her for the purposes of obtaining her consent;
- d. representing himself as a husband of the girl or woman, and the girl or woman is put in a position where, but for the occurrence of anything independent of that person's will, she would be involuntarily carnally known.

Intention manifested in terms of paragraph (c) or (d) will attract a jail term of ten years to life.

#### **2.4.4. Defilement of idiots and imbeciles**

Section 137 of the Penal Code provides that 'any person who, knowing a woman to be an idiot or imbecile, has or attempts to have unlawful sexual intercourse with her in circumstances not amounting to rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile, commits an offence and is liable to imprisonment for fourteen years, with or without corporal punishment'

#### **2.4.5. Defilement by husband of wife under eighteen**

Section 138 (1) of the Penal Code provides that 'any person who, being married to a woman under the age of eighteen years, has or attempts to have sexual intercourse with her, whether with or without her consent, before she has attained the age of fifteen years, commits an offence and is liable to imprisonment for ten years. Under subsection (2) a parent who disposes of a girl under the age of eighteen for purposes of sexual intercourse shall be guilty of an offence..

#### **2.4.6. Grave Sexual Abuse**

Under section 138C of the Penal Code, the offence of grave sexual abuse is committed when a person "who, for sexual gratification, does any act, by the use of his genital or any other part of the human body or any instrument or any orifice or part of the body of another person, being an act which does not amount to rape under section 130," does so under any of the following circumstances:

- a. Without the consent of the other person;
- b. With the consent of the other person where the consent has been obtained by the use of force, threat, or intimidation or putting that other person in fear of death or of hurt or while that other person was in lawful detention;
- c. With the consent of the other person where such consent has been obtained at a time the other person was of unsound mind or was in a

state of intoxication induced by alcohol or any drugs, matter or thing.

A conviction under the section attracts a prison term of between 15 and 30 years together with corporal punishment. Moreover, the offender will be ordered to pay compensation for any injuries occasioned to the victim.

#### **2.4.7. *Sexual Exploitation of Children***

Section 138B provides that a person commits the offence of sexual exploitation of a child if the person:

- a. knowingly permits a child to remain in any premises for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;
- b. acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse, or indecent exhibition or show;
- c. induces a person to be a client of a child for sexual intercourse or for any form of sexual abuse, or indecent exhibition or show, by means of print or other media, oral advertisement or other similar means;
- d. takes advantage of his influence over, or his relationship to, a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;
- e. threatens, or uses violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show; or
- f. gives monetary consideration, goods or other benefits to a child or his parents with intent to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show.

Punishment for sexual exploitation of children is imprisonment for between five and twenty years.

#### **2.4.8. *Sexual harassment***

Under section 138D, the offence of sexual harassment occurs when a person deliberately assaults or sexually harasses another person or uses words or actions to cause sexual annoyance or harassment to another. The actions may include unwarranted touching of body parts, forcefully kissing a person and insulting them. Punishment for sexual harassment is imprisonment of not more than five years or a fine not exceeding Tshs. 200,000, or both and the court may order the perpetrator to pay compensation to the victim for any injuries occasioned.



### 3. Introduction

The effectiveness of the law against GBV in its various manifestations will depend on the regularity of prosecution of offenders and their conviction. The deterrent effect of criminal law in the context of GBV will likely be attained if the law is vigorously implemented. The procedure for pursuing prosecution of GBV offences will be found in the Criminal Procedure Act Cap 20.

#### 3.1. Report of Offences

Generally, the victim of a crime will be required to report the same at the police station within the area in which the crime is alleged to have happened. The police will then issue the complainant with a RB Number. For gender based related offences, it is advised to report to the gender desk for specialized services. The complainant will record their statement and provide the police with any evidence in their possession, including clothes, weapons e.t.c. The complainant must verify the contents of the written statement before signing on each page. For GBV cases, the complainant must obtain a PF3 form and present it to the health facility for medical examination and finally return it to the police station to be included in the police file.

#### 3.2. Investigation and Arrest

Once a complaint is made, investigations will commence and, where evidence suggests the commission of a crime, an arrest will be made.

