HIV/AIDS, TB AND THE LAW: EXPERIENCE FROM THE BAR

A PAPER PRESENTED TO THE JUDICIAL OFFICERS IN A JUDICIAL DIALOGUE ON HIV/AIDS, TB, HUMAN RIGHTS AND THE LAW

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THEME: CREATING ENABLING ENVIRONMENT FOR PEOPLE LIVING WITH HIV AND TB THROUGH ADJUDICATION

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By

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*"The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution". **Falbo v United States 320 US 549 at 561 (1944) per Murphy J.***

Abstract

This presentation discusses the challenges associated with litigating and adjudicating HIV/AIDS cases in Court room. These challenges are not in any way different from those faced by persons infected with TB. It further explores how other jurisdictions have handled HIV/AIDs cases and the approaches taken by different members of the bench towards such cases. The study presents practical challenges faced by both litigators and adjudicators specifically stigmatising and discrimination of PLHIV during litigation and adjudication of such cases in the courtroom. It ends by giving suggestions or recommendations that both litigators and adjudicators should be concerned with while handling HIV/AIDS courtroom cases.

Keywords: HIV/AIDS, TB, Discrimination, PLHIV, ART and Sero-Positive

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1.1 Introduction and Background

The HIV epidemic remains one of the leading causes of death globally.[2] The Sub-Saharan Africa remains the region most severely affected by the HIV epidemic.[3] In this region, nearly 1 in every 20 adults is living with HIV and it accounts for 24.7 million (nearly 71%) of the 35 million people living with HIV (PLHIV) worldwide. In this region, 58% of the total numbers of people living with HIV are women. Ten countries in Sub-Saharan Africa, three of which are EAC Partner States (Kenya, Uganda, and the United Republic of Tanzania) account for 81% of all people living with HIV in the region. Additionally, 2.9 million children aged 0–14, 2.9 million young people aged 15–24 and more than 2.5 million people aged 50 years and older are living with HIV in Sub-Saharan Africa. Of the estimated 1.8 million people living with HIV who were affected by conflict, displacement, or disaster in 2006, 1.5 million were living in Sub-Saharan Africa, with this number continuing to increase.[4]

The HIV epidemic continues to raise new and complex legal and human rights issues and challenges that have confronted all arms of government. The judiciary is in a unique position ultimately, as the warden of the constitution and constitutional rights of citizens and residents. The Constitution of the Republic of Uganda, 1995 is the supreme law of the country and the judiciary is tasked with its interpretation and protection. The fundamental rights espoused in the Constitution such as equality, human dignity and health must permeate in the judgments of those tasked with their protection. The most vulnerable are the most affected, women, children who are either infected or left orphaned due to the epidemic and it is these people that the judiciary must seek to protect within the confines of the law. There are other legislations in place specifically on

[2] HIV is the 6th leading cause of death in the world with 1.5 million deaths considered to be due to AIDS related illnesses in 2012. See WHO ‚The top 10 causes of death' Fact sheet No 310, updated in May 2014, available at http://www.who.int/mediacentre/factsheets/fs310/en/index.html

[3] Resolution adopted by the General Assembly (without reference to a Main Committee (A/60/L.57)) 60/262. Political Declaration on HIV/AIDS, July 2006.

[4] A Comprehensive Analysis of the HIV & Aids Legislation, Bills, Policies and Strategies In The East African Community-Summary Report *Submitted Jointly By The EAC Secretariat HIV And Aids Unit & UNDP* Regional Service Centre For Africa, Addis Ababa (Ethiopia) October 2014.

HIV/AIDS, that is, the HIV and AIDS Prevention and Control Act, 2014, In some cases as we shall see herein, reference has been made to the provisions of the Penal Code Act specifically on criminalisation of deliberate transmission of HIV/AIDS.

Beyond legislation, the bar, courts and members of the judiciary are leaders in their communities and societies. Their stance, attitudes and behaviour towards HIV-related issues, PLHIV and members of key populations at higher risk of HIV infection can help shape social attitudes towards these populations. Members of the bar and the bench can challenge stigma and discriminatory practices against PLHIV and members of key populations inside the court and within the community.

In Uganda, responses to the epidemic initially focused on health interventions such as HIV prevention campaigns, care for the sick, voluntary counselling and testing, and more recently antiretroviral treatment (ART). There has been considerable investment in communication and awareness-creation to stem the further spread of HIV. Over time, some responses to the human rights violations of people living with, affected by, and at risk of HIV have been designed in the form of legal services. Many of these are still yet to take root and ensure accessibility by those they target.[5]

As a country, Uganda has put in a lot of effort to end the HIV epidemic in the country. It has formulated various laws and policies in order to curb the spread of the virus amongst the people, to protect the rights of those already infected with the disease and protect those not yet infected from being infected by the same. Uganda has therefore used a number of national, regional and international policies in order to fight the HIV epidemic and its related effects.

[5] Mukasa, S. & A. Gathumbi, 'HIV/AIDS, Human Rights and Legal Services in Uganda: A Country Assessment' (OSIEA, May 2008).

Overtime, in spite of the intrusive approaches to HIV prevention by the State (and private actors), the courts have sought to strike a balance between public health concerns and human rights in applying traditional elements of crime to penal provisions; jealously safeguarding privacy rights and confidentiality of medical results in wake of HIV reporting and notifications; disapproving and sanctioning HIV-based discrimination in employment, etc. Additionally, the courts have been at the centre for the right of access to HIV treatment and medicines, including, importantly antiretroviral treatment (ART).

The realities of stigma, discrimination and neglect of human rights protection has been an integral component in the responses to HIV. The high degree of stigma and discrimination associated with HIV/AIDS has made human rights protection not only a priority to ensure the rights of people living with and at-risk HIV but to address public health goals as well. It is this factual reality that has borne out the confluence between HIV, human rights and the law and it has become a seminal theme of policy, academic and even judicial discourse on HIV/AIDS.

Judges must decide all criminal cases on a fair, objective and impartial basis. A judge must first decide whether or not the accused person is guilty after carefully considering all the evidence laid before him or her. If the judge finds the accused person guilty, he or she must then carefully decide upon the appropriate penalty to impose upon the convicted person. Judges must act scrupulously as impartial adjudicators. They must keep open minds and they must refrain from doing anything that could create the impression that they are biased or partisan in their approach.[6]

[6] In ***Musindo*** **1997 (1) ZLR 395 (H)** the court reiterated the need for judicial officers to treat the prosecutor and unrepresented accused equally and even-handedly. It pointed out that there are many pressures attendant upon the judicial function and many temptations to impatience and cynicism. Those who are charged with the burden of decision cannot always conceal their irritation with the incompetent or unprepared lawyer, with the idle submission or the ignoble stance. But judges owe it to their own self-esteem; to the dignity of their office; to the credibility of the legal system; and most of all, to those who attend their judgment, to comport themselves in such a way as persuades all before them that a fair hearing was afforded and an honest and considered decision was handed down. Audience that is fairly given to both contending parties is most likely to result in a decision that not only commends itself as even-handed but is also just. An appearance of disfavour in the proceedings, conversely, is calculated to result in a decision that fails to command confidence and which is the more likely to be wrong.

