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Six Key Factors in Realizing HIV-Related Human Rights in Kenya: Actions for Policy & Lawmakers

A POLICY BRIEF

Since 1984, when the first case of HIV was diagnosed in Kenya, the country has progressively developed its laws, policies and legal jurisprudence. These policies and laws have evolved from the inclusion of a chapter on legal issues in Sessional Paper No. 4 of 1997, to the establishment of a task force on legal issues relating to HIV & AIDS in June 2001. The report of the task force led to the drafting of the HIV & AIDS Prevention and Control Bill, 2002 which was passed into law in December, 2006 and became operational in February, 2009.

The promulgation of the Constitution on the 27 August, 2010 provided a new milestone in the field of HIV, by setting standards that all other laws and policies must conform with¹.

What are the critical links between development, poverty, education and HIV? What opportunity does development present with regard to enhancing HIV related human rights? What is the place of policy, law and governance in the HIV response? This policy brief will answer the above questions with regard to specific policy, legal and governance issues citizens' face in the realization of HIV related human rights in Kenya.

In drawing examples from the Kenyan health and legal sector and how they respond to the needs of the citizens, this policy brief points out how poverty, lack of proper policies and laws and/or improper implementation of existing laws and policies continue to offset the gains that have been made in the last two decades in the HIV response. The six issues are intended to guide policy and law makers in working towards a legal and policy environment that supports PLHIV.

Key Issues

This policy brief discusses the following factors as the six most significant issues central to the realization of HIV- related human rights in Kenya:

- Widespread stigma and discrimination.
- Inaccessibility of good quality health services, including reproductive health care
- Government's restrictive and negative measures, attitudes and practices against PLHIV
- Health care providers' insensitivity to HIV-related human rights and medical ethics
- Discriminatory and restrictive HIV- related laws, regulations and policies
- Difficulty in accessing justice and HIV-related legal services for PLHIV

If the above issues are dealt with, PLHIV are more likely to live without stigma, social exclusion, fear of discrimination and violation of their rights.

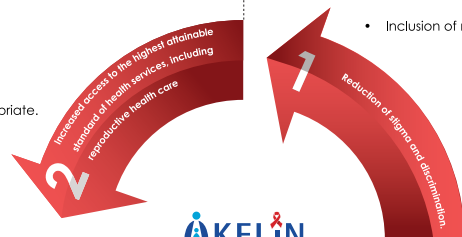
¹Kenya Legal and Ethical Issues Network on HIV & AIDS (KELIN). *Punitive laws and practices affecting the HIV response in Kenya*. 2014. Available at <http://kelinkkenya.org/wp-content/uploads/2010/10/punitive-laws-practices-affecting-HIV-responses-in-Kenya.pdf>. Accessed on 20 June, 2015

Six Key Issues in Realizing HIV-Related Human Rights in Kenya: Actions for Policy and Law Makers

Facilities, goods and services should be:

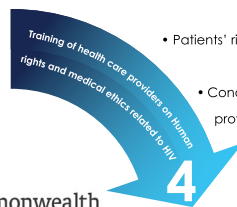
- Available in sufficient quantity and continuous supply
- Accessible to everyone (physical, economical, information and non-discriminative).
- Acceptable: adhere to medical ethics and be culturally appropriate.
- Quality assured.

- Policy and lawmakers' engagement with community and religious leaders to encourage community interaction with PLHIV and those vulnerable
- Inclusion of non-discrimination measures in institutional and work place policies
- County measures to ensure community-centered HIV-related health services
- Inclusion of community and peer mobilization in county strategic plans and in health service delivery

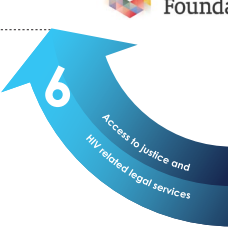


- Information and sensitization of parliamentarians, judges and prosecutors on legal, health and human rights aspects of HIV; on relevant bills, laws and policies, and the implications for enforcement, investigations and court proceedings.
- Train prison personnel on the rights and health care needs of detainees living with, or at risk of HIV infection.
- Discussions and negotiations among HIV service providers, those who access services and the police, to address law enforcement practices that impede HIV prevention, treatment, care and support efforts.

