IN NAMIBIA DO INSURANCE COMPANIES DISCRIMINATE AGAINST PEOPLE LIVING WITH HIV/AIDS (PLWHA) IN TERMS OF EXCLUSION CLAUSES: HUMAN RIGHTS- BASE PERSPECTIVE

Submitted in partial fulfilment of the requirements for the award of the degree for the Bachelor of Law (LL B)

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3 NOVEMBER 2008

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DECLARATION

I, Johannes Anthon Frans, declare that the work presented in this dissertation is original. It has never been presented to any other University or institution. Where other people’s works have been used, acknowledgement and references have been provided, and in some cases, quotations made. It is in this regard that I declare this work as originally mine in the Namibian context. Thus, this work is presented in partial fulfilment of the requirements for the award of the Professional LL B at the University of Namibia.
ACKNOWLEDGEMENTS

I would not have achieved the completion of this dissertation without assistance of various persons. I, therefore, would like to express my sincere gratitude to all people those gave a helped hand whether physically or mentally. I am very indebted to my supervisor, Prof Nick Horn for her professional guidance and valuable remarks. I would like to express my sincere gratitude to Mr. Tebello, T. and Ms. Tjatjara for their constructive comments. My sincere appreciation goes to my wife and my children for their moral support. To all authors’ work, I made references and quotation in my work for the completion of my dissertation. I am especially indebted to various writers who dealt with the issue HIV/AIDS and Human Rights.
DEDICATION

I dedicated this work to all women and men especially those living or affected by the HIV/AIDS pandemic in Namibia and elsewhere in Africa. They deserve protection and companion. To all those people who are been excluded from taking up life cover in insurance industry.
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<tr>
<td>ACHPR</td>
<td>African Commission on Human and Peoples’ Rights</td>
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<td>ASSA</td>
<td>Actuarial Society of South African</td>
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<td>ARVs</td>
<td>Anti-Retro-Virals</td>
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<tr>
<td>HIV/AIDS</td>
<td>Human Immuno-Deficiency Virus/ Acquired Immuno-Deficiency Syndrome</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>LOA</td>
<td>Life Offices’ Association</td>
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<td>OHCHR</td>
<td>Office of the High Commissioner for Human Rights</td>
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<td>PLWHA</td>
<td>People living with HIV/AIDS</td>
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<td>SADC</td>
<td>Southern Africa Development Community</td>
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<td>SAJHR</td>
<td>South African Journal for Human Right</td>
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<td>ICESCR</td>
<td>The International Covenant on Economic, Social and Cultural Rights</td>
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<td>ILO</td>
<td>The International Labour Organisation</td>
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<td>UNAIDS</td>
<td>United Nation Programme on HIV/AIDS</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>WHO</td>
<td>World Health Organisation</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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**Abstract**
Violation of Namibian people’s fundamental human rights and freedom during the colonial era was one criterion the Namibia society opted for independence struggle. In comparison the violation of people living with HIV or AIDS’ fundamental rights by the Insurance Industry in Namibia is not different of the violation committed during the colonial period. The reason why the author takes up this topic is to explore and find out whether insurance industries in Namibia do violate basic human rights norms of people infected and affected with HIV/AIDS in terms of life insurance coverage.

It is recognised worldwide that an HIV/AIDS matter is the obligation of States, governments, private sectors, human rights activist and organisation, and human rights lawyer to respect the rights of PLWHA. Governments of any state in democratic states especially to those state parties who voluntarily bind themselves to bring national legislation, policy and practice into line with their existing international legal obligation.

This dissertation explores the relevance of exclusionary clauses relied upon by the insurance industry in comparison to basic human rights entrenched under ‘The Fundamental Human Right and Freedom’ enshrined in Chapter Three of the Constitution. The Namibian Constitution prohibits unfair discrimination. A mere violation of vulnerable people’s rights based on prejudice, stereotype thinking and materialism is unconstitutional. Majority of citizens believe that people living with HIV/AIDS are continuously discriminated base on their HIV status, civil society advocates can use arguments based law in responses to stigmatisation and discrimination against people living with HIV/AIDS whether is at national or international fora to forge the respect and promotions of equal treatment for all human kind.

CHAPTER ONE

¹ Talk of Nation (31 March 2008), Insurance Life and HIV/AIDS, National Broadcasting Television Program, at 21h00 evening life Talk Show
1.1 Background of the Research

While the phrase ‘human rights’ is relatively recent on the African continent, people have been struggling for freedom, dignity, equality and social justice for centuries in Africa. In Africa, as is the case elsewhere, what is now called human rights finds its foundation in the struggle to assert these core values of human existence.\(^2\) In Namibia, realisation of basic fundamental human rights and freedoms violation during the colonial era was one of the grounds the Namibian people opted for independence struggle. The elimination of discrimination was the driving force for fighting against the colonial forces in the so-called South West Africa (Namibia).

Internationally, violation of the rights of people living with HIV or AIDS is taking various forms. It is submitted that discrimination against people living with HIV/AIDS in Namibia is direct and indirect, especially by the ‘insurance industry’. Therefore, in Namibia, discrimination which excludes people living with HIV or AIDS in itself is a violation of human rights and it is not different from the violation committed during the colonial period by German or South African occupied forces.

This has resulted in Constitutional provisions not to allow injustice in its provisions. Therefore, Chapter 3 of the Constitution, Article 5-25, is devoted to the protection of fundamental human rights and freedoms. The Constitution is been described as expressing ‘value and ideals that are consonant with the most enlightened view of a democratic society existing under the law.’\(^3\) For this reason, the Namibian Constitution prohibits those practices that are inconsistent with its provisions, such as discrimination based on the persons HIV status. However, the Constitution position of not including HIV as a ground for discrimination can be interpreted as the Namibian legislature reluctance to act and defend vulnerable groups’ interest in this matter. This silence allows the outside world to possibly judge Namibian people based on their weakness of taking the bull by its horn when it comes to malpractices being exercised to those who cannot defend themselves against the mighty. As a member of the Human Rights Commission in Ontario, Canada stated that:


\(^3\) S v Minnies & Another 1991 (3) SA 364 (Nm); Mwandingi v Minister of Defence, Namibia 1991 (1) SA 851 (Nm)
a society is judged by how it responds to those in greatest need. A tragedy such as the HIV epidemic brings a society face to face with the core of its established values, and offers an opportunity for the reaffirmation of compassion, justice and dignity.\(^4\)

The Namibian laws and policymaking process do not provide sound anti-discriminatory laws in defence of the victims of discrimination. The disinclination of lawmakers gives a green light for life insurance companies to go ahead with their discriminatory practices unabated.

The ramification of such attitude is that the extended family that traditionally constituted a social safety fabric in African communities is not able to encounter with sudden burden of HIV/AIDS orphans,\(^5\) since the age group 15-49 is the most hit by the epidemic.\(^6\) It is regrettable to see a large number of HIV/AIDS orphans abandoned and forced to seek help in the streets, begging for money, a situation that exposes them to abuse and criminality.\(^7\)

The Namibian Government through the wording of Ms Netumbo Nandi-Ndaitwa, Minister of Women Affairs and Child Welfare, representing the Namibian Government persuaded the Namibians to volunteer their time to help take care of the children orphaned by HIV/AIDS. Furthermore, she stated by said that

\[\ldots\text{his is one of our biggest challenges. Unless we volunteer, the futures of these children are doomed.}\] \(^8\)

Even if you are not infected with HIV/AIDS, you [will be inevitably] affected. Let us all volunteer to fight the deadly disease in our society, said Anita Isaacs, member of the Lironga Eparu (Learning to Survive Organization) of persons living with HIV/AIDS stated at the same occasion.

It is clear that the impact of discrimination in getting life insurance is catastrophic on the life of many people living with HIV/AIDS and their families. This was the holding in the

Canadian Supreme Court case in the *Zurich Insurance Company v Ontario*\(^9\) that there is a fundamental tension between human rights law and insurance practice. Insurance practices, particularly, impedes on equality and privacy rights of HIV positive persons.

Historically, as from 1988 whether it is in Namibia or South Africa, nearly most insurance companies have had a policy of compulsory HIV testing which excludes HIV positive potential applicants from the their scheme\(^10\). Representative of LOA said they (PLWHA) represent an ‘unacceptable’ risk.\(^11\) According to Lironga Eparu, a National Organisation of People Living with HIV/AIDS, this is a widespread problem in Namibia.

Namibia, like many sub-Sahara countries of Africa,\(^12\) has a serious and ever growing dilemma of human Immunodeficiency Virus (HIV) that can progress to Acquired Immunodeficiency Syndrome (AIDS) after damaging the immune and nervous system of an individual, eventual leading to death.\(^13\) According to the July 2008 Global AIDS Epidemic by the Joint United Nations Program on HIV/AIDS (UNAIDS), statistics shows that Namibia:

1. 180,000 number of people living with HIV/AIDS by the end of 2007;
2. 15.3%: Estimated percentage of adult (age 15-49) living with HIV/AIDS by the end of 2007;
3. 61% percentage of HIV cases that occurred among women (age 15-49) by the end of 2007;
4. 14,000: Estimated number of children (age of 0-15) living with HIV/AIDS by the end of 2007; and
5. 5,100: Estimated number of deaths due to AIDS during 2007.\(^14\)

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\(^9\) 1992 (2) SCR at para 224.


\(^12\) Whiteside, A and Sunter, C (2002), *AIDS: The challenge for South Africa*, Introductory part


Mianko Ramaroson (2003) at 1 stated that HIV/AIDS is different from other terminal illness because of the stigma and patterns of discrimination it is associated with and because no cure exists yet at then.\textsuperscript{15}

Considering Namibia long history of institutionalised discrimination under colonial regime, the right to equality has become a towering peak of the post independent legal order and the foundation of all rights entrenched in Chapter 3 of the constitution, ‘Fundamental Rights and Freedoms-Civil and Political Rights’\textsuperscript{16}.

According to de Waal, et al (2001) at 200, the rights to equality go in pursuing the establishment of outcomes in a previously deeply divided society.\textsuperscript{17} It requires that people in similar situation under similar circumstances are treated alike and people unlike be treated unlike. It is also worthy to note that discrimination on the grounds of social or economic status is prohibited, not only in Namibia but also similar prohibitions are to be found in the principal human rights documents that seeks to ensure the equal enjoyment of human rights and fundamental freedoms irrespective of wealth or other status.\textsuperscript{18}

Non-discriminatory is a derivative of the principle of equality.\textsuperscript{19} The Namibian Constitution does not create a separate section for unfair discrimination, but instead includes it in Article on equality. Article 10 (2) of the Constitution prohibits various types of discrimination and it is apparent that it is wide ranging in scope. The importance of this article is traceable in its interpretation. It is designed to protect all persons against discrimination by any person or entities as well as by the states.\textsuperscript{20} In the Kauesa v Minister of Home Affairs, the Namibian

\textsuperscript{15} Ramaroson, M (31 October 2003), \textit{The Human Rights of HIV positive persons to non-discrimination in getting life insurance in South Africa}, The degree of Master of Law (LL.M) in Human Rights and Democratisation in Africa, Centre for Human Rights, University of Pretoria, South Africa
\textsuperscript{16} Article 10 of the Namibia Constitution is similar to section 7 (1) of the 1996 Constitution of South Africa. Both provisions affirm that equality is the cornerstone of democracy in the countries. In Namibia, Article 10 is concerned with equality and non-discrimination and as has been noted has been associated with Article 8. In South Africa, in case of Fraser v Children’s Court, Pretoria North and Others 1997 (2) BCLR 1 at para 161F-162D, the South African Constitutional Court viewed equality as a core value underlying the democratic society envisioned by the 1996 Constitution.
\textsuperscript{17} De Waal, J, Currie, I and Erasmus, G (2001), \textit{The Bill of Rights Handbook}, JUTA and Company Ltd, Mercury Crest, Hillstar, Wetton
\textsuperscript{18} Article 2 UDHR, Article 2 ICCPR and ICES, and Article 14 ECHR use the terms social origin and birth; Article 1 ACHR uses the terms social origin, economic status, birth, or any other social conditions; while Article 2 of the Banjul Charter employs the terms social origin, fortune, birth or other status.
\textsuperscript{19} Article 10 of the Namibian Constitution
\textsuperscript{20} Kauesa v Minister of Home Affairs 1995 NR 175 (SC)
Court drew attention to the emphasis given in the Preamble to the Constitution to the prohibition on discrimination.\textsuperscript{21}

\textit{Article 2 UDHR}, common \textit{Article 2 of the UN International Covenants, Article 1 ACHR, Article 14 ECHR and article 2 of the Banjul Charter} contain similar prohibitions and it looks that there must not only be legal equality but also factual equality.\textsuperscript{22} In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs (2000) a South African Court’s case, the Constitutional Court said that discrimination can be on more than one ground. This means that Namibia Courts may decide that a person is unfairly discriminated against on the grounds of HIV status. In \textit{Harksen v Lane and others} (1997), the Constitutional Court held that the right to equality is violated when someone is treated differently in a way that is unfair discrimination.

In \textit{Prinsloo v Van Der Linde and Another} (1996), South African Constitutional Court said that not all cases of different treatment are unfair discrimination. The different treatment must also hurt a person’s sense of dignity as postulated in terms of Article 8\textsuperscript{23} of the Namibia Constitution. This provisions is comparable to \textit{Article 1 UDHR, Article 5 (1) ACHR} and \textit{Article 5 of the Banjul Charter} which, inter alia, prohibits ‘[a]ll forms of exploitations and degradation of man.’\textsuperscript{24}

It is well-known fact that the principle of non-discrimination is rooted in international laws that Namibia as a State has accepted and translated into national laws in terms of Article 144 which states:

\begin{quote}
Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.
\end{quote}

\textsuperscript{21}Similar statement is found in the HRC has stated that not only are measures of protection required but also ‘affirmative action … to ensure the positive enjoyment of rights’, General Comment 4 on Article 3, UN Doc HRI/GEN/1, p 3.
\textsuperscript{22}Minority Schools in Albania Case [1935] PCIJ A/B 64, at p 19, per Judges Sir Cecil Hurst, Rotsworowski and Negulesco, Joint Dissenting Opinion. The HRC defines discrimination in the ICCPR as ‘any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex…,or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms’, General Comment 18, UN Doc HRI/GEN /1
\textsuperscript{23}Paragraph 1 thereof contains a clear imperative provision, which provides a general prohibition to the effect that the dignity of all persons shall be inviolable.
\textsuperscript{24}Ex parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State 1991 (3) SA 76 (NmS)
Consequently, in Namibia, international treaties and agreements are automatically applicable in the domestic legal system.\textsuperscript{25} This means that anyone under the Namibian legal order, both public and private actors are bound by the principle of equality and therefore the principle of non-discrimination; becomes a state responsibility once a non-state actors desist to comply.

