



**AN ANALYSIS OF THE COMPATIBILITY OF MOZAMBICAN LAW WITH
INTERNATIONAL HUMAN RIGHTS LAW RELATING TO PEOPLE LIVING
WITH HIV IN THE WORKPLACE**

BY

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DECLARATION

I CARLOS DE SOUSA LOPES, herein hereby declare that this research is my original work; both in style and substance. It has not been presented to any university or other institution. Both primary and secondary sources used in the course of the research have been duly acknowledged.

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.....

DATE



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Firstly, I owe it to God.

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DEDICATION

To my beloved parents, Lopes Carvalho and Argentina Joaquim, my brothers and other relatives; in so many ways, you have been constant source of encouragement and a pillar of my life.



LIST OF ABBREVIATIONS

- ACHPR-African Charter on Human and Peoples' Rights
- ACRWR-African Charter on the Rights and Welfare of the Child
- APACRW-Protocol to the African Charter on the Rights of Women in Africa
- AIDS-Acquired Immune Deficiency Syndrome
- CAT-International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- CEDAW-International Convention on Elimination of all forms of Discrimination against Women
- CRC-UN Convention on the Rights of the Child
- CRM-Constitution of Republic of Mozambique
- HIV-Human Immunodeficiency Virus
- ICCPR-International Covenant on Civil and Political Rights
- ICESCR-International Covenant on Economic, Social and Cultural Rights
- CRPD-Convention on the Rights of Persons with Disabilities
- ILO-International Labour Organization
- PLHIV-People living with HIV
- UDHR-Universal Declaration of Human Rights
- UNAIDS-Joint United Nations Programme on HIV/AIDS



SUMMARY

The objective of this study is to analyze the compatibility of Mozambican legislation concerning HIV and AIDS (Law 5/2002 of 5 February 2002, Law 23/2007 of 1 August 2007, Law 12/2009 of 12 March 2009 and Law 19/2014 of 27 August 2014) with international human right standards for the protection of the fundamental rights and freedom of people living with HIV (PLHIV) in the workplace, in Mozambique. In particular, it critically looks at issues surrounding freedom of thought and conscience, criminalization of transmission of HIV and its impact on the human rights of PLHIV at the workplace, as well as issues of gender equality and discrimination and stigmatization under Mozambican law.

The study attempts to offer some technical and legal solutions to these problems in order to fill the existing gaps in the law, with the intention of bringing the local legal framework in to conformity with the international human rights law that protects PLHIV at the workplace.

Several challenges impeded the attainment of the objective of the study. The main challenge was the lack of literature that focuses on the subject. The study concludes that there is the need to incorporate fundamental principles of human rights, such as those of equality and non-discrimination, the right to freedom to movement and freedom of conscience into Mozambican legislation concerning HIV and AIDS in the workplace.

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CHAPTER ONE: INTRODUCTION

1.2. Background

Most developing countries are affected by the HIV pandemic. The HIV pandemic is a great problem and constitutes a significant challenge to development, social progress and health. One of the major challenges arises from discrimination and stigma in society, in particular in the workplace.

In response to this dilemma, the United Nations (UN), through the Joint United Nations Programme on HIV and AIDS (UNAIDS), promulgated the International Guidelines on HIV and AIDS and Human Rights.¹ In addition, the International Labor Organization (ILO) also adopted a number of recommendations and guidelines, such as the Code of Practice on HIV/AIDS and the World of Work (2001)² and Recommendation 200 Concerning HIV and AIDS and the World of Work (2010).³ These three documents contain recommendations for states and non-state actors that offer protection and promote the rights of persons living with HIV (PLHIV). They particularly address the issue of discrimination and stigma of PLHIV in the workplace

According to the theory of human rights, it is the obligation of Mozambique to protect, to defend and to promote the rights and fundamental freedoms of its citizens.⁴ In a bid to fulfill this obligation, the state approved four laws, as well as Decree 183-A/2001 of 18 December 2001. The first law was Law 5/2002 of 5 February 2002, which “establishes general principles intended to prevent discrimination in the workplace against persons who are, or suspected to be HIV positive”.⁵ The second is Law 23/2007 of 1 August 2007, which

¹ UNAIDS, International Guidelines on HIV/AIDS and Human Rights, Geneva, 1998. Available at: http://data.unaids.org/publications/irc-pub02/jc520-humanrights_en.pdf [accessed on 2 January 2013].

² International Labour Office, Code of practice on HIV/AIDS and the world of work, Geneva, 2001, available at: http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@ilo_aids/documents/normativeinstrument/00015.pdf [accessed on 2 January 2013].

³ International Labour Office, Recommendation concerning HIV and AIDS and the world of work, 2010 (No. 200) Geneva, 2010, available at: http://www.ilo.org/public/english/region/eurpro/moscow/info/publ/wcms_142706.pdf [accessed on 2 January 2013].

⁴ M Nowak *Introduction to the International Human Rights Regime* (2003) 48ss.

⁵ AIDS and Human Rights Research Unity, Faculty of Law, University of Pretoria: *Human Rights Protected? Mine Southern African Country Reports on HIV, AIDS and the Law*, Pretoria University Law Press (PULP)

establishes duties and rights in labour relationship and also establishes the principle of non-discrimination on the basis of HIV status in the sphere of employment.⁶ The third law is Law 12/2009 of 12 March 2009, which establishes rights and duties of persons living with HIV and some of its articles regulate labour relations. The fourth law is Law 19/2014 of 27 August 2014 establishes rights and duties of persons living with HIV and AIDS and guarantees the promotion of some important measures to prevention, to protection and treatment of illness. It further establishes the rights and duties of workers and job applicants who are living with HIV. The Ministerial Decree operationalizes the four laws, mentioned above, and regulates the way employers provide medical assistance to people living with HIV. In addition, the Decree regulates the overall organisation of public health institutions involved with HIV and AIDS.⁷ However, it is important to mention that the Decree is not the object of present study.

The Laws, mentioned above, address the issues of confidentiality, privacy of person living with HIV and medical personnel in the workplace.⁸ Mozambique is a democratic state based on principles of social justice. This means that the legislator should approve and publish laws in accordance with international human rights standards. These laws establish anti-discriminatory principles in the workplace as a result of the ILO Recommendation concerning HIV and AIDS and the World of Work, 2010 (n° 200) and other international human rights instruments ratified by Mozambique.

However, Law 5/2002 and 12/2009 were abrogated by article 72 of Law 19/2014 of 27 August 2014. Law 19/2014 (which is currently in force) replaces the two Laws mentioned above. This means that these Laws were revised and joined resulting in one comprehensive piece of legislation, Law 19/2014. As could be expected the new Law also brought about improvements and changes in emphasis. Mozambique approved four Laws, which are described above. However, there is an expectation of a positive revolution relating to this new Law (19/2014).

So, the study suggests only analyzing Laws 2/2002, 23/2007 and 12/2009 in order to establish whether the above mentioned national acts are compatible with international standards of human rights, and if there are possible gaps raised during the study which were obtain by the current Law.

(2007) 144 chapter 4. Available in www.pulp.up.ac.za accessed on 16 of January 2013.

⁶ Labour Relations Act 23/2007 of 1 August secs 4, 54 § 58.

⁷ n° 20 above.

⁸ As above.

1.2 Problem statement

The main objective of the international human rights standards identified above is to provide guidelines in order to promote a decent working environment and eliminate stigma and discrimination on the basis of real or perceived HIV status. An important step to promote human rights in society and in the workplace is to ensure that the national laws relating to HIV are compatible with international human rights standards.

Mozambique has a range of laws that deal with HIV in the workplace. For the purpose of this study, an analysis will be done to establish whether these laws are compatible with the international human rights standards that protect PLHIV in the workplace.

1.3 Research questions

The main research questions are as follows:

1. What are the international human rights standards and ILO principles relating to HIV in the workplace?
2. What do Mozambican laws relating to HIV in the workplace provide?
3. Are the relevant Mozambican laws compatible with international human rights standards and ILO principles?
4. Are the possible gaps raised in the study integrated into new law?
5. Are there some innovations or revolutions?

1.4 Objectives

1.4.1 General

The overall objective of the study is to describe international human rights standards and national laws relating to HIV in the workplace.

1.4.2 Specific

More specifically, this study aims to establish whether national laws on HIV are compatible with international human rights standards and ILO principles relating to HIV/AIDS in the workplace in Mozambique.

1.5 Significance of study

The first and primary significance of this study is that it will contribute to much needed information about human rights and how they relate to HIV with respect to workers in Mozambique.

Secondly, the study will contribute to the body of knowledge on human rights which plays an important role in human development and in promotion of fundamental rights and freedoms such as dignity of PLHIV in the workplace.

Thirdly, this research will contribute to more information and knowledge for all Mozambican people and workers in particular about HIV, its implications for human rights, the ILO principles and their relationship with national laws.

Fourthly, the study will also add to the available resources in society relating to issues of HIV.

Finally, the study will also form the basis of an advocacy tool to allow advocacy for change and compliance of Mozambican laws with international principles and standards.

1.6 Literature review

There is no literature that deals directly with the analysis of the compatibility of Mozambican law with international human rights standards and ILO principles in relation to HIV in the workplace. There is, however, a book titled *Code of International Labour Law*, written by **Nevill Biobin** in 2005, which describes five fundamental standards of international labor law, but does not delve into an analysis relating to HIV in the workplace.

There are, however, many sources that contain principles on human rights that are relevant to this research, such as the International Covenant on Civil and Political Rights (ICCPR);⁹ the International Convention on Elimination of all forms of Discrimination against Women (CEDAW);¹⁰ the International Convention on the Rights of the Child (CRC);¹¹ the

⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 2 January 2013].

¹⁰ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, A/RES/34/180, available at: <http://www.unhcr.org/refworld/docid/3b00f2244.html> [accessed 2 January 2013].

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);¹² the African Charter on Human and Peoples' Rights (Banjul Charter);¹³ the African Charter on Rights and Welfare of the Child;¹⁴ the African Protocol to the African Charter on the Rights of Women;¹⁵ and the ILO Convention concerning Discrimination in Respect of Employment and Occupation (Convention 111).¹⁶ In addition, as far as non-treaty standards are concerned, there is ILO Recommendation 200 of 2010 (Recommendation 200);¹⁷ the International Guidelines on HIV/AIDS and Human Rights;¹⁸ and the ILO Code of Practice on HIV/AIDS in the World of Work (Code of Practice).¹⁹

Lastly, there were three main national Laws that provide protection for PLHIV in the workplace: These are Law 5/2002, approved on 5 February 2002, that seeks to protect persons living with HIV and AIDS in the workplace; Law 23/2007, approved on 1 August 2007, which regulates the relationship between employers and employees and other issues such as HIV in the workplace, Law 12/2009, approved on 12 March 2009, addressing the rights and duties of persons living with HIV and AIDS; and Law 19/2014 of 27 August 2014 (which is currently into force) establishes rights and duties of persons living with HIV and

¹¹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b38f0.html> [accessed 2 January 2013].

¹² UN General Assembly, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 26 June 1987, A/RES/39/46, available at: <http://www2.ohchr.org/english/law/cat.htm> [accessed 2 January 2013].

¹³ Organization of African Unity, *African Charter on Human and Peoples' Rights (Banjul Charter)*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.unhcr.org/refworld/docid/3ae6b3630.html> [accessed 2 January 2013].

¹⁴ Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: <http://www.unhcr.org/refworld/docid/3ae6b38c18.html> [accessed 2 January 2013].

¹⁵ African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, available at: <http://www.unhcr.org/refworld/docid/3f4b139d4.html> [accessed 2 January 2013].

¹⁶ International Labour Organization, *Convention concerning Discrimination in Respect of Employment and Occupation*, Convention No.111 of 1958, available at: http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312256 [accessed on 2 January 2013].

¹⁷ Recommendation concerning HIV and AIDS and the world of work (n 3 above).

¹⁸ International Guidelines on HIV/AIDS and Human Rights (n 1 above).

¹⁹ Code of practice on HIV/AIDS and the world of work (n 2 above).

AIDS and guarantees the promotion of some important measures to prevention, to protection and treatment of the sickness. Equally, establishes the rights and duties of workers and those are applying the job living with HIV and AIDS.

1.7 Methodology

This study is analytical. In that it adopts a descriptive, analytical and critical approach to desk electronic and other materials available on the topic under study. First, the thesis will present and describe the international human rights standards and principles, ILO guidelines and national legislation on human rights relating to HIV in the workplace.

The study will, secondly, adopt a comparative approach. The study will seek to compare national legislation on HIV with the international human rights standards and principles, the ILO guidelines, with a view to analysing whether the domestic laws are compatible with the international human rights which protect PLHIV in the workplace.

1.8 Structure

The research is organized into four chapters. The current chapter serves as the introductory part by giving the background, scope, rationale, context and limitations of this study. The second chapter presents and describes the international human rights standards, ILO principles that protect PLHIV and national laws relating to HIV at workplace. The third chapter is an analysis that seeks to establish the extent to which the national legislation of Mozambique is compatible with international human rights law that protects PLHIV in the workplace. The fourth chapter makes conclusions and recommendations.

1.9 Delineations and limitations of study

This research analyses the present national laws on HIV in Mozambique. The greatest limitation in this research is the lack of literature on this area of analysis and financial resources. The nature and scope of the study limits and delineates this research in some ways. First, while there is a corresponding need for a comprehensive and effective legal, policy and institutional framework for the protection of PLHIV in Mozambique, the study is limited in its focus only on PLHIV in the workplace. In respect to delineation, the research only addresses a specific geographical scope as it only touches on relevant issues of national laws on HIV in Mozambique.

CHAPTER TWO: INTERNATIONAL LEGAL PROTECTION FOR PLHIV IN THE WORKPLACE: AN ANALYSIS OF THE STATE'S HUMAN RIGHTS OBLIGATIONS UNDER INTERNATIONAL LAW

2.1 Introduction

The international law of human rights ensures the right to equal protection before the law and to be free of discrimination based on race, color, sex, religion, political opinion, national or social origin, property, birth or other status.²⁰

At the beginning of the HIV pandemic, many persons in different social segments were discriminated against and stigmatized on the basis of their HIV status. The groups which were and still are vulnerable, include women, children, migrants, persons with disabilities and drug users.²¹

To eliminate this wave of discrimination against these vulnerable groups, the state has the obligation under human rights law to create mechanisms to eradicate the phenomena of discrimination and stigmatization in society. That is why it is very important to analyze the international instruments ratified by Mozambique which protect PLHIV in the workplace.

