



Rising to new legal challenges: HIV and Human Rights

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Introduction

- + 32 years into HIV epidemic
 - + Different epidemic
 - + Same stigma and human rights violations
- + Near universal acceptance that law has a role in protecting rights:
 - + Statement of Principles on HIV, the Law and the Judiciary in sub-Saharan Africa African Judges, 2009
 - + Global Commission on HIV and the Law, 2012
 - + Extensive body of jurisprudence
 - + Numerous statements: UN Guidelines on HIV/AIDS and Human Rights

Ten (largely accepted) human rights commandments

Thou shall not:

1. Test without informed consent
2. Breach confidentiality
3. Unfairly discriminate on grounds of HIV status
4. Deny employment on grounds of HIV status
5. Deny access to general health care services
6. Deny access to education or other social services
7. Segregate or isolate on grounds of HIV
8. Deny access to life-saving treatment
9. Enact special criminal laws to punish HIV transmission
10. Deny women rights regarding reproduction on grounds of HIV status

Emergent challenges

- + Problem is no longer what the law says, or doesn't, but how & whether it is implemented:
 - + Access to justice
 - + Human rights and legal education
- + Ensuring there is not a regression in human rights law
 - + Botswana Public Health Bill, 2013
- + Focus on governance, accountability and progressive realisation of right to health
 - + Ensure progressive realisation of right of access to health care services

Areas where judges fear to tread or tread with disregard for human rights

+ **Enforcing laws that criminalise 'sodomy' and sexual orientation**

+ Criminalising sex work

+ Failing to protect or advance women's and children's rights

Sexual orientation: Not all bad news:

- + 2009 in *Naz Foundation v Govt of NCT of Delhi* High Court declared unconstitutional s 377 of the Indian Penal Code on grounds that it violated individual's fundamental rights to equality before the law, freedom from discrimination and to life and personal liberty
- + But...
 - + 38 African countries still criminalise
 - + 42 of 54 Commonwealth countries

Recent wave of homophobia in law

- + 2010 Malawi: judge N Usiwa-Usiwa found two men guilty of “engaging in unnatural practices” “against the order of nature”
- + 2012/12: Bahati Bill, Uganda
- + Jamaica: 2013 case re whether 1864 sodomy law is in conflict with 2011 Charter of Fundamental Rights and Freedom
- + 2013: Zimbabwe Constitution
 - + s65(3) sexual orientation not listed in equality clause
 - + S78(3) prohibition on same-sex marriage
- + April 2013: Paul Kasonkomona charged under s 178(g) of the Zambia Penal Code, Chapt 87 of the Laws of Zambia for “soliciting in a public place for an immoral purpose”

Protection of African cultural/traditional rights or imposed colonial prejudice?

- + The **Buggery Act 1533**, formally **An Acte for the punysshement of the vice of Buggerie** (25 Hen. 8 c. 6), was an [Act](#) of the [Parliament of England](#) that was passed during the reign of [Henry VIII](#). It was the country's first civil [sodomy law](#).
- + Defined [buggery](#) as an unnatural sexual act against the will of God and man. This was later defined by the courts to include only [anal penetration](#) and [bestiality](#).
- + Remained in force & buggery remained a capital offence until its repeal by the Offences Against the Person Act in 1828.
- + The last known execution for "buggery" was in 1836.
- + **Sodomy was decriminalised in England in 1967.**
 - + But sodomy remains criminalised throughout much of the Commonwealth

Challenges for HIV and the law – outside the commonwealth

- + No rule of law = no justice, no effective HIV prevention
- + Middle East & Eastern Europe
 - + Protection of rights of vulnerable groups
 - + Migrants
 - + Drug users

Conclusions & recommendations

- + *Statement of Principles on HIV, the Law and the Judiciary in sub-Saharan Africa African Judges:*
 - + “We call for a review of all laws to ensure consistency with the International Guidelines on HIV/AIDS and Human Rights...”
 - + “We call for members of the judiciary to use their positions of power and influence to act as role models by providing leadership on the HIV epidemic in their communities.”