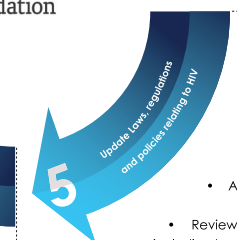
- Provide health care providers with the skills and tools necessary to ensure



- Patients' rights are protected and guaranteed.
- Conduct human rights and ethics trainings for health care providers and health care administrators.



- Define priorities for the rights based approach to health service delivery
- Create an enabling legal environment for HIV responses.
- Representation of PLHIV and key populations at national and county planning processes.
- Adequate budgetary allocations towards health services.
- Review and repeal laws that criminalize or discriminate against PLHIV, including key populations.



- Remove legal barriers to condoms, comprehensive and age appropriate sex education, sexual and reproductive health services, needle and syringe programmes, effective drug dependence treatment and other evidence based HIV prevention responses.
- Amend drug control legislation including the Narcotic Drugs and Psychotropic Substances Act to support a response to drug use as a health issue, rather than a criminal justice issue.

- Provision of legal information and legal advice and representation to ensure that PLHIV access justice for violations of their rights.
- Provision of alternative forms of dispute resolution at the local level, which will ensure that everyone has access to justice.
- Passage of the Legal Aid Bill 2013 by the National Assembly
- Increase budgetary allocation to the Judiciary and HIV & Equity Tribunal to aid in access to justice for PLHIV.



Widespread stigma and discrimination

HIV related stigma refers to prejudice, negative attitudes and abuse directed at people living with HIV. Discrimination in the context of PLHIV involves treating PLHIV in a different, unjust, unfair or prejudicial way, on the basis of their actual or perceived status. Simply put, discrimination is 'enacted stigma', and can occur at different levels: individual, family, community or national.²

The combination of ignorance, prejudice and fear creates fertile ground for the continued human rights violations and consequently, spread of HIV: on the other hand, openness, acceptance and accessible HIV services are key to its reduction. Stigma and discrimination against PLHIV have been cited as the primary hurdles in addressing prevention and care issues. They are stumbling blocks to ensuring access to essential services.

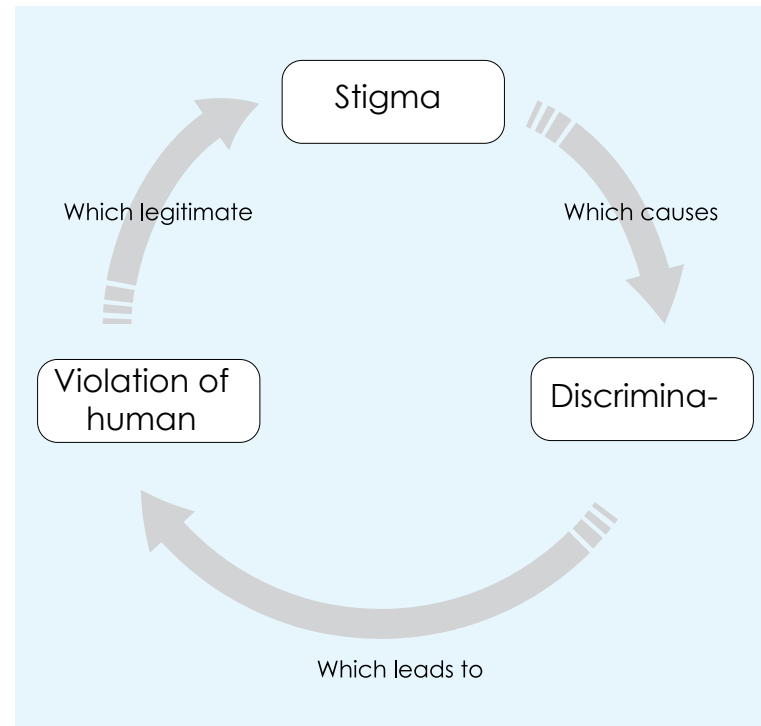


Diagram developed by Miriam Maluwa and Peter Aggleton

²National Network for Empowerment of People Living with HIV in Kenya (NEPHAK), *The People Living with HIV stigma index, Kenya*. November, 2011.

Reduction of stigma and discrimination

Some ways to address stigma and discrimination, as indicated by UNAIDS, include:³

- Policy and lawmakers' engagement with community and religious leaders to encourage community interaction with PLHIV and those vulnerable.
- Inclusion of nondiscrimination measures in institutional and work place policies.
- County measures to ensure community-centered HIV-related health services.
- Inclusion of community and peer mobilization in county strategic plans and in health service delivery.