According to the ILO, HIV affects the most productive age group (between 14 and 46 years) and this is the age group that constitutes the workforce of any country.²² Most of those among them who live with HIV suffer discrimination in the workplace on the basis of their HIV positive status. Some of them are for example dismissed unlawfully. Some are not promoted and others are denied access to medical assistance. In some instances, some of them are subjected to unlawful pre-employment testing to establish whether they are HIV positive. To be admitted to work, they sometimes have to undergo HIV diagnosis without their informed consent.²³ There is often neither privacy nor confidentiality. HIV test results are published, resulting in discrimination, stigmatization and -- consequently -- social exclusion.

Another situation resulting from discrimination and stigmatization is the dismissal and isolation of the workers infected by HIV. Articles 2(1), 14(1) (e), and 26 of the ICCPR and articles 2, 3, 28 of the ACHPR and 35 of the Constitution of the Republic of Mozambique (CRM) are similar provisions which establish (in the words of article 2 of the ACHPR) that

²⁰International Guidelines on HIV/AIDS and Human Rights (n. 1 above) 89.

²¹ As above.

²² International Labor Office, commented Recommendation concerning HIV and AIDS and the World of Work 2010 (n° 200), p.1ss.

²³ As above.

“every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political and/or other opinion, national and social origin, fortune, birth or other status”.

However, as the title of the study suggests to analyze the compatibility of Mozambican Law with international human rights law relating to people living with HIV in the workplace”, it is important to introduce and explain in a few paragraphs the status of International Law in Mozambique.

Mozambique, as one of the civil law countries in Africa, when it legally approves and ratifies international and human rights treaties or other international instruments, such instruments becomes the law of the country like any other law approved by parliament. The reason is that when international treaty is ratified, it enters into force automatically.²⁴

Conventions are international norms that states are bound to give effect to, and these provisions can be integrated into legal domestic law.²⁵ However, the recommendations only establish guidelines and programmatic principles which are not binding on the states.²⁶ Although the recommendations are only persuasive, State Parties have a moral duty to integrate the guidelines into their domestic laws.

For example, guideline 5 of the International Guideline on HIV/AIDS and Human Rights, consolidated in 2006, recommended that states “should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies”.

This recommendation inspired Law 12/2009 of 12 March of 2009, particularly in some articles such as 7, 8, 9, 10, 11 and 12, where all vulnerable groups mentioned in guideline 5 described above are integrated into Law 12/2009 of 12 March 2009. However, it is important to mention that articles indicated above of Law 12/2009 we replaced ibis verbs by current Law 19/2014 of 27 August 2014. It means that as well as in numbers (articles) and in provisions are the same, or nothing notable was changed. So, the study concludes that as

²⁴ n 20 above, 138.

²⁵ AM Fernandes, Labor Law (2010) 72 ss.

²⁶ Fernandes (n 25 above) 73 ss.

well as Law 12/2009 was compatible with international Standard (guideline 5), means obviously Law 19/2014 is compatible particularly with guideline 5).

Another example is the ILO Recommendation concerning HIV and AIDS and the World of Work 2010 (n° 200) which provides guidelines and programmatic principles to be followed in the workplace. This means that the ILO Recommendation is an essential document to be studied in order to aim whether the possible gaps raised in some articles of Law 5/2002 of 5 February 2002 as well as Law 12/2009 of 12 March 2009 are integrated into Law 19/2014 of 27 August 2014. For this reason, this mini-dissertation uses both international instruments ratified by Mozambique and some recommendations or soft law standards

2.2. International legal protection of PLHIV in the workplace

2.2.1 International level

In June 1993, at the World Conference of Human Rights, through the Vienna Declaration and Programme of Action, the international community affirmed that all human rights are universal, indivisible, interdependent and interrelated.²⁷ The indivisibility of the human rights through the enforcement of ‘socio-economic rights’ and ‘civil and political rights’ is fundamental in protecting rights of PLHIV in the workplace.²⁸ It means that a “number of international instruments may be drawn upon to support measures against discrimination on the basis of HIV status and help protect the fundamental rights of workers”.²⁹

Although Mozambique has not yet ratified the ICESCR, it has a duty to promote and protect international human rights standards. Also, the state has a duty to promote fundamental freedoms and ensure equality of citizen before the law under a number of other treaties to which it is a state party, as well as under national law.³⁰

Chapter 4 of the Mozambican Constitution establishes economic, social and cultural rights (such as the right to property (article 82), the right to inheritance (article 83), the right to work (article 84), the right to education (article 88), the right to health (article 89), the right to environment (article 90), the right to housing (article 91), and the right to social assistance (article 95)). These rights are also established in the most important international and regional human rights instruments ratified by Mozambique. These are analysed below.

²⁷ n 17 above, 84.

²⁸ As above, 85.

²⁹ n 1 above, 5 ss.

³⁰ (2004) Mozambican Republic Constitution sec 11.

(i) International Labour Organisation (ILO) Convention concerning Discrimination in respect of Employment and Occupation (or Discrimination (Employment and Occupation) Convention), 1958 (n° 111)

Under the Philadelphia Declaration, every human being has the right to material progress and spiritual development on the basis of freedom and dignity, in economic security and equal opportunities, without any kind of discrimination. Article 1 of ILO Convention n° 111 states that discrimination includes the following:

“(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; everyone has the same opportunity to enjoy all the rights established in the Recommendation such as right to equality of opportunity or treatment in employment or occupation. It means that all forms of discrimination on the basis of race, colour, sex, religion political opinion, national extraction or social origin are prohibited by the ILO Recommendation n° 111.

(b) Other distinction and all behavior which brings exclusion or nullify the equality of opportunity of treatment at the workplace are not allowed by the recommendation mentioned above.

2. However, where any one is excluded, distinguished or referenced in respect of a particular job based on the inherent requirements, no one shall complain of discrimination on the basis of non-literacy.

3. The terms “employment and occupation” established into present Convention, includes access to vocational training, access to employment, access to employment and to particular occupations, and terms and conditions of employment.³¹

Under this standard, discrimination constitutes a violation of human rights in international instruments. One of the treaties ratified by Mozambique, through Decree-Law 22/77 of 28 May 1977 and essential to deal with discrimination and stigma on the basis of real and perceived HIV, is the ILO Convention on the Elimination of Discrimination Relating to Work and Occupation.³²

The Discrimination (Employment and Occupation) Convention “is the most significant in the context of HIV in the workplace. The Convention prohibits discrimination in access to or continued employment and in terms and conditions of employment. Although

³¹ Convention concerning Discrimination in Respect of Employment and Occupation, (n 11 above)

³² as above.

HIV is not specified as a prohibited ground of discrimination, the Convention does provide for states to add additional grounds, such as HIV or health status”.³³

It means that the State has a duty to formulate and apply a national policy with the goal to eliminate all discrimination and undertake measures to ensure the promotion of equality, equal opportunities and equal treatment in issues of employment. This requirement had been domesticated (into article 41) by Law 12/2009 of 12 March 2009, as well as the similar provision has been replaced (into article 4 7) of Law 19/2014 which established that “the worker or candidate for the employment, living with HIV, enjoys protection against discrimination, in the terms regulated by the Labor Law and other specific legislation in force” (article 41). To fulfill this principle of equality and non-discrimination, the legislator established the following rights for the worker living with HIV:

a) Not to be discriminated against in respect of his or her rights in respect of work, including training, promotion and progression of his career (article 42(1) (a));

b) To the principle of equality of the rights and opportunities based on his or her merit and capacity to carry out his or her labor function (article 42(1) (b)); and

c) To receive medical assistance in accordance with the doctor’s recommendation, in the terms of labor legislation (article 42(1)). However, in terms of Law 14/2014, article 42(1) (a) and b) of Law 12/2009 was replaced in two section particularly into article 47 of Law 14/2014 expect section 42(1) (c), was replaced into article 5 (a) of current law into force. So, the study confirms that the content remain the same in two articles of laws 12/2009 and 19/2014. Yet, article 4(1) of Labor Law (Law 23/2007 of 1 August 2007) determines that “the interpretation and application of norms of the present Law, have to obey the principle of non-discrimination on the basis of sexual orientation, race, or to be HIV positive”. It means that all rights existing in Law 23/2007, covered in this study, are governed by the principle of equality and non-discrimination. Law 23/2007 remains into force. For this reason, the Law was not object in terms of transformation of Law 19/2014 of 27 August 2014. So, the study confirms that this law is compatible with Convention n° 111.

(ii) Recommendation concerning HIV and AIDS and the World of Work, 2010 (n° 200)

ILO Recommendation n° 200 of 2010 and the ILO Code of Practice on HIV/IDS and the World of Work set out “fundamental principles for policy development and practical guidelines from which concrete responses to HIV/AIDS can be developed at enterprise,

³³n 17 above, 5 ss.

community and national levels”³⁴ in order to promote a comprehensive approach to workplace programmes.

The instruments include: the protection of workers’ rights, employment protection, gender equality, entitlement to benefits and non-discrimination; prevention through education gender aware programmes and practical support for behavior change; care and support including entitlement to reasonable accommodation, affordable health services, and statutory social security programmes and occupational schemes, as well as treatment where possible.³⁵ It means that these instruments have principal objective to provide a range of guidelines focusing on the HIV pandemic in the world of work. These international instruments are structured to be implemented by states to combat stigmatization and discrimination, in order to promote dignity in the workplace.

Apart from the discrimination and stigmatization, there is also a problem of interferences in the private life of the workers. Some of the greatest problems of interference are: spreading of the health data of HIV positive persons, and complying with the obligation to undertake HIV testing without their assent (either oral or written).

Under article 17 of the ICCPR, “nobody will be subject to interferences in their private life, in their family, in their home, nor attacks to honor and reputation. All people have the right to protection against such interference or attacks”. The State is the entity that must protect vulnerable or HIV infected people against such interferences, through elaboration of anti-discriminatory laws. One such anti-discriminatory law is Law 5/2002 of 5 February 2002. Articles 2 and 3 of Law 5/2002 establish the key principles of non-discrimination and equality. These provisions determine that discrimination and stigmatization against workers on the bases of real or perceived HIV status cannot be tolerated. The outlawed forms of non-discrimination also include: those who seek employment and candidates, or those who are at serious risk of HIV infection (article 3(c) of the Recommendation). The main objective of this principle is to protect infected workers and those who are suspected to be infected by HIV, such as the candidates for employment in the public and private sectors, including domestic workers.

In addition Law 5/2002 addresses the right to confidentiality and privacy (article 5), the right to medical assistance (article 8 and 10), the right to reasonable accommodation (article 9), the right to compensation in case of unfair dismissal (article 13), the right to information and counseling (article 14), the principle of free testing without coercion (article

³⁴ n 17 above 5.

³⁵ As above.

6) and right to equal opportunity (article 7).

The following standards demanded by the ILO through Recommendation 200 of 2010 are also of importance: the principle of recognition of HIV/AIDS as a labor problem, the non-discrimination principle, and gender equality, the right to health and security in the workplace, social dialogue, and prohibition of tests for admission to employment, confidentiality, prevention, and care.

Thus, articles 2, 3 and 7; 4 and 6, 5, 9, 10, 14 of Law 5/2002 of 5 February 2002 are in accordance with principle of equality and non-discrimination, free consent, privacy and confidentiality, reorientation of the worker in accordance with capacities, the principal of medical assistance, prevention and recognition of the HIV as a labour problem, as set out in the ILO Recommendation 2010 (n° 200). Similarly, Law 19/2014, addresses the right to confidentiality and privacy (article 44 and 45), the right to medical assistance (article 53(2)), the right to reasonable accommodation (article 58), the right to compensation in case of unfair dismissal (article 62), the right to information and counseling (article 53(4)), the principle of free testing without coercion (article 46) and right to equal opportunity (article 47). Thus, the study confirms that there is a not notable revolution particularly into articles of the Law 14/2014 only replaces that was established into articles of Law 5/2005 of 5 February 2002.

However, a number of ILO standards (such as gender equality, health and security in the workplace, and social dialogue) are not incorporated into Law 5/2002 of 5 February. The non-incorporation of these principles makes it difficult to effectively combat the HIV pandemic in the workplace. In addition the study confirms that the gaps raised into Law 5/2002 of 5 February are still not integrated into Law 14/2014 expect right to health and security in the workplace (see article 53(5)) which are incorporated

(iii) International Guidelines on HIV/AIDS and Human Rights

In Mozambique, national laws on HIV/AIDS are compatible with the International Guidelines on HIV/AIDS and Human Rights and were adopted and published by UNAIDS and the Office of United Nation High Commissioner for Human Rights.³⁶

Under these guidelines, Law 12/2009 of March 2009 prohibits compulsory HIV testing for employees or prospective employees (article 37), and also has norms which protect and respect the confidentiality and privacy of people living with HIV (article 6, 27) and

³⁶Human Rights Protected? (2007), (n 20 above) 140.

ensure the provision to free medical assistance to them (article 4(2)).³⁷ In general, Mozambican laws are compatible with the International Guidelines on HIV/AIDS and Human Rights.

Similarly, Law 19/2014 of 27 August 2014 prohibits compulsory HIV testing for employees or prospective employees (article 26(1) and also have norms which protect and respect the confidentiality and privacy of people living with HIV (article 44, 45).

Currently, the right to free medical assistance was not replaced into Law 19/2014. The provision and the right to free medical assistance, was established into (article 4(2) of Law 12/2009. So, it was supposed to be replaced into article 5(2) of Law 14/2014, unfortunately was removed and the removal of the provision means the big retrocess for those was benefiting for free treatment. However, the free treatment is still benefiting the people living with HIV although the revocation of the provision.