According to Ramorosan, M (2003) who did a research on the similar topic, the author stated that testing as a pre-condition to insurance, when it comes to life policies, has raised issues of concern as it adversely affects HIV diagnosed persons and definitely violates their constitutional and human rights. It must also known that legally one cannot claim a right to remain ignorant of his or her own HIV status, especially in circumstances where a person can cause harm or wrong to others.\textsuperscript{26}

Based on all those given facts this paper will explore ‘exclusionary clauses’ in the context of human rights approach. Consider how to strike a balance between the need to ensure that all insurance companies as some do extend their coverage without financially endangered. How the insurance industry possible would embraces the human and constitutional rights of HIV positive persons without cause harm to their sense of dignity.

\subsection*{1.2 Objective of The Dissertation}

The general purposes of this research are:

- to evaluate the actuarial reasons for insurance companies to screen out people infected with HIV/AIDS;
- to explore the debate if any on HIV screening in the insurance industry after the Constitution and jurisprudential changes overall the world enhanced the right of people infected with HIV/AIDS to equal treatment in Namibia;
- Give an overview on how the problem has been handled in other jurisdictions.

\subsection*{1.3 Research Questions}

The questions that need to be considered are:

\textsuperscript{26} Viljoen, F, (2005), \textit{Righting Stigma: Exploring a rights-based approach to addressing stigma to addressing stigma}, AIDS and Human Rights Research Unit, University no Pretoria
Δ What are the reasons life industry using to justify the exclusion of HIV positive persons from life insurance schemes?

Δ How does exclusion practices by insurance companies affect the live hood of people living with HIV/AIDS and infringe upon their human and constitutional rights?

Δ In comparison how is this problem dealt with at international law.

1.4 Literature Review

Many of literature on HIV/AIDS and the insurance industry in South Africa, as mother life insurance are originated from South Africa was written in the early 1990s when the wave of impact of the epidemic was first felt. In not only South Africa but also Canada and the United States of America, have also rich resources with regards to exclusion of HIV positive person from taking life cover with life insurance industry. The matter was mainly considered from an actuarial and medical angle. There are very few unconvincingly legal literature tackled the issue.

Fear of uncertainty based on lack of proper information in respect to HIV/AIDS resulted commercial industries over the entire world to look at how HIV has affected life insurance and health insurance coverage by insurance companies in South Africa that also affected Namibia industry. Visser examined the strategy used by some insurance companies in South Africa and Namibia to avoid providing insurance coverage and paying claims to people with HIV. Swanson concentrated on the tactics explored by insurance companies in the United States to constraints their exposure to claims arising from AIDS and the responses to these tactics by legislators and lawmakers.

1.5 Methodology

The historical background connected to the topic, which includes law, has been narrowed to human rights law, as an area of specialisation. As a researcher being, interested in the field of

HIV/AIDS and Human Rights, a qualitative methodology was helpful. A desk study into current Namibian law (National Law), Regional Law or Instruments, and International Law in relation to equal treatment for people living with HIV/AIDS formed part of this research.

1.6 Overview of Chapter

The dissertation is divided into six chapters. Chapter one is introductory chapter. Chapter two examines the question of exclusionary clauses and the principles of insurance as well as the characteristics of HIV/AIDS. It targets at understanding the arguments in favour of HIV testing and exclusion of persons living with HIV/AIDS from life insurance schemes. It will look at the issue of stigmatisation and discrimination that may assist in minimizing the trends of discriminatory practice towards citizens who are being double stigmatised and discriminated based on their HIV/AIDS status.

Chapter three is going to explore State’s obligations when it comes to the protection of people living with HIV/AIDS from the angle of international, regional, and national (domestic) law. It looks also at the ‘corporate responsibility’ towards its social responsibility and accountability towards those infected and affected by HIV/AIDS.

Chapter four looks at the positions of foreign jurisdiction or jurisprudence in the conflict of interest and analysis how they have dealt the human rights implications of insurance companies’ policies towards the HIV/AIDS epidemics.

Chapter five looks on the question of whether insurance companies’ prejudice against PLWHA does reflect unfair discrimination. This is also as a concluding chapter and it puts a few recommendations.

1.7 Limitations of the Research

Despite the rights to equality and privacy are equally crucial important, this research only took the right to equality as there are many legislations, regulations, policies, charters, and jurisprudence already have clear provisions which aim at ensuring the confidentiality of medical results and the necessity of an informed consent.
This research considers private insurance only. A few companies offer special policies for people with HIV. However, most insurers charge high premiums and often limit the amount that a person’s life can be insured. This makes it unaffordable for the poor to have life cover. These insurance can either indemnity or non-indemnity. Health insurance, which may include cover against medical expenses and loss of income as a result of illness, falls into the category of indemnity insurance.

The research focuses on Namibian insurance industry as a case study based on rapid growth of HIV/AIDS in the country and for the reason that author is a Namibian citizen. The paper only considers individual life cover, as opposed to group life cover. Though there is no doubt that insurance industry is discriminatory in essence, the research focuses on the issue of discrimination based on HIV status.

CHAPTER TWO

NAMIBIAN LIFE INSURANCE’S EXCLUSION HIV POSITIVE PEOPLE

2.1 Introduction

This chapter explores the question of whether insurance industries in Namibia do exclude certain strands of society, especially (PLWHA) from taking life insurance cover. It also put under microscope the attitude of life insurance companies towards the HIV/AIDS. In brief, it will discuss the insurability of HIV/AIDS in order to understand why most of life insurance companies in Namibia singled out HIV/AIDS and declined life cover to persons who test HIV positive. First, the chapter looks at the background in relation to a fear of insurance industries. Then it looks at the principle of insurance. Thirdly, it considers the issue of insurability of HIV/AIDS. The main purpose is to understand the reason for excluding HIV positive persons from life insurance.
2.2 Background of HIV/AIDS in Namibia

The HIV/AIDS pandemic that has been compared to plague and the tuberculosis epidemic was reported in 1984 in Namibia. The lack of knowledge or information about a new disease caused a great fear among society and in the commercial world. Some individuals who have been infected or affected by this tidal wave of fear lost their vision of ensuring that they have the opportunity to make the most of their own lives. The hope for life faded away and lost the guts to meet the challenges they facing. Until now, the society is divided on the issue. Citizens is not shoudering the responsibility, size the opportunity and work together as a community to live up as they can be a nation.\(^{30}\)

The ‘Human Right’ concept the discovery of HIV or AIDS during the 1980 century was a dam’s cracking wall and the rights of people living with HIV/AIDS were not the issues to be reckon with. The wall gave away and cause flooding down the village. Fear of death because of this epidemic blinded the society and the promotion and protection of these people infected or affected with HIV/AIDS was not at the table. The ghost of the decease blindfolded the initial understanding of the AIDS and human rights relation. The unrecognising of the interlink HIV/AIDS among the community led to recognition of the applicability of international law to HIV/AIDS and the effort of international community with regards to promotion of human rights of people living with HIV/AIDS. However, flouting and disrespect, violation of basic human rights of people living with HIV/AIDS by insurance industries continued until these days in several countries not only in Africa but also all over the world.

The understanding of the importance of human rights as a factor in determining people’s vulnerability to HIV infection and exclusion from taking they hope away in achieving their families benefits resulted in absurdity discrimination and stigmatisation. The vulnerability of people infected or affected with the scourge of this deceased increased as society rejected these people. Its rejection contributed to the stigmatisation and discrimination. Through these practices, people living with HIV or AIDS’ fundamental human rights and freedom are violated. The society blamed PLWHAs’ misdeed.

Some members of society forget that Namibia is a democratic country with constitutional principles and rule of law. The Constitution states that every individual is equal before the law. An individual has a right to protection and equal benefit of the law without discrimination, stigma, and discrimination is imminent. Discrimination is still taking place in industry, companies, and among employees towards PLWHA, and among employees themselves.

The Constitution prohibits discrimination based on race, national or ethnic, colour, religion, sex, and others status. In Namibian society, especially those who have means (material means) turned blind eyes to the constitutional provisions and continued to violate the rights of vulnerable people in society unabated. This paper concedes to a Human Rights defender in South Africa who stated that those living with the virus are presented with the most serious of all to maintain their sense of human dignity while still fighting to beat the virus, keeping breathing and enjoy their lives with a sense of human dignity and pride.31

It is evident that every reasonable person in our societies understands and knows that discrimination and degradation have a tremendous negative effect not only to PLWHA, but also to those exercises it. Furthermore, an assault whether is physical or mental and dehumanisation of the people infected or affected by HIV/AIDS has negative replication in society as it related to rejection of those implicated.

All of the above points are important human rights issues for society to be able to address issues of HIV/AIDS32. It is important for people who are suffering from HIV/AIDS to be equal respected as human beings, because they are human beings and they are not different from other people in society.

Government and private institutions (Insurance Companies) and individuals must affirm their dignity and worthiness and offer unconditional support and empathy. Respect for human rights is an important prerequisite for the prevention of HIV/AIDS. Our citizens and insurance industry must remember that efforts to find a cure for HIV/AIDS, continues. HIV or AIDS is

31 Ramgobin, A., (April 2003), *discrimination against people living with HIV/AIDS: reflections on a case study to develop a holistic approach to discriminatory practices in the life insurance industry, economic social and cultural rights course, masters in international human rights law, a dissertation presented*

not black ailment problem and hope that insurance industry does also not believe the myth. A disease shows no racial, gender or class boundaries.

If other industries in the world, such as TOTAL treat people with the HIV or AIDS on a similar basis to any other employee suffering from a life disease why insurance industry in Namibia cannot do the same? It is a demand from international community that employees who are HIV/AIDS positive must not subject to any form of victimisation or discrimination. This includes also to those employees in the Industry Company and those who wants to have life insurance cover. Why are industry companies to continue exercising discrimination practices against HIV positive people in Namibia?

Insurance industries suppose to know well HIV or AIDS persons have legal right to confidentiality and privacy in respect of their health and HIV status. Under no circumstances will a person be obliged to disclose their HIV status without such person’s consent. A South African Court case, in the Christian Lawyers Association v National Minister of Health (2004), the court held that the Act required that a pregnant woman’s decision to undertake an abortion require an informed consent. The court further said that a child under 18 years was capable of giving informed consent without parental assistance. If a child was not sufficiently mature to make an informed decision, the child would not be able to give the valid informed consent required by the Choice on Termination of Pregnancy Act. The concept of consent is very important when it comes to a disclosure of information to a third party about HIV/AIDS.

2.3 Feeling of Citizens Towards Life Insurance

Most of the grass root people in Namibia are of opinion that insurance industry in Namibia is unfriendly towards HIV/AIDS in terms of exclusion. According to a member of Legal Assistance Centre (LAC), Aids Units coordinator in Namibia as quoted by Catherin Sasman

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34 The Promotions of the Choice on Termination of Pregnancy Act 92 of 1996 were challenged because they allowed a child to make a decision about terminating a pregnancy without the assistance and guidance of her parents or guardian.
in the daily Newspaper, 'The New Era'\textsuperscript{36} said that the practices of requiring a HIV-negative result for one to access life policy insurance is ‘patently unconstitutional’\textsuperscript{37}.

If one analyses these statements in more details than one can realise that there is a big problem in Namibia in respect of stigma and discrimination towards to certain sector in our society whether it is literally or figurative. There is no better example than of the insurance industry’s exclusion of HIV-positive people from life insurance cover. In addition, this paper is also going to look on the question of whether insurance companies’ violate basic fundamental human rights of HIV-positive is constitutional or unconstitutional.

\subsection*{2.4 The Principle of Insurance}

Insurance is a contract (agreement) between an insurance company (e.g. Metropolitan) and a person. It can refer to protection of the person (relative left behind) and their family from financial hardship in case something very serious, like an accident or unexpected death, happens.

Section 1 of the \textit{Long-terms Insurance Act}\textsuperscript{38} defines a life policy as a contract in terms of which a person (the insurer), in return for a premium (a regular payment or an one-off payment), undertakes to:

\begin{itemize}
  \item[a)] provide policy benefits (the sum assured) upon, and exclusively as a result of a life event or
  \item[b)] pay an annuity for a period.
\end{itemize}

The principal function of insurance is the spreading of losses by means of a common pool of individuals exposed to similar risks and to which each policyholder pays a fair and equitable premium according to the risk of loss they bring into the pool.\textsuperscript{39} The whole life insurance policy (life insurance) insures financial safety for the dependants of the policyholder, after his

\textsuperscript{37} LAC Aids Unit Coordinator, Mr Amon Ngavetene … suggested an amendment to the Short-Term Insurance Act and Long-Term Insurance Act to prohibit discrimination against people living with HIV/AIDS.
\textsuperscript{38} \textit{Act No 5 of 1998}
\textsuperscript{39} Black K & Skipper H (1987), \textit{Life insurance} at 404
or her death. In other words, the basic idea underlying insurance is that it provides financial protection to individual.\(^{40}\)

### 2. 5 Underwriting Philosophy

In short, underwriting is the process that an insurer uses to determine on what basis it will accept an applicant for insurance.\(^{41}\) Underwriting as a term is commonly used throughout the insurance business. It incorporates implicitly two essential elements: selection and classification.\(^{42}\) Without going into detail with regard to an application and methods of processing of application for life insurance, it is worthy to know that an applicant for a life insurance has duty to disclose any information, which may be considered relevant in the assessment of his or her application for life insurance.\(^{43}\) Nevertheless, it does not mean that if applicant discloses such information she or he must discriminated against based on the information such applicant provided. Unaware of the implication of all medical tests which includes compulsory HIV antibodies tests form part of request for the applicant to undergo medical examination. An accidental death does not need an HIV test.

The study conduct by Ramaroson M, (2003) at 11 reveals that the primary factor in classifying risks that are not standard is the state of health.\(^{44}\) According to this research, applicants for a life insurance have to undergo a medical examination and HIV testing. It was not in the same research that medical impairments such as HIV/AIDS, blindness, cancer, kidney failure,\(^{45}\) account for the substantial majority of substandard risks, that means with higher-than-average mortality and shorter life expectance,\(^{46}\) and are therefore declined,\(^{47}\) hence the distinction between insurable and non-insurable risks.

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\(^{40}\) Marx, G, (1992), *How to buy the right life insurance for you in South Africa*, at 13


\(^{42}\) Black, K and Skipper, H (n.37) 406

\(^{43}\) Non-disclosure of material facts renders the contract null and void and the applicant may be charged with fraud. The contract may entail an ‘incontestability clause’, which provide that after a certain period of time, a misstatement or omission on an applicant for insurance does not render the policy voidable or void, except in the case of fraud.