#### 3.3. Charges

A person arrested will be held at the police station unless otherwise allowed out on bond pending charge. The charge sheet will be drawn by a public prosecutor and it will generally be based on the evidence derived from the investigation.

The person arrested is then arraigned in court where the charges are read over and they are required to take a plea. If the accused accepts and pleads guilty, the court convicts him/her on own plea of guilty and proceeds to render sentence. If the accused person denies the charge, the matter is then set down for hearing. The accused may then be released on bail pending the trial. Even though bail is a constitutional right, the court can deny granting one if the circumstances justify such a denial. If it appears for example that the accused person is likely to abscond trial, or interfere with the witnesses, or has no known place of abode, the court may decline to exercise its discretion in favour of the grant of bail.

### **3.4. The proceedings**

On the date fixed for hearing, the matter will be called out and the accused person required to sit at the dock. The prosecution side will normally begin their case. The prosecutor will call evidence, which can be rendered by way of oral testimony and documents. The prosecution will call its first witness (usually the complainant) who will testify (a process known as examination in chief). The accused person or his/her lawyer may then ask questions of the witness (a process known as cross-examination). Thereafter, the prosecution may ask clarification questions (a process known as re-examination). This is repeated for all the witnesses called by the prosecution. Once the prosecution is done calling all its witnesses, both sides are then allowed to make submissions, to prove, in the case of the prosecution, and to deny, in the case of the accused person, that the evidence so far presented is sufficient to require that the accused person to be put to his defence. The test normally is whether the evidence is weighty enough to sustain a conviction even if the accused chose to exercise their constitutional right to keep silent. The court will then deliver a ruling on whether or not the prosecution has proven that the accused person has a case to answer.

The standard is that the prosecution must prove its case, even in this stage, beyond reasonable doubt. If the court finds that the burden has not been discharged, it will acquit the accused person. If it finds that the evidence is sufficient, then the court will call upon the accused person to answer to the accusations. The accused person may however choose to not say anything after the court finds that there is a case to answer. If that happens, the court will proceed to determine the matter by reference to the evidence already adduced.

On the other hand, the accused may choose to talk in his favour. Here, there are two options. In the first instance, the accused may choose to give an unsworn statement, meaning that the accused will only speak in his favour without having to be sworn in. This is where the accused is not willing to be asked questions regarding his/her narrative. On the other hand, the accused may decide to testify under oath during which he will be subjected to cross-examination by the prosecution. In either situation, the accused is allowed to call witnesses who may speak in his favour. Once the accused person has testified and called all his/her witnesses, the court has to render judgment. While room exists for judgment to be delivered immediately after the end of the presentation of evidence, the court would ordinarily retire to consider the facts and the law before rendering a detailed judgment on the issue.

### **3.5. Some salient issues in GBV cases**

GBV matters are not as straightforward as they may seem and some aspects thereof require closer scrutiny.

#### **3.5.1. *Investigation and preservation of evidence***

In sexual offences such as rape, the evidence of force is usually crucial. This may be seen in the marks left on the victim's body, or injuries inflicted on her. It is crucial that this evidence be collected as soon as possible following the assault because its quality deteriorates with time. Further, the state of the

complainant's clothing immediately after the assault is crucial, especially where force was used. The clothes may be torn or in pieces, or blood stained, or dirt stained e.t.c. It is also possible that finger prints may be lifted off clothing and so it must be availed. In cases of rape also, evidence of ejaculation is critical. Investigators must collect and preserve semen as soon as possible. The complainant must be made aware that she must present herself to the police immediately following the assault so that this evidence can be collected and preserved for further analysis. Investigators may also want to apprehend the suspect immediately, before any marks on their body is removed either through a shower or deteriorates through effluxion of time-the fresher a wound or bruise is, the more useful it is in an investigation. The state of the suspect's clothing also may provide useful pointers to the progress of the case.