The International Guidelines on HIV/AIDS and Human Rights establish the following: “...states have to adopt anti discriminatory laws and other protective laws which protect against discrimination, of vulnerable groups, PLHIV and persons with disability, in the public and private sectors. These laws must guarantee privacy and confidentiality of human beings. Also should emphasize education and reconciliation, and provide for speedy and effective administrative and civil remedies”.³⁸ Guideline 5 requires that the state adopt anti-discriminatory laws, which protect vulnerable groups against discriminations.³⁹

In fulfillment of guideline 5, the Mozambican legislator established in article 7 of Law 12/2009 of 12 March 2009 that people living with HIV in a state of vulnerability are the following: women, children, adolescents, elders and persons with disability and toxic dependent with income below minimum of incidence of poverty.

Thus, articles 4, 5, 8 to 12 of Law 12/2009 established that persons living with HIV, the adolescent child, woman, person with disability and drug users living with HIV in a state of vulnerability, enjoy the rights established in the Constitution, and in the international instruments of human rights ratified by Mozambique. They, too, enjoy some of specific rights that are in the present Law 12/2009 of 12 March 2009, as in the public and private sectors.

In terms of Law 12/2009 the State has the responsibility to provide measures in order to protect the citizen living with HIV. The state must further ensure that all citizens enjoy and

³⁷ n 20 above, 140.

³⁸ n 1 above, 33.

³⁹As above.

exercise the rights and fundamental guarantees established in the Constitution and other national laws; and must ensure that it allocates infrastructure for health service to assist and treat persons living with HIV.

The state must further ensure and guarantee safe blood (article 18); guarantee the publication of programmes about prevention and combat of HIV with low costs (article 38); guarantee juridical assistance for persons living with HIV (article 44); promote and ensure the realization of scientific studies in order to combat, to prevent, provide treatment and cure of sickness and the mitigation of its impact (article 45); provide medical assistance for the prisoners; promote campaigns of information and civic education.

Summarizing the issues linked with the protection of vulnerable groups, people living with HIV in both the public and private sectors are protected in articles 4, 5, 6, 7, 8, 9, 10, 11, and 12 of Law 12/2009 of March 2009. This Law is thus compatible with guideline 5 on HIV/AIDS and Human Rights.

(iv) International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR), ratified by Mozambique through Resolution 5/91 of 12 December 1991, provides for very important civil and political rights⁴⁰ and protects the family and vulnerable groups (such as women and children). In addition, Law 12/2009 establishes civil and political rights economic, social and cultural rights,⁴¹ the protection of the family, vulnerable groups (such as women, children, and the aged, person with disability and drug dependent person), the individual duties, and the duties of State.

I now proceed to analyze Law 12/2009 of March 2009 with the ICCPR to see whether compatible with the ICCPR in respect of the following: a) civil rights, b) political rights, c) protection of the family, and d) the protection of vulnerable groups.

a) The civil rights established in terms of ICCPR are, for example, the right to self-

⁴⁰ The ICCPR as it is named has two main groups of rights which are civil and political rights. Political rights are established into article 25 which are the right to vote and to be elected, the right to participate in the public decisions and right to access to public services. All the rest are the civil rights. We find also collective rights such as the right to self-determination into article 1 and right to minorities to have their own culture or lifestyle. The ICCPR protects also right to vulnerable groups such as women article 3 and children article 24. Children as the right to registration and the right to have name after his birth, the right to have nationality.

⁴¹ Economic, social and cultural rights are not established in to ICCPR that is why are going to be used in this subchapter.

determination of peoples as a collective right (article 1), the right of persons belonging to minorities (article 27), the right to recognition as a legal person (article 16), the prohibition of propaganda for war and incitement to national, racist and religious discrimination, hostility or violence (article 20), the prohibition of detention for debt (article 11); the right to minimum guarantees for detained person (article 10), the right to life (article 6), the right to freedom and personal security (article 9), the right to non-discrimination and equality before the law (article 26), the right to expression (article 19), the right to privacy (article 17), the right to movement (article 12), the right to stand before the court (article 14), the right to freedom of thought, conscience and religion (article 18), the right to freedom of association, (article 22), the right to freedom of assembly, (article 21) and the right to integrity (article 7).⁴²

Law 12/2009 of March 2009 established the following civil rights: the right to sexual, moral and psychological integrity (article 4(1) (f)), the right to privacy among the family and community (article 4(1) (g)), the right to physical integrity (article 16), the right to confidentiality and privacy (article 6), and the right to equality and non-discrimination (article 17).⁴³

However, some of the rights established under the ICCPR (such as the right to self-determination of peoples (article 1), the right to person belonging to minorities (article 27), the right to recognition as a legal person (article 16), the prohibition of propaganda for war and incitement to national, racist and religious discrimination, hostility or violence (article 20) and lastly protection family (article 23), prohibition to detention for debt (article 11), the right to movement (article 12)), are not incorporated into Law 12/2009 of 12 March 2009. Are the rights mentioned above integrated into Law 19/2014? The rights mentioned above are not established into Law 19/2014. The non-integration of rights

⁴² The right to integrity is linked to the right to life. It means that every person with HIV has right to dignity, not to be submitted to torture and other cruel treatment on the basis of real or perceived HIV. The most victims of cruel and inhuman treatment are the prisoners in prison. Articles 6(1), 7 and 10 of ICCPR; 5 and 4 of ACHPR protects life, dignity and integrity of every one without any kind of discrimination.

⁴³ The same right is protected by articles 16, 17, 32, 41 and 42 of the Law 12/2009 of 12 March 2009 where it prohibits discrimination, constitution of schools and special classes for the persons living with HIV, refusing access to the services and access to the public or private institution of student living with HIV and bad treatments for whatever person living with HIV, particularly, child or orphan with fathers victim of HIV.

indicated, means that the law needs some improvements in order to totally fulfill the rights of people living with HIV.

- b) Political rights established under the ICCPR are the right to vote and to be elected, the right to participate in public decisions and right to access to public services (article 25). Law 12/2009 of March 2009 stipulates the right of PLHIV to stand as candidate for public or private offices (article 4(1) (d)).

Therefore, if a PLHIV has the right to stand as candidate for public and private services, has the right to enjoy all rights established in article 25 of the ICCPR; which means that these articles of Law 12/2009 are compatible with the ICCPR.

- c) In respect to the protection of the family, the ICCPR provides for the following: the right to the protection of family through community and State, the right to marry and constitute family and the right to consent freely to get married (article 23 of the ICCPR).

However, in articles 5 to 12 of Law 12/2009 of 12 March 2009 established that the community has the responsibility to receive people living with HIV inside their families and, in the last instance, in substitute families or shelters and care centers.⁴⁴ It is clear that the first protector of the family is the society and lastly the State. If the society protects the family, it is also protecting PLHIV because these persons rely on the care of the family and the community. For this reason, these provisions of Law are compatible with the ICCPR.

- d) The protection of vulnerable groups under the ICCPR includes: the minimum rights to vulnerable groups such as women (where the State has the obligation to ensure equality among man and woman according to the right to enjoy all civil and political rights set out in the Covenant under article 3) and children (with the right to registration and the right to have a name after their birth, the right to have nationality (article 24)).

The same protection of vulnerable groups is covered in articles 5 to 12 of Law 12/2009 of March 2009 under study, where it is established that people living with HIV are protected by the Constitution, international instruments of human rights ratified by Mozambique and Law

⁴⁴ Mozambican State (was inspired by article 24 of the ICCPR) determined in this form because with the spread of the pandemic, many infected were rejected by their families, losing this way the access to a worthy housing, feeding and family warmth.

12/2009 of 12 March 2009 which establishes specific rights. In particular, article 7 of Law 12/2009 stipulates that vulnerable groups go beyond people living with HIV in a state of vulnerability to include groups such as: a) women, b) children, c) teenagers, d) the aged, e) persons with disabilities, and f) drug dependents whose incomes are under the line of poverty incidence.⁴⁵

Therefore, although some of the vulnerable groups (such as the aged, persons with disabilities and drug dependents) whose incomes are under the line of poverty incidence are not established in the ICCPR. Thus, as these provisions are not compatible with ICCPR, the study cannot confirm if are or not compatible because it is not in accordance of the purpose of the study.

(v) International Convention on the Rights of Child

The CRC was ratified by Mozambique on 23 October 1990 through Resolution 19/90. The ratification of the CRC improved the legal system which protects this vulnerable social group in Mozambique.⁴⁶ Generally, children are covered by most general human rights established under international instruments (such as the right to life and integrity, the right to freedom of association and the right to freedom of assembly, the right to equality and non-discrimination, the right to freedom and security, the right to privacy, the right to asylum, the right to expression, the right to education and the right to health) which are guaranteed to adults, with the exception of a few rights, for example the right to vote, the right to marry and the right to

⁴⁵ These vulnerable groups have the following specific rights: a) if it is a woman with HIV in a vulnerability state, when she is victim of rape, she is entitled to the necessary medical assistance with priority in the access to consultancy and testing as well the right to remain in house of the couple, except if the court determines to the contrary (article 8). b) children living with HIV in a state of vulnerability are entitled to education, housing and the medical care inside their family. In the last instance, such children are also entitled to be placed in substitute families or in shelter institutions. Also has the right to be respected on the basis of his or her serologic condition, the right to be assisted by a custodian of minors from the court of the jurisdictional area of their residence, attendance by the state until reaching the majority (article 9). c) With regard to the teenager living with HIV: he or she is entitled to be supported and educated by his family and, in the last instance, in a substitute family (article 5). d) When it is an old aged they are entitled to be looked after in their family and in extreme cases in shelter centers (article 10). e) If it is a disabled person they have the right to be looked after in their family and in the shelter institutions. They also have the right to information, communication and civic education on the prevention, mitigation and combating HIV (article 11). f) A drug dependent has the right to education, the right to information, the right to stay with family and in extreme cases in an institution (article 12).

⁴⁶ The CRC only protects civil rights for child (article 4).

work.⁴⁷

They, too, have the right to be recognized as human beings, in particular because children may more easily than adults be exploited for economic purposes in textile factories, be exposed to sexual violence, trafficking and forced prostitution of girls and the common exclusion of the children from decision-making process, and have a greater vulnerability to contract HIV.

The Convention on the Rights of Child establishes that the State Party “should eliminate all forms of discrimination of enjoyment of rights of child independently of race colour, sex, language, religion, political opinion, national origin, ethnic or social, economic position, physical problems, birth, or whatever condition of the child or, of his or her parents” (article 2). The Convention contains general rights and specific rights. The general rights are for example: the right to life (article 6(1)), the right to equality and non-discrimination (article 2), the right to personal integrity (article 19), the right to freedom and security (article 37), the right to privacy (article 16), the right to asylum (article 22), the right to expression (article 13), the right to association (article 15), the right to education (article 18) and right to health (article 24), the right to freedom of thought, conscience, religion (article 14). In addition, we find the following specific rights: the right to be protected against human trafficking, the protection of children with disabilities (article 23), against prostitution (article 34) and sexual abuse (article 35). To combat this social problem, the State has the positive obligation to fulfill measures in order to mitigate the negative impact of discrimination on the basis of real and perceived status of HIV.

In the fulfillment of this international obligations, the Mozambican legislator established in article 5 and 9 of Law 12/2009 that teenagers and children living with HIV/AIDS in a state of vulnerability have the right to be assisted, the right to be educated first in their family, and second, in the public institutions.

However, the specific rights established under the CRC (such as the right to be protected against trafficking, sexual abuse and prostitution) as well as the general rights (such as the right to freedom of association and the right to freedom of assembly, the right to freedom and security, the right to asylum, the right to expression, the right to association) are not incorporated into Law 12/2009. Thus, the studies confirm that the law is not compatible with CRC. Are these rights integrated into Law 19/2014? The current law as the result of compilation of the Law 5/2002 and Law 12/2009, the gaps rose in this study; it is obviously

⁴⁷Nowak (n 19 above) 91.

not integrated into new law, Law 19/2014. Thus, the study recommends their integration into Law indicated above in order to fulfill and improve the current law into force.

(vi) International Convention on the Elimination of all forms of Discrimination against Women

The CEDAW was ratified by Mozambique through Resolution 4/94 of 2 June 1993 in order to bind the Mozambican State to undertake measures to promote equality among men and women with the goal to eliminate discrimination against women in the community, private and public sectors. In current days, discrimination against women is a common and universal phenomenon.⁴⁸ In recent times, the phenomenon has worsened due to the spread of HIV.

Article 2 of Convention established a comprehensive prohibition of discrimination against women and goes beyond providing a series of detailed provisions and positive state obligations to fulfill the purpose to combat discrimination against women in political and public life (article 7 to 9), in economic, social and cultural rights (article 10 to 14), the comprehensive principle of equality before the law including matrimonial and family law (article 15 and 16). The special provisions refer to abolition of trafficking in women, exploiting of prostitution (article 6) and promoting rights of women in rural areas (article 14).⁴⁹ This Convention is the important instrument to protect women against discrimination on the basis of real or perceived HIV status in society and in particular in the workplace.

It means that the Mozambican State has the obligation to take appropriate measures to eliminate the discrimination against women with the goal to ensure the equality of men and with respect to the right to education, the right to work, the right to security and good conditions in the workplace, the right to health, including safeguarding the right to procreate (article 10 and 11(1) of the CEDAW).

Fulfilling the obligation, the Mozambican legislator established the principle of gender equality in article 36 of the CRM, in the following terms: “The man and woman are equal before the law, in all political, economic, social and cultural life spheres.” Women are a vulnerable group and this is the reason why they suffer more discrimination than men.

For this reason, article 8 of Law 12/2009 of 12 March 2009 establishes specific rights of woman living with HIV in a state of vulnerability (such as the right to medical assistance in case to be victim of sexual abuse, the right to have priority in access for counseling and testing and the right to be maintained in her home) unless the court decides to the contrary.

⁴⁸ Nowak (n 19 above) 86.

⁴⁹ Nowak (as above).

Another law which protects the rights of women is Law 23/2007 of 1 August 2007; particularly articles 11 and 12; where the specific rights for women in the workplace are established.

However, some prohibitions established in the CEDAW (such as trafficking in women and exploiting of prostitution) are not incorporated into the laws mentioned above as well as into Law 19/2014 of 27 August 2014, but are established into Law 6/2008 of 9 July 2008. For this reason, the study affirms that these laws are compatible with CEDAW, because international standards of human rights are reflected in some national laws.