\(^{44}\) Brackenridge, R. and Elder W (1985), *Medical selection of life risks*, at 34 as quoted by Ramaroson, M, note 21 at p 11

\(^{45}\) Old Mutual (1996), *Positive planning Handbook*

\(^{46}\) Black K & Skipper H , supra at 417

\(^{47}\) As n 42 above
In South Africa and hope it affected also life policies in Namibia is that in 2000, the Life Offices’ Association (LOA)\textsuperscript{48} adopted its Protocol on HIV/AIDS which form part of the Code of Conduct of the Association and was there for binding on all members offices which Namibian offices are also members. The purpose of the Protocol was to ensure that life insurance industry followed the highest standards in all aspects of HIV screening. HIV/AIDS screening is connected to a risk as the underwriting process is concerned primarily with significant risk exposures that are not common to all persons seeking insurance, for instance the risk to die of AIDS. However, it fails to predict the survival of an individual because of the many variables that can affect each person’s lifetime, hence the risk. It is good to remember that risks are never completely annihilated but only reduced.

The HIV screening resulted into exclusion discrimination of hose tested HIV positive not permitted to take up life cover with such life insurance companies. In the mean time, it resulted in the violation of their basic rights not to be unfair discriminated based on the HIV status.

2.6 Exclusion HIV-Positive Persons From Life Cover Schemes In Namibia

Though there are scientific evidences that HIV is a manageable chronic health condition and not a terminal illness\textsuperscript{49}, it is painful and hard to comprehend altitude of Southern African countries, the region with the highest prevalence rate of stigma and discrimination towards to those affected by this sickness. African Countries paint a glimpse picture when it comes to elimination effort of reducing stigma and discrimination towards minority in society.

In this sense is that individuals do not experience discrimination in a vacuum but rather in particular social and political context\textsuperscript{50}. The region forms the global epicentre of the HIV

\textsuperscript{48} The Life Offices’ Association is an association registered long-term insurance companies conducting business in South Africa. Its primary objective is to ensure the interests of life insurance companies and their policy holders.


\textsuperscript{50} Kevin Kitching (2005) as editor), Non-Discrimination in International Law, A Handbook for Practitioners, Published by Interights, The International Centre for the Legal Protection of Human Rights, Lancaster House, London., Available at <www.interights.org>
pandemic”51 while we know there is treatment for it.52 In addition, facts remain that in many African countries, legislative frameworks have not been adapted to the demands of national Bills of rights or of applicable international human rights obligations. No doubt, that in many African countries legislatures for responding to HIV/AIDS remains woefully inadequate and essentially anchored on the coercive foundations left by colonial regimes.53 It seems governments forget that HIV/AIDS is a key engine in the generation of poverty, is associated with food insecurity, is consuming both household and government resources, and is even inducing regional instability in Sub-Sahara Africa; as well as fuelling social exclusion and discrimination associated with its stigma (UNAIDS, 2002). 'AIDS', therefore, ‘deepens poverty and increases inequalities at every level, form households to global’.54

This chapter focuses on analysing the attitude of life insurance industry towards PLWHA and HIV or AIDS as an epidemic. The aim is to understand the rationale for excluding HIV positive persons from life insurance cover. In order to understand the fear of the insurance industry the issues such as; insurability of HIV/AIDS with the aim of understanding the reason why various life insurance companies in Namibia single out HIV/AIDS and decline life insurance cover55 to persons who test HIV positive.

The lack of proper or established ‘Actuarial society’56 in Namibia, the paper will refer to ‘Actuarial Society’ of South Africa. Moreover, the most branches from the parent’s insurance based in SA. For example, ‘Actuarial Society of South African’ (ASSA) uses the same methods as insurance industries in Namibia.

52 Argument submitted by the complainant’s defence team (AIDS Law Project) that took Chief of Army, the Minister of Defence, and South African President Thabo Mbeki as Army Commander-in-Chief to the South African Courts over that country’s policy of excluding HIV positive people from recruiting, external deployment and promotion in South African National Defence Force.
54 Whiteside, 2002:325
55 This year some of Namibian insurers are developing insurance products for HIV-positive clients. While some of these products have existed in the market for some time in South Africa since 2005. They previously had restricted terms and were expensive because they were priced on a basis that ignored the effects of antiretroviral therapy, said Dominic Liber, director, Quindlem Consulting, which is an organisation of actuaries and analysts. As insurers begin to price products to allow for the drugs used to treat HIV and AIDS, price will drop significantly, he said.
56 Many insurers rely on the Actuarial Society of South Africa’s ASSA2000 AIDS and demographic model, which projects the impact of HIV/AIDS on mortality, disability and health risk group and individual insurance products, to price life products. The projection is used to determine reserves required by life writers.
The Actuarial Society of Southern Africa established an AIDS Committee in 1987. It assists the actuarial professional and later the wider public in estimating the impact of the AIDS epidemic in South Africa\textsuperscript{57}. They realise early on that AIDS was to affect all aspects of life, including such diverse areas as science, politics, business and social welfare.

The research conducted in South Africa suggested that ‘the annual testing of pregnant women at South Africa antenatal clinics provides the best measure of the prevalence level of HIV in the general population in South Africa. In 1990, the prevalence level was under one percent, but by 1991 had risen to over 22 percent. These levels are not universally applicable to all sectors of the South African population, but do provide insight into the spread of the disease.’\textsuperscript{58} It goes on assessing the statistics relevant to the life assurance\textsuperscript{59} industry and says

…it is estimated that the average term to death from infection with HIV is ten years, and that most of the people infected with HIV fall in the 20 to 45 years age range, where mortality levels are low. The result is an increased focus by life companies on HIV underwriting and HIV claim exclusions to protect against excess mortality on life policies sold.\textsuperscript{60}

### 2.7 Does Exclusion Amounts to Stigmatisation and Discrimination

Historically, the practice of insurance companies whether in Namibia or elsewhere in the world, has been to regard people living with HIV as uninsurable I protecting their industries based on believe that HIV/AIDS-positive people are at high risk of dying. Therefore, insurance companies refuse life insurance cover or benefits were being declined. The insurance industry took the position that the risk of insuring people with HIV was too high, claiming that life policy premiums would also have been very high and unaffordable to most.\textsuperscript{61}

However, many of the insurance companies in Namibia and South Africa have changed\textsuperscript{62} their tendency or underwriting practices of the long-term insurance industry that led to stigma and discrimination.


\textsuperscript{58} Supra, page 1.

\textsuperscript{59} FinMark Trust, an Africa-based independent trust, estimates that only one in five Africans has a life insurance policy and only one in six has medical coverage.

\textsuperscript{60} Supra, at p.1

\textsuperscript{61} Consumer Education Article 8(8 June 2004), Long-Term Insurance Products available when you are HIV positive, The Life Offices’ Association (LOA)

\textsuperscript{62} Coenie Meyer PR (22 November 2004), New Release: The Life Offices’ Association; Long – Term Insurance Industry scraps HIV/AIDS exclusion clauses, states that in South Africa the long-term insurance industry has agreed to stop using HIV/AIDS exclusion clauses for all new business with the effect from 1 January 2005
discrimination towards people living with HIV or AIDS, stigma and discrimination still exists in our insurance industries. It is attached to the high premium that PLWHA have to pay if they want to take up life cover despite the fact that current studies show that people who are HIV-positive if they are taking their medication can leave longer\textsuperscript{63} than those without the disease.

2.7.1 \textit{What is stigma and discrimination?}

Stigma is a form of prejudice that discredits or rejects individuals who are seen to be different from other who are not HIV/AIDS positive. One Author who wrote thesis on stigma in 1963 stated that stigma is part of the attitudes and social structures that set people against each other. He continued by saying that it impedes any countervailing forces for social equality. Certainly, since Erving Goffman's seminal work on stigma in the early 1960s, stigma (plural stigmata) has been recognized as “an attribute that is significantly discrediting,” and it is known as a potent and painful force in individual lives\textsuperscript{64}. Prejudice as similar to stigma reinforce social inequality and insurance industries are promoting such inequality. It has its origins deep within the structure of society, and norms and values that govern much of everyday life.

The effect or impact of stigma is devalued and ashamed\textsuperscript{65} of HIV positive persons resulted in others to feel that they are superior\textsuperscript{66}. When a person or people act on their prejudice, stigma turns into discrimination. Discrimination can be defined as any action or measure that results in someone being treated unfairly because they belong or are associated or seen to belong to a particular group for example ‘\textit{Eshenge}’ (in Oshidonga language means a gay man) discriminated against because of his sexual orientation. Therefore, stigma and discrimination can occur anywhere and everywhere. People can discriminate, both in their personal and professional capacities, while systems and institutions can discriminate through their practices and policies. Such discriminatory acts, based on presumed or actual HIV status, are a

\textsuperscript{63} When such a person is taking his or her medication (Antiretroviral (ARV) treatment as recommended
\textsuperscript{66}Ecumenical Advocacy Alliance, \textit{Understanding HIV/AIDS related stigma and discrimination}, 150, route de Femey, Geneva, Switzerland.
violation of human rights. HIV related discrimination is unconstitutional and it amount to unfair treatment of people based on their actual or suspected HIV status. ‘Fact Sheet 4’ shows that discrimination against people living with HIV and AIDS also extends to those with whom HIV and AIDS are associated in the public and private sectors. It is where the insurance industry comes in. Example, some insurers require an HIV test before providing insurance, or refuse to provide health and life insurance to ‘omashenge’ (gay men), regardless of their HIV status.

2.7.2 What Role Does Stigma Play?

First, stigma often leads to discrimination in turn this lead to human rights violations for people living with HIV or AIDS, not only by the insurance industry but also by individual or collective persons in society towards those affected by the pandemic. Stigma and discrimination hamper prevention and care efforts by sustaining silence and denial about HIV/AIDS as well as reinforcing the marginalisation of PLWHA and those who are particularly vulnerable to HIV infection. It is the same when it comes to insurance industry in Namibia. An exclusion of HIV or AIDS’ from not taking up life cover in the insurance can be a pure discrimination against PLWHA.

It is discrimination when negative thoughts of those manage insurance companies fail to take, or omit to take, action to treats HIV positive people unfair and unjust based on their presumed or actual HIV or AIDS status. Therefore, stigma and discrimination leads to a denial of essential human rights of people living with HIV or AIDS. This is exactly what the insurance industry is doing. In Namibia, many of these industries are still denying people living with HIV or AIDS to take life cover with their industry.

Let consider hypothetical cases:

(1) Johannes Shipinga has five children. He has a well-paid work, but his predicament is that if he dies unexpectedly, his children will end up without any financial support. He decided to insure his life with N$500 000 based on his salary and status in the society. He goes to an insurance company in Windhoek and the company agree to insure his if he pays the industry a premium of NS1000 per month because he is forty-five years

67 Fact Sheet 4 (July 2005); HIV-Related Stigma And Discrimination, National Aids Trust
old. This means if he dies, be it 10 years or even 1 year later, his children will get N$5000 000. This will help to further their studies and their lives.

(2) Julius Indongo wants to take out a bond of N$55 000 to buy a house in Katutura. Mr Indongo is married man with two years old son. He has not big assets like a car or a piece of land. The bank asks him to take out a life insurance policy and transfer this to them. This means that if Indongo dies before paying off his home loan, the bank will be able to recover the value of the loan by claiming the insurance policy. The insurance company refuses to insure Indongo because his medical tests show that he is HIV positive. Therefore, the Bank Society refuses to give him a loan for his house though the test does not indicate that Indongo is to die in with ten years period. A person who is HIV negative went to a specific bank, applied for the loan. Such person was given a loan of N$400 000. This person is single, has no families or relatives. The person died within two years after the bank granted him a loan because of heart failure because he was too fat. Mr Indongo is still well and alive. Based on the doctor result he is going to leave a normal life so long he is taking his medication on as it has been prescribed. Is this discrimination towards Mr. Indongo by the bank when the bank refused him a loan based HIV status or not.

(3) This is a case where Nambuhu Mbondi, a client of certain insurance company in Namibia contributed towards the monthly premiums of a life insurance policy held in favour of his two children who were minors. After his one of his child dies, the client claimed the benefits from the insurance company. The insurance company repudiated the claim based on a clause in the insurance policy, which excluded liability if “the assureds’ death was in an away due to or arising directly, entirely or partially from AIDS or HIV.”

These cases raise many issues, including the breach of confidentiality and privacy by the doctor who submitted the deceased’s death certificate to the insurance company, and the issues of administrative justice in the manner in which the issue, i.e. the matter relating to the exclusion clause which discriminates against people on the basis of their HIV status.

However, a new approach submerges in Namibia with regard to obtaining for HIV/AIDS. Old Mutual Company that moved away from using exclusion clauses on new product publicly
declares that they have developed a new product for PLWHA this year. Nevertheless, it remains challenging for some living with disease as the charges made for people living with HIV is subject to exorbitant charges. The majority of HIV positive people are poor people who are only earn little monthly salaries. They cannot afford high monthly charges. Many major life insurers issue a standard policy only to HIV negative people, while some offer cosily and highly restrictive individual plans for HIV-positive insured. In addition, some small carriers still add AIDS exclusion clauses to policies or put caps on AIDS-related care. It is indirect discrimination exercised towards HIV/AIDS positive people.

2.8 HUMAN RIGHTS AND HIV/AIDS: CONSTITUTIONAL PROVISIONS

The notion of ‘fundamental human rights and freedom, in the response to HIV/AIDS is a link between human rights and HIV/AIDS. The Namibian’s government as a State in terms of the constitution has obligations and duties to promote and protect the rights of people living with HIV/AIDS. This includes also provisions of certain international instruments, which deal explicitly with the matters related to HIV or AIDS. The International Guidelines on HIV/AIDS and Human Rights are aiming at translating international human rights norms into concrete measure applicable in HIV/AIDS context.

2.8.1 The Relevance of Human Rights

Generally, the rights we are talking are ‘human rights’. These rights cannot be separated from people as human beings. These are rights enshrined in the Namibia Constitution, Chapter 3. The rights that three Organs of State, the Courts and judges should be astute to recognise that the constitution requires citizen to intolerant towards systemic forms of exclusion and domination within society. The Deputy Chief Justice of the Republic of South Africa

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68 Chordas, L (01 June 2004), Insuring hope: Insurance for individuals with AIDS in Africa is hard to come by, but carriers are making changes to help the millions infected with the disease. (AIDS in Africa), Best’s Review
Dikgang Moseneke during the 90\textsuperscript{th} anniversary celebration of the University of Fort Hare described the fundamental rights that are indivisible and interrelated as that of

\begin{quotation}
...fundamental rights which gird social justice are just as important, if not more important, than so-called first generation rights.\textsuperscript{72}
\end{quotation}

The existing of these rights makes us human being and therefore, without these rights we cannot talk about we us human being. It is therefore, the notion of violation comes into a picture. As violation of the rights of people living with HIV/AIDS continued and is still continuing, several fundamental rights are threatened in the context of HIV/AIDS, including the rights to non-discrimination, the rights to privacy, the rights to health, the right to appropriate protection in social security and the rights to work.