### **3.5.2. *Expert testimony***

It is important in sexual violence cases to seek for and obtain expert evidence. In the case of rape, a victim must be examined by a doctor or other qualified health official who can prepare a report giving a prognosis of what might have happened to a victim. In cases of systemic domestic violence, evidence of the psychological effects suffered by a victim may be tendered by a psychiatrist or other qualified health personnel. Expert witnesses are therefore key in most GBV cases. Quite aside from situations where the law or practice dictates that they be used, it is important to determine whether their use will bolster a prosecution

## SECTION FOUR: LITIGATING HIV AND AIDS AND GBV CLAIMS



### 4. Introduction

Criminal prosecution seeks to render punitive sanctions against the perpetrator of any HIV and AIDS or GBV related violation. It is resorted to when it is deemed necessary that imprisonment or a fine should be pursued. Even though Tanzanian law on sexual and GBV contemplates that a court may order compensation for injuries suffered by a victim, the outcome of a criminal prosecution generally does not improve the victim's lot, for example in terms of making good any losses suffered by the victim as a result of the violation, or compensating the victim for financial losses incurred as a result of the violation. The best way to achieve this is through civil litigation. The law allows a victim to take up a claim against a perpetrator, for damages for violation of the victim's rights. Also, civil litigation is an important tool for calling to attention government inaction in the face of long-standing and systemic violations of a particular class of people, in this case PLHIV. It has been deployed with success in other jurisdictions. Litigation may be pursued by the victim, for the specific goal of pursuing compensation for violations i.e. private interest litigation. It may also be pursued for a wider public cause, especially where a big number of victims are involved and where change of law or policy is the objective.

### 4.1. Private Interest Litigation

#### 4.1.1. *Constitutional petition*

Rights that inure to individuals and which are constitutionally protected are entitlements that can be vindicated by way of constitutional litigation. The Constitution of the United Republic of Tanzania 1977 contains a robust bill of rights that has specific application to individuals living with HIV and AIDS such as:

- The right to non-discrimination and the right to equality before the law (Articles 12 and 13)
- The right to life (Article 14)
- The right to personal freedom (Article 15)
- The right to privacy (Article 16)
- The right to freedom of movement (Article 17)
- Freedom of expression (Article 18)
- Freedom of association (Article 20)
- Right to work and to just remuneration (Articles 22, 23)
- The right to own property (Article 24)

Where it is claimed that any of these or other constitutional rights have been, are being or will likely be violated with reference to an individual, then that individual has the right to institute proceedings for redress in the High Court, which is the court with the mandate to hear and determine such claims. The procedure to be followed is set out in the Basic Rights and Duties Enforcement Act 1994. The case is commenced by way of a petition under section 5 of the Act. Under section 8, the High Court has the power “to determine any question arising in the course of the trial of any case which is referred to it in pursuance of section 6, and may make such orders and give directions as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions of sections 12 to 29 of the Constitution, to the protection of which the person concerned is entitled.” A petition is required to set out the following:

- a. the name and address of the petitioner;
- b. the name and address of each person against whom redress is sought;
- c. the grounds upon which redress is sought;
- d. the specific sections in Part III of Chapter One of the Constitution which are the basis of the petition;
- e. particulars of the facts, but not the evidence to prove such facts, relied on; and
- f. the nature of the redress sought

A petition may be filed in the High Court in relation to an independently arising matter or in relation to a matter pending trial in a subordinate court in which an issue arises as to the contravention of the provisions on fundamental rights. The matter will be referred by the magistrate presiding over it in the subordinate court where it arises. When it is established that a violation has occurred, the High Court can exercise very wide powers to secure a remedy for the applicant. Under section 13 of the Act, the High Court can make all such orders as are necessary and appropriate to secure the applicant's rights, and where a violation involves a law or action, the High Court can order the Parliament or other relevant authority to rectify the offending legislation or action within a specified time. Section 14 provides for a right of appeal by a person aggrieved by the decision of the High Court.

#### **4.1.2. *Civil law remedies***

It is possible that a claim raises issues that can be addressed by ordinary civil litigation through the award of remedies such as damages or injunction. It is also possible for a victim of a criminal offence to maintain a claim in damages following the conviction of an offender. This is because a fine as may be ordered by a court will be paid to the Government and not the victim. Even if compensation is ordered by the court in the case of sexual offenses, the amount may be limited to the injury suffered by the victim. It is also important to note that an acquittal in a criminal case is not necessarily a bar to the pursuit of money damages in a civil suit. Where a civil claim is sought, the victim will file a normal civil suit against the offending party. The procedure to be followed is set out in the Civil Procedure Code and the rules made thereunder.