(vii) International Convention on the Rights of Persons with Disabilities

The International Convention on the Rights of Persons with Disabilities (CRPD) was ratified by the Mozambican parliament through Resolution 29/2010 of 31 December 2010, with the clear intention to recognize that persons with disabilities have the same human rights and fundamental freedom as other persons. Disabled persons living with HIV suffer double discrimination, first on the basis of their physical condition and poverty (where applicable), and second, on the basis of their real or perceived HIV status.

Article 3(1) (a) of the Convention establishes positive obligations on the State to fulfill economic, social and cultural rights and to undertake measures of legislative and social character with the purpose to eliminate the discrimination against persons with disability and to ensure their integration into society.

Measures that public authorities and private institution have to promote are: integration and providing goods, services, installations, programmes and activities as well as employment, transport, communications, housing, leisure, education, sport, access to justice, police activities, politic activities and administration. According to these measures, persons with disability enjoy the right to work, the right to transport and movement, the right to communication, the right to housing, the right to leisure, the right to education, the right to sport, the right to access to justice, the right to access to public and private institutions.

Article 11 of Law 12/2009 of 12 March 2009 establishes that “persons with disability living with HIV/AIDS in state of vulnerability, have the specific rights such as: the right to live with his/her family, the right to civic education, the right to communication and information, the right to live in the solidarity institution as the last measure”.

However, the right to housing, the right to leisure, the right to transport which materialize the right to movement and right to sport, are not incorporated into Law 12/2009

of 12 March 2009. At first glance, it appears that this Law is not compatible with the CRPD.

Therefore, as the legislation declares in article 4 to 11 of Law 12/2009 of 12 March 2009 that persons with disability have the right to enjoy all rights existing in international instruments, in the Constitution and in another laws, it is fair to affirm that the Law is compatible with the CRPD.

2.2.2 Regional level

(i) African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights was ratified by Mozambique through Resolution 9/88 of 25 August 1988. The Charter as the regional instrument, as well as the other international instruments of human rights, establishes the right to equality and non-discrimination before the law and provides the following: a) the individual civil and b) political rights, c) the individual economic, social and cultural rights, d) the civil and political collective rights, e) the collective economic, social and cultural rights, f) the minimum rights of vulnerable groups, g) individual duties, and h) the duties of the state.

Law 12/2009 of March 2009 establishes individual civil and political rights, the economic, social and cultural rights, the protection of the family, vulnerable groups (such as women, children, the aged, person with disability and drug dependent), individual duties, and the duties of the state.

I now proceed to describe the following, with reference to the Law: a) the individual civil rights, b) the individual political rights, c) the individual economic, social and cultural rights, d) the collective civil and political rights, e) the collective economic, social and cultural rights, f) the minimum rights of vulnerable groups), g) the individual duties, and h) the duties of the state.

- a) Individual civil rights established in the ACHPR are, for example, the right to equality and non-discrimination (article 2 and 3),⁵⁰ the right to life and

⁵⁰ Prior to the enactment of Law n° 12/2009 in Mozambique, discrimination on the basis of HIV status was common in communities, schools, in the hospitals, workplaces, where the principle of non-discrimination as set under the Charter was not adequately considered. The establishment of the Law has incorporated the principle of equality and non-discrimination. This principle is stated under articles 16, 17, 32, 41 and 42 of the Law 12/2009 of 12 March 2009 prohibiting discrimination and mistreatment to PLHIV. Further, it prohibits denying access to public and private institutions for students living with HIV discriminate against workers or candidates for the employment who are living with HIV.

integrity of his person (article 4), the right to the respect of the dignity (article 5), the right to liberty and to the security of his person (article 6), the right to have his cause heard (article 7(1)); the right to appeal to competent national organs (article 7(1)(a)), the right to be presumed innocent (article 7(1)(b)), the right to defense (article 7(1)(c)), the right to be tried within a reasonable time (article 7(1)(d)), the right to freedom of conscience, the profession and free practice of religion (article 8); the right to receive information (article 9(1)), the right to express and disseminate his opinion within the law (article 9(2)), the right to free association (article 10(1)), the right to assemble freely with others (article 11), the right to freedom of movement (article 12), the right of equal access to the public service of his country (article 13(2)) and the right of equal access to public property (article 13(3)).

Law 12/2009 of March 2009 provides for individual civil rights such as the right to psychological integrity (article 4(1) (f)), the right to privacy among the family and community (article 4(1) (g)), the right to physical integrity (article 16), the right to confidentiality and privacy (article 6) the right of equality and non-discrimination (article 17).

However, some of the rights (such as the right to have one's cause heard (article 7(1)), the right to appeal to a competent national organs (article 7(1) (a)), the right to be presumed innocent (article 7(1) (b)), the right to defense (article 7(1) (c)), the right to be tried within a reasonable time (article 7(1) (d)), the right to freedom of conscience, the profession and free practice of religion (article 8); the right to receive information (article 9(1)), the right to express and disseminate his opinion within the law (article 9(2)), the right to free association (article 10(1)), the right to assemble freely with others (article 11), the right to freedom of movement (article 12), the right of equal access to the public service of his country (article 13(2)), the right of equal access to public property (article 13(3))) are not incorporated into Law 12/2009 of March 2009. The non-integration of the mentioned above into Law 12/2009 as well as into Law 19/204 cannot be affirmed that the law is not compatible with because the legislation declares in article 4 to 11 of Law 12/2009 of 12 March

2009 currently replaced in articles 6(1), 7(1), 10, 11(1), 12(1) and 18(1) of Law 19/2014 that people living with HIV have the right to enjoy all rights existing in international instruments, in the Constitution and in another laws, it is fair to affirm that the Law is compatible with the ACHPR. So, the study recommends the integration of the rights indicated above in order to improve the current Law into force.

b) The most individual political right is the right to participate freely in the government of his country (article 13(1) of the ACHPR)). This provision means that every citizen has the right to be elected and the right to vote, the right to participate directly or through freely chosen representatives in accordance with the provision of the law without any kind of distinction and discrimination because of HIV status.

Similar provision (such as the right to participate in the decision-making and other family acts (article 4(1) (c)), the right to apply the job in the public and private sectors) is established under article 4(1) (c) and (d) of Law 12/2009 of March 2009 and consequently is compatible with article 13(1) of the ACHPR mentioned above.

c) Individual economic, social and cultural rights established under the ACHPR are the right to property (article 14), the right to work (article 15), the right to enjoy the best attainable state of physical and mental health (article 16(1)), right to social security (article 16(2)), the right to education (article 17(1)), the right to take part in cultural life freely (article 17(2)) and the right to have family (article 18(1)).

Individual economic, social and cultural rights established under the Law 12/2009 of March 2009 are the right to sexual and moral integrity (article 4(1) (f), the right to medical and medicinal assistance (article 4(1) (a)); the right to co-habitation and education (article 4(1) (b)); the right to participate in the decision-making and other family acts (article 4(1) (c)), the right to work and professional training (article 4(1) (e)); the right to be respected for their serological condition (article 4(1) (h)), the right to solidarity of the family and community assistance (article 4(1) (i)), the right to food in terms regulated by Family Law 10/2004 of 25 August 2004) and another legislation (article 4(1) (j)) a right to free treatment in the National Bureau of

health (article 4(2)) and the right to medical assistance (article 4(2)).

Therefore, the economic, social and cultural rights established under the ACHPR and the provisions established under the Law 12/2009 of March 2009 are compatible except the right to property which is not integrated under Law 12/2009.

d) The political collective rights established in the ACHPR (such as the right of equality of all peoples (article 19), the right to existence of all peoples and the unquestionable and inalienable right to self-determination (article 20(1)), the right to assistance of the state parties in their liberation struggle against foreign domination (article 20(3)), the right to national and international peace and security (article 23(1))) and;

e) The economic cultural collective rights (such as the right of people to freely dispose of their wealth and natural resources (article 21(1)), the right of people to economic, social and cultural development (article 22(1) the right to a general satisfactory environment favorable to their development (article 24) are not integrated into Law 12/2009 of March 2009. The study affirmed above that non-integration of the mentioned above into Law 12/2009 as well as into Law 19/204 cannot be affirmed that the law is not compatible with because the legislation declares in article 4 to 11 of Law 12/2009 of 12 March 2009 currently replaced in articles 6(1), 7(1), 10, 11(1), 12(1) and 18(1) of Law 19/2014 that people living with HIV have the right to enjoy all rights existing in international instruments ratified by Mozambique, in the Constitution and in another laws, it is fair to affirm that the Law is compatible with the ACHPR. So, the study recommends the integration of the rights indicated above in order to improve the current Law into force.

f) The protection of the rights of vulnerable groups such as women, children, the aged and persons with disability is established under article 18(3) and 18(4) of the ACHPR respectively. The State has the obligation to ensure the elimination of all discrimination against women and also ensure the protection of the rights of the women and the child as stipulated in international declaration and convention, and to undertake special measures of protection in keeping the physical or moral needs of person with disability and aged persons.

Similarly, Law 12/2009 of 12 March 2009 covers and goes beyond establishing some vulnerable groups such as women (article 8), children (article 9), elder persons (article 10), person with disability (article 11), toxic dependent (article 12) and prisoners (article 39). Although ACHPR only protects women and children (article 18(3)) and elderly persons (article 18(4)), the study confirms that these provisions are compatible with ACHPR.

g) Individual duties provided under the Charter are: the duty towards individual's family and society, the State, and other legally recognized communities and the international community (article 27(1)); the duty to respect the rights of others, collective security, morality and common interest (article 27(2)), the duty to consider and respect fellow being without discrimination, the duty to maintain relation aimed at promoting, the duty to safeguarding, reinforcing mutual respect and duty to tolerance (article 28); the duty to preserve the harmonious development of the family, the duty to work to the cohesion and respect of the family, the duty to respect one's parents at all times and to maintain them in case of need (article 29(1)), the duty to preserve social and national solidarity (article 29(4)).

Similarly, the domestic legislation establishes duties for PLHIV in article 13 of Law 12/2009 of 12 March 2009 such as: the duty to abstain to practice sexual relations without protection (article 13(1) (a)), the duty to avoid sharing sharp objects with other people (article 13(1) (b)), the duty to adopt ways to avoid transmission of HIV virus to others (article 13(1) (c)), the duty to inform others of the danger of the epidemic (article 13(1) (d)); the duty to carry out all medical treatment (article 13(1) (e)), the duty to disclose their status to the doctors (article 13(1) (f)), the duty to disclose before sexual partners or spouses (article 13(1) (g)) and the duty to not donate blood unless for research purposes (article 13(2)). These provisions are created to protect the life of other individuals as well as are provided into article 27(2) of the ACHPR.

In the light of the above, the study affirms that Law 12/2009 of 12 March 2009 is compatible with the African Charter.

h) Under the ACHPR the State has the duty to eliminate all forms of discrimination against woman and ensure the protection of rights of women and children, as it is stipulated in the declarations and international convention (article 18(2)(3) of the ACHPR), the duty to undertake and adopt legislative measures to

give effect the rights and freedoms established into the Charter (article 1), the duty to protect the health of their people and ensure that they receive medical attention when they are sick (article 16(2)). The state also has individually and collectively the duty to ensure the exercise of the right to development (article 22(2)), the duty to promote and ensure through teaching, education and publication (article 25), and the duty to guarantee the independence of the courts (article 26). In addition to this, the state has the duty to take specific measures to protect the elder persons according to their physical and moral needs (article 18(4) of the Charter)).

Similarly, Mozambican State has the duty to promote and ensure education, information for PLHIV (article 34 of Law 12/2009), the duty to promote campaigns of education, information counseling, testing about HIV (article 35 of Law 12/200), the duty to publish information about HIV through public organs of social communication (article 36). Also has the duty to promote scientific research in order to address the problem of HIV (article 45 of Law 12/2009), and the duty to ensure that the rights and fundamental freedoms established into Law 12/2009 are enjoyed by PLHIV.

Thus, the study confirms that these duties are compatible with the duties established into African Charter.

(ii) African Charter on the Rights and Welfare of the Child

The African Charter on the Rights of Child ratified by Mozambique through Resolution 20/98 of 26 May 1998 also establishes the principle of equality and non-discrimination (Article 3). In some aspects, children's rights such as the right to life, the right to education, the right to movement, the right to health, the right to housing, the right to opinion and the right to expression, are the right of adults.⁵¹ The rights mentioned above except the right to marry, the right to vote and the right work are contained into the 12/2009, 12 March 2009.

However, we only need to announce the rights which are not incorporated into Law 12/2009 of 12 March 2009 such as: the right to survive and development (5), the right to good name and nationality (article 6), the right to freedom to expression (article 7), the right to freedom to association (article 8), the right to freedom to thought, conscience, and the right to religion (article 9), the right to leisure (article 12), the right to special treatment when it is in conflict with law (article 17(1)), the right to not be submitted to work incompatible

⁵¹ See commented International Guidelines on HIV/AIDS and Human Rights (n 1 above) 93.

with his physical condition (article 15(1)), the right to adoption (article 24), the right to not be abused sexually (article 27) and the right to not be trafficked (article 29).

Article 5 of Law 12/2009 guarantees every children living with HIV/AIDS enjoy the rights presented in the Law, in the Constitution, in the International Convention on the Rights of Child, in the African Charter on the Rights and Welfare of the Child. Thus, the study confirms that Law 12/2009 of 12 March 2009 in some aspects is compatible with the ACRWC and other aspects (such as the right to adoption, the right to not be abused sexually and the right to not be trafficked are not integrated into law 12/2009 as well as into Law 19/2014 of 27 August 2014. The study affirmed above that non-integration of the rights mentioned above into Law 12/2009 as well as into Law 19/204 cannot be affirmed that the law is not compatible with because the legislation declares in article 4 to 11 of Law 12/2009 of 12 March 2009 currently replaced in articles 6(1), 7(1), 10, 11(1), 12(1) and 18(1) of Law 19/2014 that people living with HIV have the right to enjoy all rights existing in international instruments ratified by Mozambique, in the Constitution and in another laws, it is fair to affirm that the Law is compatible with the ACHPR. So, the study recommends the integration of the rights indicated above in order to improve the current Law into force.