Therefore, the protection of fundamental rights has to constitute a central part of the fights HIV/AIDS by all stakeholders whether is public or private role-players if the society wants to overcome epidemic. The Secretary – General to the Human Rights Commission’s report in 1995 clearly established the existence of undeniable links between human rights and the HIV or AIDS predicament. It states that:

\begin{quotation}
In the first instance, failure to protect human rights increases the risk of transmission of the disease. Coercive measures, such as mandatory screening, lack of confidentiality and segregation, drive people away from prevention education and health-care services and subvert this process of behavioural change.

Secondly, individuals and groups in society who are disadvantaged and/or do not enjoy the full exercise of their rights are particularly vulnerable to infection as they limited or no access to HIV/AIDS-related education, prevention and health-care programmes. Infection among such groups rapidly diffuses to society.

Finally, discrimination against and stigmatisation of persons already affected by HIV/AIDS (those infected, suspected of infection and their families and associates) greatly magnifies the tragic impact the disease has on their lives. Such discrimination is widespread. It not only violates the rights of those affected but also further disables them by limiting their access to employment, housing, health care and vitally needed support systems.\textsuperscript{73}
\end{quotation}

\textsuperscript{72} Dikgang Moseneke, Supra
If one analyses the stigmatisation and discrimination as it is being exercised by the insurance industry in the past, it exactly what the above quotations are telling us. Its ramification of the violation of those person affected by the act is precisely a Report postulates. It is crucial to take note that vulnerability and human rights is inseparable. It is necessary for the insurance industry whether is in Namibia or else where in the world that a realisation in relation to the protection of human rights and HIV/AIDS is interlinked. This is not only because of the very nature of the rights themselves that exist to preserve the human dignity of infected people, but also because the protections of these rights are integral part in fighting against the epidemic.

2.8.2 What constitutes a Rights-based Approach?

What Constitutes a Rights-based Approach, in the context of HIV or AIDS, human rights concept has been recognised as central to the response to HIV or AIDS since the creation of the WHO Global Programme on AIDS. The question what constitutes a rights-based approach, for a non-professional, lack for clarity what ‘rights based approach’ in respect of HIV/AIDS work actually means? Except from the rights postulated in various international and regional, national legal instrument, UNAIDS give a brief explanation in regards to rights based approach in HIV/AIDS conceptualisation explained that:

…there is no obvious consensus on what constitutes a human rights approach, and organizations that implement rights based approach, in HIV/AIDS and more generally, use a broad range of definitions and do a variety of different things under the same heading. A rights based approach is interpreted differently by people whose work is in advocacy and the legal accountability of governments as they develop and implement national policies and programmes, by NGOs who have who have taken on human rights base approach in their programme of work, and by international agencies who support these efforts. In fact, there are more differences than similarities in the interpretations of rights based approaches amongst these stakeholders. Some actors have determined that a grounding in legal interpretation of rights is key to rights-based programming efforts, others that participation of affected communities is central to this concept, while others that attention to discrimination, or transparency and accountability, or conscious attention to all these criteria or to a range of criteria not mentioned here should play this role.5

A realisation of states’ obligations in fulfilling its promises found in ratification of declarations concerning the promotion and protections of those who are being infected or

55 Supra pp. 1-2
affected by the decease need to waken up may be the state will look and consider the seriousness of the activities in the insurance industries. The reminder will lead to the life insurance industry in understanding the principle when they conducting their business activities as valid justification for human rights to remain central to the response to the epidemic.

The difficulty when one is affronted with the question what is human rights-based approach, it is also necessary and timely to clarify human rights-related concepts and approaches. Once agreement is reached such agreement must be prioritised. This would help in providing tools and approaches for ensuring compliance with human rights concerns and principles in HIV/AIDS defending efforts. Therefore, the government and private sectors, individuals and groups collectively have responsibilities in the context of HIV/AIDS to curb the violations of PLWHA rights in Namibia.

To conclude this chapter, it is important to know that insurance companies are bound by their duty to protect their policyholders from an unfair burden as well as their duty to maintain a financially sound underwriting policy towards HIV/AIDS. At the same time, the constitutional provisions bound such commercial industries not to discriminate against anyone, especially against HIV positive persons. As a tendency in Namibia, insurance companies refuse to insure the life of HIV positive person for economic reasons without properly analysing life expectancy of such person. However, such treatment infringe on the human and constitutional rights of the HIV positive persons, in particularly their rights to equality entrenched in Article 10 of the constitution of Namibia. The moment the insurance companies starts to respect the rights to equality by accommodating in their practices, the fundamental tension as was noted by the Supreme Court of Canada in the leading case of Zurich Insurance v Ontario which exists human rights law and insurance practice will automatically be reduce.

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76 Zurich Insurance Co v Ontario (Human Rights Commission) 1992 (12) CCL1 (2) 206 (SCC) at para 224. The case involved a 20-year-old unmarried male who applied automobile insurance from the respondent insurer. After he was informed about his insurance premium, he filed a complaint under the Ontario Human Rights Code. The complaint alleged that he was denied the right to contract on equal terms without discrimination, and his right to equal treatment in services, goods and facilities has been infringed. He alleged specifically that he has been discriminated against based on his age, sex and marital status. In this case, the Supreme Court of Canada held that the automobile driver classification of unmarried male drivers under 25 years practiced by the respondent insurer contravened the Ontario Human Rights Code.
The issue of determining whether discrimination is fair or not is traceable from the South African Constitutional Court. In this case, the court refers to the impact of the discriminatory treatment on the victim. In this case, the court stated that the purpose is to weigh the importance of the limitation with the proportionality of the infringement.\textsuperscript{77}

\textbf{CHAPTER THREE}

\textbf{3.1 Introduction}

In this chapter, deals with the obligation of a State as holder and protector of its citizens’ rights in general and in specific of those who have diagnosed HIV positive. It is based on the unquestionable human rights of HIV positive person not to be discriminated against.\textsuperscript{78} This part will look into State’s obligation according to international, regional and national law in protecting people living with HIV/AIDS against unfair treatment.

\textsuperscript{77} Harksen v Lane NO 1998 (1) SA 300 (CC).

\textsuperscript{78} Article 10 (1) of the Constitution states: ‘\textit{All persons shall be equal before the law}’. Sub-section (2) states: ‘\textit{No persons may be discriminated against on the grounds of sex, race, colour, ethnic, religion, creed or social or social economic statuses}.’
3.2 State’s obligations Towards the Rights of HIV/AIDS Positive Persons

HIV/AIDS is a human rights issue. There are several interrelated aspect associated with this, including:

1. the human that are accorded to all people simply because of their humanity, including those with HIV/AIDS,
2. the denial of rights, especially of those already the most vulnerable, including those with HIV/AIDS, and
3. the need to promote the rights of those with HIV/AIDS, in order to address the impact of the disease on individuals and the spread of the epidemic in society.

Namibia as a State codifies the human rights principle that it will follow in the Constitution. Namibia has chosen to do so, and has produced arguably the progressive Constitution in the world. The Constitution of Namibia is the ‘Supreme Law’ in the country. All other laws and policies that are written or to be pronounced by government must conform to the principles (principles of human dignity, the worth of every individual, equality and human rights) that are contained in the Constitution, and if they do not, they may be found to be illegally by the Courts. People are protected under the Constitution from the actions of others and action as of the Government that deny them their human rights. This is the core found in international instruments for the protection of all human being despite their differences.

Chapter three of the Constitution lists important rights that all people have. People must respect, protect, promote and fulfil these rights. These obligations are on the shoulder of a State to see everyone, institutions or arms of governments respect such rights according to the law of the country. However the question arise, do countries fulfil these obligation entrusted them according to international law?

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80 Article 1 (6) of the Constitution
81 Article 8 of the Constitution
82 Article 78 of the Constitution ‘The Administration of Justice’
A program conducted on SVTV 2 on Swedish Television on the July 2002 titled Kamera: Leva med HIV, the interviewee answered on the question put by said that it is sad that the leader of our government is presiding over a holocaust of poor people and he is doing nothing about it.... The AIDS issue has become more than a health issue, much more than a prevention issue. It has actually become a test of government.\(^83\)

In this matter, is Namibia as a State is also included in the above quotation? Nevertheless, if is not, it also not innocent when it come to law in place for fighting the stigma and discrimination. Because applicability of International law to HIV/AIDS is that governments are publicly accountable for their actions towards people in the context of HIV/AIDS.\(^84\) In this sense, governments are responsible for not violating rights directly, as well as for ensuring the conditions that enable people to realise their rights as fully as possible. The Human Rights and HIV/AIDS intertwine this means that for every human right, state has responsibilities at three levels:

1. they must respect the rights
2. they must protect the rights
3. they must fulfil the rights.\(^85\)

In relations to Laws in response to HIV/AIDS, it can be direct or indirect used if our government want to put measures in place for the prevention of this malpractice directed towards our people who are infected or affected by the pandemics. Direct measures would be steps taken by governments with the stated object of responding to HIV/AIDS. Indirect measures would be those that are not so directly targeted at HIV/AIDS or public health, nevertheless have significant consequences for on the capacity of communities and people to respond effectively to the pandemic. The Namibia’s government can be credited for its effort in spending N$220 million a year to fight HIV-AIDS\(^86\), when it comes to the latter category.

The question is that this 220 million a year are use correctly if there is no Anti law for the protection of HIV-positive people against discrimination. Will be enough if the state is not

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\(^86\) The Namibian, Friday October 17, 2008, Lands and Resettlement, Minister Alfeus !Narused speaking at a three-day workshop on HIV-AIDS and alcohol
regulating the insurance industry’s misbehaviour towards HIV/AIDS? Though the Minister noted the Namibia government in collaboration with the private sector, non-governmental organisation (NGO) and related development partners have embarked on various campaigns to prevent the continued spread of the disease, he failed to mention what measure are place for those discriminate against people living with HIV/AIDS. Furthermore, he fails to mentions which laws are enacted to curb anti-discrimination in Namibia.

3.3 Human Rights of PLWHA in Democratic Society Set-Up

Debates concerning democratisation and development increasingly reflect an interest in human rights-based and exclusion of people living with HIV from sharing social economic rights. These rights are excluded at moment such person has tested. Based on the result of such test such person is left into in the pool of stigmatisation. Agbakwa, SC’s writing mentioned that the denial is on increase and government and civil society is reluctant to take preventive measures. The author continued by saying that

…where human survival needs frequently go unmet, as in Africa, protection of human rights ought to focus on ‘preventing governments from neglecting their citizens’.

It is regrettably that African States are lip zipped when it comes to issue of protection of people living with HIV or AIDS. Many states have so far failed to match their words with appropriate, sufficient action in order to fulfil various constitutions’ wishes.

3.4 Corporate Responsibility or Accountability In Relation to HIV/AIDS Affected People

The question is whether insurance industries in Namibia do have social responsibility towards people living with HIV/AIDS or not? Before answering, it must be emphasised than there can be no successful fight against the spreading of HIV/AIDs without effective implementation of existing human rights standards. It is widely recognised now that human rights are


inextricably linked with the spread and impact of HIV/AIDS on individuals and communities around the world. In order to answer this question, one has first to look what ‘Corporate Responsibility and accountability’ is. According to Corp Watch is that:

Corporate responsibility refers to any attempt to get corporations to behave responsibly on a voluntary basis, out of either ethical or bottom-line considerations.

‘Corporate accountability’ includes compliance with law of the land. It refers to the prerequisite of the corporations to behave according to social norms in the country where they are doing their business or face consequences. To hold corporate accountable in relation to issue of HIV or AIDS discrimination, means to hold corporations accountable to their human rights’ violation, especially to unfair discrimination when it come to certain service they are providing. These corporate they must be held accountable in terms of the constitution provisions and other laws provided.

In the existing international framework in the context of normative obligations and procedural, insurance industries form part of corporate governance. Thus, corporate in Namibia has to be within line of Namibia constitution provisions and international human rights norms. Without laws that compared insurance industry in fulfilling its obligation the struggle against the HIV/AIDS pandemic, which is a critical component of the struggle for sustainable livelihoods, sustainable households and sustainable communities, will be a dream. The government’s effort of curbing spreading of HIV will be in vain.

Namibia people believe that insurance industry whether they are national enterprises or multinational corporate are suppose to act inconsistent with the host states’ existing international human rights obligations. This obligation of states appears also in Organisation for Economic Co-operation and Development (OECD) provision with regards to protection of HIV/AIDS rights which states that

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91 A discussion of claims against corporations for negligence under national law, or for violations of health and safety rules is outside the scope of this dissertation. In many cases, the claims may not be presented as human rights claims but rather as a violation of a duty to care such the asbestos mining case in South Africa (*Lubbe et al v Cape [200] 1 WLR 1545( HL)*).
...while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host government’s international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.92

Through policies and laws, Namibia as a state can enforce the right to non-discrimination and equality upon private sectors to respect and protect human rights93. In particular, legislation, regulations and other measures to eliminate all forms of discrimination against people living with HIV/AIDS and members of vulnerable groups, and to ensure that their can exercise their fundamental rights to the fullest.94 Though it so difficult for lawyers to the vexing question of corporate criminal accountability, it also hard to condemn a company when it is, first, so difficult to see into its thoughts, and second, so difficult to restrain its bulk. In a famous law review article, John Coffee quoted an eighteenth-century Lord Chancellor of England who asked:

‘Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked’?95

However, in modern world these corporate have ‘soul to damn’ and have ‘body to kick’.

Existing international regimes, regional and national laws cover the human rights obligations of corporations; the possibilities for monitoring these obligations are the shoulders of various states that are assent to the international conventions, treaties and agreements. These can be implemented by means of the existing normative obligations and procedural possibilities with regard to international human rights norms96. It is therefore, unreasonable exclusion of a HIV positive person from taking up life insurance cover with insurance company is in itself discrimination. Even Namibia does not have anti- discrimination; and HIV-positive person in the context of Namibian law cannot be said is to a ‘person with disability’, but constitution and other law prohibit discrimination.97

92 James Salzman (2001), The OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, General Policies II.2.
93 For example, the Declaration of Commitment on HIV/AIDS, adopted on 26 June 2001 by the General Assembly of the United Nations, constitutes a worldwide commitment to a redoubling of national, regional and international efforts in the fighting against the epidemic on all fronts, especially in the field of human rights.
96 Meeran. R ‘Cape pays the price as justice prevails’ The Times (Law Supplement), 15 January 2002, at 5
97 Sections 18 and 19 of The Affirmative Action (Employment) Act, Act No. 29 of 1998

These resolutions invite States to undertake the necessary measures to do away with these types of discrimination, guarantee full exercise on the part of HIV/AIDS sufferers of all civil, political, economic, social and cultural rights; to guarantee access to medication; and to involve community organisations, NGOs and HIV/AIDS sufferers themselves in policy-making for the struggle against AIDS.