Generally, a civil suit is commenced by way of a plaint - which is a document containing facts that allege the existence of a civil claim against the person sued (the defendant), the basis of the claim and the remedies sought.

The plaintiff must generally be in the name of the victim. This is because of the rule in civil procedure that unless otherwise exempted, the claimant must be the one who has suffered the injury complained of (the locus standi rule). One exception would be suits by minors, which can be presented by persons acting on their behalf. Once a plaintiff is filed it is served on the defendant who then gets an opportunity to reply by filing a statement of defence. Once the time allowed for filing and exchange of all documents (known as pleadings) has elapsed, the suit may be set down for hearing. The parties present their evidence either through oral testimony or documents or both. A party may also present the evidence of an expert witness. The plaintiff would ordinarily commence followed by the defendant. Once both parties have presented their cases, the court prepares a judgment, which is the formal expression of its decision. Depending on the weight of evidence, the suit is either allowed or dismissed.

The standard of proof in civil claims is said to be on balance of probabilities. This means that the plaintiff should present evidence that tends to show that it is more likely than not that the defendant committed the breach being complained of. While the standard is not so high as to require the resolution of all doubt before a determination (as is the case in criminal prosecution), the plaintiff would do well to present evidence that is cogent and that shows that indeed the defendant is responsible for the plaintiff's injury. If the court is convinced that the plaintiff has discharged the burden of proof, it will allow the plaintiff's case and award the prayers it deems fit depending on the claim, and also on what the plaintiff asked for and proved. If damages are awarded, the defendant will be required to pay the same to the plaintiff. If the defendant does not settle the compensation on their own volition, the plaintiff has to realize the same through the process of execution, which involves attachment and sale of the defendant's property.

Claims which may raise civil suits include, but are not limited to:

- i. physical assault committed in the context of GBV may amount to the tort of assault, or battery;
- ii. sexual harassment can also raise the tort of battery or assault;
- iii. where a HIV positive person is unlawfully or unfairly dismissed, the civil law claim of breach of contract may arise, or a labour law claim may be mounted;
- iv. psychological abuse may lead to infliction of emotional damage (recognized as a tort in other common law jurisdictions);
- v. a widow living with HIV who has been evicted from her family land by marauding in-laws who probably blame her for their son's death may properly seek an injunction in the context of the tort of trespass to land, or a claim in land court;
- vi. Testing a person for HIV without consent will raise a claim in trespass to the person;
- vii. Subjecting an HIV positive person to treatment without their consent is a battery; and
- viii. misdiagnosis, perhaps leading to prescription of unnecessary treatment, will attract a claim in medical negligence, a tort.

## **4.2. Public Interest/Strategic Litigation**

Public Interest Litigation focusses on issues of particular importance to the community at large, a major section of the public, or disenfranchised minorities. This sort of litigation is defined as court action seeking remedies aimed at a broader public good as opposed to the specific interests of the individual litigant (s). While such litigation may be initiated by a single individual, it generally would have wider ramifications for the public at large. Critical to the success of litigation in the public interest, is the ability of any person, besides a victim, being able to take out proceedings on behalf of another, who may not be in a position to do so.

That is to say, that the common law restriction on standing to sue must be loosened so that the person filing the claim need not be the one who has suffered the injury.

Tanzanian law on standing to sue has been contradictory, with one High Court decision adopting a broad interpretation and another one narrowing it altogether. The former case is that of *Christopher Mtikila & 3 Others v Republic* where the High Court, in interpreting the provisions of Article 26(2) and 30(3) of the Constitution, held that there was no requirement of personal interest in matters of interest to the public. The High Court was to flip this interpretation in a subsequent case, that of *Legal and Human Rights Center and Tanganyika Law Society v Hon. Mizengo Pinda and the Attorney General* where it held that such personal interest was mandatory for a claim for violation of rights to be sustained. Barring the question of standing, which seems unresolved, the applicable procedure is the one obtaining for any other petition seeking to enforce fundamental rights under the Constitution. Some serious thought, however, must go into the decision as to the public interest case to pursue, the preparation to be undertaken, the objectives to be achieved and also the strategy to be adopted. The excerpt below will help in highlighting some of the issues to be considered in public interest litigation as a way of advancing rights in the context of HIV, AIDS and GBV.