The issues that underscore this reality inform this *presentation on Litigating, Judging, and Adjudicating HIV in the Court room.*

1.2 Key Considerations in Judging and Adjudicating HIV/AIDS

While discussing HIV/AIDS-Implications of the Law and the Judiciary, the Hon. Justice Michael Kirby AC CMG applied the 6 Cs which I find very persuasive to the subject at hand.[7] These are **Contemporaneity; Consciousness; Courts; Cases; Colleagues and Community**. These are very critical areas that can guide both the Bar and Bench in both litigating and adjudicating cases concerning HIV/AIDS and TB in the Courtroom. I will follow them with modifications to apply to the Ugandan Bar and Bench.

1.2.1 Contemporaneity

This refers to the quality of being current or of the present. It relates to belonging to the same period of time. Issues such as consent for testing; counselling of those at risk and those who are infected with HIV; issues of confidentiality and discrimination; the special problems of vulnerable groups, some of them subject to discrimination which is reinforced by the law; issues of the safety of the blood supply and of the work environment are key considerations.

In 1999, the High Court of Australia delivered a decision which illustrates the way in which HIV/AIDS will present to courts questions of law both of difficulty and sensitivity: ***X v The Commonwealth***[8]. The case concerned a soldier who was enlisted in the Australian Defence Force (ADF). After his enlistment, a pathology test showed that he had been infected with HIV, the virus that causes AIDS. He was immediately discharged pursuant to a policy of the ADF applicable to all new recruits requiring the termination of their employment if they tested positive to HIV. The ex-soldier complained about his

[7] HIV-AIDS-Implications for the Law and the Judiciary. A paper presented to the Fiji Law Society on the 15th Anniversary Convention, Figatoka, Fiji Islands on 27th May 2006.
[8] (1999) 200 CLR 177.

discharge to the Australian Human Rights and Equal Opportunity Commission. The ADF admitted that there was discrimination against him otherwise contrary to the Disability Discrimination Act 1992 (Cth). However, it asserted that the discrimination was lawful in his case because, within one of the exceptions recognised by the Act, the soldier was unable to perform the "inherent requirements" of the particular employment.

It was contended that one of the "inherent requirements" of a soldier was a capability to (as it was vividly put) "bleed safely", if bleeding arose in circumstances of combat or training. The Commissioner, who held an inquiry for the Commission, held that the relevant exemption applied only where there was "a clear and definite relationship between the inherent or intrinsic characteristics of the employment and the disability in question". At first instance in the Federal Court of Australia, the judge reviewing this decision declined to disturb it for error or law. However, the Full Court of the Federal Court of Australia set the decision aside and ordered a rehearing. It held that the Inquiry Commissioner had misdirected himself in adopting a construction of the exception under the Act which was too narrow and restrictive.

On further appeal by special leave to the High Court of Australia, the Court, by majority, upheld the Full Court decision. It directed that the matter be returned to the Human Rights Commission for redetermination without adopting the "narrow and restrictive construction" which the majority felt had originally been taken. Hon. Justice Michael Kirby AC CMG dissented from this opinion, concluding that there was no error of law in the approach of the Inquiry Commissioner. It was Justice Michael Kirby`s opinion that the Act that was being applied should be given a beneficial construction to secure its objectives, namely the elimination of decisions against people with disabilities on the basis of attributes ascribed to their disabilities by stereotyping. Justice Michael Kirby suggested that the imposition of a universal "policy" requiring the dismissal of all recruits in a large employment area within the federal government defied the particularity

required of employers in decisions affecting employees necessitated by the Act. This view did not prevail.

This case illustrates the way in which HIV/AIDS is no longer a remote, exotic far-away problem for judges. It is becoming a regular visitor to the courts whether in Uganda, Australia or elsewhere. Judges must be alert to its legal dimensions.

By definition, judges and lawyers are leaders of their communities. They are invariably educated above the average. They ordinarily enjoy a comparatively privileged lifestyle. Typically, they are respected because of their offices. Their special positions in society impose upon them a responsibility of leadership. Nowhere is that responsibility tested more than when a completely new and unexpected problem presents itself to society. All the lawyers' instincts for legality, fairness and reasonableness must then be summoned up, to help lead society towards an informed, intelligent and just solution to the problem. It is dangerous to generalise about our profession. In our region of the world several different legal systems may be found. In each of them, the role of the lawyer will be different.

Typically, in common law countries which personally derive their legal systems largely from England, the judge enjoys a specially important place in the exposition, development and application of the law. This gives lawyers a creative role. The creative role in developing the common law gives the lawyers of our tradition opportunities and responsibilities of law-making, which are probably greater than in most countries of the civil law tradition. But even within common law countries, the opportunities of legal development will differ at different levels of the hierarchy. Thus, a judge of the final appellate court will have an enormously important role in applying the Constitution, in expounding basic human rights, in sometimes striking down legislation as unconstitutional, and in keeping the other branches of government in check. A judicial officer at the other end of the spectrum, a magistrate, will have much less opportunity to develop and expound new legal principles. He or she will generally be bound simply to apply statute law or common law as elaborated by the higher courts. Yet a magistrate will

see many more citizens than higher court judges do. Typically, the magistrate's court processes about 90% are criminal and small debt proceedings. This is where most people and most lawyers see the judiciary. It is a mistake to conceive of the role of our legal system as limited to judges of the highest courts. In the face of HIV/AIDS, lawyers everywhere must give a measure of leadership. The epidemic presents many problems of a legal character; but still more problems of prejudice, ignorance and discriminatory attitudes. This is why discrimination against PLHIV, or thought to be in that position, is sometimes described as the "second epidemic".

1.2.2 Consciousness

The first responsibility of the legal profession is consciousness about HIV/AIDS, and about the relevant legal principles which affect the performance of their professional tasks.

At the outset of this epidemic, the first rule in HIV/AIDS law and policy is to base all action and responses upon sound data. That data will require those involved in relevant decisions and the exercise of governmental power (including in the courts) to know what they are dealing with, and what they are talking about.

This is why it is important that all lawyers today, in every country, should have more than a layman's understanding of HIV/AIDS. The epidemic has affected millions of people. It thus has enormous implications for the running of courts, the decision-making in cases, relationships with colleagues, and the legal profession's role in the community.