It is not only the Human Rights Commission, which made effort to describe some measures when it comes to the fighting of HIV/AIDS prevention but also trade law\footnote{99 In the last decade, international trade law under the aegis of the WTO Agreements has arguably become the dominant site for the legal governance of HIV/AIDS. This has been achieved by the combination of the General Agreement on Tariffs and Trade (GATT, 1994), with its accompanying side agreements, including the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), and the WTO’s Dispute Settlement Understanding which creates a judicial mechanisms for resolving trade disputes. Article XX (b) of GATT 1994, enables countries to declare exemptions from the general principles of international trade law on public health grounds. However, the SPS Agreement requires that such exemptions have to be founded on standards of scientific evidence that many African countries are unable to muster without assistance, while the TRIPS Agreement confers unprecedented rights and bargaining position on pharmaceuticals in the trade in pharmaceutical products for the control and treatment of HIV/AIDS. For example, perceived patent violations may trigger wide-ranging, WTO-authorised trade sanctions at the instance of the patent holder (pharmaceutical) against a developing country.}, and human rights law have both emerged as the dominant sites of governance of legal response to HIV/AIDS. Public health emergencies notionally create regimes of exception, enabling State to derogate from their basic human rights and trade law obligations. For example, the International Covenant on Civil and Political Rights recognises that public health could justify the limitation of certain rights including freedom of movement, freedom of expression, and freedom of assembly and association, among other rights.

The African Civil Society, Governance and AIDS Initiative in its working paper states that the public health exceptions to human rights protection are usually used to justify derogations...
of limitations that limit the enjoyment of basic civil and political rights while those derogations based on trade law are used to justify expansion or protection of economic, social and livelihood rights.\textsuperscript{100}

It is important to know that though none of the international human rights conventions specifically provides protections against unfair discrimination on the basis of HIV/AIDS they have other provisions that may be interpreted to provide protection to people living with HIV/AIDS. These include the right to health and access to health care, which are included in the ICESR, CEDAW, the CRC, and the rights not to be discriminated against based on disability in the UDHR and ICESCR. In the absence of international instruments that deals specifically with HIV/AIDS, the International Guidelines on HIV/AIDS and Human Rights are an important indication of the view taken by the UNITED Nation on the rights of people with HIV/AIDS.\textsuperscript{101}

3.5 Constitutional Protection for People Living with HIV/AIDS

It is imperative for citizens to remember that Human Rights require a conception of what rights one possesses by virtues of being human. Human Rights are not only protected because the constitution affords protection, but protection is self-speaking evidence of being human beings. Simply we are human beings and independent of our varying social circumstances and degrees of merits.\textsuperscript{102} According to Shestack JJ, in his writing ‘The Philosophic Foundations of Human Rights’ he stated that :

\begin{quote}
The justification and affirmation of the core principles of human rights as universal principles are highly significant and reassuring for the vitality of human rights in rules are People living or infected with HIV or AIDS are inseparable from the constitutional protection and equality before the law.
\end{quote}

Ernst-Ulrich Petersmann’s thesis mentioned that constitution embraces the notion of constitutionalism which he described as a

Bottom-up struggle for the protection of human rights and human dignity in the Kantian sense of maximum equal liberty for the personal development of every individual.\footnote{Ernst-Ulrich Petersmann, (2001), \textit{Human Right And International Economic In The 21st Century: The Need To Clarify Their Interrelationships}, Journal of International Economic Law, at pp. 2-39}

In 2004, a 	extbf{Chinese President Hu Jintao} visited a hospital in his country. He made a remark to Non-governmental organisations, dedicated to AIDS prevention and treatment in the Beijing You’ an Hospital, by calling all members of society to show care and love for AIDS patients and eliminate any forms of discrimination against HIV carriers and AIDS patients, so that all AIDS victims can “feel the warmth of society”.\footnote{Author unknown, (1st December 2004), \textit{Ending Discrimination Against HIV/AIDS Patients}, (From Xinhua News Agency, China}

This call includes also insurance industry not to discriminate HIV/AIDS people from their business activities. Historically the industry has taken a conservative view and denied insurance cover to people with HIV. Now it is time for the life insurance industry to let fade away the hang over of their conservative view. Based on particularly concerned about the need to end unfair discrimination against people with HIV and develop appropriate serves for them. This is also the requirement of the Constitution [Namibia Constitution] prescribes in it various provisions.

Namibian Constitution’s principle is anchored in the concept of Constitutionalism. Its Constitution is not a pure Namibianised (not wholly an indigenous document)\footnote{Naldi, G J, (1995), \textit{Constitutional Rights in Namibia: A Comparative Analysis with International Human Rights}, Juta & Co, Ltd, Kenwyn} but people through their representatives have influenced it. The Constitution reflects the 1982 Constitutional Principles, which anchored in the democratic values and are concern for fundamental rights as derived from international standards.

On economical welfare\footnote{Article 95 of the Constitution provides also the concept ‘Promotion of the welfare of the people’}, the World Trade Organisation (WTO) guarantees the freedom, non-discrimination, rule of law, compulsory adjudication and of a mutually beneficial of labour are shown to be compatible with the six basic functions of human rights law.\footnote{Journal of International Economic Law, Oxford University Press} Therefore, the Namibian Constitution protects people living with HIV or AIDS the same way as those who are not living or affected by the scourge of HIV or AIDS pandemic.
Chapter 3 is devoted to the protection of PLWHAs’ fundamental human rights and freedoms that the Constitution has describes as expressing ‘values’ and ‘ideals’ which are consonant with the most enlightened view of a democratic society existing under law.\(^{108}\) The exclusionary clause will be weighted against human rights- base perspective. This is to consider whether the discrimination or its discriminatory practice violates the basic principle provisions enshrined in Chapter 3 of the Namibian Constitution.

The Constitution protected all peoples regardless their status. People living with HIV/AIDS are vulnerable group\(^{109}\). According to the Namibian Charter on HIV/AIDS (2000) defines in the context of HIV vulnerable groups as ‘Group that are vulnerable to HIV infection as a result of prejudice or inequalities in society. In the Namibian society are inseparable from the protection. There is no doubt that (PLWHA) falls under vulnerable groups in our society. The vulnerable group that is part of our society is being discriminated based on their HIV or AIDS status.

The insurance industry excludes them from gaining benefits. These benefits, affects their families after their death based on the exclusionary practices exercised by the insurance industries. The denial of life coverage to one sector of the population is a violation of basic rights. It is also contrary to the democratic\(^{110}\) principle. The systemic violation of human rights takes places on daily basis. It urgently needs to be addressed through means of innovative and holistic strategies if we are going to fight stigma and discrimination.

It is true that Namibian insurance companies are in the hand of rich people who are belongs to high elite. This so called or perceived as high society stigmatise our vulnerable group, especially PLWHA in society. They usually excluded people living with HIV/AIDS from not taking up life policy or paying them. Though this small highly classified rich people currently is trying to move away from directly discriminating people who are being affected by HIV/AIDS by scrapping exclusionary clauses, they are still indirectly do stigmatise and

\(^{108}\) S v Minnie and Another 1991 (3) SA 364 (Nm), 384; Mwandingi v Minister of Defence, Namibia 1991 (1) SA 851 (Nm), 857 - 8

\(^{109}\) The Namibian Charter on HIV/AIDS (2000), Legal Assistance Centre, Published by AIDS Law Unit of the Legal Assistance Centre, Capital Press, Windhoek, Namibia

\(^{110}\) Ernst-Ulrich Petersmann in his ‘abstract’(2001), supra, pp. 2-39, states that “The universal recognition of human rights calls for the constitutionalization of international law and foreign policies based on human rights and principles of rule of law, limitation and separation of government powers, social justice, ‘democratic peace’, and national as well as international constitutionalism. The eight core principles of constitutionalism must be applied in a mutually complementary manner at local, national, and international levels wherever power risks being abused”.

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discriminate against PLWHA through increasing contribution fees for people who living with HIV or AIDS. These commercial industries in Namibia or else where in Southern Africa countries are trying to build a world free from discrimination when their activities are full of discrimination.\textsuperscript{111}

The attitude can also be associated with an attempt to alter the balance of power in favour of the most vulnerable groups in society as found in laws, which deals with insurance industry in Namibia. In this matter, people living with HIV or affected by AIDS in Namibia.

The measures invented in Long-Term Insurance industry invented the measures upon their discriminate rest. On that invented measures people affected are being excluded from taking up life cover is of great concerns. It will also look at the reason and associated difficulty if any to why insurance company in Namibia could not remove all HIV/AIDS exclusion clauses for new and in some instance existing business as it already done by insurance industry since 1 January 2005 in South Africa.\textsuperscript{112} Why the Namibian government through its machinery is reluctant to address the issue of stigma and discrimination by not enacting a law that scrap all exclusionary clauses that still exist insurance policy contract, whether it is a Long or Short Term Insurance Act.

3.6 State's Obligation Incorporating International Human Rights Principle\textsuperscript{113} into Domestic Law

Generally, though it is difficult to establish a comprehensive body of legal principles that outlines state obligations and the obligations of private sector [i.e. insurance industry in

\textsuperscript{111} Fact remains that the commercial companies do not feel pity and they do not have to when it comes to poor people who are most the victims of the pandemic. What they have to do is to be consistency with the provisions of the Supreme law of the land. Nevertheless, they do not realise that the poor, form the majority of the lower class [working class] are the most customers of these industry. They are the people who are discriminated the most.

This is every serious violation of basic human rights. The practice is unconstitutional and it is not compatible with the provisions of Namibian Constitution. This is a burning issue that needs legislature to look into and hear the voice of people, especially those who are excluded from exercising their benefits and basic human rights.

\textsuperscript{112} Gerhard Joubert (2004), (Executive Director of the organisation), News Release, \textit{THE LIFE OFFICES’ ASSOCIATION (LOA)} (22 November 2004)

\textsuperscript{113} A wide spectrum of documents ranging from the declarations, resolutions of the General Assembly, guidelines, reports, general comments and concluding observations with respect to state reports to treaty bodies such as CEDAW and CRC is clearly indication of states to bind themselves to such obligations they consented through ratification, accession, etc.
Namibia] with respect to human rights and HIV/AIDS\(^{114}\), there is no excuse for State’s failure to meet its obligation. The promotion and protection is universally recognised fundamental rights and individual freedoms in accordance with the international human rights instruments.\(^{115}\) It is widely recognised that international human rights law prohibits all forms of discrimination based on HIV status.\(^{116}\) International human rights law can be defined “the legal principles primarily aimed at the protection of individual and groups against violations—mostly by governments—of these internationally guaranteed rights”\(^{117}\)

Namibia as a State has subscribed to the Universal Declaration of Human Rights and Fundamental Freedoms and other international instruments that defines and protects personal rights, and freedoms. However, our constitution does not expressly states its adoption based on the continuous process of the human rights’ development since Second World War. In addition, Namibia as a state by ratifying voluntarily various covenants and international legal instrument, especially to the instruments that protect and promote human rights and freedom refers to the international Bill of Rights, which is consisting of three instruments:

- *The Universal Declaration of Human Rights* (1948);
- *the International Covenant on Economic, Social and Cultural Rights* (1966)\(^{118}\) and
- *the International Covenant on Civil and Political Rights* (1966)\(^{119}\).

These three are not only documents\(^{120}\) that define and establish human rights and fundamental freedoms but there are many others documents. Various documents, recommendations, comments and guidelines are supplementing those documents mention above for the promotion and protection of human rights. Together they form the foundation for the more than fifty additional United Nations human rights conventions, declarations, sets of rules and


\(^{116}\) Marie-Clude Chartier (2002), Supra


\(^{118}\) The Preamble to the International Covenant on Economic, Social and Cultural Rights (UN CESCR, 2000) accords socio-economic rights, such as health, equal consideration to civil and political rights. With regards to achieving freedom from want, ‘health is a fundamental human right indispensable for the exercise of the human rights’ UN CESCR, general Comment 14, 2000), and we might also add, dependent upon other rights.


\(^{120}\) It must be remember that each of these documents have a different status in international law, with treaties forming the most certain sources of legal obligations.
principles. These Covenants are international legal instruments. It means members of the United Nations, when they become parties to conventions by ratifying or acceding to them, accept major obligations grounded in law. Their mirror are well boded well in Namibian Constitution. It resulted in the adoption of the Constitution. It reflects these wish of these various writings. The quoted phrase is similar to the principles enshrined by others instrument such as Articles 2 and 7 of UDHR, Articles 14 (1) and 26 ICCPR, Article 24 ACHR and Article 3 of the Banjul Charter.

According to few authorities, there is no doubt that the legal aspect of HIV/AIDS in Namibia and southern Africa revolve primarily around human rights. The Human rights Commission has also adopted numerous resolutions confirming the prohibition, under international law of human rights, of discrimination based on real or supposed HIV status, and restating that provisions concerning discrimination in international instrument on human rights must be interpreted as including discrimination based on a person’s state of health such as their HIV/AIDS status. These resolutions invite States to undertake necessary measures to do away with this type of discrimination, to guarantee full exercise on the part of HIV/AIDS sufferers of all civil, political, economic, social and cultural rights.

There is no doubt that Namibia is experiencing an increasing rate of discrimination and intolerance against people living with HIV/AIDS. I can use a quite a number of incidents of unfair discrimination based on HIV/AIDS status that occur on a daily basis. Therefore, Namibia is not in isolation when it comes to stigmatisation and discrimination of those affected. It is not also in isolation when it comes to fighting stigma and violation of people living with HIV or AIDS. Namibia is part of global village. Incorporate of the conventions, declaration and guidelines into our national law for the sake of humanity are essential.

124 I personal I am also a victim of the discrimination even though I am HIV negative. This happen when I lost my job and my wife wanted me to include me in her funeral cover. I refused to take up HIV test because the I knew that I am HIV negative and the Sanlam Industry knew it because that time I was a member of that company based on three policy covers I had with them. They refused to include me in my wife funeral cover based on my refusal to go for HIV test.
In regards to rights-based approaches, the impact of the HIV/AIDS epidemic represents a ‘test’ of governance in that states have human rights obligations to prevention, care, treatment, as well as to take action to prevent discrimination and to uphold ‘rights’ and respond adequately to kind stigmatisation and discrimination by various stakeholders in the country such as the insurance industry.

