

Towards Realization of Women's Sexual and Reproductive Rights in Tanzania: The Case of HIV and AIDS Act of 2008, its compatibility with International Norms and Standards

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Abstract: *In 2008, Tanzania enacted the HIV and AIDS Act - a legal basis for protecting the rights of people living with HIV/AIDS. This law facilitates state's realisation of its obligations in respect to article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Indeed, parties to this Protocol ought to ensure the women health right, like sexual and reproductive health is respected and promoted within their jurisdictions. Objectively this paper explores the extent to which HIV and AIDS Act conforms with the international minimum standards by providing critical analysis on the role played by the different key players to the national HIV and AIDS policy and law. This paper recommends Tanzania to make more efforts towards creating public awareness and taking steps towards realization of the HIV and AIDS Act in line with international standards in its implementation*

Keywords: Women; Sexual and Reproductive Rights; Tanzania. HIV and Aids; International Norms and Standards

Research Area: Law

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1. INTRODUCTION

It is an undisputed fact that, in 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol)¹ became the first human rights treaty adopted by the African Union (AU)². Subsequently thereto in 2008, Tanzania enacted a specific piece of legislation termed as The HIV and AIDS (Prevention and Control) Act of 2008, (HIV and AIDS Act 28 of 2008) aiming to establish HIV Law and provides a legal basis for protecting the rights of people living with HIV and AIDS³. This law plays great role towards realization of the states' obligations in respect to the provisions of

¹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. This Protocol entered into force on 25th day of November 2005, following the legislative requirements that, a minimum number of fifteen (15) AU member States should accede to it. Since then, more States have accepted the Women's Protocol as binding and became part to it. The United Republic of Tanzania is a member of both African Charter for human and people's rights as well as the women protocol.

² This organization formerly was abbreviated as Organization for the African Unity – OAU. It was 9 September 1999, when the Heads of State and Government of the Organisation of African Unity issued a Declaration (the Sirte Declaration) calling for the establishment of the African Union, with a view, inter alia, to accelerating the process of integration in the continent to enable it play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they are by certain negative aspects of globalization.

³ HIV and AIDS Act 28 of 2008.

article 14 of the Women's Protocol. This article⁴ requires state parties to the African Charter for Human and Peoples' Rights⁵ (African Charter) to ensure that the right to health of women, including sexual and reproductive right is respected and promoted⁶.

Considering the fact that, Tanzania has ratified both the African Charter⁷ and Women Protocol⁸ thus, the main task this paper intends to discharge is to explore the extent to which HIV and AIDS Act 28 of 2008 is in conformity with the international human rights instruments that provide for the minimum standards for the rights balancing in respect to sexual and reproductive rights in one hand, health and other related rights in another hand. It should be affirmed here that, the realisation of women's sexual and reproductive rights in Tanzania can be critically examined from the essence of appraising the HIV and AIDS Act 28 of 2008. The gist of the Act⁹ and its compatibility with International Norms and Standards ought to ensure proper administration and respect of the women's sexual and reproductive rights in Tanzania.

Therefore, among others, this paper will examine albeit briefly the role played by different state actors¹⁰ within Tanzania in respect to the national HIV response as provided for under the law¹¹. This discussion will be strictly confined only on the sphere of women's sexual and reproductive rights. For the purposes of attaining this noble objective, this paper will briefly highlight the country's profile, followed by examination of international articulations towards sexual and reproductive rights, and lastly a discussion will center on the HIV and AIDS Act 2008. Recommendations on the way forward towards realisation of women's sexual and reproductive rights in Tanzania will be provided prior to conclusion. The methodology adopted for the development of this paper is chiefly library research.

1.1 Country profile

The United Republic of Tanzania (Tanzania) is a union between the Republic of Tanganyika and Zanzibar, which was sealed on 26th day of April 1964¹². Geographically Tanzania is located in East Africa between 29° and 41° East and 1° and 12° South covering approximately surface area of 942 600 km. It borders with the Republic of Kenya and Uganda in the north, Rwanda, Burundi and the Democratic Republic of the Congo in the West, Zambia, Malawi and Mozambique in the South and in the East by the Indian Ocean.¹³ The legal system of Tanzania¹⁴ is structured on the common law¹⁵ framework. The

⁴ (Women's Protocol N 2) Article 14.

⁵ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

⁶ For the purposes of ensuring respect and promotion of sexual and reproductive rights to women, article 14 Women protocol mentions six items to be respected. These include the right to control their fertility; the right to decide whether to have children or not, the number of children and the spacing of children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV/AIDS, in accordance with internationally recognised standards and best practices; and lastly the right to have family planning education.

⁷ Tanzania ratified African Charter on 18 February 1984.

⁸ Tanzania ratified Women Protocol on 3 March 2007.

⁹ Act 28 of 2008.

¹⁰ These include but not limited to the government departments, health sector, NGOs, faith-based groups, and the private sectors.

¹¹ The law mentioned here is not restricted to the HIV and AIDS Act 28 of 2008 but also other pieces of legislation, policy frame works and other enabling provisions.

¹² CM Peter, Human Rights in Tanzania, Selected Cases and Material, 1997 1.

¹³ Peter (N 13) 2.

categories of laws that operate in Tanzania include statutory laws¹⁶, pre-existing laws¹⁷, received laws¹⁸, case law (precedent) and qualified international laws¹⁹.