In Australia for example, the Judicial Commission of New South Wales in 1992 published an HIV Outline - Source Material for Judicial Officers in New South Wales.[9] It starts with basic facts about AIDS and HIV infection, with rudimentary information on what AIDS is; when it first appeared; how HIV is transmitted; how many people in

[9] Judicial Commission of New South Wales, Sydney, 1992.

Australia have been affected; which groups of people have been particularly infected; what the life expectancy of a person with HIV or AIDS is; how it is diagnosed; what are its symptoms; whether health care workers and other professionals are at risk of HIV infection; and what risk still exists in donated blood, blood products or human tissue.

The booklet continues with basic information on public health legislation applicable to people with HIV/AIDS, and with chapters on relevant statutory and common law principles applicable to such topics as liability for HIV transmission; application of antidiscrimination laws; the rules on confidentiality; the relevance of HIV/AIDS to sentencing; and the impact of HIV/AIDS on family law.

Doubtless, with the passage of time, some of the data concerning the epidemic has been overtaken. Certainly, much of the treatment of particular legal issues would now have to be elaborated by reference to more recent developments. An international attempt to do this is provided by the UNAIDS publication, Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV (March 2006). This publication collects cases from many courts, mostly, but not wholly in the common law world. The cases concern: HIV-related discrimination; Access to HIV-related treatment; and HIV prevention and care in prisons It shows how many issues are now coming before courts, worldwide.

However, the beginning of wisdom is knowledge of the features of the epidemic already mentioned herein. Judicial officers, by their privileged position, and responsibilities to make decisions relevant to the lives of people with HIV/AIDS, owe it to their communities to inform themselves about the basic facts. They should not rely solely upon the general media, for it is often guilty of misinformation and extravagant reporting on this topic. It must be assisted by informed and unbiased help from a skilled legal profession. That is why the first step in the role of the legal profession in this area is consciousness about HIV/AIDS. That consciousness should extend globally, but should

be supplemented by a detailed knowledge of the best data available on the spread of the epidemic in the judge's own jurisdiction, as well as the most relevant statutory and common law principles, that a judge, suddenly facing in court or elsewhere a problem involving HIV/AIDS, will need to be aware of. It is the responsibility of the Executive Government in every jurisdiction to provide to judicial officers the basic information contained in the HIV outline mentioned above. It is the function of professional bodies to supply information to practicing lawyers. If this is not done, conscientious legal professionals must inform themselves.

1.2.3 Courts

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

Around various medical conditions there can gather elements of prejudice and stigma. It is found in community attitudes to various venereal conditions, inherited disabilities, and even to cancer. But HIV/AIDS in the courtroom is specially sensitive. In part, this is because of its still significant association with death. In part, it is also because the modes of transmission are frequently by sexual intercourse and injecting drug use. The association of HIV/AIDS with drugs, sex, and in particular, groups which have often been (and sometimes still are) the subject of stigma and even criminalisation (homosexuals, drug-addicted persons, sex workers etc) makes community responses to the epidemic highly sensitive, and sometimes over-reactive. Lawyers are members of their communities. They cannot be entirely free from the attitudes, fears and prejudices of the societies they live in. But it behoves judges and legal practitioners 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.

When AIDS first came along, there was often gross overreaction to its presence in the courtroom. In some countries, prisoners, actually infected, or suspected of being infected, with HIV/AIDS, were brought into court by guards wearing space suit protection, completely unnecessary and highly prejudicial to the fair trial rights of the accused. This happened in Australia in the early 1980s. There is no need for such special courtroom procedures, as the wearing of surgical masks or gowns or protective gloves, still less for the exclusion of the defendant from the courtroom. In the United States it has been suggested that such courtroom precautions, without any scientific basis, would be a violation of constitutional rights to due process of law.[10]

Requests by court staff for the testing of prisoners, or for the provision of special gloves and uniforms to sheriff and bailiff officers, should ordinarily be rejected. It is a duty of the presiding judicial officer to make sure that his or her court staff are protected from risks of infection, or exposure to such risks. But it is now well known that casual contact will not transmit HIV. The judiciary should not permit court process to be distorted, invariably to the disadvantage of the litigant, by generally unnecessary isolation, or disadvantageous treatment[11]:

> We are employers, of sorts, with large personal and official staffs, whose safety and security are our utmost concern. Judges are independent and are paid a salary which is not based on whether they win or lose. ... Our job is to do the right and just thing, without fear or favour. Ensuring the right to an attorney, the right to have one's case heard the fundamental rights of fairness and due processes are the cornerstones of the halls of justice.

[10] Wiggins v Maryland 315 Md 232; 554 A 2d 356 (1989) (Maryland CA). See M C Morgan, "The Problems of Testing for HIV in the Criminal Courts", 29 Judges' Journal, No. 2, 25 (1990).
[11] R T Andrias, "Shed Your Robes - Three Reasons for Aggressive Judicial Leadership in Coping with the HIV Epidemic", 29 Judges Journal, No. 2, 7, (1990).

Due to the nature of the sensitive questions that can arise in cases involving HIV/AIDS, it will often be the duty of the judge, assisted by legal practitioners, to afford a measure of confidentiality to the persons involved. This is because it is usually permissible and proper to report court proceedings which are open. It would be wrong to close every court proceeding which involved some issue concerning HIV/AIDS, or concerned a person living with the virus. The principle of open justice is fundamental to the role of the judiciary. In societies like Fiji, Australia, New Zealand and Uganda perhaps, on the other hand, the need to protect confidentiality and personal privacy can be secured by judicial orders in appropriate cases, forbidding the naming of those who are infected. In such cases, the courts try to balance the public interest in protecting confidential information against the public interest which favours disclosure.[12]

In ***X v Y***[13], 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 the information from confidential hospital records. The newspaper argued that there was an overriding public interest in disclosing the information, because the public was entitled to know that the doctors had HIV. However, 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 people with HIV must not be deterred from seeking appropriate testing and treatment. This decision is important because the lawyers recognise that confidentiality in relation to a person's HIV status could be important, not only to protect the interests of the infected person, but also for public health strategies generally against the spread of the epidemic.

[12] See Woodward v Hutchins [1977] 1 WLR 760 (CA); W v Edgell [1990] 1 All ER 835.
[13] X v Y [1988] 2 All ER 648. See also R Sarre, "HIV/AIDS and Suppression Orders", (1995) 17 (3) Bulletin of Law Society of South Australia, 11.