³Joint United Nations Programme on HIV & AIDS (UNAIDS), *Guidance Note: Key Programmes to reduce Stigma and Discrimination and increase access to Justice in National HIV Responses*. Geneva, 2012

Inaccessibility of good quality health services, including reproductive health care

The Constitution of Kenya and the World Health Organisation (WHO) Constitution⁴ enshrines the highest attainable standard of health as a fundamental right of every human being.

The right to health includes access to timely, acceptable and affordable health care of appropriate quality. PLHIV are particularly vulnerable to and disproportionately suffer from a wide range of preventable diseases and adverse effects of inadequate water, sanitation and hygiene mainly due to their suppressed immune systems.⁵

Improper implementation of existing laws and policies continue to offset the gains that have been made in the last two decades in the HIV response. The six issues are intended to guide policy and law makers in working towards a legal and policy environment that supports PLHIV.

Schedule 4 of the Constitution of Kenya provides that the national government is responsible for development of health policies. It is also responsible for standards of health service delivery and guidelines for their enforcement. County Governments, on the other hand, are in charge of health services, including facilities, pharmacies, ambulance services, and for promotion of primary health care as transferred by the Transition Authority.⁶

⁴World Health Organisation (WHO), Constitution of the World Health Organisation, Basic Document, Forty-fifth edition, Supplement, October 2006. Available at http://www.who.int/governance/eb/who_constitution_en.pdf Accessed on 20 June, 2015

⁵Hutton, G., & Bartram, J. (2008). Regional and global costs of attaining the water supply and sanitation target (Target 10) of the Millennium Development Goals. World Health Organisation, Geneva. http://libdoc.who.int/publications/2007/9789241595759_eng.pdf

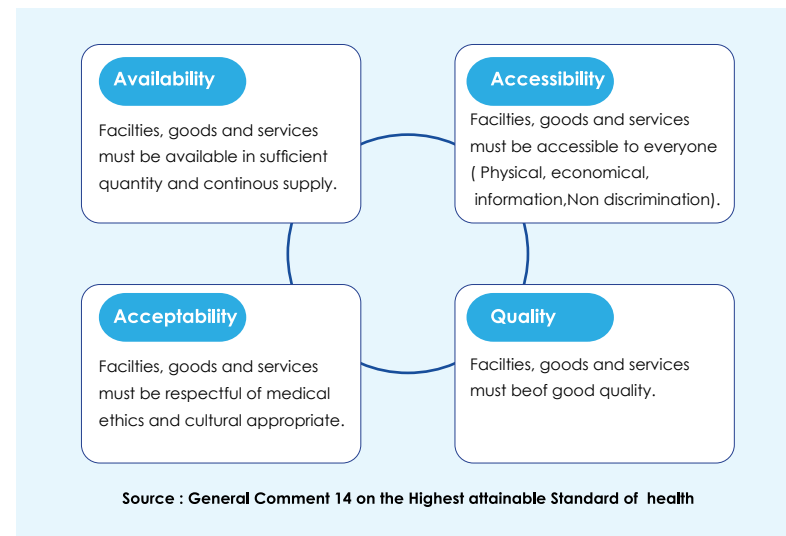
⁶Pursuant to the provisions of Section 23 (1) of the Transition to Devolved Government Act, 2012, the Transition Authority identified functions listed in the Fourth Schedule of the Constitution and transferred them to the County Governments through Legal Notice No. 16 of 2013. Available here <http://www.transauthority.go.ke/images/Advisory%20Reports/Transfer%20Of%20Functions%20To%20County%20Governments.PDF> Accessed on 23 June, 2015

⁷Office of the United Nations High Commissioner for Human Rights (OHCHR) & World Health Organisation(WHO), Right to Health- Fact Sheet No. 30, Geneva, 2008. Available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> Accessed on 23 June, 2015

Access to the right to health⁷ for PLHIV includes:

- Access to health facilities and treatment. This includes treatment for opportunistic infections as well as constant supply of ARVs.
- Well-equipped facilities with properly trained health care professionals to handle the complex medical issues presented by PLHIV.