1.2 Women's Sexual and Reproductive Rights - conceptual frameworks

Strictly speaking the microscopic view on the key United Nations (UN) human rights instruments reveals that, the issue of sexual and reproductive rights is placed at pivotal position in respect to the right to health.²⁰ The question of imposing the maximum control on women, regarding their fertility and sexuality is considered as the corner stone of the reproductive health right. Furthermore, the essence of women's reproductive rights has been echoed by different international recommendations²¹ through different fora. Generally, the basic human rights principles²², like right to equality²³, non-discrimination²⁴, rights relating to individual freedom, self-determination and autonomy; rights regarding survival, liberty, dignity and security; rights regarding family and private life; rights to information and education; and the right to the highest attainable standard of health altogether in totality can be jurisprudentially construed to mean weapons for the protection, promotion and guarantee of sexual and reproductive rights to women.

2. LEGAL AND POLICY FRAMEWORKS GOVERNING WOMEN'S SEXUAL AND REPRODUCTIVE RIGHTS IN TANZANIA

¹⁴ A legal system presupposes laws applicable and judicial hierarchy in the country.

¹⁵ Law originated from England. Commonly known as English law. This law imported in Tanzania and other African countries due to colonial inventions.

¹⁶ Both principle and subsidiary. Principle legislation are those statutes legislated directly by legislature, while subsidiary are those enacted by other bodies, vide provisions of article 97(5) of the Constitution of United Republic of Tanzania.

¹⁷ According to the legal system of Tanzania, pre existing laws refers to that law which were applicable in the territory before coming of the colonialism, mainly laws applicable during this time were Islamic law and customary law in nature. Both laws are applicable vide Section 11 of Judicature and Application of Laws Act R E 2002.

¹⁸ Received laws refer to the law imported into Tanzania through colonial effects. Common law, doctrines of equity and statutes of general application, in group termed as received laws in Tanzania and made applicable for dispute resolutions subject to minimum qualifications on them.

¹⁹ International law is not automatically applicable in Tanzania due to its dualistic nature. Ratification process ought to be taken so that international law to be applicable in the territory.

²⁰ Some of these international human rights instruments referred here include but not limited to Universal Declaration on Human Rights (Universal Declaration), the International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), African Charter for Human and Peoples Rights, other international human rights law treaties dealing with reproductive rights include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol), the Southern African Development Community (SADC) Protocol on Gender and Development also guarantees women's reproductive health, and the SADC Health Protocol obligates state to take steps in order to deal with the HIV pandemic.

²¹ See for example recommendations by committees of ICESCR and CEDAW. Also, about three of the Millennium Development Goals (MDGs) prove directly to relate to reproductive health: these include, MDG 3 which encompasses the promotion of gender equality and empower women; MDG 5 which focuses on improving maternal health; and lastly MDG 6 which makes a dimensions for combating HIV/AIDS, malaria, and other infectious diseases.

²² As entrenched in different bill of rights within different modern constitutions worldwide.

²³ Article 12 of Tanzania Constitution 1977 (as amended from time to time).

²⁴ (Tanzania Constitution N 24) article 13 (5).

Sexual and reproductive health rights are integral elements of the right to health. The right to health is also a part and parcel of the cardinal and fundamental right to life. In granting the right to life the Tanzania Constitution provides that:

Every person has the right to live and to the protection of his life by the society in accordance with the law²⁵.

In grasping jurisprudential impression of the above mentioned constitutional provision, the definition of reproductive rights can be borrowed from that used by Black's law dictionary²⁶. It provides that:-

Reproductive right is a person's constitutionally protected rights relating to the control of his or her procreative activities.

When analyzing broadly the above mentioned definition, one can deduce that, reproductive health is one specific aspect of the right to health, and while it applies to both men and women, there are aspects of the right which affect women in particular. From this definition it is evident that the underlying concern of the reproductive right is to empower women to control their own fertility and sexuality with maximum choice and minimum health problems with the assistance of adequate and comprehensive reproductive information and services. Thus for the purposes of ensuring respect and promotion of sexual and reproductive rights to women, article 14²⁷ mentions six items to be respected. These include:-

- a. the right to control their fertility;
- b. the right to decide whether to have children, the number of children and the spacing of children;
- c. the right to choose any method of contraception;
- d. the right to self-protection and to be protected against sexually transmitted infections, including HIV and AIDS;
- e. the right to be informed on one's health status and on the health status of one's partner, particularly if affected with sexually transmitted infections, including HIV and AIDS, in accordance with internationally recognised standards and best practices; and
- f. the right to have family planning education.

Navigating on laws applicable in Tanzania one can briefly extract that, the constitution²⁸ guarantees right to equality²⁹. The Constitution also prohibits and makes unconstitutional any discriminatory treatment³⁰ to any person whosoever. In respect to sexual and reproductive rights, the Law of Marriage Act, 1971³¹ provides statutory requirement for consent prior to marriage solemnization. Furthermore the country penal law provisions make it a criminal and punishable under the law, an act of having carnal knowledge to any woman or a girl without having her consent voluntarily obtained³².

Therefore, in a nutshell, grasping what is actually thought to be a pivot of the sexual and reproductive rights one may borrow the arguments advanced by the UN Committee on

²⁵ (Constitution of Tanzania N 24) article 14.

²⁶ AG Brayan, Black's Law Dictionary, 2007 1330.

²⁷ Women Protocol (N 2 Above) article 14.

²⁸ The Constitution of the United Republic of Tanzania 1977 (as amended from time to time)

²⁹ Article 12 (N 23)

³⁰ Article 13(N 23).