(Excerpt):[Christopher Mbazira, Zachary Lomo and Ismene Zarifis Economic, Social and Cultural Rights Litigation: A Manual for Public Interest Lawyers and Litigators \(2014\), Public Interest Law Clinic, School of Law, Makerere University, pp 145 - 155](#)

### **4.3. Remedies at regional and international forums**

Besides local remedies, it may be possible to seek help from inter-state mechanisms, both regional and international, particularly where the domestic processes appear constraining, and the possibility of securing a positive outcome is practically rendered impossible.

Regionally, the East African Community and the regime under the African Union provide useful frameworks for advancing rights of PLHIV.

#### **4.3.1. *The East African Court of Justice***

This body is established under the Treaty Establishing the East African Community as the judicial arm of the community with jurisdiction to hear and determine cases on:

- i. disputes on the interpretation and application of the Treaty;
- ii. disputes between the Community and its employees arising from the terms and conditions of employment or the interpretation and application of the staff rules and regulations;
- iii. disputes between the Partner States regarding the Treaty if the dispute is submitted to it under a special agreement;
- iv. disputes arising out of an arbitration clause contained in a contract or agreement which confers such jurisdiction on the Court to which the Community or any of its institutions is a party; and
- v. disputes arising out of an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the Court.

The treaty envisages that a human rights jurisdiction will be extended to the court at some later point in time but this has not been forthcoming. The Court has, however, held that to the extent that the Treaty Establishing the East African Community mandates it to determine whether states are in compliance with its principles, if such principles are to be found in a human rights instrument referred to in the Treaty, the Court will have no impediment in measuring state compliance against the instrument. In this case, the Court held that it could determine a dispute whether a member state had violated its obligations under the African Charter on Human and Peoples Rights, an instrument forming part of the principles of the Treaty. It is possible to pursue a claim premised on

violation of a principle of human rights in the East African Court of Justice. Moreover, the Court has claimed such jurisdiction based on the obligation on member states to “abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and maintenance of universally accepted standards of human rights.”

#### **4.3.2. *The African Commission on Human and Peoples’ Rights***

The African Charter on Human and Peoples Rights creates the African Commission on Human and Peoples Rights as the body empowered to monitor implementation of the Charter. Among others, the Commission has powers to receive and consider complaints (referred to as communications) filed against states by those who allege violation of the rights protected by the Charter. The Commission has established a practice of considering these complaints and giving rulings with recommendations, which are transmitted to the African Union and forwarded to the state concerned. It should be noted, however, that the Commission only entertains complaints filed after exhausting local remedies. This means that the complainant must have tried to obtain remedies from domestic judicial system in vain. There are exceptions such as where the remedies are unduly prolonged or are unavailable. In addition to exhaustion of local remedies, the Charter describes additional prerequisites of a communication as is indicated below:

**(Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982),  
entered into force 21 October 1986)**

**Article 56**

Communications relating to human and peoples' rights referred to in 55  
received by the Commission, shall be considered if they:

1. Indicate their authors even if the latter request anonymity,
2. Are compatible with the Charter of the Organization of African Unity or with the present Charter,
3. Are not written in disparaging or insulting language directed against the State concerned and its institutions or to the Organization of African Unity,
4. Are not based exclusively on news discriminated through the mass media,
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged,
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter, and
7. Do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.