In conclusion, it is essential to know that these obligations mentioned above are concerned with the steps that States have to take toward the progressive realisation of the rights in question to the ‘maximum available extent of the state resources’. For example core obligations, are regardless of resources ‘to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’ (UNCESCR, 2000).

Yamin (2002: 38&39) succinctly captures these elements and says the following:

...asserting a rights to health means that not only has a government moral or humanitarian responsibilities to attend to health needs of the most vulnerable and economically disenfranchised of the population, but it also has legal obligations that, at minimum, require to establish a normative framework consistent with international law, to reflect health as a priority in its budget, and to devise a plan to take deliberate steps to move towards the progressive realisation of the rights to health.125

In addition, these obligations also invoke additional human rights principles such as ‘participation’, ‘non-discrimination’ as well as ‘accountability’ and ‘access to effective remedies’ (Yamin, 2002).126 If Namibia as a State takes steps in eliminating discrimination against HIV-positive people, it will be a closer step to elimination of institutional discrimination, the category that includes cases where discrimination originates in specific institutions within society, where certain people are given preference over others. Some areas include the employment sector, insurance benefits, certain medical aid provisions and unequal protection under the law.127

3.7 Recognition of the Relationship between Human Rights and HIV/AIDS


126 In South Africa, for example, for people living with HIV/AIDS, efforts to ensure the right to equality, equal protection and benefit of law can draw upon the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000.

Human being as habitat of this global village must know and reminds themselves that, integral to the UN human rights ‘system’ is what called the ‘indivisibility’ and interdependent’ of all human rights. The recognition with regard to PLWHAs’ rights is not domestically but universally recognised as this epidemic affects human rights physically, mentally and psychologically. According to Human Rights and HIV/AIDS webs, it that:

In 1980s, the relationship between HIV/AIDS and human rights was only understood as it involved people infected with HIV and with AIDS and discrimination to which they were subjected. (1) For HIV-infected people and people with AIDS, the concerns included mandatory testing; restrictions on international travels; barriers to employment and housing, access to education, medical care, and/or health insurance; and many issues raised by names reporting, partners notification, and confidentiality.

These issues are grave, and almost 27 years in Namibia and else where in the world [own observation] in relation to the epidemic, they have not been resolved. In some ways, the situation has become even more complicated, as old issues appear in new places or present themselves in new or different ways. For example, in certain settings, access to employment is continuing to be denied to people infected with HIV. In Namibia, even in place where this situation has improved as the government set up various programme to address the issue or effort to minimise the spread of HIV, HIV-infected individuals now run the risk of finding themselves excluded from workplace health insurance schemes, with considerable impact on their health and, therefore, on their capacity to work. This issue with tremendous human rights implications, that have been raised for HIV-infected people, in particular the large and growing disparities and inequalities not only regarding access to antiretroviral therapies but also in the way these people get their medicine, housing, insurance life cover and other forms of care in Namibia public health institution.

3.7.1 How Constitution Prescribes Discrimination

Through its constitutional provisions, Namibia Constitution prohibits discrimination. The commercial industries in Namibia are well familiar with the constitution provisions. All

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129 Human Rights and HIV/AIDS webs http://hivinsite.ucsf.edu/InSite?page=kb-08-01-07 accessed on 22nd June 2007
130 This issue came up during the Supporting Group Tuesday meeting of people living with HIV or AIDS that they are being put in separate cue when they go for their fill-up. They have own Pharmacy made only for the people who are been living with HIV or AIDS.
stakeholders whether is public or private sectors in Namibia are acquiesces with the object of the constitution when in relations to the protections of its citizens. They know that the Constitution is the fundamental Supreme Law of the Namibia, the organs of state are clearly subordinate to it. It is not only the organs of state that are subordinate to the provisions of the constitution but also private institutions such as commercial industries and individual must also respect the provisions of the constitution.

Their acts must be consistence with the ‘basic Principles’ of the constitution which reflects the values of a liberal democracy in the context of democratic society which Namibia as a State was founded. They all know that that the conduct, which is inconsistent with Chapter 3 – ‘Fundamental Human Rights and Freedom’, does not has place in Namibia whether is in public sector or private sector. In Hoffman Court’s case, the Court reasoned that at the heart of unfair discrimination lay the recognition that under the Constitution, all human beings, ‘regardless of their position in society, must be accorded equal dignity’ (para 27).

3.7.2 The International Human Rights Law and Non-Discrimination

Discrimination, degradation and dehumanisation are all important human rights issue for society to be able to address issue of HIV or AIDS in Namibia. It is important for people suffering from HIV or AIDS to be respected as equal human beings. Government, private institutions and individuals must affirm their dignity, worthiness and offer unconditional support and empathy.

On international arena international human rights, law prohibits all forms of discrimination based on HIV status. In the context of this notion, Article 7 of the Universal Declaration of

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131 Preamble and article 1 (6) ; *Cultura 2000 v Government of the Republic of Namibia* 1993(2) SA 12 (Nm).25
133 Preamble and Article 1 (1)
135 Article 2 and 7 of the Universal Declaration of Human Rights; Articles 2.2 and 3 of the International Covenant on Civil and Political Rights, Article 2,3 and 26 of the international Covenant on Economic, Social and Cultural Rights, Article 2 of the International Convention on the Rights of the Child.
Human Rights serves as a foundation. This Article lays the foundation for a vertical and horizontal application of the rights. The Article provides the equality for all people by stating that:

All people are equal before the law and are entitled without any discrimination to equal protection of the law.

Relying on human rights legal frame we can say that human rights perspective provides normative\textsuperscript{136} and legal protection to vulnerable groups in particular, which is further reflected in the principles of ‘minimum core’ and ‘adequate realisation’.

*The Human Rights Committee’s General Comment 18 (37)* as a starting point in respect to the interpretation of non-discrimination on international human rights law reserves a recognition in this matter. It begins with premises that: Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle relating to the protection of human rights\textsuperscript{137}. One of the Reports is of that Secretary General on International and Domestic Measures Taken to Protect Human Rights and Prevent Discrimination in the Context of HIV/AIDS. This report clear states that:

\begin{quote}
  discrimination on the basis of HIV or AIDS status, actual or presumed, is prohibited by existing international human rights standards and that the term ‘or other status’ in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS\textsuperscript{138}.
\end{quote}

The UN Human Rights Commission’ Report paragraph 23, the Secretary General suggested that international human rights treaty bodies, responsible for the supervision and monitoring of international human rights instruments are developing case law and jurisprudence which define the application of human rights of a general nature within the particular context of HIV or AIDS.\textsuperscript{139}

To make it stronger, the Commission of Human Rights established means and measures by appointing a Special Rapporteur on discrimination against HIV-infected people, for a period

\textsuperscript{136} The Human Rights provisions contained in the Constitution of the Republic of Namibia provide the overall normative framework for policy; *University of Namibia Policy on HIV/AIDS*


\textsuperscript{138} This is access in *Report of the Secretary General on International and Domestic Measures Taken to Protect Human Rights and Prevent Discrimination in the Context of HIV/AIDS*, E/CN.4/1995/45 at paragraph 22.

\textsuperscript{139} *Ibid, paragraph 23*
of three years. In his conclusion he put strong emphasis on matter of discrimination by said that discrimination against HIV infected people or people with AIDS is neither admissible under international human rights instruments no justified as an appropriate means of policy for controlling the AIDS pandemic.

In addition, the Commission on Human Rights adopted several resolutions that address discrimination. While these resolutions do not bind states in the same manner, as would a treaty, nevertheless, states are called upon to report on these issues by the treaty bodies as mentioned earlier. Consequently, they have impact upon states to that extent. Pursuant to these resolutions, it formulated a set of 12 guidelines for states.

3.7.3 **Guidelines and Comments in assistance for States**

There are few guidelines and comments, which a state can use in its law for the protection and promotion of human rights of those being infected or affected by HIV or AIDS. For example, Guidelines 5 requires states to enact or strengthen anti-discrimination and other protective law that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research and provide for speedy and effective administrative and civil remedies.

The Commission on Human Rights requested the Secretary General to prepare a report on these guidelines for the consideration at its fifty-third session. In his report, the Secretary General suggested that Guideline 5 should be interpreted to mean that exemption superannuation and life insurance should only relate to reasonable actuarial data, so that HIV or AIDS is not treated differently from analogous medical conditions.\(^\text{140}\)

Guidelines 10 requires states to ensure that the governments and the private sector codes of conduct that translate human rights principles into codes of professional responsibility and practice with accompanying mechanisms for implementation and enforcement. In this regard, the Secretary General suggested that the state should “require or encourage professional groups and other private sector industries (e.g. law, insurance) to develop and enforce their own codes of conduct addressing human rights issue in the context of HIV/AIDS.” Relevant

\(^{140}\) Report of the Secretary General on HIV/AIDS and Human Rights, E/CN.4/1997/37 at page 26
issues would include confidentiality, informed consent to testing, reducing vulnerability, discrimination, and practical remedies for breach/misconduct.

Guidelines 11 requests states to establish monitoring and enforcement mechanisms to guarantee protection of HIV and related human right, including those of people living with HIV/AIDS, their families and communities.

3.7.4 ILO Code of Practice

The ILO code of practice on HIV/AIDS and the world of work is an addition to the above-mentioned non-binding guidelines. The code of ILO is also part of the Namibia Labour Law. The Labour Act\textsuperscript{141} makes it illegal to discriminate on the grounds of a person’s HIV status, or to harass a person because he or she is HIV positive. Chapter 2 ‘Fundamental Rights and Protection’ of the Labour Act, prohibits discrimination in any employment practice, directly or indirectly, against any individual on the basis of AIDS of HIV status is specifically listed as a prohibited ground of discrimination in the labour Act.\textsuperscript{142}

Is discrimination prohibited in insurance industry? If discrimination is not prohibited when it comes to life insurance companies, why it is not permitted in place of work in terms national and international law conceptualisation?

An ILO Code of Practice on HIV/AIDS and the world of work\textsuperscript{143} is a document that consists of 32 pages document begins with a set of key principles of which non-discrimination comes second to the recognition of HIV/AIDS as a workplace issue. It suggests that the stigmatisation and discriminatory practice constraints efforts aimed at promoting HIV/AIDS prevention.\textsuperscript{144} With reference specific to testing, it suggests that testing should be prohibited for insurance purposes.

The ILO demands that Insurance companies should not require HIV testing before agreeing to provide coverage for a given workplace. ILO suggests that employers should not facilitate any

\textsuperscript{141} Labour Act, Act No.15 of 2004
\textsuperscript{142} Section 5 (2) (f) Labour Act.
\textsuperscript{143} An ILO code of Practice on HIV/AIDS and the world of work (2001), International Labour Office, Geneva, Switzerland
testing for insurance purposes and the information that the insurance company already have should remain confidential.\textsuperscript{145}

Concerning the benefits and social security coverage, it is also suggests that governments, employers and worker’s organisations should ensure that people living with HIV/AIDS are treated “no less favourable” than workers with other serious illnesses, and that their families are not excluded from the full protection and benefits of social security programmes.\textsuperscript{146}

It is not only ILO guidelines, International Human Rights law or Conventions but court’s cases serve as precedent when it comes to the protection of people living with HIV/AIDS’ rights. Therefore, there is a need to look at the jurisprudence beyond Namibia or South African legal systems.

3.7.5 SADC Code Of On HIV and Employment

In 1997, the Southern Africa Development Community (SADC) adopted the Code on HIV/AIDS and Employment, the provisions of which Namibia busy incorporating into national law. This Code objective is to ensure non-discrimination between individuals with HIV infection and those without, and between HIV/AIDS and other comparable health-medical conditions. Regrettably, the Code does not say anything about insurance business and applies only to workplace.\textsuperscript{147} A study conducted by Lirette Louw\textsuperscript{148} at that time found that most insurance companies operating in the Southern African countries test applicants for life insurance for HIV and reject the application if the test resulted in positive.\textsuperscript{149} Nonetheless, HIV status is usually not declared as being the ground for the rejecting the applicant.

3.7.6 Conclusion

In summary, is that none of the international human rights conventions specifically prohibits unfair discrimination based on HIV status because the problem of HIV/AIDS had not yet

\textsuperscript{145} Ibid at page 15
\textsuperscript{146} Ibid at page 17
\textsuperscript{147} <http://www.hri.ca/>
\textsuperscript{148} Louw L (2003), \textit{HIV/AIDS and Human rights in SADC} unpublished. The study focuses on Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe
\textsuperscript{149} The exception is Namibia where, since 1996, metropolitan Namibia offers life cover to HIV positive persons. Available at Metropolitan Namibia \url{http://www.metlife.co.za/default.asp?page=241161}, accessed on 23 October 2008
existed at the time they were drafted. However, Article 51 and Article 68 give space for amendment. People must take a note that HIV positive persons are simple protected under the general anti-discrimination provisions that be interpreted to include HIV status as a prohibited ground. Though no text providing legal protection to the human rights of person suffering from HIV/AIDS, as vulnerable group on its own, has ever been adopted whether at international regional nor at the national levels.

CHAPTER FOUR

150 The International Covenant on Civil and Political Rights, 1966
FOREIGN JURISPRUDENCE IN FRAMEWORK OF HUMAN RIGHTS: CONFLICT BETWEEN INSURANCE BUSINESS PRACTICES AND THE RIGHTS TO NON-DISCRIMINATION

4.1 Introduction

When the Namibian Courts interpreting the provisions especially found in Chapter 3 of the Constitution ‘Fundamental Human Rights and Freedom’ in terms of Chapter 9 of the Constitution, the constitution invites judges to consider also foreign jurisprudence if local jurisprudence lacks such references or is not helpful. This chapter explores legal cases where insurance industries refused to grant life insurance policies to individuals based on a physical impairment. Most of the legal contentions between insurance companies and HIV positive individuals are in which AIDS exclusion clauses included in the contract allow insurance companies to refuses to pay out the benefits of a policy upon the death of the policyholder as a result of HIV/AIDS infection.

Namibia as a States is not Sidudu Island. It is a part of global village. Its legal system is intertwining with other sources found in the main stream of sources of law. It is important for an infant country such as Namibia who just got its independent after 18 years to have a cursor study of other jurisprudence whether is ratio decedendi traceable from various Courts, International Courts of Justice, Human Rights Courts’ decisions or various Comments having bearing on human rights issues. Whether is Courts decisions’ or other variable resources demonstrated the strategic advantage in addressing an issue from angle of a violation of the right to equal treatment before the law and the basic principle of non-discrimination. In the same breath, Namibia Constitution provides the principle of non-discrimination that forms the cornerstone of international human rights law.

It is therefore, interesting to mention some cases where the court reached decisions for the protection and promotions of human rights in the world, which is full of prejudices towards those, are seen they do not deserve to be treated equal by followers.