(iii) Protocol on the Rights of Women in Africa

In the similar form, the rights of this vulnerable group are also protected by the Protocol on the Rights of Women in Africa ratified by Mozambique through Resolution 28/2005 of 13 December 2005. The Protocol contains some human rights established in the Covenant on the Civil and Political Rights and in the African Charter on Human and Peoples' Rights and contains the principle of equality and non-discrimination between man and woman and the positive obligation to the state to fulfill the rights established on Protocol.⁵²

Although the Protocol has the rights established in the ICCPR and ACHPR, it is important to our study to announce the rights, guarantees and prohibitions stated into the Protocol as follows:

- a) The civil rights established into Protocol (such as the right to dignity (article 3), the right to life, integrity and security of person (article 4), the right to access to justice and equal protection before the law (article 8)) are compatible with the provisions stipulated into Law 12/2009 of March 2009 which provides the individual civil rights (such as the right to psychological integrity (article 4(1)(f)),

⁵² Article 2 of Protocol on the Right of Women in Africa, (2003/2005), available in *Compendium of the Key Human Rights Documents of the African Union* (2010), 63.

the right to privacy among the family and community (article 4(1)(g)), the right to physical integrity (article 16), the right to confidentiality and privacy (article 6) and the right of equality and non-discrimination (article 17)).

- b) Political rights: the right to participation in the political and decision-making process established in article 9 of the Protocol is compatible with the rights established in article 4(1) of Law 12/2009 of 12 March 2009.
- c) Economic, social and cultural rights established into Protocol: the right to peace (article 10), the right to education and training (article 12), the right to economic and social welfare rights (article 13), the right to health and reproductive rights (article 14), the right to food security (15), the right to adequate housing (article 16), the right to positive cultural context (article 17), the right to a healthy and sustainable environment (article 18), the right to sustainable development (article 19), the rights of the widows (article 20); the right to inheritance (21), the right to special protection of elderly women (22), the right to the special protection of women with disabilities (article 23), the right to the special protection of women in distress (article 24), the right to marry and the right to have same rights in case of separation, divorce and annulment of marriage (article 7).

In addition, the individual economic, social and cultural rights established under the Law 12/2009 of March 2009 are the right to sexual, moral integrity (article 4(1) (f), the right to medical and medicinal assistance (article 4(1) (a)) with the right to co- habitation and education (article 4(1)(b)), the right to participate in the decision-making and other family acts (article 4(1)(c)) the right to work and professional training (article 4(1) (e)).

Also the following should be mentioned: the right to be respected for their serological condition (article 4(1) (h)), the right to solidarity of the family and community assistance (article 4(1) (i)), the right to food in terms regulated by Family Law 10/2004 of 25 August 2004) and another legislation (article 4(1) (j)) and right to free treatment in the National Bureau of health (article 4(2)) the right to medical assistance (article 4(2)).

Therefore, some of the specific rights established in the Protocol, (such as the right to peace (article 10), the right to protection in armed conflicts (article 11), the right to health and reproductive Rights (article 14), the right to food security (article 15), the right to adequate housing (article 16), the right to positive cultural context (article 17), the right to healthy and sustainable environment (article 18),

the right to inheritance (article 21), the right to sustainable development (article 19)) are not incorporated into Law 12/2009 of 12 March 2009. In these respects, it may be affirmed that Law is not compatible with the Protocol. However, the study affirmed above in similar situation that non-integration of the mentioned above into Law 12/2009 as well as into Law 19/204 cannot be affirmed that the law is not compatible with because the legislation declares in article 4 to 11 of Law 12/2009 of 12 March 2009 currently replaced in articles 6(1), 7(1), 10, 11(1), 12(1) and 18(1) of Law 19/2014 that people living with HIV have the right to enjoy all rights existing in international instruments ratified by Mozambique, in the Constitution and in another laws, it is fair to affirm that the Law is compatible with the ACHPR. So, the study recommends the integration of the rights indicated above in order to improve the current Law into force.

2.3. Conclusion

This chapter seeks to draw conclusions based on the research finding and, by so doing, answers the research questions in chapter one. It then makes recommendations based on the conclusions.

2.3.1. International human rights standards and ILO principles relating to HIV in the workplace

The international human rights law as articulated in the international human rights instruments such as ICCPR, CEDAW, CRPD, CRC, the CAT, ACHPR, ACRWR, the African Protocol to the African Charter on the Rights of Women APACRW, the ILO Convention (Convention111), the ILO Recommendation 200 of 2010 the International Guidelines on HIV/AIDS and Human Rights and ILO Code of Practice on HIV/AIDS in the World of Work, ensures the right to equal protection before the law and to be free of discrimination based on race, colour, sex, religion, political opinion, national or social origin, property and birth or other status.

Among the human rights principles relevant to HIV/AIDS are the right to non-discrimination, equal protection and equality before the law; the right to life; the right to the highest attainable standard of physical and mental health; the right to liberty and security of person; the right to freedom of movement; the right to seek and enjoy asylum; the right to privacy; the right to freedom of opinion and expression and the right to freely receive and impart information; the right to freedom of association; the right to work; the right to marry

and to form a family; the right to equal access to education; the right to an adequate standard of living; the right to social security, assistance and welfare; the right to share in scientific advancement and its benefits; the right to participate in public and cultural life; the right to be free from torture and cruel, inhuman or degrading treatment or punishment. At the beginning of the HIV pandemic, many persons in different social segments were discriminated against and stigmatized on the basis of their HIV status. To eliminate this wave of discrimination, the Mozambican Parliament approved three Laws, as well as Decree 183-A/2001 of 18 December 2001.

2.3.2. The content of Mozambican laws relating to HIV in the workplace

The current legal framework on HIV in the workplace in Mozambique partly aligns with international standards. For example, the first law is Law 5/2002, 5 February 2002, which specifically addresses HIV in the workplace. It prohibits discrimination on the basis of HIV status in access to and continued employment, training, promotion and career opportunities and further prohibits testing without consent. It also provides for confidentiality regarding to information about an employee's HIV status.

The second is Law 23/2007 of 1 August 2007, which establishes duties and rights in labour relations and also establishes the principle of non-discrimination on the basis of HIV status and sexual orientation in the sphere of employment (article 4).

The third law is Law 12/2009 of 12 March 2009, which establishes rights and duties of people living with HIV and some of its articles regulate labour relations based on principles of equality and non-discrimination. It also provides for confidentiality, and privacy regarding information about an employee's HIV status.

2.3.3. The relevance of Mozambican laws compatible with international human rights standards and ILO principles

An important step to promote human rights in society and in the workplace is to ensure that the national laws relating to HIV are compatible with international human rights standards. However, some norms and standards that govern international legal system of human rights and HIV in the workplace are integrated into specific legislation that regulates rights and duties of PLHIV in the workplace. The Discrimination (Employment and Occupation) Convention prohibits discrimination in access to or continued employment and in terms and conditions of employment. This requirement has been domesticated in to articles 41 and 42 of Law 12/2009, of 12 March 2009 and article 4(1) of the 23/2007, of 1 August 2007. It means

that the laws above mentioned are governed by the principle of equality and non-discrimination established in the ILO Discrimination (Employment and Occupation) Convention. For this reason it can be affirmed that these laws are compatible with the Convention.

Recommendation 2010 (n° 200) establishes the rights and principles (such as the principle of recognition of the HIV/AIDS as a laboring problem, the non-discrimination principle, gender equality, the right to health and security in the workplace, social dialogue, and prohibition of tests for admission to employment, confidentiality, prevention, and care) and; Law 5/2002 of 5 February 2002 establishes the rights (such as the right to confidentiality and privacy (article 5), the right to medical assistance (article 8 and 10), the right to reasonable accommodation (article 9), the right to compensation in case of unfair dismissal (article 13), the right to information and counseling (article 14), the principle of free testing without coercion (article 6) and right to equal opportunity (article 7)). However, the ILO standards (such as gender equality, health and security in the workplace and the principle of social dialogue), are not incorporated into Law 5/2002, 5 February 2002. The International Guidelines on HIV/AIDS and Human Rights establish that “states have to adopt anti discriminatory laws and other protective laws which protect against discrimination, of vulnerable groups, PLHIV and persons with disability, in the public and private sectors”. These laws must guarantee privacy and confidentiality of human beings and should emphasize and provide education, reconciliation and quick administrative and civil solutions (guideline 5).

Under this guideline, Law 12/2009 of March 2009 protects vulnerable groups (such as child and teenager (article 5, 9), woman (article 7, 8), aged person (article 10), person with disability (article 11), drug dependents (article 12)) and prohibits compulsory HIV testing for employees or prospective employees. Law 12/2009 has also norms which protect the confidentiality and privacy (article 6, 27) of people living with HIV and ensure the provisions to free medical assistance to them (article 4(2)). Thus, we conclude that this Law is compatible with guideline 5 on HIV/AIDS and Human Rights.

The ICCPR protects vulnerable groups such as women (article 3) and children (article 24), protects the rights of the family (article 23), and establishes the general principle of equality and non-discrimination (article 26), civil (article 1, 3, 7, 9, 10, 11, 16, 18, 20, 21, 22, 23, 24, 25, 26, 27) and political rights (article 25). Also Law 12/2009 of March 2009 establishes the civil (article 4(1)(f) and (g)) and political rights (article 4(1)(c) and (d)), economic, social and cultural rights (article 4(1)(a), (b), (e), (h), (i), (j)), principle of equality

and non- discrimination (article 16, 17, 41,42) protects vulnerable groups (such as children, teenagers, women, the aged, person with disability) (articles 5 to 12). However, some of the rights established under the ICCPR (such as the right to self-determination of peoples (article 1), the right to person belonging to minorities (article 27), the right to recognition as a legal person (article 16), the prohibition of propaganda for war and incitement to national, racist and religious discrimination, hostility or violence (article 20) and some of political rights (article 25), protection family (article 23), prohibition to detention for debt (article 11), the right to movement (article 12)), are not incorporated into Law 12/2009 of 12 March 2009.

The Convention on the Rights of Child establishes general and specific rights. The general rights are for example: the right to life, the right to equality and non-discrimination, the right to personal integrity, the right to freedom and security, the right to privacy, the right to asylum, the right to expression, the right to association, the right to education and right to health. In addition, we find the following specific rights: the right to be protected against traffic, sexual abuse and prostitution. However, the rights above indicated (such as the right to freedom of association and the right to freedom to assembly, the right to freedom and security, the right to asylum, the right to expression, the right to association) and the specific rights (such as the right to be protected against traffic, sexual abuse and prostitution) are not incorporated into Law 12/2009 of March 2009.

The CEDAW provides a series of detailed provisions and positive state obligations to fulfill the purpose to combat discrimination against women in political and public life (article 7 to 9), in economic, social and cultural rights (article 10 to 14), the comprehensive principle of equality before the law including matrimonial and family law (article 15 and 16). The special provisions refer to abolition of trafficking in women, exploiting of prostitution (article 6) and promoting rights of women in rural areas (article 14). However, the purpose to combat discrimination against women in political and public life, in economic, social and cultural rights, is established also in article 36 of the CRM, as expressed in the following expression: “man and woman are equal before the law, in all political, economic, social and cultural life spheres.” Article 8 of Law 12/2009 includes specific rights such as the right to medical assistance in case to be victim of sexual abuse, the right to have priority in access for counseling and testing and right to be maintained in her home unless the court decided otherwise. This study concludes that these provisions are compatible with Mozambique’s international obligations.

The International Convention on the Rights of Persons with Disabilities recognizes that persons with disability have the same human rights and fundamental freedom as other

persons. Article 3(1)(a) of the Convention establishes the positive obligation to state to fulfill the economic, social and cultural rights and to undertake measures of legislative and social character and measures to eliminate the discrimination against persons with disability and measures to ample integration into society.

According to these measures, persons with disabilities enjoy the right to work, the right to transport and movement, the right to communication, the right to housing, the right to leisure, the right to education, the right to sport, the right to access to justice, the right to access to public and private institution and the right to enjoy other human rights established into international instruments and national laws. However, the right to housing, the right to leisure, the right to transport which materialize in the right to movement and the right to sport, are not incorporated into Law 12/2009 of 12 March 2009. Since the legislator declares in article 4 to 11 of Law 12/2009, 12 March 2009, those persons with disabilities enjoy all rights set out in international instruments, in the Constitution and another laws, it is fair to affirm that Law 12/2009 is compatible with the CRPD.

The ACHPR as the regional instrument as the other international instruments of human rights establishes the right to equality and non-discrimination before the law and provides the individual civil and political rights, the individual economic, social and cultural rights, the civil and political collective rights, the economic, social and cultural collective rights, the minimum rights of vulnerable groups, the individual duties and the duties of State. Similarly, Law 12/2009 of March 2009 establishes the principle of equality and non-discrimination, civil and political rights, economic, social and cultural rights, the protection of vulnerable group, the individual duties and the duties for State.

However, some of civil rights established under the Charter (such as the right to have his cause heard (article 7(1)), the right to appeal to a competent national organs (article 7(1) (a)), the right to be presumed innocent (article 7(1) (b)), the right to defense (article 7(1) (c)), the right to be tried within a reasonable time (article 7(1) (d)), the right to freedom of conscience, the profession and free practice of religion (article 8), the right to receive information (article 9(1)), the right to express and disseminate his opinion within the law (article 9(2)), the right to free association (article 10(1)), the right to assemble freely with others (article 11), the right to freedom of movement (article 12), the right of equal access to the public service of his country (article 13(2)), the right of equal access to public property (article 13(3)) and political collective rights and the economic, social and cultural collective rights are not integrated into Law 12/2009. The non-incorporation of the rights above indicated, cannot be affirmed that this Law is not compatible with the ACHPR because the

legislator established into articles 4(1), 5(1), 9, 10, 11(1), 12 of the Law 12/2009 that the PLHV have the right to enjoy not only the rights are set out in this Law, but also all rights which are in other national laws and international instruments of human rights ratified by Mozambique.

However, some of the rights established in the ACRWC (such as the right to survive and development (5), the right to good name and nationality (article 6), the right to freedom to expression (article 7), the right to freedom to association (article 8), the right to freedom to thought, conscience, and the right to religion (article 9), the right to leisure (article 12), the right to special treatment when is in conflict with law (article 17(1)), the right to not be submitted to work incompatible with his physical condition (article 15(1)), the right to adoption (article 24), the right to not be abused sexually (article 27) and the right to not be trafficked (article 29)) are integrated into Law 12/2009, 12 March 2009. Thus, we conclude that rights established under the ACRWC are the same rights of the adults as well the rights stipulated into Law 12/2009. The reason is that we only announced the rights which are not incorporated into Law 12/2009, 12 March 2009.