³¹ Cap 29 RE 2002

³² See Section 130 Penal Code Cap 16

Social, Economic and Cultural Rights³³ when elaborating on the link between the right to health on one hand and sexual and reproductive health rights on another hand in General Comment 14³⁴ on the right to the highest attainable standard of health. The committee observed as follows:-

To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights³⁵.

3. ANATOMY OF THE HIV AND AIDS ACT 28 OF 2008

In 2008 the Parliament of Tanzania enacted a master piece of legislation aiming to provide for the prevention, treatment, care, support and control of HIV and AIDS³⁶. Among others the main objectives of the Act³⁷ is for the promotion of public health in relation to HIV and AIDS and provision of appropriate treatment, care and support using available resources to people living with or at risk of HIV and AIDS³⁸. A close study of this piece of legislation, the following facts can be established:-

This legislation has a total of 54 sections. The territorial application is only mainland Tanzania. The law has been divided into twelve parts; each is dealing with specific aspect relating to matters incidental and connected to HIV and Aids. For the interests of this paper two important parts, namely part seven and eight are of great importance. While part seven deals with stigma and discrimination, part eight has been enacted specifically to deal with rights and obligations of people living with HIV and AIDS. Part seven comprises a total of five sections, section 28 to 32 while part eight has only three sections 33 to 35. The Act establishes research committee under part IX followed by procedure for monitoring and evaluation of it in part X. Furthermore the Act creates offences and punishments under part XI followed by miscellaneous provisions at the end of the law that is part XII. The Act³⁹ has only one schedule. These mentioned parts, that is part seven and eight will be the corner stone of the discussions for the proceeding part of this paper. The next part will concentrate

³³ UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Twenty-second session, Geneva, 25 April-12 May 2000 Agenda item 3. Available at <http://un.cescr-eng>, accessed on 1 November 2013

³⁴ The right to the highest attainable standard of health : . 8 November 2000. E/C.12/2000/4. (General Comments), <http://un.cescr-eng>, accessed on 1 November 2013

³⁵ The Committee on Social, Economic and Cultural Rights elaborated on the link between the right to health and sexual and reproductive health rights in General Comment 14 on the right to the highest attainable standard of health.

³⁶ Long title (Act 28 of 2008 N 4).

³⁷ (Act 28 of 2008 N 4).

³⁸ Long title (Act 28 of 2008 N 4).

³⁹ Act 28 of 2008.

on reviewing the provisions of this Act⁴⁰ in respect to its compliance with the international standards of women's sexual and reproductive rights.

4. REVIEW OF THE PROVISIONS OF HIV AND AIDS ACT, IN RESPECT TO ITS COMPLIANCE TO THE INTERNATIONAL HUMAN RIGHTS STANDARDS.

4.1 Non-discrimination

Part VII of the Act⁴¹ has been designed specifically to deal broadly with the legal issues namely, discrimination and stigmatisation. Discriminatory laws, policies as well as other practices are statutorily prohibited and made as acts against the law.⁴² Furthermore this law restricts health practitioners from stigmatisation or discrimination acts⁴³. All other forms of discrimination are prohibited under this law⁴⁴. Whereas specific stigma and discrimination restricted and prohibited under this law.⁴⁵ Lastly but not least offences in relation to stigma and discrimination have been created in this Act⁴⁶. Section 28 of the Act provides, a person shall not formulate a policy, enact any law or act in a manner that discriminates directly or by its implication persons living with HIV and AIDS, orphans or their families.

This statutory provision is in conformity to the liberal interpretations of articles 12 and 13 of the constitution⁴⁷. The importance of this legal provision in respect to sexual and reproductive rights can be viewed from the fact that, the Universal Declaration proclaims that 'all human beings are born free and equal in dignity and rights.' Therefore, human rights belong to all without discrimination, a principle that has been enshrined in all major human rights treaties. Over two decades of the AIDS pandemic and 17 international AIDS conferences, stigma and discrimination based on misperceptions of HIV and AIDS is still pervasive, and even more, at times, perpetuated by the very health care workers whom those vulnerable to infection, and those infected, turn to for help. Individuals, including health professionals, tend to stigmatize HIV-positive women, in particular, those seeking services related to reproductive decision-making. Negative experiences by women living with HIV include, but are not limited to: not receiving information related to HIV and pregnancy; not receiving proper care when delivering because health care workers fear infection; and being blamed for serving as 'vectors' of the disease. In most instances, pregnancy for HIV-positive women is discouraged based on a number of reasons including: exposure to re-infection for herself and her partner; exposure to infection to the baby; and weakened immune system. The essence, of the statutory provisions of section 24 above, is also subject to discussions within the purview of reproductive rights on the issue of controlling fertility.

The international standards appeal that, the right to control one's fertility means the right of a woman to reproductive autonomy⁴⁸. This encompasses the right to decide freely and responsibly if, when, and how often to reproduce⁴⁹. This right exists regardless of one's HIV status.

⁴⁰ (Act 28 of 2008 N 4)

⁴¹ Sections 28 to 32 (Act 28 of 2008 N 4)

⁴² Section 28(Act 28 of 2008 N 4)

⁴³ Section 29 (Act 28 of 2008 N 4)

⁴⁴ Section 30 (Act 28 of 2008 N 4)

⁴⁵ Section 31 (Act 28 of 2008 N 4)

⁴⁶ Section 32(Act 28 of 2008 N 4)

⁴⁷ Constitution of the United Republic of Tanzania, 1977 as amended from time to time.

⁴⁸ Article 14 (Women Protocol N 2).

⁴⁹ Brayan (Black's Law Dictionary N 27) 1330.