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152 Articles 78 (4) and 80 (2) read with article 144 of the Constitution
153 Chapter Three of the Namibia Constitution, article 5 – 25 and Article 144
It is not only Namibian Courts dealt with issue of HIV in its Court in the name of the protection of PLWHAs’ rights but also various Courts in the world met that scenario.

There is a growing body of jurisprudence that can assist judicial officers if they are affronted with sensitive cases. They can apply such law in order to protect the rights of the most vulnerable groups; people living with HIV/AIDS\textsuperscript{154}. One must take note that many of these cases have been decided in the absence of specific legislative provisions especially to HIV/AIDS’ cases in the workplace. These legal precedents serve a good example how general legal provisions relating to equality, dignity and privacy can be used to curb infringements of fundamental rights based on HIV status in the workplace.

One example is of that case of Eldridge and Others v Attorney General of British Columbia (1997) 3 Butterworths Human Rights Cases [BHRC] 137 should be of interest to Namibian lawyers involved in human rights litigation, particularly on the issues surrounding equality clauses.\textsuperscript{155}

The Court held that the government were obliged to conform to the provisions of the Canadian Charter. It further held that the failure of the Medical Services Commission and hospitals to provide sign language interpretation services to facilitate effective communication between deaf patients and their physicians rendered the appellants unable to benefits from the legislation to the same extent as hearing persons and thus discriminated against them, in violations of s 15 (1) of the Charter. The Court further decided that, since the effect of that discrimination was clearly that deaf persons were receiving inferior medical treatment, it could not be seen as a minimal impairment of the appellants’ s 15 (1) rights and could not be justified under s 1 of the Charter.\textsuperscript{156}

In elaboration to various countries courts’ decision, they also see that HIV/AIDS is not impediment when it comes to work or various benefits as human basic rights. These courts judgments form part of HRC’s jurisprudence. Therefore, Namibia court’s system can use

\textsuperscript{154} HIV/AIDS WORKS, Using the ILO Code of Practice and training Manual: Guidelines for labour judges and magistrates, ILO AIDS <www.ilo.org/aids>

\textsuperscript{155} The facts of the case are not important in this moment but its interpretation is of crucial to this point. The question to be answered was whether failure to include medical interpreter services for the deaf infringed s15 (1) of the Charter. If the answer was in affirmative, the next question would be – was the infringement demonstrably justified in a free and democratic society, as envisaged in s 1 of the Charter?

growing jurisprudence for the combating of the infringement of those who are being targeted. This can only be achieved if it analyses various court decision in similar matter and facts.

4.1 **Namibia**

Does the Constitution allow violation found in life policy in terms of exclusion clauses embraces by the insurance companies in Namibia? If the Namibia Constitution and international law prohibits discrimination based on person status is our government not also accomplices to the violation of basic human rights; namely people living with HIV or AIDS who are equal before the law?

The Namibian Court dealt with similar matter in respect to HIV/AIDS discrimination decision. The Court’s judgment also form part of our human rights jurisprudence. In Haindongo Nanditume v Minister of Defence the court held that the refusal by the Minister of Defence to employ a person solely based on their HIV status is discrimination in an unfair manner. At that time, the Namibia Labour Court Act No. 6 of 1992 did not specify HIV status as a prohibited ground of discrimination. The court upheld the argument that HIV status alone is not an indication of fitness to work and thus to exclude someone from employment solely on the basis of their HIV status constitute unfair discrimination defined as defined by the Labour Act. This is a milestone for Namibian Judicial System. It is clear from point of view that unfair discrimination cannot hold water in Namibia, though it still exercised at certain degrees by companies that only think about the ideas of making monies and forgets about the social responsibilities they have to fulfil towards the society at all.

4.2 **South African legal system**

In South Africa and Botswana, the question of whether or not a job application could be refused solely because of applicant’s HIV status has been decided on constitutional grounds.

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157 The New Labour Act, Act No. 11 of 2007 which still has to be enacted in its Chapter 2 ‘Fundamental Rights and protections in terms of S 5 (2) (f) prohibited discrimination on the ground of HIV/AIDS.
This decision does not differ from the Namibian Labour Court of Haindongo Nanditume v Minister of Defence Court’s case.

In *Hoffmann v South African Airways*\(^{158}\), the South African Constitutional Court (SACC) held that the exclusion of Mr Hoffmann from employment as a cabin attendant constituent an infringement of his right to dignity. The Court reasoned that at the heart of unfair discrimination lay the recognition that under the Constitution, all human beings, regardless of their position in society, must be accorded equal dignity’, para 27. In a like manner, in Diau v Botswana Building Society, the Industrial Court considered refusal to employ solely based on HIV status to an infringement of the right to dignity. These cases form a very important jurisprudence in Southern Africa countries when it comes to discrimination of people living with HIV/AIDS. Despite these cases were related to rights to work discrimination I am convinced that it has also impact to the discrimination related to exclusion clauses found in the life police insurance industry.

### 4.3 Canada

In other jurisdictions, such as Canada and other western countries, termination of employment based on HIV status has been held to be an infringement of the right not to be discriminated against because of disability. One of the cases the African can rely on as persuasive when it comes to jurisprudence on human rights violation especially on HIV/AIDS is the case of *Thwaites v Canada (Canadian Armed Forces)*\(^{159}\). In *Thwaites v Canada (Canadian Armed Forces)*, the Canadian Human Rights commission found that the Canadian Armed Forces had failed in its legal duty to accommodate the complainant based on his disability and to individually assess his capabilities. The Commission stressed the importance of searching for reasonable alternatives or accommodating the individual to permit such person to job.

It held that:

> Indeed, without reasonable accommodation, the protection given … to certain groups, the disabled in particular, would quite illusory.

In *Saskatchewan Human Right Commission v Saskatoon City*\(^{160}\) the Supreme Court of Canada found that individualised testing be considered as an alternative to a discriminatory practice.

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\(^{158}\) Hoffmann v South African Airways 2001 (1) SA 1 (CC)

\(^{159}\) 1989 (2) SCR 1297

\(^{160}\) 1989 (2) SCR 1297
Furthermore, the Court stated that human rights values cannot be over-ridden by business convenience alone. The Court further stated that exemptions from human rights principles must be narrowly construed because to allow ‘statistically supportable’ discrimination would ultimately defeat the purpose of human rights legislation of protecting individuals from collective fault.

In the case of *J v London Life Insurance Co*¹⁶¹ the British Columbia (BC) human Rights Tribunal found that London Life Insurance Co discriminated against the complainant on the ground of martial status and physical disability, by denying him individual life insurance cover without any reasonable justification.¹⁶² The Court found out that in deny insurance to persons in J’s situation; London did not undertake any actuarial studies to determine the risk of HIV infection. It simply relied on the fact that no actuarial data regarding transmission rates of HIV were available. Based on these analyses the BC Human Rights Tribunal held that life insurance is a service customarily available to the public and should not in terms of section 8¹⁶³ of the Canadian Human Rights Code, be denied to a person who applied for it. Furthermore, the BC Human Rights Tribunal concluded that the decision of London Life to refuse life insurance cover to J was not in accordance with a sound and accepted practice.

### 4.2 India

In India, both the Bombay (MX v ZA AUR 1997 (Bom 406) and Gujarat High Courts (Chotulai Shambahi Save v State of Gujarat (2001), the court held that exclusion from employment solely on the basis of HIV status constitutes an infringement of Article 14 (Equality before the Law, and Article 16 (Equality of opportunity in matters of public employment) of the Indian Constitution.

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¹⁶¹ 1999 (36) CHRR D/43
¹⁶² J’s wife was HIV positive resulted from a blood transfusion in 1980. J sought to purchase life insurance on his own life with London Life Insurance Co (London Life). The respondent denied J’s application upon being informed that his spouse was HIV positive. London Life was not the first insurance company to deny J coverage. Based on routine medical examination, New York Life Insurance and Canada Life Insurance refused him cover on the basis that he was a high risk. J then applied for life insurance through NN Financial, which also declined coverage, without any medical examination. London Life viewed J as someone who is at high-risk to contract HIV. Even J was HIV negative and was not suffering from disability at the time the decision was made to refuse him access to insurance, he was classified as non-insurable. According to London Life, the main reason was that J was having or continued to have sexual relations with a person who is HIV positive.
¹⁶³ J brought his claim based on Section 8 of the Canadian Human Rights Code, by alleging that unfair discrimination on the ground of physical disability and marital status with respect to a service customarily available to the public.
4.3 Australia

X v. The Commonwealth of Australia\textsuperscript{164} at issue in this case was the ability of the Australian Defence Force to terminate the service of an enlisted soldier solely based on his HIV status. The soldier has succeeded before the human rights tribunal to which he complained, was returned to the tribunal for a re-hearing. The decision of the tribunal resulted in a settlement on undisclosed terms\textsuperscript{165}.

The second case was of that an Australian High Court decision in the Australian Mutual Provident Society v Goulden\textsuperscript{166} in favour of the industry in 1986. The case dealt with the inconsistency of section 49K (1)\textsuperscript{167} of the Australian Anti-Discrimination Act of 1977 and section 78\textsuperscript{168} of the Life Insurance Act of 1945. The inconsistency between the two legal provisions arisen from a case, which involved a blind man. The facts of the case are not going to explored in this paper, but legal principle laid in this is of very important. The Australian High Court declared section 49K (1) of the Anti-Discrimination Act invalid under the Australian Constitution. The Court in reaching into conclusion, it adopted an approach of Dixon J in Victoria v The Commonwealth.\textsuperscript{169}

The Court held that a State legislation which makes it generally unlawful for a life insurance company to take account of physical impairment in determining whether it would or would not accept a particular proposal or the terms upon which it would grants insurance cover would be inconsistent with the essential scheme of the provisions of the Act that regulating the issue of policies and the fixing of premiums.

4.4 Conclusion

\textsuperscript{164} [1999] HCA 63
\textsuperscript{166} 1986 (160) CLR 330
\textsuperscript{167} Section 49K(1) of the Anti-Discrimination Act renders unlawful any refusal to insure a person or the creation of any adverse differentiation in insurance terms on the ground of ‘physical impairment’ of the person concerned.
\textsuperscript{168} Section 78 of the Life Insurance Act expresses a legislative intention to protect the interest of policyholders by allowing registered life insurance companies to classify risks and fix premium according to their own judgment, based on actuarial advice and prudent insurance practice.
\textsuperscript{169} 1937 (58) CLR (618) at para 630.
The legal system consists of rich jurisprudence whether it is on national or international level; there is no reason why the life insurance industry cannot be challenged if they are still exercising such practices in Namibia if the insurance companies are based on blanket discriminatory practices. It is worth to say that the life insurance business should not practice discrimination towards HIV positive individuals. Ramaroson, M. (2003) stated that instead of excluding all HIV positive individuals, the number of CD 4 cells in their blood could be used to determine their insurability, as metropolitan life and Old Mutual currently practice it.

Therefore, Namibia legal system can use these various valuable sources for the protection of vulnerable people in society as provided by laws. It is only way human rights and fundamental freedoms of people with HIV/AIDS (and those vulnerable to HIV infection), its integration can be fully realised.

CHAPTER FIVE

OBSERVATION AND RECOMMENDATION

5.1 Life Insurance Business Practices Do Reflect Unfair Discrimination

“If we are to achieve the constitutional goal of equality ‘we must never tolerate prejudice either directly or indirectly” (para 37)\textsuperscript{170}.

There is doubt that AIDS epidemic has devastating effects in Namibia not only on the social economic welfare but also on financial stability. The raising costs of the disease are leading not only to higher insurance premiums and reduced benefits, but also to questions about how best to balance the economic viability of the insurance industry with the Government’s desire to improve access to financial services and create a bigger private social safety net. Question is how Namibia, as a State could improve access to financial services and create a bigger

private social safety net if part of society are being denied such benefit through unconstitutional behaviours or practices?

There is no doubt that treatment is being regarded as a cost-effective option\textsuperscript{171}. Therefore, issuers of individual insurance policies are more able to protect themselves from HIV-related costs. Most major life insurer would issue a standard policy only to HIV-negative people, and increasing number requires follow–up tests to retain coverage. Though in Namibia and South Africa a few companies have started offering individual plans for HIV – positive people, they are too expensive and unaffordable when it comes to vulnerable people in our society. Based on these measures put in place when it comes to the viability of life cover of HIV-positive people I am convince that these are means provided to discriminate against PLWHA indirectly.

Life insurance companies directly and indirectly use various tools to unfairly stigmatise and discriminate against PLWHA. This does not only happen in Namibia but it also happen in most of African countries, especially Sub-Sahara countries are most facing a biggest threat of HIV/AIDS’ scourge. It is also the continental with unabated stigma and discrimination towards people living with HIV or affected by AIDS.

The Insurance industries beliefs that they are faced with economical loss when they think about HIV/AIDS; though prima facie it is a health crisis\textsuperscript{172} that has since wrecked havoc in the political, economic and legal sphere of the greater African society based on little knowledge about it. Therefore, this commercial community used many methods to justify unfair discrimination. The following practices are the mirror of unjustified discrimination. The Short-Term Insurance Act\textsuperscript{173} and Long-Term Insurance Act\textsuperscript{174} both do not make provisions for prohibition of discrimination against persons living with HIV/AIDS\textsuperscript{175}.

\textsuperscript{171} Stephen Cramer the head of the HIV/AIDS research unit at Metropolitan Life one of the South African insurers to examine the AIDS issue stated that AIDS remains a challenge for the insurance industry and a stinky issue for Namibian’s Government that wants to expand services without bankrupting employers [who employed the customers for the insurance companies] or insurance industry.

\textsuperscript{172} In 	extit{Minister of Health and Others v Treatment Action Campaign and Others} 2002 (10) BCLR 1075 (CC), The Constitutional Court of South Africa has agreed on the impact of HIV/AIDS on human life.

\textsuperscript{173} Act No. 4 of 1998

\textsuperscript{174} Act No. 5 of 1998

Insurance companies are not compelled to ensure quality pre-and post-counselling when sending people for HIV test. Whether it is intention or not the insurance companies in some instances fails to inform the applicants that they have options not to take the HIV test. They (insurance industries) ignored the issue of education, which support to be prerequisite. Because of these failures, they continued to violate the rights of people living with HIV through discernment found in terms of exclusionary clauses in the life insurance’s contract or cover.

These clauses in an insurance policy, which say that the insurance company will not pay out in some situations, are known as ‘exclusion clauses’. Most of Namibian citizens think that exclusion clauses are unconstitutional. Most of insurance life cover in Namibia contains exclusion clauses that deal with HIV and AIDS, for example: a clause that says that the insurance company does not need to pay if the insured commits suicide or dies of AIDS. It is worrisome when it comes to these exclusion clauses because some of them are vague and very broad. They (exclusion clauses) give insurance companies wide powers to decide if a death is some way HIV- or AIDS related176.