### **4.3.3. *The African Court on Human and Peoples' Rights***

The Protocol to the African Charter on Human and Peoples Rights on the Establishment of the African Court on Human and Peoples Rights established the African Court on Human and Peoples Rights. The Arusha-based Court is empowered to receive cases against states parties alleging the violation of the rights protected in the African Charter, its protocols and other human rights instruments ratified by the state. Unlike the Commission, which makes recommendations, the African Court makes binding decisions. It should be noted, however, that the Court only has powers over states which have made a declaration accepting individuals and NGO to institute suits against them. The only exception is with respect to cases filed by the African Commission

**Protocol to the African Charter on Human and Peoples Rights on the  
Establishment of the African Court on Human and Peoples Rights  
Adopted by the African Union on 10th June 1998**

**Article 3 JURISDICTION**

1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.
2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

**Article 5 ACCESS TO THE COURT**

1. The following are entitled to submit cases to the Court
  - a. The Commission;
  - b. The State Party which has lodged a complaint to the Commission;
  - c. The State Party against which the complaint has been lodged at the Commission;
  - d. The State Party whose citizen is a victim of human rights violation;
  - e. African Intergovernmental Organizations.
2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join.
3. The Court may entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

**Article 34 RATIFICATION**

4. At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.
5. Declarations made under sub-article (6) above shall be deposited with the Secretary General, who shall transmit copies thereof to the State parties.

The Rules of the Court are available at <http://www.african-court.org/en/index.php/basic-document/basic-docuemnts-featured-articles>

#### Key References

- The National Policy on HIV and AIDS, 2008
- The Penal Code, Cap 16
- The Criminal Procedure Act, Cap 20
- The HIV and AIDS (Prevention and Control) Act of 2008
- The Tanzania Third National Multi-Sectoral Strategic Framework for HIV and AIDS (2013/14 – 2017/18)



### 5.1. Introduction

Planning a public interest litigation case is critical to its outcome and impact. It is imperative for intending litigants to think strategically what they ought to do before going to court and what they will do after court. For instance, reflect on key issues such as:

- a. What is the problem? What does the community say about it? Does the community see it as a problem? Is it a clash of value systems or world views? From which world view is this a problem?
- b. What are the causes?
- c. What material issues does the problem present or rise?
- d. How do you proceed? Is this the best course of action? What local alternatives are available?

### 5.2. Strategy before Litigation & Advocacy

Before the decision to go to court is taken, intending litigants should carry out two key critical set of activities: they should undertake a thorough or 'a-3D', so to speak, diagnosis of the problem and the potential threats or barriers or fears and estimate the level of resistance that they are likely to encounter. This is resistance from those who are more likely to lose directly or indirectly if the litigation is successful. If the litigation is unsuccessful, they should also foresee the reprisals that are likely to occur and how that might exacerbate the situation that the litigation intended to redress.

#### 5.2.1. *Thorough Diagnosis of the Problem*

A thorough analysis of the problem or situation analysis should at least address the following seven aspects. This list is not exhaustive:

- a. This is probably the most crucial facet of the whole PIL planning process. Getting the problem right is key. Understanding the local context in

which the problem developed is critical. But determining causes of a given social problem can be challenging, especially in the context of competing world views about everything, from child upbringing, domestic violence, marriage, to sexual choices people make in life. Crucially, differentiating symptoms from cause is critical. What could be a problem from a purely black letter law perspective or other world views, for example, a western world view about children made to work or domestic violence against spouses, women in particular, could be understood as a social responsibility issue whereby parents and the community are duty-bound to inculcate in the child the virtues of work and responsibility, in particular the child needs to learn the hard realities of life, often in the Ugandan context, especially the rural setting. This includes working, for example, in the field or fetching water or collecting firewood, sometimes for hours on long. Distinguishing abuse from proper parental responsibility, including administering punishment to a child is not straightforward because what constitute abuse is one community may not be considered as such in another.

Another illustration could be taken from the world of marriage, in particular domestic violence. Domestic violence has a multiplicity of causes, yet activists often seem to treat it as a black and white issue of gender inequality by which they mean women are always being treated unfairly by men and heaping the blame on patriarchy. Patriarchy is a method of social organisation where the male members of the family and clan are head of that family and authority, thereby discounting the role which women themselves play in defining social rules in almost most societies.