Considering the importance of this right, it is the obligation of the Tanzania government to take all appropriate measures to insure that it provides adequate, affordable and accessible health services, including information, education communication and programs to women especially those in rural areas⁵⁰. Furthermore, international standards require the Tanzania government to establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.⁵¹ Moreover, laws require a state to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus⁵².

Different studies⁵³ reveal that, out of the estimated 200 million women who become pregnant each year, around 2.5 million are HIV-positive women. In the context of pregnancy, HIV creates a complicated intersection between HIV status and the childbearing desires of women. A considerable number of service providers are of the opinion that pregnancy ought to be prevented at all costs in HIV-infected women. As a result of such views, women are sometimes pressured to abort or subjected to permanent sterilization methods without their informed consent even though they desire children. Conversely, women who do not want children at all, or do not want to have more children beyond what they have, are unable to prevent pregnancy due to inadequate or inaccessible family planning services. Others are unable to safely terminate an existing pregnancy due to prohibitive abortion laws in their countries.

Here it can be argued that, section 28 of the HIV and AIDS Act, is in line with other international human rights instruments protecting sexual and reproductive rights. Under the shield of discrimination against HIV-positive women, the HIV and AIDS Act, 2008 concur with international human rights obligations to prohibit discrimination against women in every area. Violations of HIV-positive women's reproductive health rights which are discriminatory based on their HIV-status, have the effect of impairing and nullifying the recognition, enjoyment and exercise of their rights as envisaged by CEDAW and the African Women's Protocol. Stigmatizing women with HIV is also a violation of their right to dignity.

Finally, it should be noted here that, it has been argued more often than not that, the most stigmatised disease in history is probably HIV and AIDS.⁵⁴ Stigmatisation and discrimination are one of the key challenges in the prevention and control of the HIV and AIDS disease. In its literal meaning stigma refers to a mark on a person or group of people. Normally the people who are stigmatised and discriminated against are perceived negatively.⁵⁵ In Tanzania, like many other countries in Sub Saharan Africa stigma and discrimination related HIV and AIDS are still widespread and continue to play a major role in escalating HIV infections. Even though it is alleged that majority of women (93%) and (96%) of men express their willingness to provide care for their family members with AIDS at

⁵⁰ Article 14(2)a (Women Protocol N 2).

⁵¹ Article 14 (2) b (Women Protocol N 2).

⁵² Article 14 (2) c (Women Protocol N 2).

⁵³ Centre for human rights University of Pretoria (2009), *The impact of the Protocol on the Rights of Women in Africa on violence against women in six selected Southern African countries: An advocacy tool*, available at www.chr.up.ac.za, accessed on 2 November 2013.

⁵⁴ Cameron, E. *Legislating an epidemic: the challenge of HIV/AIDS in the workplace*. 2007. ILO Headquarters.

⁵⁵ UNAIDS (2000). *Protocol for the Identification of discrimination against people living with HIV*. Best Practice Collection. UNAIDS, Geneva.

home. However, only 41% of women and 57% of men express their willing to disclose their family member's HIV status.⁵⁶ The factors that seem to mediate stigma includes:

- a. Cultural and specific beliefs
- b. Religion
- c. Access to anti-retroviral therapy
- d. Gender

The HIV and AIDS Act of Tanzania strictly states that, it will not permit any policy, enactment of laws or any act in any manner that will directly or indirectly discriminate persons living with HIV and AIDS, their families and orphans.⁵⁷

Despite these provisions, discrimination against HIV infected or a person suffering from AIDS still persists in Tanzania. There are several people living with HIV and AIDS who have been stigmatised directly and others indirectly. Such discrimination mostly affects women.⁵⁸ One of the reasons for this is that, the mindset of patriarchal society is still persisting especially and greatly in the rural regions of the country. Therefore women living with HIV and AIDS are doubly discriminated compared to men.⁵⁹

The Act provides further restriction of health practitioners to discriminate or stigmatise others especially when dealing with persons living with HIV and AIDS.⁶⁰ However, this has proved difficult in many cases due to lack of professionalism by some health practitioners who have fail to adhere to the professional code of conduct on confidentiality of information. There have been allegations on the leakage of the information to the public especially from medical personnel in public hospital laboratories with regards to some of their clients known to have been infected with HIV. Such an unethical conduct makes many people fear to go for medical practitioners for voluntary testing especially girls and women who are stigmatised and discriminated twice as men.⁶¹

Nevertheless, the law explains restriction or denial of other forms of discrimination which includes services in institution, denial of admission, travelling, employment opportunity, living and right of residence and stigmatisation or discrimination of the person's actual, suspected or perceived HIV and AIDS status.⁶² Though there are provisions and penalty against any person who contravenes such provisions yet it is uncommon to find such cases in court of law.⁶³

Such provisions do not provide adequate protection of women against HIV infection.⁶⁴ In addition most women fear to disclose their status to their partners because in

⁵⁶ Tanzania 2011-2012 HIV/AIDS and Malaria Indicator Survey (THMIS).

⁵⁷ Section 28 of The HIV and AIDS (Prevention and Control) Act 28 of 2008 of Tanzania.

⁵⁸ TACAIDS, Tanzania Human Rights Report 2012.

⁵⁹ 'HIV in Tanzania: Challenges and donors Policies' <http://www.europabook.eu/news-and-events/EBnews/hiv-tanzania-challenges-and-donors-policies> (accessed 28 September 2013).