In Australia, there have been similar orders by the superior courts protecting the confidentiality of people infected with HIV.[14] Sometimes these have proved controversial. Occasionally, the media attack the confidentiality orders of the judge. But the judiciary will know, and give value to, the competing interests at stake. So it was in the Bombay High Court where an interim order was issued suppressing the information of the identity of a person infected with HIV. Both were allowed to sue by pseudonyms (Mr. M X and Ms. Z Y). The applicants challenged a public corporation's dismissal of Mr. M X because he had tested HIV positive. He had been exposed to HIV. The corporation's policy permitted discrimination on that basis. Mr. M X had been a casual labourer for a public sector corporation. He was cleared for promotion, subject to a medical. The medical examination declared him to be fit. He was then required to undergo a further examination for permanency. He was again found to be physically fit. But the HIV test revealed that he was sero-positive. The corporation sought to justify its discriminatory policy, although it is hard to see how, before any onset of disability, such a policy could be justified especially in the case of a labourer. Mr. M X challenged the policy as contrary to law and a violation of the non-discriminatory clauses (ss 14, 15 and 16 of the Constitution of India). The Bombay High Court showed considerable sensitivity in its name suppression order. Some people, denied confidentiality, would simply abandon their rights at law or never come to court.[15] Legal representatives must be sensitive to, and protective of, values that ensure equality before the law.

In the High Court of Australia, a case was filed which concerned an allegation of direct discrimination in the provision of local government planning permission concerning PLHIV: ***IW v The City of Perth***.[16] The City Council of Perth in Western Australia, by 13 votes to 12, rejected a proposal to establish a drop-in centre for people with HIV. The applicant and his colleagues complained to the Commissioner for Equal Opportunity on

[14] See Loker v St Vincent's Hospital (Darlinghurst) & Anor, unreported, Supreme Court of NSW, Australia, 11 October 1985 (Allen, M). See also Australian Red Cross Society v B C, Supreme Court of Victoria (Appellate Division), unreported, 7 March 1991. Noted in Judicial Commission, above n. 1, 29.
[15] A Grover, "Names Suppressed in Indian Discrimination Case", (1995) 6 HIV/AIDS Legal Link, No. 3, 26.
[16] (1997) 191 CLR 1.

the ground that the City Council had discriminated unlawfully contrary to the Equal Opportunity Act, 1984 (WA). The Tribunal established by that Act found that five of the majority votes had been impermissibly based on "the AIDS factor". By majority, the High Court of Australia dismissed the claim that the Council had discriminated contrary to the Act.[17] The majority of the Court held that the Council was not "providing a service" within the meaning of the Act. It also held by majority that the applicant was not an "aggrieved person" within the Act as the actual applicant for town planning approval was an association, a distinct legal person, not the members of it, including the appellant.

The case shows once again the technical hurdles which must often be overcome if claimants under discriminative legislation are to result in redress. The decision of the Full Court of the Supreme Court of Western Australia denying redress for the vote found to have been affected by discriminatory considerations was affirmed.[18]

A factor in such cases is often the need for urgency in the judicial decision. Particularly at an advanced stage of AIDS, unless lawyers become pro-active, and take control of litigation involving people suffering from HIV/AIDS, the litigant may be improperly denied a right or remedy, and such loss may prove irreparable[19]:

> If attorneys will not vigorously represent or refuse to represent HIV defendants, or if a defendant is denied access to the courtroom, time is critical. Similarly if an AIDS litigant does not receive a fair trial because of bias or hostility, given the pace of the appellate process, the probability is that he or she won't be around for a retrial. Finally, if a defendant is sentenced to prison merely because of his or her HIV condition, the person usually receives sub-standard medical care and other deprivations before an appeals court can rectify the situation.

[17] Brennan CJ, Dawson, Gaudron, McHugh and Gummow JJ; Toohey and Kirby JJ dissenting.
[18] Perth City v IW (1996) 90 LGERA 178.
[19] Andrias, above, n. 4, 7.

It is the duty of a judge, as the exemplar of due process, to insist upon fairness in the court, and to prevent discrimination from showing its face.

An article in the Victorian Law Institute Journal described the kind of problem that can arise in the context of a litigant's sexual orientation. The same problem might arise in the context of HIV/AIDS status:[20]

> Often it is simply a matter of homosexuality being unnecessarily dragged into a case. The criminal lawyer, Jeff Tobin, whose gay clientele is ten percent of his practice and growing, says that a lot of his work is in making sure the courts don't dwell on who his clients prefer to spend their lives with. Sexuality is rarely an issue in criminal matters and it should certainly not impinge on a person's equality in the eyes of the law. Having a client's gay status thrown about in court doesn't always help get a fair judgment.

1.2.4 Cases

The cases involving aspects of HIV/AIDS are now legion. Whole texts are written about AIDS and the law.[21] From something which began rather modestly,[22] this is now a very large enterprise. In many countries, including Uganda, special legal series are now published on aspects of HIV/AIDS and the law.

In one of the Australian Journals on HIV, it carries a report by Sally Cameron on a "Groundbreaking New Zealand Case on Disclosure"[23]. The article explains the decision of Judge Susan Thomas in the New Zealand District Court in Wellington in the trial of Justin Dalley under ss 145 and 156 of the Crimes Act 1961 (NZ). Mr. Dalley was HIV positive. His victim did not contract HIV. However, he was prosecuted for having anal and vaginal intercourse without warning his partner about his HIV status. The Judge

[20] K Derkley, "The Hard Earned Pink Dollar", Law Institute of Victoria Journal, August 1995, 742, 743

[21] See e.g. J Godwin & Ors, Australian HIV/AIDS Legal Guide, 2 ed., the Federation Press, Sydney, (1993).

[22] 15 See e.g. M D Kirby, "AIDS Legislation - Turning Up the Heat?" (1985) 60 ALJ 324. 16 (2005) 5 HIV Australia (No 1), 34. 20.

[23] (2005) 5 HIV Australia (No 1), 34.

dismissed the prosecution. She found that there was a moral but not a legal duty to inform a sexual partner. In effect, she held that all persons in today's society, having sexual intercourse with strangers, must be aware of the risks of HIV and of the need for self-protection.

A number of examples may, however, illustrate the way in which informed lawyers can render a service by the sensitive application of the law to novel problems presenting as a result of HIV infection. In common law countries, bail before trial is quite normal. It is not always a feature of most civil law traditions. In the United States, it has sometimes been argued that the defendant's HIV status is relevant to whether or not he or she should be released pending trial. This is because of the shortened lifespan of most people found HIV positive.