In the development of health delivery strategies, county governments should ensure that all PLHIV have access to health services, including those unique to PLHIV. The services must be delivered in a manner that respects the rights of PLHIV.





The Kenyan government has often adopted restrictive and negative measures, attitudes and practices against PLHIV or those considered to be most at risk of HIV infection especially sex workers and injecting drug users.⁸ Capacity building and sensitization of law makers and enforcement agencies will ensure that they understand the importance of the law in protecting those affected by HIV against discrimination and violence, and to support access to HIV prevention, treatment, care and support.

⁸Joint United Nations Programme on HIV & AIDS (UNAIDS) *Judging the epidemic: A Judicial Handbook in HIV, Human Rights and the Law*, Geneva, 2013

Sensitization of law makers and law enforcement agencies

To address restrictive and negative measures, attitudes and practices against PLHIV, the Joint United Nations Programme on HIV & AIDS (UNAIDS)⁹ recommended programmes such as:

- Information and sensitization of parliamentarians, judges and prosecutors on legal, health and human rights aspects of HIV; on relevant bills, laws and policies, and the implications for enforcement, investigations and court proceedings.
- Training for prison personnel on the rights and health care needs of detainees living with, or at risk of HIV infection.
- Discussions and negotiations among HIV service providers, those who access services and the police, to address law enforcement practices that impede HIV prevention, treatment, care and support efforts.
- To ensure sustained enlightenment of judiciary, legislature and law enforcement agencies, relevant HIV-related legal, health, and human rights content should be included in the respective departments' training curricular.

⁹Joint United Nations Programme on HIV & AIDS (UNAIDS), [Guidance Note: Key Programmes to reduce Stigma and Discrimination and increase access to Justice in National HIV Responses](#). Geneva, 2012.

Health care workers are not simply inputs in the production of health care, it is important to consider how their attitudes, perceptions and experiences and responses to HIV & AIDS affect the quality of care they deliver.¹⁰

Human rights and ethics trainings should be conducted for individual health care providers, administrators and regulators.

The County governments should budget for and undertake continuous professional development training on human rights and medical ethics for all health care workers responsible for provision of HIV related services.

¹⁰Rajaraman D & Palmer N, Changing roles and responses of Health care workers in HIV treatment and care, *Tropical Medicine and International Health*, Volume 13 No. 11 pp. 1357-1363, November 2008. <http://onlinelibrary.wiley.com/doi/10.1111/j.1365-3156.2008.02176.x/pdf>

Training of health care providers on human rights and medical ethics related to HIV

The objective of continuous training of health care providers is three-fold:

- Ensure that health care providers know about their own health rights (HIV prevention and treatment, universal precautions, compensation for work-related infection) non-discrimination in the context of HIV.
- Reduce stigmatizing attitudes in health care settings.
- Equip health care providers with the skills and tools necessary to ensure patients' rights are protected and guaranteed.

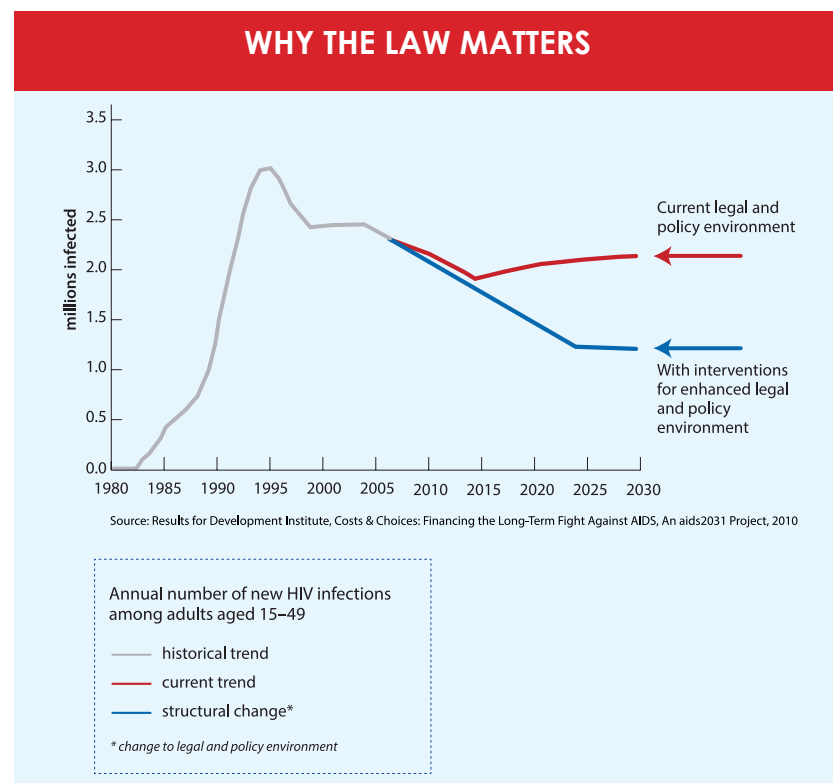
Discriminatory and restrictive HIV- related laws, regulations and policies