⁶⁰ Section 29 of Act 28

⁶¹ Journal of Tropical Medicine, Volume 2009(2009), Article ID 145891, Stigma of People with HIV/AIDS in Sub-Saharan Africa: A Literature Review, Ngozi C. Mbonu, Bart van den Borne, and Nanne K. De Vries. Department of Health Promotion, School of Public Health and Primary Care CAPHRI, Faculty of Health, Medicine and Life Sciences, Maastricht University, The Netherlands. <http://dx.doi.org/10.1155/2009/145891> (accessed 12 October 2013).

⁶² Section 30 and 31 (Act 28 of 2008 N 2).

⁶³ Section 32 (Act 28 of 2008 N 2).

⁶⁴ 'Global Criminalization Scan. Global Network of people living with HIV AIDS'

<http://www.gnpplus.net/criminalisation/country/tanzania-united-republic> (accessed on 28 October 2013).

many cases once they disclose this if they are married usually are divorced and if not married their partners are likely to end up the relationship and hence will separate them. In some incidents they even face domestic violence just because they are known for their HIV status. For example a client lady received by Tanzanian Legal Human Rights Centre who is HIV status, *inter alia* stated that:

[I had a love affair with [.....] who is retired military officer. We stayed happily together as sexual partners for about eight years. Things changed completely when I informed him of my HIV status after I was tested and found positive. Since that day he change and immediately stopped paying for the house rent which was due. He also took the title deed of the house he gave me and completely disappeared. I cry daily and night because even our last born is ill and he is being taken care of by the neighbours. I suspect he is also HIV positive. I regret to have disclosed my HIV status to him at the time I really needed money for paying rent and school fees for my children].⁶⁵

In addition, about 56.6% of women admitted they had been abandoned and more than one-third (33.5%) were widowed, separated or divorced.⁶⁶

4.1.1 Physical and Sexual Abuse

In the Tanzanian laws the term sexual abuse simply means 'forcing undesired sexual behaviour by one person to another'.⁶⁷ The term encompasses the behaviour of any adult towards a child to either sexually stimulate the child or an adult. It is referred to as child sexual abuse if the victim is younger than the age of consent. The Tanzanian Penal Code does not provide the definition of the term sexual abuse instead it provides the definition of the term grave sexual abuse.⁶⁸ However, in practice sexual abuse offence is interpreted depending on the circumstance of the case by referring to other sexual offences that are grouped as offences against morality under the Tanzanian laws.⁶⁹

There is a significant public health problem due to the high magnitude of adolescent sexual abuse. The sexual abused actions are commonly known to occur at home done by close related people such as relatives, neighbours and friends. According to Tanzanian Commission for AIDS Report, conducted through cross-sectional study targeted in and out school adolescents at the age between 10-19 years old in six regions Dodoma, Dar es Salaam, Mtwara, Kigoma, Iringa, Mwanza, Kilimanjaro and Tabora regions. It has been further reported that, over 50% of the attempted rape cases occurred at home, while 21% of attempted rape cases occurred in the bush, while 15.82% attempts in the farm 15.82% and few attempts of 11.86% occurred at school.

On the same report mentioned above, it has been reported further that, about 39.87% of attempt rape cases by most students are reported have been done by their friends, 20.89% attempted by their neighbours, whereas 19.62% reported the attempted rape by unknown individuals and 8.86% students have reported to be victims of attempted rape by their teachers.⁷⁰ Sexual abuse in adolescent in this report included any one of these actions; raped,

⁶⁵ Legal and Human Rights Center, Tanzania Human Rights Report 2009.

⁶⁶ HIV Behavioural and Biological Surveillance Survey among Female Sex Workers in Dar es Salaam, 2010. Tanzania Ministry of Health and Social Welfare.

⁶⁷ Sexual Abuse. http://en.wikipedia.org/wiki/Sexual_abuse (accessed 20 September 2013).

⁶⁸ Section 138 Chapter 16 of The Tanzania Penal Code [Principal Legislation]. Act 4 of 1998 s.12.

⁶⁹ From section 129 up to 162 of The Tanzanian Penal Code[Principal Legislation]. Act 4 of 1998 s.12.

⁷⁰ The United Republic of Tanzania, Prime Minister's Office. Tanzania Commission for AIDS, Sexual Report of 2010.

raping others, genital or anal manipulation, watching pornography movies or picture, making pornographic movies or picture, caressed and caressing others.

4.1.2 *Early Marriage*

The law of Tanzania allows contracting a valid marriage with girls aged as young as 15 but only with parental consent. According to the UN Population Fund, between 20 percent and 40 percent of young girls get married before attaining adulthood.⁷¹ The pregnant adolescent girls attending hospitals in the densely populated in central and southeastern coast of Morogoro provinces commented that their husbands put them at risk with HIV and AIDS infected disease because they have had multiple partners. This is because adolescent brides are unlikely to negotiate for safer sex due to their vulnerability of being immature and financially dependent on their husbands.

It was stated by the director of the AIDS Business Coalition⁷² that most of these adolescent wives do not have sufficient knowledge about HIV and AIDS and do not have the courage to convince their partners to know their sero -status.⁷³ The director also stated, that "The education system is not protective of young girls. They walk long distances to and from school, which exposes them to the risks of rape or abduction into marriage. The laws do not criminalise anti-girl practices, such as early marriage. Nevertheless, under the Tanzanian law early marriages is considered when one gets married below the age of majority that is eighteen years whereas under Islamic law the minimum age of marriage is reached when the girls attain the age of puberty.⁷⁴ For example, the National Muslim Council of Tanzania submitted to Tanzania Women's Law Association during the process of enacting the new HIV and AIDS law of Tanzania asserted that, the law proposed should comply with the Islamic law in conformity with the Holy Quran. However, the majority argued that a girl under eighteen years is neither physiologically nor anatomically fit to contract marriage. Therefore, the issue of age remains controversial in respect to early marriages in Tanzania.