Typically, constitutional and statutory standards refer to the central question of whether the defendant will return to court to face the charges. Few, if any, refer specifically to HIV status. According to one analysis, it is not so much the category in which the person belongs, as the behaviour in which he or she engages, which is relevant. The stereotyping views about dangers to the public should be expelled by the judge, who should confine his or her decision to the actual known conduct of the applicant. An appellate court in New York held that it was an abuse of discretion to impose a condition of a negative HIV/AIDS test prior to release on bail, in so far as this was not mentioned in the statutes, and could involve an injustice to the particular applicant.[24]

Increasingly, lawyers are being faced by applications of the general criminal law, with special HIV/AIDS statutes designed to penalise persons who know that they are infected, but proceed to have unprotected sex and spread the virus. A Kenyan visitor was convicted in New Zealand under the general law where his partner was infected.[25] But in

[24] See People v McGreevy 514 NYS 2d 622 (1987) (NYCA).
[25] Morgan, above n. 3, 25. See The Queen v Mwai [1995] 3 NZLR 149 (CA).

Victoria, Australia, a judge directed a jury to acquit a person accused, following consensual, unprotected intercourse, because he considered the risks of infection unreasonably slight.[26]

In the criminal area, the main questions which have come before judges involve issues such as sentencing persons who are known to be infected with HIV, and ordering parole release of such persons. In Australia, the principle that has been applied was stated by ***King CJ*** in the ***South Australian Court of Criminal Appeal in R v Smith***[27]:

> The state of health of an offender is always relevant to the consideration of the appropriate sentence for the offender. The courts, however, must be cautious as to the influence which they allow this factor to have upon the sentencing process. Ill health cannot be allowed to become a licence to commit crime, nor can offenders generally expect to escape punishment because of the condition of their health. It is the responsibility of the correctional services authorities to provide appropriate care and treatment for sick prisoners. Generally speaking, ill health will be a factor tending to mitigate punishment only where it happens that imprisonment will be a greater burden on the offender by reason of his state of health, or where there is a serious risk of imprisonment having a gravely adverse effect on the offender's health.

In ***R v McDonald***[28], the accused had been aware at the time of his original sentencing that he had HIV, but did not disclose the fact to the court. Evidence as to his HIV status was brought out in an appeal. There was also evidence that the appellant, by reason of his HIV infection, had been transferred to a special wing of the prison, where conditions were more restricted than in any other part of the prison system. The New South Wales Court of Criminal Appeal said:

[26] Two charges were brought under the Crimes (HIV) Act of the State of Victoria. The accused was acquitted on the direction of Teague J of the Supreme Court of Victoria.
[27] (1987) 44 SASR 587; 27 A Crim R 315 (CCA SA).
[28] (1988) 38 A Crim R 470 (CCA NSW).

> The very nature of the confinement in the assessment unit imposes hardships, including the lack of opportunity that would exist in other sections of the prison for the appellant to determine who his associates would be. He is necessarily confined with other AIDS sufferers ... While so confined, the appellant would have reduced opportunities for courses of education ... A further consequence of confinement ... is the loss of opportunity for remissions.

The Queensland Supreme Court ordered that an HIV positive prisoner should have his application for parole reconsidered. It overruled the Parole Board's original determination that special circumstances had not been shown by reason of HIV status[29].

Other areas where judges are called upon to make sensitive decisions include in family law[30]; in immigration decisions on permanent residence or refugee status[31]; in adoption[32]; in disturbance of a will which fails to make provision for a life partner and is contested by the family[33]; in discrimination cases involving employment, including in the military[34]; in superannuation rights[35]; in insurance benefits[36]; and in industrial cases concerned with family leave entitlements[37]. All of these and doubtless many other, cases call forth understanding by the lawyers involved. In such cases especially, judges need to ground all decisions upon sound data resting on the evidence not on prejudice, stereotypes, myths or pre-judgment.

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[29] Decision of Fryberg J in the Supreme Court of Queensland, noted (1985) 6 HIV/AIDS Legal Link, No. 2, 13.
[30] K B Glen, "Parents With AIDS, Children with AIDS", 29 Judges Journal No 2 14 at 17 (1990). See also Judicial Commission, above, n. 1, 33.
[31] Decision of Refugee Review Tribunal (Aust.) N 94/04178, noted (1994) 5 HIV/AIDS Legal Link, No. 4, 3. See also M Alexander, "HIV and Permanent Residence" (1995) 6 HIV/AIDS Legal Link, No. 2, 8.
[32] Glen, above, n.23, 18.
[33] Derkley, above, n. 13, 743.
[34] Canadian HIV/AIDS Policy and Law Newsletter, April 1995, 14.
[35] Derkley, above, n. 12, 742.
[36] A Anderson, "Landmark Discrimination Case - Gay Family Wins Right to Family Health Insurance", (1995) 6 HIV/AIDS Legal Link, No. 3, 18.
[37] M Alexander, "Success in the Family Leave Case", (1994) 5 HIV/AIDS Legal Link, No. 4, 12; ibid, "Family Leave Test Case" (1995) 6 HIV/AIDS Legal Link, No. 1, 3. The case referred to is a decision of the Australian Industrial Relations Commission in the Family Leave Test case. The principle has been accepted in State Industrial Commissions. See note (1995) 6 HIV/AIDS Legal Link, No. 2, 4 (NSW Industrial Relations Commission).

Many cases are now coming before the courts concerning claims for negligence. The cases may involve an accusation that a medical practitioner did not test the patient for his or her HIV status; did not inform the patient's partner of a positive HIV test of a patient, so as to warn him or her of the risk of infection[38]; and the failure to advise against the risks of exposure to accidental infection. The cases are virtually infinite in their variety. Whilst it is unlikely that some of the more esoteric cases will come before courts in many countries, claims in negligence provide the vehicle for assertions that medical practitioners, other health workers, public authorities, and the like, have not acted with due care. Where a person has become HIV infected, it is natural that he or she should look to others who are felt even partly to blame to provide financial protection during life and protection for dependants thereafter.

Some of the most difficult decisions arise in the area of family law. Cases have been decided whereby access to a child was denied to a father found to be HIV-positive[39]. The basis of the decision, however, was not any real risk to the child, but that it was "not unreasonable" for the child's mother to have concerns without the risk of infection from fatherly social contact. This was an irrational fear, and the judge should not have given effect to it. A better approach was suggested in another case, where the judge held that it was a more appropriate response to the risk of stigmatisation to bring the child up in a way that assists him or her in coping with it, and not to shield the child from reality altogether[40].

The call to the proper function of lawyers in all of the cases which are mentioned herein, and doubtless many others, is to rest the decision upon sound evidence. In so far as the judge may take judicial notice, he or she must inform the decision about the real nature of HIV/AIDS, so that prejudice is replaced by knowledge; and stereotyping by the judicial commitment to equal justice under the law.