Laws, regulations and policies have a direct impact on the HIV epidemic, as well as the lives and human rights of those living with, affected by or vulnerable to HIV infection. It is therefore essential to monitor and update laws, regulations and policies so that they support as opposed to hinder access to HIV and health services.

The law either in statute or on the streets as they are interpreted dehumanizes many of those at the highest risk of HIV like sex workers and men who have sex with men, people who use drugs and prisoners¹¹. Rather than providing protection, the law renders these populations vulnerable to HIV. Laws that criminalize sex work, drug use and harm reduction measures encourage civilian and police violence, while making legal redress for victims impossible. Fear of arrest drives key populations underground, away from HIV and harm reduction programmes. Incarceration and compulsory detention exposes detainees to sexual assault and unsafe injection practices, while condoms are contraband and harm reduction measures (including antiretroviral medicines) are denied.

¹¹The Global Commission on HIV and the Law was launched in June 2010 to develop actionable, evidence-informed and human rights based recommendations for effective HIV responses that promote and protect the human rights of people living with and most vulnerable to HIV. The report is available at <http://kelinkkenya.org/wp-content/uploads/2010/10/FinalReport-RisksRightsHealth-EN.pdf>. Accessed on 3 June, 2015

The Constitution of Kenya provides an expansive bill of rights which can be relied on by all, including PLHIV. It also provides reliance on treaties that Kenya has ratified, and has outlawed all customary practices that contravene the provisions of the bill of rights



Review laws, regulations and policies relating to HIV

National and County governments should ensure:

- Development of specific plans to define priorities for the rights based approach to health service delivery, and create an enabling legal environment for HIV responses.
- Representation of PLHIV and key populations at national and county planning processes, including those relating to HIV and legal environments.
- Adequate budgetary allocations towards health services.
- Review of laws that criminalize or discriminate against PLHIV, including key populations.
- Removal of legal barriers to acquisition and possession of condoms, comprehensive and age appropriate sex education, sexual and reproductive health services, needle and syringe programmes, effective drug dependence treatment and other evidence based HIV prevention responses.
- Amendment of drug control legislation, including the Narcotic Drugs and Psychotropic Substances Act, to support a response to drug use as a health issue, rather than a criminal justice issue.

Article 48 of the Constitution of Kenya (2010) provides that the state has an obligation to ensure access to justice for all persons and if any fee is required, it is reasonable and does not impede access to justice. The right to access justice is an immediate right and not progressive, therefore the government should ensure that all citizens access justice always.

Access to legal-aid services and justice for PLHIV, and particularly those among already vulnerable populations, is central to a more effective response to the HIV & AIDS epidemic.

Legal aid plays an important role in guaranteeing protection from discrimination, getting redress for rights violations and supporting access to HIV prevention and treatment services.

However, the enforcement of even the most basic human rights for people living with HIV in Kenya is difficult. This is because of high levels of stigma, a serious shortage of legal aid services and concerns about the possible disclosure of people's identity during legal proceedings, which makes many potential clients afraid of taking any legal action or pursuing legal redress for violations.

Access to Justice and HIV related legal services

- Provision of legal information and legal advice and representation to ensure that PLHIV access justice for violations of their rights.
- Provision of alternative forms of dispute resolution at the local level, which will ensure that everyone has access to justice. Community and traditional leaders should be encouraged to resolve disputes and change attitudes towards harmful and retrogressive traditional norms that put citizens at risk of HIV infection.
- Introduction to the National Assembly and passage of the Legal Aid Bill, 2013.
- Increase of budgetary allocation to the Judiciary which will trickle down to the HIV and Equity Tribunal to aid in its decentralization.

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