The Protocol on the Rights of Women in Africa establishes the principle of equality and non-discrimination and contains some civil and political rights, as well as economic, social and cultural rights and some specific rights. Law 12/2009, March 2009 establishes the principle of equality and non-discrimination, civil and political rights, economic, social and cultural rights, the protection of vulnerable group, the individual duties and the duties for State. However, some of the rights (such as the right to peace (article 10), the right to health and reproductive rights (article 14), the right to food security (15), right to adequate housing (article 16), the right to positive cultural context (article 17), the right to a healthy and sustainable environment (article 18), the right to sustainable development (article 19), the rights of the widows (article 20), the right to inheritance (21), the right to the special protection of women in distress (article 24), the right to marry and the right to have same rights in case of separation, divorce and annulment of marriage (article 7)) are not integrated into Law 12 of March 2009.

In conclusion: The non-incorporation of some the rights into laws indicated above, cannot be affirmed that these laws are not compatible with the international instrument of human rights because the legislator established that the PLHV have the right to enjoy not only the rights are set out into this Law, but also all rights which are in other national laws and international instruments of human rights ratified by Mozambique. For this reason, the study confirms that Law 12/2009 of 12 March 2009, Law 5/2002, 5 February 2002 and Law

23/2007, 1 August 2007 are compatible with ratified by Mozambique such as ICCPR, CRC and other international instruments of human rights.

CHAPTER THREE: A CRITIQUE OF MOZAMBIQUE'S LEGAL FRAMEWORK THAT PROTECTS PLHIV IN THE WORKPLACE

3.1 Introduction

This chapter critically examines the current Mozambican legislation which protects PLHIV in the workplace and assesses the extent to which these laws comply with the ILO's Recommendation Concerning HIV and AIDS and the World of Work, 2010 (n°200).

3.2 National legal protection of PLHIV in the workplace

3.2.1 Law 12 of 2009

The law that specifically addresses the rights and duties of persons living with HIV is Law 12 of 2009, 12 March 2009.⁵³ Articles 41 to 43 of this Law prohibits discrimination on the basis of HIV status in access to and continued employment, training promotion and career opportunities, as well as by prohibiting HIV testing without consent. Law 12/2009 also provides for confidentiality, privacy regarding information about HIV status of employees and vulnerable groups such as women, children, persons with disability, elder persons, and toxic dependent persons.⁵⁴

Is this Law compatible with the international legal order for protection of PLHIV? To answer this question, we are to analyse the Mozambican Law 12/2009 of 12 March 2009 vis-à-vis ILO Recommendation n° 200 (2010) and more specifically, article 2 of the Law and article 2 of the ILO Recommendation n° 200. 1111 Before analyzing the soundness and legitimacy of article 2 of act 12/2009 and 2 of recommendation we need to study the evolution of the act in cause. The emerging and expansion of HIV/AIDS in Mozambique, summoned the approval of act 5/2002 of February 5, as the country's workplace first HIV/AIDS act.

Article 3 of Law 5/2002 of 5 February established that "the present Law applies, without any discrimination, to all employees and job applicants, in public administration and other public or private areas, including domestic workers". Article 3 was restrictive in its application because it only protects the job applicants, workers who are already employed as domestic workers and those who are working in the private or public sectors.

⁵³ Rights and duties of People living with HIV Act 12 of 2009 art 1.

⁵⁴ See Act 12/2009 of 12 March 2009.

It is therefore recommended to extend article 3 by introducing other social classes and other sectors of activities such as: job seekers, apprenticeship (those learning at work), trainees, volunteers, and the people who have been dismissed or suspended from the job and refugees (see the scope of application of the Recommendation 200 of 2010). It is also argued that article 3 of Law 5/2002 should be amended to include provisions that cover some sectors such as: people employed in the economic sector, independently of being formal or informal as well as the ones that are in the Armed Forces and the uniformed sectors.⁵⁵ In that way Law 5/2002 would be compatible with the paragraphs 1 of the Recommendation cited above. It means that the law will embrace all social classes and not only cover those that are already employed. Are these raised issues in article 2 of Law 12/2009 integrated into Law 19/2014 of 27 August 2014?

With the employment of act 19/2014 of August 25, the article 3 of act 5/2002, experienced the following change: the present act is applied to all those who are living infected by HIV/AIDS, to health personnel and other critical risky situations, as well as all employees and job candidates in Public Administration and other public or private sectors and to domestic employees (article 2 of act 19/2014). The article 2 of act 19/2014, result from the compilation of article 3 of act 5/2002 of February 5 and from article 2 of act 12/2009 of March 12, therefore, this made impossible to notice or verify any clear and explicit change. In this manner, without the integration of the above indicated terms, article 2 of the employed act continues in contradiction with article 2 of recommendation.

The above study affirms that act 5/2002 was restrictive, in a sense that it only regulated and handled the HIV/AIDS situation in the workplace. The Mozambican legislator, with the intention of expanding ahead the necessity of its application, aiming to reinforce the safety upon those infected and living with HIV/AIDS, act 12/2009 of March 12 was approved.

Article 2 of Law 12/2009 of 12 March 2009 establishes that “the present law is applied to PLHIV, members of staff in the health sector and other people in situation of risk or transmission, as well as the population in general.” Primarily, the Law covers all social classes that are in this situation or that are already at risk. So, the scope of application of Law 12/2009 is wider and poses a challenge in terms of application. The terms of this article are not clear and concrete and further require an extensive interpretation.

⁵⁵ As above.

Article 2 of the Recommendation 200 of 2010 lists, in a concrete way, the people and the sectors that are to be protected by the law. In terms of individuals, the Recommendation includes all workers who exert their activities at workplaces, including engaged people or occupied to one entity, trainees, inexperienced people, dismissed and suspended workers and candidates to work. For the sectors of activities, the Recommendation includes the public and private sectors, the armed forces, and informal sector. It is obvious that unlike the Mozambican HIV Law, article 2 of the ILO Recommendation 200 is very specific in terms of the categories of persons and sectors which it protects.

Therefore, it is necessary to amend article 2 of Law 12/2009 of 12 March 2009 to become compatible with article 2 of the Recommendation 200 of 2010.⁵⁶ Has the new act improved the provisions according to the Recommendation?

According to nr 2 of act 14/2014, did not observe any clear changes rather than the resulting compilation of the previous above indicated acts. In this manner, the employed act, specifically in article 2, is not corresponding with article 2 of recommendation.

- a) Article 6 of Law 12/2009 constitutes the right of the person living with HIV “not to be obliged to reveal its serological state”. Article 3(i) of the Recommendation establishes that “no workers should be required to undertake an HIV test or disclose their HIV status”. For this reason we conclude that, article 6 is compatible with article 3(i) of the Recommendation 200 of 2010.

However, the study argues that the provisions of article 6 should also cover situations where it prescribes mandatory HIV testing and condemns those that would reveal someone’s HIV status. If the Mozambican legislator includes these juridical situations in the article mentioned above, it will improve the provision and effectively protect the human rights of PLHIV.

The right to confidentiality and privacy of the workers is provided for under articles 6, 25, 27, 30, 37, 49 and 50 of Law 12/2009, 12 March 2009.

- b) Article 37 of this Law mentioned, prohibits mandatory HIV testing for the purpose of recruitment and maintenance of the employment relationship.

However, the ambit of the ILO Recommendation 200 of 2010 in this respect is very wide. Paragraph 3(h) of the Recommendation extends the right to privacy and the right to confidentiality of the workers to their dependents and families.

Therefore, this study suggests that article 37 of Law 12/2009, 12 March 2009 should

⁵⁶ See Mozambique ILO/AIDS Comments in relation to the revision of Laws No.12/2009 and No. 5/2002, (2011), 2.

include families of the emigrant workers and their dependents as well as employment interviewees should not be obliged to reveal their HIV status. In this way, article 37 of Law 12/2009 would be compatible with paragraph 3(h), 24 and 27 of the ILO Recommendation 2010 (n° 200). Are the raised issues in article 37 of Law 12/2009, 12 March 2009 integrated in article 37 of Law 19/2014? The right to consent primarily was provided in article 6 of Law 5/2002 of 5 February 2002.

The Law above was restrictive only to regulate issues relating to people living with HIV in the workplace. In 2009 was approved Law 12/2009 of March 2009 with ambit of application very wide than other indicated above. Article 6 of 5/2005 was replicated in article 37 of Law 12/2009 with some improvement of terms public and private institution, access to education, training courses of peoples living with HIV. Currently, the right of consent it is established in article 6 of Law 19/2014. Article 6(1) of the Law 19/2014 is the resulted of article 6 of Law 5/2002 and article 6 of Law 12/2009. Article 6(2) of Law 19/2014 is the resulted of article 4 of Law 5/2002 and article 37 of Law 12/2009. Finally, article 6(3) of Law 19/2014 is the resulted of article 5(2) of Law 5/2002 and article 49 of Law 12/2009. However, the current law is still compatible with Recommendation although the rose issues are not included in article 6 of the current Law, for this reason, we recommend their inclusion.

Stigmatization and discrimination based on HIV status is prohibited under Law 12/2009, 12 March 2009.⁵⁷ Further, Law 12/2009 provides for access to education and social reintegration of the infected and affected people in the community.

- c) Article 41 of Law mentioned above provides for non-discrimination in the workplace. Paragraph 3(c) of the Recommendation 200 of 2010 prohibits stigmatization of the workers, in particular, women. It means that no one should be discriminated against just because he or she is suspected to be living with HIV. Sometimes a person is suspected to be living with HIV just because he or she comes from a particular region which has HIV prevalence.

However, paragraph 10 of the ILO Recommendation 200 is very categorical in prohibiting discrimination based on HIV positive status.⁵⁸ It is argued that article 41 of Law 12/2009 should be amended in order to be compatible with the Recommendation 200 of 2010. If the legislator amended article 41, no person should be discriminated against just because his or her (physical) appearance suggests being

⁵⁷ Arts 16, 17, 19 & 41 of Law 12 of 2009 (n 53 above).

⁵⁸ n 3 above 3.

HIV positive. Unfortunately, article 51 of Law 19/2014 replaced by article 41 of Law 12/2009, was not improved according to recommendation above.

Law 12/2009 protects the vulnerable group such as those who apply for employment and infected people and provides civil and political rights for every person including those who are affected by HIV.⁵⁹

Therefore, it is unconstitutional to discriminate against people on the basis of HIV status in all government sectors such as education sector, employment sector, health and other social services sectors.⁶⁰ The Mozambican legislator recognized the question of HIV epidemic. The typical example is shaped into article 8 of the Law 12/2009 where a woman in case of sexual violation, enjoys priority in access to advice and testing. Article 8 of the Law mentioned above also guarantees that woman must remain in the conjugal home unless a court determines otherwise.

Law 12/2009, 12 March 2009 provides equality of men and women in all institutions (articles 16, 17, 18). This is in line with paragraph 3(a) of the Recommendation n° 200 of 2010. Currently, Law 19/2014 of 27 August 2014 Article 14 of this Recommendation provides for empowerment of women and prohibits violence based on gender. The rights of people living and affected by HIV and AIDS and issues of gender are adequately protected by the Law.⁶¹

The National Strategic Plan for HIV/AIDS is in place combating stigmatization and discrimination based on HIV status. This plan aims at reducing the negative impact of HIV and AIDS for the better development of the country and provides for mechanisms that protect the most vulnerable social classes such as children, women, persons with disability and drug dependent persons.

Some of the areas that need to be highlighted in this Law 12/2009 of 12 March are the right to freedom of thought and the right to consent and criminalization of HIV transmission.

(i) The right to freedom of thought or consent

Article 18 of the ICCPR established that “every person is entitled to freedom of thought, conscience and religion...” Every person is born free and equal in dignity. Each person is

⁵⁹ Arts 5, 10, 11 & 12 of Law 12/2009 (n 53 above).

⁶⁰ As above, arts 9, 10, 11, 12, 17, 39 & 41.

⁶¹ n 54 above.

endowed with reason and conscience and must act with fraternal spirit to one another”.⁶² It means that no one should be denied or limited the right to freedom of thought and conscience just because he or she is suspected to be infected by HIV. HIV infected people suffer psychological and physical abuse, stigmatization and discrimination.

Law 12/2009 of 12 March 2009 prohibits the forced disclosure of HIV status and stipulates the right to privacy and confidentiality or to not reveal one’s serological status of person living with HIV.⁶³ This is in line with freedom of thought and conscience established in article 41 of the Constitution.

However, the same people is obliged to reveal his or her situation in relation to HIV in the terms of the law.⁶⁴ Thus, in the terms of article 13 of Law under study, a people living with HIV is obliged to reveal to his or her sexual partner, to their physician and to adopt attitudes, habits and behaviors that avoid the transmission to others, not to donate blood and other constant prohibitions fixed into article. In this article, it is easily noticeable that the stigma is created by the legislation. And, with the stigma created, the legislation, in turn, brings to the fore the issue of discrimination.

The legislation, when establishing these limitations, declared that people living with the HIV is a desirable person in society. To limit the right to freedom of conscience and thought (what people have by nature), with the intention to protect the health of the partner, is a violation of human rights. It can happen that a partner with bad intentions demands that the other has to reveal his or her serological condition and then to split up and make public the status of the other person.

The question that can be raised is whether an HIV positive person can marry and form a family. It is clear that this social class has the right to marry and therefore form family. The interesting thing is that this Law was passed in Parliament when scientific research has established that it is possible to have HIV negative babies born from HIV positive parents.

The act of sex must be negotiated between two partners with their freedom of conscience and thought.⁶⁵ For this purpose, it is important that the individual be well informed about the dangers of this disease in order to protect himself. This is the main weapon to combat discrimination and stigmatization in society.

It is wrong to make a law which compels persons to reveal their serological status to their doctors, to their partners and to compel them to adopt certain behaviors in order to avoid

⁶² Universal Declaration of Human Rights art 1.