[38] See reference (1995) 6 HIV/AIDS Legal Link, No. 3, 5.
[39] In the marriage of B & C (1989) FLC 92, 043 (Family Ct of Aust).
[40] Jarmen v Lloyd (1982) 8 Fam LR 878 (Family Ct of Aust).

1.2.5 Colleagues

It is inevitable that as HIV/AIDS penetrates more societies and every branch of society, the legal profession and judiciary will become aware of colleagues who are living with HIV/AIDS, either in the judiciary, or in the legal profession. Because the judiciary is still generally made up, in most countries, of middle aged to elderly males, the modes of transmission of the virus may be less likely to have consequences affecting judges, than other groups in society. But this is not necessarily so. These suppositions sometimes collapse in the face of reality. In South Africa, Justice Edwin Cameron, a Judge of the Supreme Court of Appeal, is living with HIV. He is open and forthright about it. He speaks up for the millions who are silent and ashamed. His book, Witness to AIDS is a brilliant description for judges and lawyers of what HIV/AIDS is really like. This is a textbook commendable for reading to have some understanding about this subject[41].

But it is important that lawyers should reach out to their colleagues facing this predicament. They should ensure that they are received without discrimination, but with support, where that is appropriate, and accommodation where it is necessary. Bar Associations, in several countries, have provided special assistance to members of the legal profession who cannot continue in their professional work because of HIV/AIDS. Judges, as leaders of the profession, must not forget their duties of professional comradeship and support where colleagues are affected. This means not just other judges, but legal practitioners, court staff, police and bailiffs, their families and friends.

1.2.6 Community

Finally, lawyers are members of their communities. They must give a lead to community discussion of HIV/AIDS, its causes, and the behavioural modifications that are necessary to arrest the spread of the epidemic.

[41] See review of Witness to AIDS in (2006) 79 ALJ 795

We cannot be interested in everything. But many of the features of HIV/AIDS are relevant to the professional duties of judges and other lawyers. Typically, laws stigmatise, and sometimes criminalise conduct which is relevant, e.g. the sexual activities outside marriage; prostitution; homosexual activities; and injecting drug use. It is therefore the duty of judicial officers to reflect upon the effectiveness of current laws, in so far as they are relevant to the epidemic. Where law has become part of the problem, legal practitioners (being better informed and usually more powerful) have a responsibility to add their voices to the discussion of law reform. In default of a cure for, or vaccine against, HIV/AIDS, the only readily-available weapon in society's armoury is behaviour modification. It is the lesson which lawyers can tell society that strong criminal sanctions are only of limited use in securing and reinforcing behaviour modification in such basic activities as sex and drug use.

This is the reason, in many countries; the advent of HIV/AIDS has led to a rare, and long delayed, re-examination of rules of law long established. Although the law in most countries no longer punishes (as once it did) adultery, as a criminal offence, legal vestiges from the same time intrude upon other consensual adult conduct of citizens. Because judges are the instruments of enforcing such laws, and because lawyers play a key role in the process, their moral sense is bound to be enlivened by what they are required by the law to do. This gives them both the motivation and the legitimacy to voice their opinions to the suggestions of reform.

It is surely no coincidence that, since the advent of HIV/AIDS, very significant pressure have built up, particularly in developed countries, for re-examination of laws concerning sex and drug use. The AIDS paradox teaches that criminalisation and stigmatisation make it more difficult to reach the minds of those affected. The first step on the path to effective behaviour modification will often be decriminalisation, and the provision of educational messages. It is in this sense that informed judges can contribute to AIDS prevention by participating in discussion of legal reform. The same message is relevant to

the re-evaluation of laws on homosexual conduct and drug use.[42] Although HIV/AIDS is a human virus, and not limited to any sub-group, its early unequal impact upon homosexuals in Western countries has directed a lot of attention to the alienation of this group of the community, and the need to redress the unequal laws and policies which drive its members into a dangerous ghetto where HIV/AIDS dwells[43]. A decision of the Constitutional Court of South Africa unanimously ruled that the colonial relics in South African statute law were unconstitutional when measured against the constitution of the new South Africa. A similar decision was handed down by the Supreme Court of the United States, when it struck down the Texas anti-sodomy law as contrary to the requirements of the Constitution of the United States[44]. It may not be wholly coincidental that there is a challenge before the Delhi High Court concerning the constitutionality of s 377 of the Indian Penal Code punishing homosexual crimes.

In a number of parts of Australia, the advent of the AIDS epidemic prompted a debate on euthanasia. In two jurisdictions (the Australian Capital Territory and the Northern Territory)[45] the criminal law was modified to permit assistance to aid peaceful death under given conditions. A significant part of the momentum towards law reform in this area has been the predicament of young people dying prematurely by reason of HIV/AIDS. In this connection, the judicial function remains: of protecting the vulnerable and defending their human dignity against well-meaning, or avaricious, family and friends.

[42] See e.g., the comments of Nicholson CJ, Family Court of Australia (1994) 5 HIV/AIDS Legal Link, No. 4, 13 about same sex relationships.
[43] See e.g., the comments of Nicholson CJ, Family Court of Australia (1994) 5 HIV/AIDS Legal Link, No. 4, 13 about same sex relationships.
[44] Lawrence v Texas 539 US 558, 586 (2003).
[45] See B Delahunty, "ACT Approved Passive Euthanasia", (1994) 5 HIV/AIDS Legal Link, No. 4, 10 (Medical Treatment Act 1994 ACT); P Leach and S McLean, "Euthanasia Law Passed in the Northern Territory", (1995) 6 HIV/AIDS Legal Link, No. 2, 1. The Northern Territory law was later overridden by an Act of the Australian Federal Parliament.

1.3 Experience from the Bar and Bench in Uganda

Litigation and Adjudication of HIV/AIDS cases in Uganda has majorly been in the area of criminal law. This is partly because of the country`s efforts at criminalizing what has been disguised as the deliberate transmission of HIV/AIDS. Persons that have so far been tried in both lower courts (magistrate courts) and courts of record (specifically High Court of Uganda) have been charged under section 171 of the Penal Code Act cap. 120, with the offence of Negligent act likely to spread an infection of disease. Although we have the HIV and AIDS Prevention and Control Act, 2014, prosecution under this law hasn`t been realised. This is partly due to perhaps the discriminative character of the law and challenges associated in proving most of the provisions under the Act. In some of the decisions in this are in Uganda, there has been judicial activism and developing jurisprudence in the arena of HIV/AIDS litigation and adjudication.

In ***Kemigisha Adrine vs Uganda***[46]; ***Hon. Mr. J. Musa Ssekaana*** considered the severity of the Applicant`s HIV status in addition to other conditions to grant the applicant bail pending her trial.