In the case of Africa, something called 'bride price' has been singled out by some western scholars and their local disciples as the main cause of domestic violence and have mobilised resources to get rid of

it. Indeed, some of the public interest causes that have been litigated in our courts in the recent past have had considerable financial and intellectual support from abroad. That is not to say that local actors cannot collaborate with foreign sympathisers; the critical questions are: what kind of collaboration and who sets the agenda for that collaboration? Who determines what the issues of social justice are? In other words, who determines what is the problem and can defining the problem escape cultural biases? Indeed, as the case of Mifumi demonstrates, domestic violence, whether against women or not, is not caused by one particular factor, so-called 'bride price.' Couldn't 'bride price' simply be a symptom and not cause of domestic violence? How does one explain the levels of violence against women in developed countries where no 'bride price' plays a role in marriage relations?

The observations of some of the Justices of the Constitutional Court in the Mifumi case, discussed in Chapter Four, and Justice Mpagi-Bahigeine's observations, in particular are pertinent this aspect and are quoted in extenso here: I observe that all the deponents of the affidavits in support of the petition concentrated on incidences of domestic violence allegedly consequent upon failure to effect refunds of bride-price. I found this evidence lacking in data. Domestic violence is a worldwide plight to women/men which has received United Nations' attention – The Declaration on the Elimination of Violence Against Women – (General Assembly Resolution 48/104 of 1993) specifically enjoins member states to pursue policies to eliminate violence against women (emphasis supplied). The Domestic Violence Bill is still in the offing, hopefully the Act will soon emerge to take care of the situation. Curiously, violence is more prevalent in countries where the term 'bride-price' is unheard of, with the exception of India, but even in the case of India it is the payment

of insufficient dowry by the bride which is the cause of domestic violence and suicide. It is not due to “bride-price” (emphasis supplied). This is not to discount the possibility of abuse of a particular cultural practice but an objective analysis of the problem of domestic violence in the community (the Japadola, in the Mifumi case) might reveal intriguing causes that might point to individual weakness and character traits that we are increasingly avoiding to confront and instead heaping blame on States, governmental agencies, and teachers and other social practices.

Thus, the local social justice activist must not only have a thorough grasp of his or her social context but also remain fiercely objective and independent when confronted with the challenge to determine whether a particular problem is indeed a problem within its context. An Activist must not be easily taken in by the allure of the liberal and neo-liberal world, whereby a *laissez-faire* lifestyle – everything-goes – is packaged and repacked in individualised and legal forms and sold, sometimes enforced through various methods, as the only way human beings on planet earth can live their lives so much so that those other world views they are completely ignorant about are considered backward, uncivilised, or criminals. In the same vein, social justice activists must not be taken in by the romanticised African value system either but must not be afraid to defend what is part of his or her heritage. Every society of human beings has both good and bad attributes and therefore no particular society can claim to dictate to others what is best. A thorough and objective analysis of the problem will not only allow you to identify the issues and areas of action but also provide the foundation for the ways in which it needs to be solved. With the information from the situation analysis, you can develop a ‘problem and solution tree’, whereby the ‘problem tree’ will allow you to understand the causes and the ‘solution tree’ providing a visual frame of the solutions and their impact on change.

- b. Frame the issues, goal(s), and objectives of litigation and advocacy
- A party seeking redress through courts of law must allege material propositions of fact and law in order to demonstrate that they have a cause of action or their suit may be dismissed on this aspect alone. Issues in litigation arise when one party affirms and the other denies a material or material propositions of fact or law. Generally, issues arise once there are disputed questions of fact. At this point, it may be useful to refresh your memory by perusing through the civil procedure rules and the relevant case law on this topic. Thus, a thorough analysis of the problem should provide some picture of what propositions of fact or law might be asserted and contested if you decide to go to court as the last resort. If the problem is robustly defined and potential issues envisaged, you will have:
- i. Separated the facts, good from bad facts;
  - ii. Devised a strategy for dealing with the facts, in particular the bad facts;
  - iii. Know how to tell the story;
  - iv. Envisaged the themes and theories upon which to premise your case in court;
  - v. Some idea how to prepare for examination of witnesses in court, both examination in chief and cross-examination;
  - vi. Some idea of what evidence you will need to buttress your case, including the type of witnesses and exhibits.
- c. Assess your capacity/competence
- Assessing your capacity both in the sense of knowledge and skills and availability of resources to execute a particular public interest litigation suit is paramount. In this respect, some of the key aspects to consider include the following:

