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Human Rights, Gender & Ethics Track

**Legislation on HIV/AIDS:
Relevance in Prevention, Stigmatization and
Discrimination in the African Setting**

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Introduction

Achievements so far:

- **Institutionalization of multi-sectoral response to HIV/AIDS.** Establishment of National AIDS Commissions/Councils (NACs), Prevention/ Action Committees, etc
- **The robust HIV/AIDS policy environment continent-wide.** Adoption of various national HIV/AIDS policies, strategic plans or frameworks and sectoral policies, e.g. in the workplace and in education. Also, mainstreaming of HIV/AIDS in public policies, e.g. country PRSPs, national development plans

Observation (applies globally, regionally & sub-regionally):

- **Widening “policy/legal divide”** e.g. Some 38% of countries, including almost one-half of those in sub-Saharan Africa, have yet to adopt legislation to prevent discrimination against people living with HIV/AIDS, UNAIDS 2003.



Nature of HIV/AIDS-related stigmatization and discrimination

- Complex. But manifests at the individual, community and societal (systemic) levels. Reinforces existing prejudices against already marginalized groups, e.g. MSMs, SWs, migrants. Also rooted in fear of infection or consequences of infection, Parker et al 2002.
- Protective role of the law in addressing systemic manifestations, Hamblin 1991. Legislation as a supplement to strategies/actions, which address individual and community attitudes, e.g. public education campaigns in the media; counselling, community mobilization (organizing), improved access to health and other social services.



Global responses to the HIV/AIDS policy/legal divide (1)

- **(Non-binding) International Guidelines on HIV/AIDS and Human Rights:**
- **Guideline 5** “States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, that will ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation and provide for speedy and effective administrative and civil remedies.”
- Also, **Abuja Declaration of 2001.**



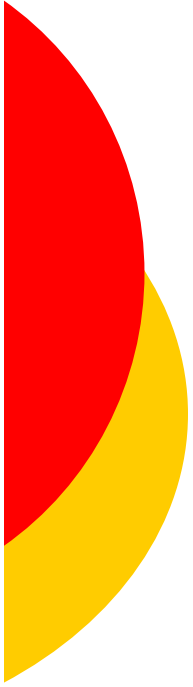
Global responses to the HIV/AIDS policy/legal divide (2)

- **(Non-binding) UNGASS DoC on HIV/AIDS 2001:** "by 2003, to enact, strengthen or enforce as appropriate legislation, regulations and other measures to eliminate all forms of discrimination against, and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups; in particular to ensure their access to, inter alia, education, inheritance, employment, health care, social and health services, prevention, support treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic."



HIV/AIDS-specific rights-based approaches

- **Strongly promoted by the International Guidelines and UNGASS DoC 2001.** Rooted in entitlements (e.g. anti-discrimination protections) enshrined in the African Charter on Human and Peoples' Rights; the African Charter on the Rights and Welfare of the Child; Protocol to the African Charter on the Rights of Women in Africa. Also, CEDAW, CRC, ICESCR.
- **Underpins regional initiative: AWARE-AIDS initiative to introduce a model law on STI/HIV/AIDS for West and Central Africa.** Geographical coverage: ECOWAS countries and Cameroon, Chad and Mauritania. Model Law covers discriminatory acts, as well as education and information on HIV/AIDS, secure practices (blood safety, surgery and tissue/organ donation), voluntary counselling & testing, privacy and confidentiality protection.



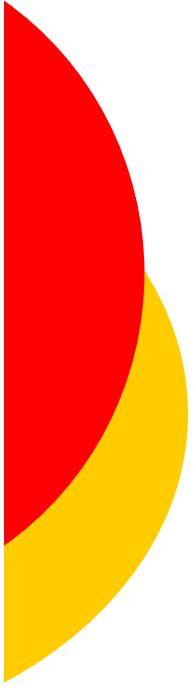
The role of the law in HIV/AIDS prevention (1)

- Stigmatization and discrimination undermine prevention efforts.
- Therefore, in addition to legislative measures, crucial to improve and widen access to education and information on HIV/AIDS and adopt cooperation-based approaches.
See, Articles 2-8 of the Model Law.
- Also, Guideline 9 of Inter. Guidelines: “States should promote and support creative educational, training and media programmes designed to combat attitudes of discrimination and stigmatization associated with HIV/AIDS; and create understanding and acceptance.”



The role of the law in HIV/AIDS prevention (2)

- Criminalizing activities that give rise to the risks of HIV transmission (proscriptive role of the law). Criminal sanctions for homosexuality and sex work (“officially sanctioned discrimination,” UNAIDS). Implications for access to prevention services. Proscriptive approaches counter-productive, Hamblin 1991.
- However, emerging jurisprudence in some countries on wilful/deliberate transmission of HIV.
- Recognizing the economic and social factors underpinning HIV transmission in Africa, particularly poverty and gender inequalities. N.B. entitlements under the Protocol to African Charter on the Rights of Women.



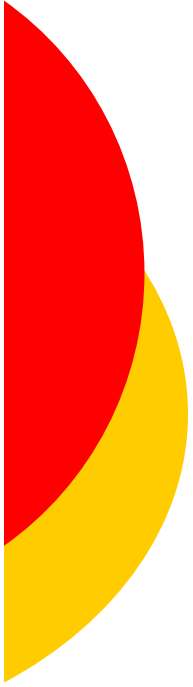
Key provisions in CEDAW and PRWA: Equal access and women's empowerment

- Article 12(1), CEDAW
- “State Parties shall take all appropriate measures to eliminate discrimination against women in the field of healthcare in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning.
- Articles 14(d) and 14(e), PRWA provide that women are entitled to: “the right to self-protection and to be protected against sexually transmitted infections including HIV/AIDS;” and “the right to be informed of one’s health status and on the health of one’s partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognized standards and best practices.”



Major constraints in the African setting

- Lack of political will to introduce HIV/AIDS-specific legislation and religious/cultural barriers
 - ➔ Continued reliance on existing anti-discrimination legislation despite obvious limitations, e.g. with regards to prohibited grounds of discrimination, types of prohibited conduct. (“discrimination by neglect”). Also, narrow conception of persons actually affected by stigmatization and discrimination.
- Lack of fulfilment of ESRs, e.g. the right to the best attainable standard of health as in the ICESCR. Progressive realization of ESRs.
- Limited access to judicial/legal redress. Effects of high costs, delays, rigid procedures. Issues of fast-tracking and preserving anonymity.



Final remarks

Legislation can play a constructive role in the response to HIV/AIDS. This is already affirmed in UNGASS DoC and the Inter. Guidelines and from best practices in some countries. The way forward requires:

- Adopting the GIPA principle in community mobilization and resisting stigma and discrimination through educations campaigns and litigation. GIPA means the greater involvement and empowerment of PLWHIV/AIDS in policy formulation and programme implementation.



Final remarks (contd)

- The need for more effective pressure groups to sustain legislative advocacy and lobbying for HIV/AIDS specific legal reforms & fulfilment of ESR. The importance of networks and alliance-building. Other steps that are crucial include:
- Training of PLWHIV/AIDS, media, judges and legislators on human rights issues in HIV/AIDS.
- Legal aid provision to support the filing of test cases.
- Using alternative forms of dispute resolution, e.g. interventions by Nat. Human Rights Commissions, mediation and conciliation/justice sector reforms to improve litigation process.

Thank you