Equally, the practice of polygamy and the spread of HIV and AIDS is also debatable; under customary laws as well as Islamic law. For example under Islamic laws men are permitted to have up to four wives under certain conditions provided under the Islamic law and under the customary laws men can marry more than ten wives. Although the HIV and AIDS law of Tanzania convict any person who intentionally transmits HIV to another person⁷⁵ the law

⁷¹ Tanzania: Early Marriages put Girls at Risk of HIV <http://www.irinnews.org/report/61121/tanzania-early-marriage-puts-girls-at-risk-of-hiv> (accessed 21 October 2013).

⁷² The AIDS Business Coalition Tanzania (ABCT) is a coalition of Tanzanian employers who have come together to fight HIV/AIDS at the workplace. ABCT was formed in 2004 by 23 companies and has grown to 75 members at present from various sectors, such as tea and cement production, newspapers, hotels, banks, security companies, etc. ABCT is a non-profit NGO. ABCT is mandated by the Tanzanian Government to coordinate and support the private business response to the epidemic. ABCT does this by supporting the Private Companies in setting up and managing programs against HIV and Aids at the workplace and by feeding back their concerns and needs to the government. ABCT accompanies its members from the first assessment of the individual HIV-situation to the planning and execution of Workplace Programs, the formulation of the Workplace Policy, up to the continuous monitoring and evaluation of the activities. ABCT is involved in various lobby & advocacy activities, both national and international.

⁷³ Cap 29 R E 2002.

⁷⁴ The Islamic law is among laws applied in Tanzania particularly on law of inheritance and marriage. The Holy Quran and Hadith (actions and words) of Prophet Muhammad (Peace Be Upon Him) are the two major sources under Islamic law. The same was submitted

⁷⁵Section 47 (Act 28 of 2008 N 2).

cannot force any one to be HIV tested without having the persons consent.⁷⁶ Therefore the spread of HIV becomes very challenging to protect the spreading of HIV and AIDS in such marriages by lack of knowledge of HIV status from any of the wives including the husband whom such women share.⁷⁷

Furthermore, the inequality between male and female hinders females in decision making for having safer sex and use of condom. For young girls it increases violation of their rights thus causing gender based violence. The common known forms of Gender Based Violence are economic violence in terms of financial deprivation, sexual, physical and psychological aspects.⁷⁸

4.1.3 Sexual Abuse

There are a lot of sexual abuse cases but most of them are not reported. Among the reasons people claim the perpetrators are never convicted due to corruption by some police officers and so they feel they cannot attain justice. As for the police and prosecutors they argue many of these cases the family of the victims do not provide cooperation due to the fear of being stigmatised and fear for witchcraft by the accused.⁷⁹ As a result the spread of HIV and AIDS persists vigorously especially in the rural areas and the regions where the literacy level is low. The situation is worse for the persons with disability who are most vulnerable especially for those who are mentally impaired. It is very unlikely to find such cases, even if they are brought before the law most of these cases end up withdrawn. It is very unfortunate the law does not have a proper mechanism to protect them and also proceed with these cases of persons with mental disability.

4.1.4 Sexual Harassment in work place

Due to poverty some of the women offer to have sex when asked by the employers so as to ensure they retain their positions at work places. Some of the women have been forced to become prostitutes or bar maids.⁸⁰ These women do have high risk of contracting the HIV and AIDS disease because normally if they agree to have sex with their clients without using condoms they are paid huge amount of money. Some of the women in other work places offer to have sex with their employers so as to retain their jobs due to their poor financial position. Among other reasons of sexual harassment from men is Tanzanian men have traditionally been encouraged to engage in extramarital and promiscuous sex in which there is no accurate legal force to control them.

4.2 The right to control fertility

In general sense, the right to control one's fertility can be construed to mean among others, an exclusive right of a woman to decide on reproduction and or procreation. Looking closely at this right, one can argue that, this right embodies therein a bundle of other rights,

⁷⁶ Section 15 (Act 28 of 2008 N 2).

⁷⁷ Review and Assessment of Laws Affecting HIV and AIDS in Tanzania.

⁷⁸ The United Republic of Tanzania, Prime Minister's Office. Tanzania Commission for AIDS. The National HIV and AIDS Response Report 2012 Tanzania Mainland. August 2013.

⁷⁹ Stated by Resident Magistrate Court in Bagamoyo district in Tanzania.

⁸⁰ HIV Behavioral and Biological Surveillance Survey Among Female Sex Workers in Dar es Salaam, 2010.

including but not limited to the right to decide freely and responsibly time, circumstances and manner how often to reproduce.

This right exists regardless of one's HIV status. As pointed earlier in this paper⁸¹ that, out of the estimated 200 million women who become pregnant each year, around 2.5 million are HIV-positive women. In the context of pregnancy, HIV creates a complicated intersection between HIV status and the childbearing desires of women. A considerable number of service providers are of the opinion that pregnancy ought to be prevented at all costs in HIV-infected women. As a result of such views, women are sometimes pressured to abort or subjected to permanent sterilization methods without their informed consent even though they may desire children. Conversely, women who do not want children at all, or do not want to have more children beyond what they have, are unable to prevent pregnancy due to inadequate or inaccessible family planning services. Others are unable to safely terminate an existing pregnancy due to prohibitive abortion laws in their countries.