- i. Legal knowledge and skills
  - ii. It is imperative that your team of lawyers handling the matter must have the requisite legal knowledge and skills. How does one determine that the team at your organisation has the requisite knowledge and skills to handle the matter at hand? No fast and hard rules but at least three aspects are critical: the complexity and specialised nature of the problem; the training and expertise of the lawyer or lawyers in the field under which the problem fell; and generally, the possession of skills to determine what kind of legal problems are involved in a given situation or scenario.
  - iii. Maintaining competence
  - iv. When did members of your team attend the last advanced studies or knowledge and skills improvement courses? If your team comprise people that take seriously the task of maintaining their legal knowledge and skills through continuing legal education seminars and courses, then you have a fairly competent team.
  - v. But do not rest on your laurels, you might think of maintaining the competence of your organisation by working in collaboration with experts in the relevant field, including local community experts often ignored or even misunderstood and labelled as part of the problem.
  - vi. Preparation
  - vii. Thorough preparation of the case is important, and this requires the capacity or ability to inquire into and critically analyse the factual and legal aspects of the problem at hand.
- d. Research: A thorough analysis of the problem, or the situation should provide you with leads on further research to generating evidence for the case. The problem will have generated themes and sub-themes. Frame research questions along these. Next you will have to

address where you can find the information you need and who will be undertaking the research. Crucially you will have to determine how you will collect or gather the information or data and analyse it.

- e. Identify potential plaintiffs and defendants  
Once you know the problems and issues and the best course of action to find solutions, it means you know exactly what you want, and your next challenge is to identify persons in your judgment would make it happen. Being able to identify who your potential plaintiffs and defendants would be involves your analysing various actors and their powers and grasping how they can advance or undermine your cause. In analysing who your potential plaintiffs and defendants are and the powers they wield, you may wish to consider some key attributes:
  - i. Plaintiffs and defendants
  - ii. These could be individuals, groups, or institutions and your key interest is to establish, for example, who might be most adversely affected, if litigation is successful? Who are likely to gain if litigation is successful or unsuccessful and the subsequent changes that this may usher? Who complains most about the issues?
  - iii. Interest of plaintiffs and defendants  
Having analysed who are likely to be losers and gainers you might want to focus on the specific interests of the potential plaintiffs and defendants. What specific benefits, if any, are likely to be gained by all parties associated directly or indirectly with the problem and litigation to resolve it? What are the expectations of the people for whom this litigation is initiated? Would the plaintiff be interested in participating in the case and thus be willing to contribute some resources to its successful prosecution? The enthusiasm and zeal of the would-be plaintiffs for the cause is critical. What other factors may undermine the enthusiasm of potential plaintiffs to a PIL suit?

Consider the democratic credentials of the Ugandan government of the day, in particular with respect to free speech and assembly and access to justice.

- f. Determine time frame – how long for  
Determining how long for a PIL case will take before the court can pronounce itself on the matter is impossible. Nonetheless, it is imperative that anyone preparing a PIL case should make efforts to estimate how much time is needed to execute the case. Estimating how much time is needed to prosecute the case serves two crucial purposes. In the first place, it helps inform decision on resource mobilisation and allocation in order to successfully execute the case. In the second place, it is possible to plan an advocacy strategy.
- g. Assess amount of resources needed: Mobilising resources, and in particular financial resources, with which to fund the suit is a critical factor to the success of a PIL case and must be planned and thought out clearly. It is important to identify means for fund-raising, keeping in mind that some potential sources, such as philanthropic organisations are often weary of funding PIL suits due to their adversarial nature. One source of funding could be through legal aid, but in Uganda legal aid is yet far from being implemented and it is doubtful that the government would be willing to provide legal aid to public interest causes that challenge its policies and practices that undermine the public interest. In Uganda law schools providing clinical legal education are almost non-existent, save for the Makerere University Law School's newly launched Public Interest Law Clinic, but where they become established, could be one possible source to turn for support in handling a public interest litigation suit.



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