In ***Uganda vs No. 19515 Sgt. Driver Nkojo Solomon***[47]; ***Hon. Mr. J. Wilson Masalu Musene*** found the accused guilty with the offence of murder but considered his HIV/AIDS positive status as a mitigating factor and did not sentence him to a maximum punishment rather imprisonment for 18 years.

In ***Rosemary Namubiru vs Uganda***[48]; ***Hon. Mr. J. Rugadya Atwoki*** upheld the conviction by the lower court that the appellant was negligent since she knew her HIV positive status and the consequence of her actions but reduced the sentence of 3 years`

[46] HCCA No. 97 of 2019, High Court of Uganda at Mbarara delivered on 24th January 2020.
[47] HCT-00-CR-SC-0036-2016, High Court of Uganda at Kampala (then Criminal Division)) delivered on 16th January 2018.
[48] HCT-00-CR-CN-0050-2014, High Court of Uganda at Kampala (Criminal Division) delivered on

imprisonment five months which is the period she had so far served in prison. It is however important to note that the court observed that;

a) *The appellant was an elderly person aged 64 years, thus a mother and grandmother to the toddler;*
b) *That she was **"sickly"** and **"HIV positive"**.*
c) *The toddler remained HIV-free.*
d) *The appellant had no intention of harming the toddler.*
e) *The court also noted that the sentence was manifestly excessive. It argued that **"medical practitioners need some degree of protection"**. It noted that 3 years was an excessive sentence and accordingly reduced it to five months.*

In ***Komuhangi Silvia vs Uganda***[49]; ***Hon. Mr. J. Stephen Mubiru*** made quite a number of important observations concerning HIV/AIDS prosecution in relation to sec. 171 of the Penal Code Act cap. 120. His Lordship observed the following;

a) *In order prosecution to succeed under this offence, it must establish that the act was committed with intent to cause the contact which causes infection of a disease.*
b) *Criminal negligence refers to a mental state of disregarding known or obvious risks to human life and safety.*
c) *Likelihood connotes a significant possibility as contrasted with a remote possibility, that a certain result may occur or that infection in such circumstance may exist. **There should be evidence led before court showing that infection in such circumstances is not merely fanciful, remote or plausible but rather that it is statically significant and almost certain**. It should be one whose occurrence is almost certain to materialize, unless preventive steps are taken.*
d) *Evidence must show the presence of "significant risk" and the circumstances must have presented a realistic possibility of transmission.*

[49] HCCA No. 0019 of 2019, High Court of Uganda at Gulu delivered on 29th August 2019.

The above decisions specifically *Komuhangi Silvia vs Uganda (supra)*, demonstrate that handling matters in the court room concerning PLHIV must be taken consciously. The evidence must be carefully scrutinized and the accused`s HIV status should not be used to disadvantage him or her in the entire trial process. This is not a call for preferential treatment of accused PLHIV but a responsibility of both the bar and bench not to stigmatise and discriminate accused persons during the trial process because of their HIV positive status.

A comparison between *Rosemary Namubiru* and *Komuhangi Silvia`s* cases presents a great concern. In the latter, the Trial Judge emphasizes once the accused`s viral load is low, then the intention of transmitting HIV is absent. In the former, the Trial Judge did not consider any scientific evidence of transmission of HIV but concentrated on the ordinary ingredients of the offence under the Penal Code Act.

This is a challenging situation because both the bar and bench need to appreciate the scientific evidence on transmission of HIV to appreciate the ingredient of intention and what amounts to a neglect act in the context of HIV/AIDS.

1.6 Recommendations for Effective Litigation and Adjudication of HIV/AIDS Cases in the Court Room

As litigators and adjudicators, we need to address a number of issues. There are a number of considerations in the court room we need to be a live at while handling HIV/AIDS cases.

1.6.1 Fighting against Stigma and Discrimination in HIV/AIDS Litigation and Adjudication

Both the bar and bench should be reminded that discrimination is unconstitutional[50]. It is only fair and proper to ensure that rights of accused persons are respected regardless of their HIV status. It is very embarrassing in the court room to see accused persons

[50] See Art. 21 of the Constitution of the Republic of Uganda, 1995

subjected to different treatment just because of their HIV status. This should strictly be condemned and never practiced. The sanctity or decency of the courtroom should be maintained[51] and there should not be any necessity of changing courtroom procedures because parties to the case are HIV+ or the case is HIV/AIDS-related, unless the parties request a change.[52] This is a common practice here in Uganda, for example, in defilement cases.[53]

1.6.2 Legal aid and Pro bono services

Bar associations like the Uganda Law Society (ULS) should explore strategic litigation of human rights violations arising from violation of the rights of PLHIV. This can be discussed in the context of legal representation of individuals, class actions strategic litigations and related supportive interventions and these services are specifically to benefit PLHIV and TB. It should be noted that different organisations stand to be represented by different lawyers or law firms being retained by the organisations, for example TASO-Uganda, UGANET, CEHURD, FIDA-U, HRFAP and other Human Rights Action Groups. ULS should liaise with Law Council to enforce the regulations on handling pro bono cases by private law firms in the country. This will help to improve access to justice by vulnerable groups of people including PLHIV in Uganda.

1.6.3 Enforcement of Human Rights of PLHIV

The Constitution has provisions on mostly economic, social and cultural rights. Chapter Four on the Bill of Rights is devoted to civil and political rights. Under the National Objectives and Directive Principles of State Policy in the Constitution, there is no specific reference to the right to health; rather it is implied under objectives on provision

[51] UNAIDS, Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law (2013).
[52] Ibid.
[53] Although the Judges tend to be rather biased, just as the law is, towards young girls who are defiled by an HIV/Aids Accused Person

of basic medical services, access to clean and safe water, food security and nutrition. Under Chapter 4, Article 21 of the Constitution provides for equality and freedom from discrimination. This includes equality before and under the law in all spheres. Other rights guaranteed under Chapter 4 include protection of the right to life (Art. 22), personal liberty (Art. 23), respect for human dignity and protection from cruel, inhuman and degrading treatment or punishment (Art. 24), protection from deprivation of property (Art. 26), right to privacy of person, home and other property (Art. 27), right to a fair hearing (Art. 28), right to education (Art. 30), and family rights (Art. 31). There should be specific provisions on the right to health.

1.6.4 Empowerment Projects

Lawyers have considered being part of regional and international networks, which may be of assistance or provide support in protecting and promoting the rights of PLHIV. Lawyers have also spearheaded legal empowerment projects majorly targeting PLHIV, affected by and at risk of HIV with the information and tools they need to defend their own rights. These legal empowerment approaches include; sensitization and awareness creation on HIV/AIDS and TB on rights targeting PLHIV, health service providers, LC Court Officials, police and the wider community. Organisations like ACCORD and LEDOWO have trained PLHIV and TB and other community members as paralegals, while others have done skills based training on issues such as the production of a patients' charter and other information, education and communication materials as well as radio programs and other media based activities which are part of empowerment.

