

HIV-AIDS, GOVERNANCE AND THE LAW: FRAMING AN AGENDA FROM AFRICA

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Introduction

Africa has proved to be a fertile ground for the growth of HIV. It is host to the largest proportion of persons living with HIV/AIDS in the world. Simultaneously, Africa is also home to populations least able to afford effective governmental intervention to protect of persons living with HIV/AIDS. Africa's sero-prevalence crisis poses severe challenges for the efficacy and legitimacy of law on the continent. The full extent of these legal challenges in Africa has yet to be mapped and it is not necessarily the mission of this writer to map them. Rather, this brief article identifies five specific areas, as illustrations of the kinds of legal fields in which these challenges most urgently arise. The mapping of a fuller agenda for HIV/AIDS and law in Africa implicates African governments, regional and international governance institutions, civil society development and advocacy organizations, lawyers and judges, and academic researchers and teachers. It also requires cross-disciplinary collaboration and belongs beyond the limits of this article.

Pandemics and the law

HIV/AIDS provides the latest chapter in the long, chequered and largely undistinguished history of the interaction of law with public health. The mobility of human beings across the diverse boundaries of an unevenly developed but increasingly globalizing world is accompanied by greater microbial, viral and bacterial mobility.

As the instrument through which states address their governance challenges, the law has shown a remarkable lack of foresight, subtlety, empathy or respect for victims in grappling with infectious diseases. Long before the HIV/AIDS pandemic and before African States emerged or became capable of regulating their own affairs, there were global infectious disease crises associated with smallpox, bubonic plague, and syphilis, and other less well known ailments.

The classic legal response to health crises for which science has not yet found a cure has been invariably coercive measures of isolation, termination, quarantine and vector control. California's State Courts notoriously supported the detention of women that tested positive for gonorrhoea in 1919. Confronted in the 1927 with an alleged case of mental ill health across three generations of the same family (that later proved to be unsubstantiated), the United States Supreme Court authorized involuntary sterilization as a response. In an eloquent display of the full majesty of law's capacity for brutality, Judge Oliver Wendell Holmes, speaking for the Court in *Buck v. Bell*, justified this as follows: "it is better for the world if, instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover the cutting of fallopian tubes. Three generations of imbeciles are enough." More recently, the diagnosis of an atypical pneumonia in south-east Asia in early 2003, later christened the Severe Acute Respiratory Syndrome (SARS), led several countries to introduce a raft of harsh travel bans, isolation, and quarantine measures for nationals of countries in which SARS cases were rumoured to exist.

Contextualising legal responses

The scientific context governing legal responses to HIV/AIDS is much more advanced and favourable than in previous pandemics. Medical science is more sophisticated today than ever before. Research investment in HIV/AIDS has never enjoyed greater priority or the attention across the frontiers of many disciplines.

The media for communicating accurate information about the virus, the methods for managing its transmission and research developments in the search for medical responses have shown technical advances and global penetration that are unmatched in history. A global community of activist and advocacy groups has grown around HIV/AIDS. Yet, in the absence of a proven cure, legal responses have been based on a mixture of prejudice, myth, mis-information, and fantasy. In Nigeria, for instance, a High Court judge barred a female litigant living with HIV/AIDS from her court because the judge erroneously took the view that HIV was contagious. The woman was suing her employers, a medical establishment, for unlawful termination of her employment on grounds of her sero-status.

Governing infections

Infectious diseases have always created governance challenges for states both internally and in their relations with one another. Legal responses to such diseases initially took the form of coercive, control measures. As government has grown more complicated both domestically and globally, so also have the forms and mechanisms of governing infections become more complicated. Today, therefore, countries may choose to govern infections through a mixture of measures in immigration, environmental, criminal, human rights, or trade law, civil and criminal procedure and evidence laws, in addition to specifically targeted public health policies. Domestically, these measures may be deployed through legislation, case law, and administrative measures and policies. Internationally, they may take the form of different forms of international co-operation, treaty and institutional arrangements. International institutions and organizations increasingly also adopt declarations, resolutions and other measures of so-called “soft law” affecting public health issues such as HIV/AIDS.

Law's responses to HIV/AIDS could be direct or indirect. 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, but nevertheless have significant consequences for on the capacity of communities and people to respond effectively to the pandemic. Restrictions on freedom of association or expression (such as broadcasting or educational guidelines that preclude public advertisement of condoms or removing health education from school curricula on moral or religious grounds) would fall into the latter category.

Trade law and human rights law have both recently emerged as the dominant sites of governance of legal responses to HIV/AIDS. Public health emergencies notionally create regimes of exception, enabling State to derogate from their basic human rights and trade law obligations. The International Covenant on Civil and Political Rights recognizes that public health could justify the limitation of certain rights including freedom of movement, freedom of expression, and freedoms of assembly and association, among other rights. However, such limitations must be specifically targeted in proportion to the perceived harm. These exceptions cut both ways and are also mutually contradictory. They can diminish or enhance the protection and well being of persons living with infectious ailments or with HIV/AIDS, in particular, depending on how they are applied. 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. In addition, with wartime rape as the major vectors of HIV in much of Africa, international justice mechanisms instituted in response to such experiences, including the genocide in Rwanda, have failed to anticipate or address this new form of war crime.

HIV-AIDS & trade law

In the last decade, international trade law under the aegis of the WTO Agreements has arguably become the dominant site for 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 mechanism 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. But 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-authorized trade sanctions at the instance of the patent holder (pharmaceutical) against a developing country.