4.3 Family Planning and Access to Contraceptive Services

The notion family planning can be defined to mean practices consciously adopted by a family to determine the number of child spacing and pregnancies in the interest of the welfare and well being of the members of the family⁸². There are socio-economic justifications for the essence and need of campaigning for family planning generally, and specifically for individual countries, a person or clan. As for a country, Tanzania explains the rationale behind Family Planning in its national family planning Policy as to avoid pregnancies before the age of 18 years or after 35 years⁸³. Generally, there are several ways of attaining objectives of the family planning one of them being the use of contraceptives.

Stating the use of condoms, section 23⁸⁴ provides that the ministry shall quantify requirement of condoms in Tanzania by espousing different stakeholders, mobilizing resources required for procurement of condoms generally with a view to ensuring availability of condoms of standards quality in Tanzania. Subsection 2 of the same section proceeds by providing that, no condoms shall be manufactured or imported to Tanzania unless such condoms conform to the standards provided by the Tanzania Bureau of Standards and where possible, the condoms should bear the information relating to the condoms and be in Braille print.

This being the case under the HIV and AIDS Act, on the same year of legislating this law, the report of the Millennium Development Goals indicates that in Sub-Saharan Africa, nearly one in four married women has an unmet need for family planning. Meaning that, 25 percent of married women either do not have access to or are not using contraceptives (condoms being one of them).

It should be emphasized here that, the right to family planning is enshrined explicitly at the African regional level in the Women's Protocol. There is a direct relationship between a woman's fertility rights and the available contraceptive services. Studies show that access

⁸¹ See (N 33)

⁸² United Republic of Tanzania; The National Family Planning Programme, Plan of Operations 1989 pp. 87. Quoted by Rose E J Kinemo, in *Abortion and Family Planning in Tanzania* at Page 1.

⁸³ United Republic of Tanzania; The National Family Planning Programme, Plan of Operations 1989 pp. 57, Quoted by Rose E J Kinemo, in *Abortion and Family Planning in Tanzania* 1989 1.

⁸⁴ HIV and AIDS ACT 2008

to family planning services for women and men living with HIV are not adequately addressed throughout the world and access to contraception is limited in many Sub-Saharan African settings.

Family planning should be initiated during pre-test and post-test counselling and should occur in follow-up information and counselling sessions as well as at regular intervals throughout care. Family planning should include information on risks associated with pregnancy for HIV-positive women; on how to prevent unintended pregnancies through various contraceptive methods, and the risks and benefits associated with each method; and on how to prepare for a healthy pregnancy should that be the desired outcome of family planning. Therefore, there is a need for explicit policies that recognize reproductive choice in HIV-infected individuals including improved access to contraception and other reproductive health care services.

4.4 Unwanted pregnancy and access to legal abortion

In the entire world, pregnancy is wanted and a happy event for women, their husbands or partners, families and the community in general. But this is not always the case, millions of women around the world become pregnant unintended. An unintended pregnancy may be a factor for determination as to whether such pregnancy to be wanted or unwanted. Though there are several factors for making a pregnancy wanted, then for any reason when a woman is not ready at the time of conceiving to bear the fruits of the pregnancy, then such pregnancy may be termed as unwanted pregnancy. The direct cause for abortion is unwanted pregnancy. Abortion can either be lawful or unlawful.

Generally abortions in Tanzania is illegal act and punishable under the criminal laws, punitive sanctions have been stated against any convict of the act. According to Tanzania penal statutes, section 150 of the Penal Code cap 16 provides as follows:-

. Any person who with intent to procure miscarriage of a woman whether she is or is not with child unlawfully administers to her or causes her to take any poison or noxious thing or uses any force of any kind, or uses any other means whatsoever, is guilty of a felony and is liable to imprisonment for fourteen year.

From the above section one can argue that, generally in Tanzania abortion is unlawful and thus it is prohibited as a method of child spacing in family planning. There are valid exceptions to this general rule of prohibiting abortion. Such exception is that, pregnancy may be lawfully terminated only by a registered medical practitioner and in accordance with the Abortion law of Tanzania. Therefore, it can be deduced that, in Tanzania a person shall not be guilty of an offence under the abortion law when a pregnancy is terminated by a registered medical practitioner on good faith – that the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman or any existing children of her family greater than if the pregnancy were terminated or there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be serious handicapped.

From the above given facts, it can be correctly argued that, the health status of potential mother is a factor to be considered whether abortion is lawful or not. Hence, a foetus capable of being born alive may only be destroyed if it is necessary to preserve the life of the pregnant woman or a girl and not for child spacing purposes.

Furthermore, throughout perusal to the provisions of HIV and AIDS Act there is no justification to abort on HIV status. HIV sero positivity in Tanzania is not an umbrella for a woman to decide whether to give birth or not automatically.

Therefore, medical practitioners should neither conduct abortion for the purposes of child spacing in family planning nor for HIV sero positive status in Tanzania. The medical practitioner should only conduct abortion when he is of opinion formed on good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant women.