The company deciding on the cause death or disability: In some life cover policy, there are clauses say that the insurance company will not pay out the insured person beneficial because the company decided that died or become disabled as a result of AIDS. This allows the insurance companies in Namibia to decide what the cause of death or disability is on its own. From that decision, the company is benefitting many monies from deaths. The insurance companies in Namibia is here to make monies (business purposes) and they are suppose also to plough back some of their earning in development by means of social up lifting and eradicate the poverty in the society. Instead of the above they encroaches the rights of vulnerable group in our society. Is this encroachment justifiable?

176 Example; is a clause that say that the company will not pay if the insured has HIV or AIDS at the time of death. However, a person who has HIV, such person would not necessary die of an AIDS related condition. For instances he or she could be killed in a car accident or electrified or stabbed to death. Sometimes the insurance company will still refuse to pay out if the cause of death has nothing to do AIDS. If one evaluates these above example giving about the cause of death of the insured person, one will not come up with a reasonable answer regards to the refusal of payment towards those left by the deceased person. A person will end up thinking that these insurance companies are ripping-off our people benefit they deserve.
One again, the Namibian Constitution protects the weak, the marginalised, the socially outcast and victims of the prejudice and stereotyping. People living with HIV/AIDS fall into this latter category and accordingly deserve protection. Minority’s plight has been greeted with extreme prejudice and it is common cause that they are subjected to systemic disadvantage and discrimination. The Constitution provides the protection for all people and this intercession is illustrated in the Constitutional Court in case of Jacques Charl Hoffman. It serves as bright star for all citizen of this country in reminding them about what role can the Constitution play in the protection of human rights, and of the fact that in the constitutional era prejudice and stereotyping have no place.

Thought the constitution provides equality before the law, vulnerable groups in the Namibian society are still subject to various stereotypes of prejudices, stigmatisation and discrimination. The Namibia society feel that the state is failing its obligation if it cannot address the exclusion of PLWHA from taking up life cover by insurance companies.

Some citizens still feel that so-called elite societies, who own corporate, do not see that all people are equal before the law. Even people fought against discrimination and equality for all and equality before the law for all people, in reality, government is not fulfilling its mandate as provided by the constitution in terms of equality and freedom from discrimination.

Namibia as a country and its citizens is facing with the increasingly devastating impact of HIV/AIDS on individual and community well-being, economical development, life expectancy and mortality. Citizens who are living with HIV or AIDS being as a minority are being stigmatised and marginalised and condemned to ‘economic death’ as a result thereof, especially when denied an equal opportunity in employment and life policy coverage. Denial of life policy coverage based on their HIV status impaired their dignity and constitutes unfair discrimination. Therefore, Article 10 of the Constitution guarantees and prohibits the PLWHA the violation of their rights to equality.

5.2 The Role of National Law

DE REBUS, DECEMBER 2000, at. p 50

Article 10 of the Namibia Constitution, prohibits discrimination based on the grounds of sex, race, colour, ethnic origin religion, creed or social or economic status

Hoffman v South African Airways (CC) (case CCT/2000 unreported)

Article 10 (1) and (2) of the Namibia Constitution, Act 1 of 1990
It is not only the Namibian Constitution which is silence when it comes to the protection of people living with HIV or AIDS when it come to insurance business practices but also none of the international human rights conventions specifically provide protection against unfair discrimination on the basis of HIV/AIDS. Though they do not have such provisions both they have other provisions, that may be interpreted to provide protection to protection to people living with HIV/AIDS. These include the right health and access to health care that are included in the ICESCR, CEDAW and the CRC and the rights not to discriminate against based on disability\textsuperscript{181} in the UDHR and ICESCR.

In the absence of international instruments that deals specifically with HIV or AIDS, the International Guidelines on HIV or AIDS and Human Rights are an important indication of the view taken by the United Nations on the rights of people with HIV or AIDS\textsuperscript{182}. The Guidelines were developed by the Joint United Programme on HIV/AIDS to provide a human rights framework for member states of the UN in which to design appropriate programmes and policies. It emphasise the need to ensure that state’s programmes and policies must protect and promote the human rights of people living with HIV/AIDS.

From the above-mentioned instruments, it is clear that insurance industry is not exempted from these Guidelines or from the constitutional prohibition. For example, Guidelines 5 provides that states should ensure that the rights of people living with HIV/AIDS are protected. Significantly, it recommends that such protection should be provided through legislative measures.

The Southern African Development Community (SADC) has also unanimously approved a regional Code on HIV/AIDS in the workplace based on the “fundamental principles of human rights. It states that employees with HIV/AIDS should be treated in the same way as any other employee with a life threatening illness. However, it failed to mention about non-discrimination inclusion of HIV/AIDS in police cover by life insurance industry. Namibia as state failed also to mention. One wonders, why our government is not addressing this discrimination through legislative measures.

In the Namibian context, human rights defenders can use general law provisions appear in Supreme Law that provided anti-discrimination law. There are also various Acts of

\textsuperscript{181} (Affirmative Action Act 29 of 1999, section 4)
Parliament that judicial officers can use in protecting and promotion of human rights in Namibia, such as the following:

- The Constitution,
- the Affirmative Action Act,
- Labour Act No. 11 of 2004,
- Employees Compensation Act,
- Social Security Act,
- National Code on HIV in Employment,
- Health and Safety at Work just to mention few.

Courts can provide justice to those affected by the discrimination practices on daily basis. Lawyers and non-governmental organisation can use the above-mentioned laws and policies for the protection of vulnerable group in society. Based on the fact that there is no difficulty to curb discrimination when it comes to people living with HIV/AIDS being excluded from taking up life cover then justice can be done. One must not confused law with justice. In Namibia or else where in the world where democracy exist and such country obey the tenets of democracy principles, such country and its citizens have to remember that law can be used as an instrument of justice.

However, it can also be used as an instrument of justice. For example, the extreme example the law being used as an instrument of injustice during the apartheid era in Namibia where only minority group had a voting rights. Even in democratic states with voting rights for all, some sections of society are much more influential than others are, and therefore are able to ensure that their concerns are given priority over the needs and interests of more vulnerable groups. In addition, the function of universal human rights is to provide a framework to achieve a more fully balanced, just system. Therefore, our tasks as citizens of this countries is to lobby for law and ensure that national laws are conform to human rights especially to include PLWHA in the main stream of our society.

5.3 Namibia HIV-AIDS Charter Of Rights

The Namibian government reviewed the nature in a response to HIV/AIDS as prescribed in various international law and conventions. The government comes up various Charters and policies formulations but no policies or Charters addressing against discrimination exercised by the insurance industry. There is still lack of concrete laws for the protection of people living with HIV/AIDS against any stigmatisation and discrimination.

Though Namibia Constitution clearly states that everyone is equal before the law, people living with HIV/AIDS in Namibia are suffered double edges sword through unfair practices. I would say that the insurance companies in Namibia contributed also hugely on HIV prevalence, which is very high in many communities. Their contribution to HIV or AIDS continues unabated at the national, social and individual levels; to be highly stigmatised; and to cause serious discrimination based on HIV/AIDS status\textsuperscript{185}.

5.4 The African Charter

The African Charter on Human and Peoples’ Rights (Charter)\textsuperscript{186} is the principal instrument for the promotion and protection of human and people’s rights. Van Boven described the Charter as a human rights instrument specifically designed to respond to ‘African concerns, African traditions and African conditions.’\textsuperscript{187} We must remember that the Charter never anticipated the existence of the HIV/AIDS pandemic; the substantive provisions of the Charter are to some extent flexible to address the denial of human rights because of HIV/AIDS.\textsuperscript{188} The human and peoples’ rights provided for in the Charter can include, at least in implied terms, those associated with people infected by HIV/AIDS. The HIV/AIDS pandemic has become one of the contemporary African concerns.\textsuperscript{189}

5.5 Where Is Justice For All In Namibia’s Context: Human Right Approach?

\textsuperscript{185} Opening up the HIV/AIDS epidemic (August 2000), Guidance on Encourage beneficial Disclosure, Ethnical Partner Counselling, And Appropriating Use Of HIV Case Reporting, Joint United Nations Programme on HIV/AIDS (UNAIDS) and World Health Organisation (WHO) August 2000, \textasciitilde{mhtml:file://E:\Research File\opening up the hiv-aids epidemic.mht} accessed on the 29\textsuperscript{th} April 2008.

\textsuperscript{186} OUA Doc.CAB/LEG/67/3 rev.5. Adopted June 27, 1981 and entered into force in October 21, 1986


\textsuperscript{189} Article 16 (1) and (2) of The African Charter on Human and Peoples’ Rights is important when it comes to the promotion and protection of human rights especially to those infected and affected by the pandemic.
In general, the Constitution as whole provides the protection for all people in totality. The Constitution, specific, guaranteed and gives protection for “Fundamental Human Rights and Freedom”.\textsuperscript{190} It does matter whether a person is sick or not sick, disable or not disable, mental defect or not such a person is equal protected by our constitution at all times.

The law of the land sees all people equal and deserve all protection in the same way. If there is a violation of one of the constitutional provision, such people living with HIV or AIDS her/his human rights is violated by one of the organs of state, the constitution\textsuperscript{191} empowers such person to act. On balance of probability if his or her fundamental rights or freedom has been infringed or threatened, she or he has a locus standi as an aggrieved person to approach the Namibian’s Court to secure enforcement of such rights and freedoms.\textsuperscript{192}

Article 25 (2) allows such person to bring an actions against the violator if is in the public interest, or an action popularis,\textsuperscript{193} especially cases about discriminations, which are unabated, exercised towards vulnerable society; people living with HIV/AIDS. What needed is education with regard to the rights people are entitled to exercise when a violations occur.

The Supreme Court in several judgments has stated that the Constitution ‘expresses the commitment of the Namibian people to the creation of a democratic society based on the respect for human dignity, protection of liberty and the rule of law’,\textsuperscript{194} and justice for all. It seems it does not make any sense when it comes to ‘Insurance Industries’ in Namibia. They do not obey law of the land when it comes to moneymaking business. Insurance industry are exempted when it comes to violation of basic human rights of PLWHA. The Namibian Parliament what has to is to remind these institutions that they also have obligations to respect all people including people (HIV/AIDS) in their business’ practices. Time has come to remind some of insurance company to start taking their responsibility by protecting the rights and give justice to all.

\textsuperscript{190} Chapter 3 (three) of the Namibia Constitution
\textsuperscript{191} Article 25 (2) of the Constitution
\textsuperscript{192} Kauesa v Minister of Home Affairs
\textsuperscript{193} Catholic Commission for Justice and Peace, Zimbabwe v Attorney- General, Zimbabwe 1993 (4) SA 239 (ZS), 246-7; Section 7 (4) of the SA Constitution allows any person, and in some instances organisations, to seek enforcement of the fundamental rights. In this context serve as persuasive or some times as precedents, C Loots, Standing to Enforce Fundamental Rights, 10 \textit{SAJHR} (1994) 49 when it comes to the enforcement of Human Rights can also be used as argumentation criteria in the court of law.
\textsuperscript{194} \textit{Ex Parte Attorney-General, Namibia : in re Corporal Punishment by Organs of State} 1991 (3) SA 76 (NmS), 78
5.6 Relevancy of Human Rights Principles

The fundamental rights are threatened when one is associated with HIV/AIDS, including the rights to non-discrimination, the rights to privacy, the rights to appropriate protection in the social security and rights to work. There, the protection of fundamental rights must constitute an integral part of the fighting against HIV/AIDS if the epidemic is to be overcome.\(^{195}\) The relevance of human rights principles is entwined in the universal human rights. All human beings should enjoy the universal human rights. Whether these rights in act can be enjoyed within a given state depends on the degree to which the rights are recognised and effectively realised. States signify their recognition of and commitment to specific human rights through their ratification of international human rights agreements and through their national constitutions.

States can recognise human rights in various ways. Many states have explicitly acknowledged the international human rights agreements in their constitutions. This obliges such state to have primary responsibility for the implementation of human rights. Not only national governments have the primary obligations for the realisation of human rights but also other bodies such as private sectors, including the international community, have obligations as well. For example, Trade law and human rights law have both emerged as the dominant sites of governance of legal responses to HIV/AIDS.

HIV-AIDS and trade law—international trade law under the aegis of the WTO Agreements has arguably become the dominant site for legal governance of HIV/AIDS. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) confers unprecedented rights and bargaining position on pharmaceuticals in the trade in pharmaceutical products for the control and treatment of HIV/AIDS.\(^{196}\) The Namibian Constitution\(^{197}\) demonstrates comprehensive recognition of a broad system of universal human rights. In addition, the ratification of modern international human rights agreements signifies the nation’s formal legal commitment to widely recognised human rights.


\(^{197}\) Articles 140, 143 and 144 read with Article 63 (2) (e), Article 32 (3) (e) of the Namibia Constitution.
CHAPTER SIX

6.1 Conclusion and Recommendation

6.2 Conclusion

The ratification of some of Human Rights Conventions, Declaration by Namibia as a state’s commitment to the broad human rights framework established in international law. Therefore, the seriousness of the commitment is demonstrated by the array of institutional arrangements through which the government carries out its human rights obligation. In regards to the commitment of state, when there are violations of human rights, the courts use the international standards as a tool for the interpretation of national law, basing themselves on the presumption that it was the intention of the lawmaker to give the law a content that was compatible with the international human rights law.

The law making members must remember that a human rights-based approach to HIV/AIDS is one that protects respects and fulfils – rather than restricts the human rights and fundamental freedoms of those who are HIV positive and vulnerable to HIV infection. Therefore, these lawmakers has to fulfil the wish of international community which is found in various conventions, UN documents and Declarations by transforming them into national laws.

In order to respond effectively to HIV stigma and discrimination, Government and private sectors together with various stakeholders have to think about interventions within national border. A range of strategies that tackle prejudice and protect people’s rights needs to be implemented. The legislature needs to come up with a specific anti-discrimination law to protect those are being discriminated because of HIV/AIDS status.

All role-players having interests in promotions and protecting the rights for people who are not able to protect themselves against stigma and discrimination, must remember that a human rights-based approach to HIV/AIDS is also important because it is morally right.
Recommendations

○ Human Rights Law on international and regional should be amended to include HIV status as a separated prohibited grounds of discrimination.

○ Courts whether it is on international, regional or national levels should be made more accessible to vulnerable people.

○ On regional levels a body must be created for the monitoring violation especially by the private sectors.

○ Namibia as a State should enact a specific law aimed at anti-discriminatory practices.

○ Insurance companies, which still practices such discriminatory practices against HIV positive person should, made accountable and more responsive to the principles of human rights.

○ Companies must be enforced to adopt their underwriting on the basis of neutral grounds.
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