1.6.5 Promoting Access to Justice

Even if the law is comprehensive, the breadth of the mandate of human rights mechanisms, rights can only be enjoyed when there is a realistic means of investigation and enforcement. A strong, independent legal profession is important to this process. Effective, well-resourced offices for the Public Solicitor and the Public Prosecutor are critical to the efficient functioning of the legal system and to the rule of law in general.

Strengthening the capacity of the judiciary and the legal aid system should be a high priority on national budget agendas.

1.6.6 Law and Policy Advocacy Projects

Although not directly part of service delivery, these categories of projects seek to ensure a conducive legal and policy framework for the protection of human rights of PLHIV. Areas of focus identified include the Employment Act and Policy, national legislation on HIV/AIDS, the Sexual Offences Bill, Domestic Relations Bill, the Bill on Trafficking in Persons, and ratification of the Optional Protocol to the African Charter on Women's Rights in Africa. Key actors include Centre for Domestic Violence Prevention (CEDOVIP), Uganda Women's Network (UWONET), Uganda Women's Parliamentary Association (UWOPA), Uganda Network on Law, Ethics and HIV/AIDS (UGANET), Platform for Labour Action, and LAW-Uganda. The Parliamentary Committee on HIV/AIDS is also a critical player in this category.[54] In 2006, LAW-Uganda developed a training manual on legal support to survivors of domestic violence and established a pilot shelter for battered women, which ran for a year. The shelter provided a space for battered women who would be linked to the police, a medical clinic and a counsellor. Lessons taken from the pilot were valuable and could be utilised in establishing shelters for battered women. The National Community of Women Living with HIV/AIDS (NACWOLA) Memory Project and activities of the School of Public health can also be categorised among support mechanisms. The Memory Project of NACWOLA involves the documentation of the family tree and life histories by PLHIV that they then leave behind for their children to read. The School of Public Health undertakes has developed a course unit on Law, Ethics and HIV that would enhance the capacity of actors especially health practitioners.[55]

[54] HIV/AIDS, Human Rights & Legal Services in Uganda Lori Michau & Dipak Naker: Mobilising Communities to Prevent Domestic Violence. A Resource Guide for Organisations in East and Southern Africa, 2003

[55]H IV/AIDS, Human Rights & Legal Services in Uganda Joint Survey Report on Local Council Courts and Legal Aid Service Providers, 2006

1.6.7 Bar-Bench Forums

Different Bar-Bench forums exist in Uganda and these are primarily interactive and consultative in nature as they involve practical experiences from both sides. From these interactions, good and progressive deliberations may result into purposive recommendations that may inform policy formulation and enhancing court room adjudication of cases concerning HIV/AIDS and TB.

1.6.8 Judicial Activism

It has been argued that Legislation is the primary function of Parliament in Uganda. The critical question however is whether Judges make law. Theoretically, one can argue that Judges do not make law but practically Judges make law. Legal realism believes much in decisions of courts to be law. Indeed courts have interpreted several Acts of Parliament and have made decisions either nullifying them or upholding them.

1.6.9 Reference to a wide range of Legislation while adjudicating HIV/AIDS Cases

There`s already in place the Human Rights (Enforcement) Act, 2019. This Act has emphasized respect, protection and promotion of Human Rights. It has made it unlawful to violate rights of a suspect or an accused at any stage specifically before, during or after the trial process. The enforcers of the law are thus being tasked to be very careful as they handle cases and matters concerning rights of persons including PLHIV. Members of the Bar and the Bench are thus tasked to be careful and avoid stigmatisation and discrimination of PLHIV while handling matters involving them.

1.6.10 Use of Pseudonyms

Whether litigants are suing or being sued, one of the first sacrifices they make is their privacy regarding the matters in dispute. The resulting public revelations can sometimes lead to embarrassment, or worse, which has been described as “an unavoidable consequence of an open justice system.” Today`s increased recognition of the importance of privacy interests may seem at odds with the limited recognition they receive in civil

litigation. Litigants often ask, "Can I shield my identity from the public?" Usually the answer to this question is no. The importance of an open court system is normally the overarching public policy imperative. The open court principle has been described as "the very soul of justice."[56] In order to gradually fight against stigma and discrimination in HIV/AIDS adjudication, we need to revisit some of our legislations on procedures and identity.

1.7 Conclusions

The legal profession has an important role to play in the response to the HIV/AIDS epidemic. It should be aware of the causes of HIV/AIDS, and familiar with the body of law that is growing up as a consequence of its unexpected advent. It should ensure justice and equality in every courtroom, and be alert to the differential way general laws fall upon those who are living with HIV/AIDS, their families and dependants. Because judges sometimes have choices in deciding cases, where their decisions are relevant to HIV/AIDS, they should rest them upon sound data. They should be helped to do so by an informed and enlightened legal profession. They should expel from their minds the stereotypes, the myths and the prejudice that have surrounded HIV/AIDS in its short history. This does not, of course, mean automatically deciding every case in favour of the person living with HIV/AIDS. The law must be observed and lawyers must remain professional and neutral in the performance of their tasks. But it does mean that the judges, in particular, should be generally aware of the features of HIV/AIDS and approach legal and factional problems without the blinkers of prejudice or ignorance. All lawyers should be particularly alert to colleagues in the court process who suffer because of the epidemic. To the best of their ability, they should reach out with help and understanding. And as leaders of the community, they should contribute to the discussion of law reform which the HIV/AIDS epidemic demonstrates to be needed. HIV/AIDS is, after all, another verus - a human illness, an enemy to the entire human family.

[56] Becoming Jane or John Doe: Can Civil Litigants Use a Pseudonym to Protect their Privacy? Canadian Privacy Law Review. Volume 7. Number 7. pg. 81.

We need to unite in responding to it rationally, and justly, and according to law. We are only at the beginning of this unpredicted challenge to our species. Countries worldwide with their different cultures need to learn about the paradox and observe its lessons. Harsh laws will not achieve these objectives, as any lawyers can tell. Instead, sensible policies, redress for discrimination and suitable law reform as well as unyielding honesty and provision of access to new anti-retroviral drugs will be the chief weapons against the spread of HIV/AIDS and against its burden on those already infected. Lawyers, as leaders and teachers, must play their part in responding to AIDS[57].

[57] See generally D C Jayasuriya (ed.) HIV Law and Law Reform - Asia and the Pacific, UNDP, New Delhi, 1995.