Different studies reveal that, in Africa, the risk of dying following unsafe abortion is the highest worldwide, where 13% of maternal deaths are due to unsafe abortion. Many countries in Africa have restrictive abortion laws. It has been argued further that, many pregnancies are unwanted, unplanned, and often unintended. Some, for example, are the result of sexual violence, including within marriage. In other cases, women cannot negotiate safe sex in their relationship and others cannot access contraception. Research indicates that HIV-positive women are terminating pregnancies in countries with numerous legal restrictions on abortion, and therefore are victims of unsafe abortions. As a result of restrictive laws, both UNAIDS and the International Community of Women Living with HIV/AIDS (ICW) have recommended that women living with HIV should have a right to choose to terminate a pregnancy upon learning of their HIV status and should be supported to do so without judgment. This move should however not be used to coerce or pressure HIV-positive women into having an abortion in cases where they desire to have children.

Linking the issue of unwanted pregnancy and access to abortion in relation to HIV and AIDS Act⁸⁵ of Tanzania one can conclude that, the matter has been ignored or avoided despite the fact that women living with HIV are frequently faced with unwanted pregnancies. The Act⁸⁶ is silent on the matter, and no attention has been drawn to curb the situation. This attracts a close eye on HIV testing during pregnancy law and practice in Tanzania.

4.5 HIV testing during pregnancy

Generally, according to section 15 (1) of the Act,⁸⁷ in Tanzania HIV testing is a matter of one's own volition. The law provides *inter alia* that, under normal circumstances a person shall not be compelled to undergo HIV testing.⁸⁸ Exceptions provided under this generality include under court orders, or when one is donating human organ and tissue, and or when there is criminal trial for sexual offenders.

The main concern of this paper is for HIV testing for the pregnant woman. The law provides clearly that, for the pregnant woman and the man responsible for the pregnancy or spouse such person has to be counseled and offered voluntary HIV testing.

It should be noted here that, different writings on HIV, AIDS and women's rights usually focuses on prevention of perinatal transmission (PPT), often rendering women's rights secondary at best, if not non-existent. The goal of PPT of HIV has led to harsh policies in various settings, including HIV testing policies for pregnant women that threaten their autonomy, bodily integrity, and privacy. Even though many countries have chosen the route of provider-initiated testing and counseling (PITC), it is sometimes likely that a patient will

⁸⁵ Act 28 of 2008.

⁸⁶ Act 28 of 2008.

⁸⁷ Act 28 of 2008.

⁸⁸ Subsection 3 of section 15 (Act 28 of 2008).

not be made aware of their right to refuse the test, nor be given the required information for informed consent. Women should make informed decisions before consenting to HIV testing. Testing and disclosure could have adverse consequences as laws criminalizing the 'wilful' transmission of, or exposure to, HIV have been enacted and proposed in a number of states throughout Africa.

4.6 Forced or coerced sterilisation

In other jurisdictions it has been reported that, HIV-positive pregnant women have recently been subjected to coerced or forced sterilization. The ICW has documented 40 instances of coerced or forced sterilization in Namibia whereby informed consent was not adequately obtained. Forced or coerced sterilization adversely affects women's physical and mental health, and infringes upon the right of women to control their fertility and to decide on the number and spacing of their children. According to the International Federation of Gynecology and Obstetrics (FIGO), no incentives should be given or coercion applied to promote or discourage any particular decision regarding sterilization.

5. CONCLUSION

In a final analysis it can be concluded that, the spread of the HIV will be significantly impeded, if not halted entirely, in societies where women sexual and reproductive rights are respected, protected, and fulfilled. As highlighted above, stigma and discrimination, barriers to controlling one's fertility, unmet family planning needs and lack of access to contraceptive services, restrictive abortion laws, mandatory HIV testing, and coerced or forced sterilisation are all issues confronted by women living with HIV, which in turn threaten their sexual and reproductive rights. A lot has been said, designed and propounded for the purposes of eliminating discrimination against women.

For best results and realizing women sexual and reproductive rights there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. Despite the enactment of HIV and AIDS Act which to a great extent tried to conform to the international human rights standards then efforts should be directed to strategic plans, and operational procedures and policies on reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence.

The realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights

6. RECOMMENDATIONS

Firstly and foremost thing, there is a need for policy makers to ponder on developing a national comprehensive rights-based sexual and reproductive health policy for women, which comprises contraception, including emergency contraception, accessibility and affordability of PPT measures; ongoing anti-retroviral treatment (ART) to ensure parents'

survival and measures to help women deal with unwanted pregnancies including safe and legal abortion on women desires.

Public awareness campaigns should be strengthened in respect to HIV-positive women. Furthermore there should be a clear statement of inclusion of HIV positive women to be included in policy-making, implementation, and oversight concerning their sexual and reproductive health care rights, facilities and strategies.

From the fact that, article 14 of the women protocol vests duty to a state party to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus. Then it is hereby recommended to Tanzanian law makers to rethink on factors and justifications governing lawful abortion in respect to unwanted pregnancy. A window should be opened to women living with HIV and AIDS who do not want to carry a pregnancy to term. And by doing so, HIV and AIDS Act would conform to the international standards in respect to HIV pregnant women. In turn sexual and reproductive rights would be protected.

Lastly but not least there is a need for legislative reform with respect to restrictive abortion laws in order to create an enabling environment for safe, and legal abortions for women's wellbeing. Relevant UN agencies such as UNFPA, UNIFEM, and UNHCHR should provide technical assistance to states through promoting and protecting women's sexual and reproductive rights, particularly with respect to women living with HIV. In this regard, the HIV and AIDS Act ought to be reviewed and accommodate issues pertaining relevancy of safe abortion as propounded by international standards.

International donors must earmark funding for strengthening national programmes and services that support and protect women's sexual and reproductive health rights, particularly those that integrate HIV and reproductive health services so that to suit international norms and granted standards.

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