⁶³ Arts 6, 13, 25 (n 53 above).

⁶⁴ As above, art 13.

⁶⁵ PlusNews.org, n°6, *Human Rights and HIV/SIDA*, (2008),2

the transmission of the virus.⁶⁶

Articles 17 of the ICCPR and 41 of the CRM provide with similar provisions that “all citizens have the right to defend their private life. This right cannot suffer restrictions even to their relatives, their correspondences, in their home, attacks to their honor, and reputation”. Articles 13, 25, 26, 40 of Law 12/2009 are clearly violating the right to freedom of thought and conscience and the right to privacy of the people living with HIV. In terms of Law 19/2014 of 27 August 2014, articles indicated above there are not assignable changes. For this reason, the criticism presented into Law 12/2009 should be considered has done into Law 19/2014.

It is my considered opinion that articles 13, 25, 26, 40 of Law 12/2009 which compels people living with HIV to reveal their HIV status to their partners and their doctor violates their right to privacy and thought. Further, doctors should not be allowed to test patient’s blood without their consent and even routine HIV tests on the pregnant women should not be undertaken. Courts, Public Prosecutor and Police should not compel the perpetrator or offender of rape to go for HIV tests. This would be against the principles of consent and freedom of thought and right to privacy. For example: if a person living with HIV is obliged to reveal his or her HIV status to the partner, the Law seems to suggest that human rights are divisible.

It means that some can enjoy them and others not. In the same way, the law would be seen to force an HIV positive person to renounce his or her right to freedom of thought and conscience. Arguably, in that respect, Law 12/2009, 12 March 2009 is not compatible with the international standards.

However, we can save article 13 of Law 12/2009 on the basis of the complementary characteristic of human rights.⁶⁷ This characteristic determines that “human rights must not be interpreted separately; rather, they must be interpreted together as one completing the other, with the purpose of full accomplishment of the rights for all citizens without distinction of their serological condition or any other statute”. In these terms, if interpreted together with, the constitutional and international norms and other laws, PLHIV will effectively enjoy their rights and fundamental freedoms.

For example, article 18 of the ICCPR and 54 of the CRM constitute the right to freedom of thought and the right to decide on his or her life. So, without coercion by law to reveal their serological condition, the question of the prohibition of blood donation could not

⁶⁶ As above.

⁶⁷ <http://nossodireitoshumanos.blogspot.com>. Accessed in 27/8/2012 as 12h 12.

be legislated. It is presumed that doctors have taken possible care in the treatment of blood. They never put blood into someone's body without laboratorial analyses first.

The fact that the person living with HIV has to adopt certain behaviors that should avoid the transmission of HIV to others, including the obligation to reveal their serological status to the doctor and many other situations, results in the present law being far from preventing the discrimination and stigmatization of people living with HIV. In short, this Law is to some extent not in line with the international standards of human rights. Are there some changes in Law 19/2014? The study affirmed above that Law 19/2014 was the result of replacement or compilation of Law 5/2002 of 5 February 2002 and Law 12/2009 of March 2009. Thus, articles 13 of Law 19/2014 repeals article 13 of Law 12/2009; article 26 of Law 14/2014 repeals article 25 of Law 12/2009; article 27 of Law 14/2014 repeals article 26 of Law 12/2009 and article 41 of Law 19/2014 repeals article 40 of Law 12/2009.

However, in terms of article 13, 26, 27 and 41 of Law 19/2014 of 27 August as a result of replacement of Law 12/2009 of 12 March, still incompatible with international instrument mentioned above. It means that all criticism presented in articles above of Law 12/2009, is valid for Law 19/2014.

What happens to the person who acts in contravention with what is provided in article 13 of Law 12/2009 of 12 March 2009? To answer this question, we should explore the extent to which the criminalization of transmission of HIV between partners violates the freedom of conscience and thought.⁶⁸

(ii) Criminalization of HIV transmission

Prohibition of fraudulent transmission of HIV is established under article 52 of Law 12/2009 12 March 2009. The fraudulent transmitter will be punished with the penalty of 2 to 8 years imprisonment. Article 40 of Law 12/2009, 12 March 2009 requires the perpetrator of rape or sexual crimes to be subjected to HIV test. This is done by request from the court, Public Prosecutor or the police. The strange thing is that the article does not require the victim to go for an HIV test.

Thus, article 40 of Law 12/2009 presumes that the author of the crime is the potential carrier of the virus. This is a wrong way of dealing with HIV matters. It goes against the principle of equality and non-discrimination and the right to privacy established under international instruments, constitutions and national laws.

⁶⁸ Nowak (n 19 above) 58 ss.

It is difficult to determine who transmitted the virus to the other first, especially in situations where both the alleged perpetrator and the victim are HIV positive.

The obligation to reveal the serological status to the doctor, to the partner and the penalization of the transmitter of the virus perpetuates transmission of HIV because the potential PLHIV fear to see the doctor at hospital.

In addition, articles 13, 25, 26, 40, 52 of Law 12/2009 violate freedom of thought and the right to privacy of people living with the HIV and do not assist in combating discrimination and stigmatization based on the HIV status. However, freedom of thought should not be limited unjustifiably because PLHIV cannot express their views and opinions freely and therefore are excluded from social dialogue and they suffer discrimination and stigmatization in the workplace. In conclusion, some of these articles of Law 12/2009 of March 2009 are not in agreement with the international standards of human rights.

Are there some changes in Law 19/2014? Once again the study affirmed above that Law 19/2014 was the result of replacement or compilation of Law 5/2002 of 5 February 2002 and Law 12/2009 of March 2009. Thus, articles 13 of Law 19/2014 repeals article 13 of Law 12/2009; article 26 of Law 14/2014 repeals article 25 of Law 12/2009; article 27 of Law 14/2014 repeals article 26 of Law 12/2009 and article 41 of Law 19/2014 repeals article 40 of Law 12/2009.

However, in terms of article 13, 26, 27 and 41 of Law 19/2014 of 27 August as a result of replacement of Law 12/2009 of 12 March, still incompatible with international instrument mentioned above. It means that all criticism presented in articles above of Law 12/2009, is valid for Law 19/2014.

In terms of Law, 12/2009 some articles keep personal data protection such as articles 46, 47, 48, 49, 50, 51 and 53, stet discrimination, the spreading of images of people with HIV without their assent, the defamation, slander, the revelation of serological state of a person with HIV, the fraudulent delivery of clinical results to a third party without assent of this, the document forgery and the transmission in mass of the HIV; respectively. All these provisions which protect the right to confidentiality and right to privacy of people living with HIV are compatible with the international human rights standards. Are there some changes in Law 19/2014? Again the study has affirmed above that Law 19/2014 was the result of replacement or compilation of Law 5/2002 of 5 February 2002 and Law 12/2009 of March 2009. Thus, articles 6(3) of Law 19/2014 repeals article 47 of Law 12/2009; article 66 of Law 14/2014 repeals article 48 of Law 12/2009; article 67 of Law 14/2014 repeals article 49 of Law 12/2009 and article 68 of Law 19/2014 repeals article 53 of Law 12/2009.

However, in terms of article 6(3), 66, 67 and 68 of Law 19/2014 of 27 August as a result of replacement of Law 12/2009 of 12 March, however there some changes which the study is going to develop in chapter four.

What happens with Law 5/2002, 5 February 2002? The same analysis made for the Law 12/2009, 12 March 2009, is also necessary for Law 5/2002 in order to examine if it is in agreement with international human rights standards.

3.2.2. Law 5/2002, 5 February 2002

Law 5/2002, 5 February 2002 specifically addresses HIV in the workplace. It prohibits discrimination on the basis of HIV status in access to and continued employment, training, promotion and career opportunities as well as HIV testing without consent. It also provides for confidentiality regarding information about an employee's HIV status.⁶⁹

Articles 2(1), 14(1) and 26, of the ICCPR; articles 2, 3, and 28 of the ACHPR and article 35 of the CRM establish with similar provisions that “all persons are equal before the law...” It means that everyone has the right to equal protection against any discrimination and the right to be protected against any incitement to such discrimination.

The characteristic of the interdependence of human rights proclaims that some constitutional and infra-constitutional provisions should not go against human rights. On the contrary, they must relate to one another in order to achieve a desired purpose.

Therefore, article 4(2) of Law 23/2007 established that “whenever a norm of the present Law or other norms that regulate the work relations have a contradiction, the interpretation should be in accordance with principles of equality and non-discrimination defined in this article”. Some of the important principles which protect human rights are the principles of equality and non-discrimination.

However, article 15 of Law 5/2002 violates the provision of the Law indicated above and the international human rights standards in that it establishes that “HIV infected workers must abstain from behaviors that can put other non-infected people at risk”.

This article excludes this social class from society, it is judgmental, humiliating and highlighting that these persons living with HIV are different from others. They are being excluded, rejected from their workplace; they are undergoing repulsion, ostracism and dishonor.⁷⁰

⁶⁹n 17 above, 3.

⁷⁰ See Preamble of Act 5 of 2002.

Article 15 designated above is in contradiction with the object and objectives established in articles 2 and 3 of Law 5/2002, article 35 of the CRM (Constitution of Republic of Mozambique- which establishes the principles of Equality and Non-discrimination); articles 2(1), 14(1) and 26 of the ICCPR; articles 2, 3, and 28 of the ACHPR and the Convention of Non-discrimination of Workers-n.111). All provision mentioned above except article 15 of Law 5/2002, protects persons living with HIV on the basis of the non-discrimination and equality principles.

The Mozambican legislator, when establishing article 15 of Law 5/2002, is legally discriminating against and stigmatizing people living with HIV in the workplace and perpetuating stigmatization and discrimination in the workplace. What is expected in a modern society is to accommodate and aid those who are HIV positive. Therefore, article 15 establishes that HIV positive persons must adopt certain behavior to avoid the transmission of the virus to others, and provides adequate measures to deal with HIV in the workplace.⁷¹ No one should be obliged to adopt certain behavior or to think in a certain way because the right to freedom of thought is an absolute right, and it cannot be limited in any way.⁷² This article, which fixes restriction of fundamental rights in favour of other persons, is not compatible with international human rights standards. Are there some changes in Law 19/2014? Again the study has affirmed above that Law 19/2014 was the result of replacement or compilation of Law 5/2002 of 5 February 2002 and Law 12/2009 of March 2009. Thus, articles 55 of Law 19/2014 repeals article 15 of Law 5/200 of 5 February 2002.

However, in terms of 55 of Law 19/2014 of 27 August as a result of replacement of Law 5/2002 of February, still incompatible with international instrument mentioned above. It means that all criticism presented in article 15 of Law 5/2002, is valid for article 55 of Law 19/2014.

Thus, the study suggests analyzing articles of Law 5/2002 of 5 February 2009 to see its compatibility with provisions of Recommendation 200 of 2010 of the ILO. Paragraph 3(a) of the Recommendation provides that “the answer to the HIV/AIDS must be recognized as contribution for the accomplishment of the human rights and fundamental freedoms and equality of gender for all, including workers, their relatives and dependents.”

The Preamble of Law 5/2002 describes the effects and impact of HIV in society and it is assuming that HIV is taking considerable proportions and constitutes at the current

⁷¹ n 63 above.

⁷² Nowak (n 19 above) 58.

moment, an objective threat of the fundamental rights of the citizen, the social harmony and to social development. However, paragraph 2 of the Preamble proposes that appropriate measures should be taken to prevent the exclusion, stigmatization and discrimination through the education, information, sensitization and sanitary assistance. The Preamble of Law is not to some extent compatible with the preamble of the paragraph 3(a) of the ILO Recommendation 200 of 2010.

Thus, we propose the introduction of a general amendment on the preamble of the Law 5/2002 in order to contribute to the accomplishment of the human rights and fundamental freedoms, gender equality for all, including workers, their relatives and dependents. So, it is proposed that the principle of the equality of gender established in paragraph 14 of the Recommendation be incorporated into Law 5/2002, in order to be compatible. For example, the study suggests the following description based on the Preamble of Law 5/2002: the “state should take some measures that can reduce the transmission of HIV and alleviate its impact, assuring the respect for the human rights and fundamental freedoms, the equality of gender and the empowerment of woman should be taken in order to forbid the violence and sexual abuse at the workplace, assuring the participation of the woman and man in the defense of the HIV/AIDS and to assure the reproductive rights either of the woman or of the man”.⁷³ Such an amendment would be compatible with this Preamble and the Recommendation 200 of 2010. Are the issues rose above integrated in preamble of Law 19/2014 of 27 August 2014? Are there some changes in Law 19/2014? Again the study has affirmed above that Law 19/2014 was the result of replacement or compilation of Law 5/2002 of 5 February 2002 and Law 12/2009 of March 2009.

However, the preamble of Law 5/2002 and Law 12/2009 was not contemplated in preamble of Law 14/2014 of 27 August 2014. It means that the preamble of law 5/2002 was so developed than the preambles of laws 12/2009 and 19/2014 although the same needed some improvement according to preamble of Recommendation. Thus, the study suggests the improvement as the Recommendation recommends. Article 1 of Law 5/2002 define terms such as AIDS, HIV, HIV positive person, person with AIDS, Worker and Employer. In this study we are interested only in the first two terms namely, AIDS and HIV. The term AIDS is defined as “Acquired Immunodeficiency Syndrome” caused by HIV, which attacks and destroys certain cells of the organism, important for the immunologic system.

⁷³ n 54 above, 8

However, paragraph 1 of the Recommendation 200 of 2010 refers to “AIDS as Acquired Immunodeficiency Syndrome that results from advanced infection level of the HIV, and is characterized by the opportunistic diseases as cancer and others”. The terms established in article 1 of the Recommendation 200 of 2010 which are not included into article 1 of Law 5/2002 are the term “... that result from this advanced level of the infection of the HIV” and the term “characterized by opportunistic disease..”. In these terms, it is necessary to amend the Law to make it compatible with the paragraph 1 of the Recommendation 200 of 2010. Another question is about the meaning of the term HIV. In Law 5/2002 of 5 February 2002, it is defined as a “virus of human immunodeficiency, a virus that transmits AIDS”. Paragraph 1(a) of the Recommendation 200 of 2010 defines HIV as a “virus of human immunodeficiency that destroys the human immunologic system that can be prevented with appropriate measures.”⁷⁴

The definition of term HIV in article 1 of Law 5/2002 should therefore include sentences such as the following: “virus destroys the human immunologic system, and it can be prevented with the appropriate measures”. In such a way, article 1 of Law 5/2002 would be compatible with paragraph 1 of the Recommendation 200 of 2010. Are there some changes in Law 19/2014? Again the study has affirmed above that Law 19/2014 was the result of replacement or compilation of Law 5/2002 of 5 February 2002 and Law 12/2009 of March 2009. Thus, articles 1 of Law 19/2014 does not repeal article 1 of Law 5/2002 and article 1 of Law 12/2009. Thus, the study recommends the improvement of article 1 of Law 19/2014 according to paragraph 1 of the Recommendation.