Under the GATT 1994, Public health emergencies can justify nationally imposed limitations on trade regimes. The Doha Declaration on the TRIPS Agreement and Public Health adopted by the Ministerial Conference of the WTO in November 2001, affirmed that “each [WTO] member [State] has the right to determine what constitutes national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency. The Declaration also recognizes that WTO member States can grant compulsory licenses and reserve the right to determine the grounds on which such licenses are granted. Most African countries, however, lack the human and material resources to operate the complex rules of international trade law with skill or rigour. There is scope for African countries to pool their limited expertise and resources if they are to use the mechanisms of international trade law effectively.

HIV/AIDS & human rights law

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. As a result, legislative bases for responding to HIV/AIDS remain woefully inadequate and essentially anchored on the coercive foundations left by the colonial regimes. To advocacy groups calling for the provision of condoms in prisons, South Africa's former Minister for Corrections during President Mandela's government, Sipo Mzimela, infamously riposted that he was not employed to promote sodomy among prisoners. Regimes of access to treatment, voluntary testing and other measures of determination of sero-status, and the protection of the rights of persons determined to be sero-positive are in severe arrears of best practice or of a policy framework conducive to reduction and control of transmission or high-risk behaviour.

Judicial responses have similarly been uneven. In 2002, the South African Constitutional Court mandated access to anti-retroviral treatment, in this case for pre-natal mothers living with HIV/AIDS. In contrast, Nigeria's Federal High Court, ruled early in 2004 that persons living with HIV/AIDS do not have a right to exercise under Section 42(1) of Nigeria's 1999 Constitution that prohibits discrimination. Yet, the same court said that the non-provision of treatment to prisoners living with HIV/AIDS amounted to unconstitutional torture and a violation of the obligation(s) of government to guarantee the best attainable state of physical and mental health under the African Charter on Human and Peoples' Rights.

HIV-AIDS & international justice

In much of West Africa and Central Africa, war has been a significant vector of HIV/AIDS. In West Africa this occurred through the Mano River wars in Liberia and Sierra Leone, which began in 1989. Many victims and witnesses of the violations in Sierra Leone and Liberia became infected after they were raped as innocent victims of violations committed by combatants. These victims are mostly women.

In the Rwanda genocide and the other wars in the Great Lakes countries of Central Africa, intrusive and enforced sexual outrages against women were a major war crime. In both Rwanda and the Mano River countries, judicial responses have been set up in the International Criminal Tribunal for Rwanda and the UN-supported Special Court for Sierra Leone. The recognition of gender-based outrages as war crimes represents a major advance in international justice. However, many of the female victims of these outrages have become victims of a consequential HIV/AIDS directly traceable to their wartime victimization. The international community has been ready to invest vast sums of money in ensuring the conviction of a few of the perpetrators of these atrocities but very little or no money in ensuring that these women get access to

basic treatment. Meanwhile the enforced, wartime transmission of HIV/AIDS is not yet recognized as the international crime it ought to be.

HIV/AIDS & Immigration

Since the onset of the pandemic, many countries have introduced HIV/AIDS-related travel restrictions including such measures as blanket bans on sero-positive persons, disclosure of sero-status as a condition for admission, and expulsion of persons with positive sero-status. A 1999 survey, *Deutsche AIDS Hilfe* found that 101 out of 164 countries surveyed had some form of HIV/AIDS-related AIDS restrictions. Most of these restrictions affect travelers from Africa traveling to destinations outside the continent. Similar controls within Africa are rare but cannot be ruled out. In this there is an unjustifiable failure of protection by African countries for their nationals overseas. In June 2004, the UNAIDS and the International Organisation for Migration (IOM), issued a joint “Statement on HIV/AIDS-related Travel Restrictions”, which concluded that “HIV/AIDS-related travel restrictions have no public health justification and are costly and ineffective.”

HIV/AIDS & the criminal process

There are many ways in which HIV/AIDS relates with criminal and process. Many countries, including a few in Africa, now criminalize the transmission of HIV/AIDS through high-risk conduct undertaken with full knowledge of sero-status. However, the skills to investigate such crimes are very limited in Africa. The standards of management of and responses to HIV/AIDS in prisons are notoriously problematic in most African countries.

Conclusions

As with previous global pandemics, the response of the law in Africa to HIV/AIDS remains ponderous, ill-informed, and mostly heavy handed. Judges do not seem to know enough to enable them to respond with compassion and nuance to it, legislatures seem indifferent or ill-prepared as are national bureaucracies. Yet the law remains the primary site for the governance of public responses to HIV/AIDS. The gap left by the failure of the law to fulfill this role is currently filled by a variety of non-State actors, particularly, religious and community leaders. In many African countries, religious communities have succeeded in framing HIV/AIDS as the ultimate precursor of Apocalypse and accompanying damnation. Religious institutions now require open disclosure of pre-marital serologies as a condition for marriage without providing any support, counseling or other guarantees to persons whose lives would be altered by such measures and their outcomes. Such measures would struggle to pass legal muster if the law could be properly deployed in response to HIV/AIDS.

274 U.S. 200, 203 (1927)

David P. Fidler, “SARS and International Law”, *ASIL Insights* , April 2003.

Minister of Health v. Treatment Action Campaign , CCT 8/02, Judgment of 5 July 2002.

Festus Odafe & 3 others v. Attorney-General of the Federation & 3 Others , Suit No. FHC/PH/CS/680/2003, judgment of Judge R.O. Nwodo of 23 February 2004.

UNAIDS/IOM Statement on HIV/AIDS-related Travel Restrictions, 8 (June 2004).