Article 4 of Law 5/2002 establishes the following: “It is prohibited to test employees or job applicants for HIV without their consent. It is prohibited to test employees or job applicants for HIV for the purpose of training courses or promotions”. It means that “HIV testing or other forms of screening for HIV should not be required of workers, including migrant workers, jobseekers and job applicants” (article 25 of the Recommendation). “Testing must be genuinely voluntary and free of any coercion and testing programmes must respect international guidelines on confidentiality, counselling and consent” (article 24 of the Recommendation). In order to make article 4 of Law 5/2002 compatible with articles 24 and 25 of the Recommendation 200 of 2010, it is necessary the Mozambican parliament only to amend the terms “migrant workers and jobseekers” into articles mentioned above. If this is done, Law 5/2002 would be compatible with the paragraphs of the recommendation

⁷⁴ n 54 above, 5.

mentioned above. Are the raised issues integrated into Law 19/2014? Article 51 of Law 19/2014 repeals article 4 of Law 5/2002. However, the article 51 of the new law was not improved according to the Recommendation. For this reason the study recommend the integration of the terms rose above.

Article 5 of Law 5/2002 states that employees living with HIV enjoy the right to confidentiality regarding their condition of being HIV positive, in or outside of the workplace and adds the following: “Health care professionals, from the public service or private sector, are obliged to maintain confidentiality regarding information about employees that are HIV positive”. In addition, article 3(h) of the Recommendation establishes that “workers, their relatives and dependents enjoy the protection of their privacy, including confidentiality toward the HIV/AIDS on its state”. So, to be compatible with the Recommendation, it is necessary to amend article 5 of Law 5/2002 with the following sentence: “Workers and their dependents enjoy the right to privacy”. It is important to note that the extension of the right to privacy to dependents and relatives of the worker does not depend on the state of HIV infection. It means that the relatives and dependents of the worker shall not suffer stigma and discrimination. What about Law 19/2014 of 27 August? Article 44 and 45 of Law 19/2014 repeals article 5 of Law 5/2002 of February 2002. However, articles mentioned above of new Law are integrated in accordance with 3(h) of the Recommendation. For this reason, the study suggests articles 44 and 45 of the current Law to be amended in order to become compatible with international instruments of human rights.

Article 5(2) of Law 5/2002 establishes that “health care professionals, from the public service or private sector, are obliged to maintain confidentiality regarding information about employees that are HIV positive except if this information is necessary for the measures of prevention of the HIV/AIDS in the workplace”. It means that “aaccess to such information sould be governed by rules of confidentiality consistent with the ILO Code of Practice on the Protection of Workers’ Personal data, 1997, and other relevant international data protection st andards” (article 27 of Recommendation 200 of 2010). However, article 5(2) of Law 5/2002 of 5 February 2002 does not explain how to get information relating to HIV workers. This study suggests that the last part of article 5(2) of Law 5/2002 should be amended, because the non-inclusion of the ILO provision gives employers the opportunity to demand information without rules “of confidentiality consistent with the ILO Code of Practice on the Protection of Workers’ personal data, 1997, and other relevant international data protection standards” (arti cle 27 of Recommendation 200 of 2010). The study affirmed above that article 44 and 45 of Law 19/2014 repeal article 5 of Law 5/2002. However, articles 44 and 45 of the current Law,

has excluded the right to information relating to HIV in the workplace. But the same right we can find established as a duty of the employer 53(4) of the current Law to promote information for all the workers. So, the study suggests that the right to information should be integrated in article 44 and 45 of new Law in order to be compatible with Recommendation.

Paragraph 24 of the Recommendation 200 of 2010 stipulates that “testing must be genuinely voluntary and free of any coercion and testing programmes must respect international guidelines on confidentiality, counselling and consent.”

Article 6 of Law 5/2002 establishes that “an employee may not be obliged to inform his or her employer of his or her HIV positive or negative status. The employee may voluntarily request an HIV test, which must be done by a qualified person at an authorised health post”. Article 6 of Law 5/2002 and paragraphs 24 of the Recommendation uphold the individual’s freedom to decide about him or her, without any type of coercion in order to reveal his or her serological status. Thus, a worker must not be obliged to tell his or her employer about his or her HIV status.⁷⁵ Note that article 46 of Law 19/2014 repeal article 6 of Law 5/2002 of February 2002 and there is now notable change to comment. For this reason, article 6 of Law 5/2002 is compatible with paragraphs 24 of the Recommendation.

Article 7 of Law 5/2002 states that “employees shall enjoy worker’s rights without any discrimination on any ground. The principle of right to equal opportunities with regard to merit and ability to exercise one’s duty shall apply to all employees”. Article 7 mentioned above upholds the equality of opportunity in the training, promotion and progression in the professional career, independently of serological state of the worker.

Article 10 of the Recommendation 200 of 2010 further provides that the “Real or perceived HIV status should not be a ground of discrimination preventing the recruitment or continued employment, or the pursuit of equal opportunities consistent with the provisions of the Discrimination (Employment and Occupation) Convention, 1958”. Note again that article 47 of Law 19/2014 of August 2014 repeals article 5/2002 of 5 February and there is not notable changes to comment. The conclusion is thus arrived at that article 7 of Law 5/2002 is compatible with article 10 of Recommendation n° 200 of 2010.

Article 11 of the Recommendation 200 of 2010 states that “real or perceived HIV status should not be a cause for termination of employment”. Temporary absence from work because of illness or care giving duties related to HIV or AIDS should be treated in the same way as absences for other health reasons, taking into account the Termination of Employment

⁷⁵ n 54 above, 5

Convention, 1982”. It means that “the employer has the duty to train and re-assign every worker infected with HIV or suffering from AIDS who is not capable of fulfilling his or her work duties. Also, “the employer has the duty to maintain medical assistance owed to the employee infected with HIV, according to the policy of psychosocial medical assistance and medication adopted for all employees and in light with the National System of Social Security”.(articles 9 and 10 of Law 5/2002). However, article 58 of Law 19/2014 repeal article 9 of Law 5/2002 of February 2002 and article 59 of the current Law repeals article 11 of Law 5/2002 and there is not notable change to comment.

The study concludes also that these articles are compatible with Recommendation 200 of 2010, because some juridical situations are incorporated into articles of Law 5/2002.

Paragraph 3(c) of the Recommendation establish that “there should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection.” It means that discrimination or stigma against workers must not exist, particularly for those who are looking for a job and those that seem to be infected by HIV, or because they are from a place with higher risk of infection of HIV.

Article 2 of Law 5/2002 states that “the present Act establishes the general principles aimed at guaranteeing that all employees and job applications may not be discriminated against in the workplace on the basis of being or suspected to be HIV positive or suffering from AIDS”. So, we suggest that article 2 of Law 2/2002 includes the protection of the people looking for employment and those who are suspected to be infected.⁷⁶ The same article should protect the vulnerable people against stigma and discrimination. For example, the following amendment to article 2 should be included: “workers, including their relatives and dependents, should not be discriminated against regarding the benefit of social security and access to medical treatment”.⁷⁷

In short, in order for this article to be compatible with international human rights standards, it should include the following formulation: “the non-discrimination of the workers, candidates to work are not to be discriminated in equality of opportunity and treatment for both the employees and non-employee” (paragraph 10, of the Recommendation). Note that article 4 of Law 19/2014 of 27 August 2014 repeals article 2 of Law 5/2002 of February 2002 and article 2 of current Law was not amended according with

⁷⁶ n 3 above, para 3(c).

⁷⁷ n 54 above, 6.

recommendation above mentioned and the provision of Law has disappeared in the current Law. Article 9 of Law 5 provides that the employing entity is obliged to train and to reorient all HIV/AIDS infected workers who are not able to perform their laboring functions.

Paragraph 13 of the Recommendation 200 of 2010 states that “persons with HIV-related illness should not be denied the possibility of continuing to carry out their work, with reasonable accommodation, if necessary, for as long as they are medically fit to do so”. The measures of reintegration must be in accordance with his/her physical capacity of performing an action. Some physical exercises must be encouraged taking into account the instruments of the ILO and UN.⁷⁸

So, this article can be affirmed as compatible with paragraph 13 of the Recommendation although it needs some amendment in order to be fully compatible with the paragraph of the Recommendation 200 of 2010.

Paragraph 3(e) and 19 of the Recommendation 200 of 2010 state that “the right to medical assistance must be extended for the relatives and dependents of the workers”. Equally, paragraph 19 of the Recommendation states that “the workers, relatives and dependents must benefit from the advice and voluntary test; access to the antiretroviral treatment, and the education, information and support to a good consistent nutrition, including the treatment of infectious and opportunistic diseases such as tuberculosis and other disease inherent to the virus of the HIV including psychological support”. In addition article 58 of Law 19/2014 of 27 August 2014 repeals article 9 of Law 5/2002 of February 2002 and there is nothing to comment because there is not notable evolution to mention. However, the study recommends an amendment of article according to the observation mentioned above.

While in article 10 of Law 5/2002, only the worker has the right to medicines and medical assistance.⁷⁹ So, in order to see article 10 of the Law in study, to be compatible with paragraph 13 of the Recommendation, it is the necessary to include all rights, benefiting not only the worker, but also his or her relatives and dependents. In addition article 53 of Law 19/2014 repeals article 10 of Law 5/2002 of 5 February 2002 and article 53 of Law 19 has similar provision established in article 10 of Law 5. For this reason the recommendation to improve are the following:

Paragraph 40 of the Recommendation states as follows: “training, education, information, consultation, safety instructions and any necessary guidance in the workplace related to HIV and AIDS, should be provided in a clear and accessible form for all workers

⁷⁸ n 54 above, 6.

⁷⁹ n 54 above, 7.

and, in particular, for migrant workers, newly engaged or inexperienced workers, young workers and persons in training, including interns and apprentices”. Training, instructions and guidance should be sensitive to gender and cultural concerns and adapted to the characteristics of the workforce, taking into account the risk factors for the workforce.” Article 14 of Law 5/2002 states that “employers in conjunction with competent service providers shall make HIV/AIDS information, prevention and counselling services available in their workplaces.” On the matters related to HIV, an employer has the duty to provide safe contents accessible to all workers, in particular for the migrant workers, trainees, young workers, experienced workers and inexperienced workers.

Under the Recommendation, training and criteria of instruction must be sensible to the questions of gender and cultural aspects, and they must adapt to the typical characteristics of the workforces, taking into consideration the risk factors of the laboring mass.⁸⁰

In order for article 14 of Law 5/2002 to be compatible with paragraph 40 of the Recommendation, it is suggested to incorporate all aspects listed above. It also should create information services, education and counseling in the workplace in order to avoid the infection. However, the beneficiary of these partnerships should not be included in a broad way.

Yet, in the scope of the partnerships with the competent institutions such as the Ministry of Labour, the General Inspection of Work, the National Council of Combat to AIDS and the national trade unions might be the subject for a new and possible writing to the article in study. In terms of paragraph 30 of the Recommendation, the environment of the work must be secure and healthy in order to avoid the transmission of HIV in the workplace.

Article 15 of Law 5/2002 states that “employees living with HIV shall abstain from behaviour which might put other employees at risk of contamination.” This article obliges the HIV infected workers to abstain from behaviour that support that infected people should act in good way in order to not put at risk the other people who are not infected. Article 15 is far from preserving effectively the rights of the workers against HIV pandemic because it does not provide good environment in the workplace. What will happen with a worker who is in this situation or condition? He or she is going automatically to exclude himself before other colleagues in the workplace. Since it is not completely compatible, we suggest the removal of article 15 and that it is replaced with the provisions of paragraph 30 of the Recommendation 200 of 2010.

⁸⁰ n 54 above, 7

To improve the law it is necessary to include a provision that protects the worker who, due to the nature of his or her activities at work is at a higher risk of being infected with HIV and other transmissible diseases such as tuberculosis. And it also should include the protection of other workers who due to their occupations are exposed to the risks of transmission of the disease (see 3 paragraphs (g) and (k) of the Recommendation 200 (2010).

3.3. Conclusion

It has been noted that most of the standards that are provided for under domestic law, are not effectively compatible with international standards in order to ensure effective protection of the rights of workers because according to some provisions of Law 12/2009, for example, persons living with HIV are bound to disclose their HIV status to their partners. If they do not, are liable for prosecution by the authorities in order to ensure that they disclose.

That is why the study affirms that it is evident that there is inadequate protection of freedom of conscience or thought, right to equality and non-discrimination, gender equality, right to freely consent to HIV testing, criminalization of the fraudulent transmission of HIV by sexual partners. Consequently, there is inadequate protection of the rights of PLHIV in the workplace.

The other gap in the law relates to the lack of effective procedures to effectively protect rights. Law 12/2009 provides for example for the right to integrity, the right to housing and the right to education. However, the Law does not stipulate the procedures and the principles that will be used to address the violation of the rights.

Further, other articles are not compatible with the international standards for HIV in the workplace because certain aspects of the law contradict some provisions established by international human rights standards such as compulsory disclosure of HIV status to partners, doctors and criminalization of transmission of HIV. Consequently, the law promotes discrimination and stigmatization of PLHIV to some degree in society and in particular in the workplace.

CHAPTER FOUR: CRITICAL ANALYSIS OF 19/2014 OF 27 AUGUST 2014: RETROGRESSION AND INNOVATION

4.1 Introduction

Mozambican HIV/AIDS legislation evolved significantly in the period between 2002 and 2014. Among other legislation, Law 5/2002 of 5 February 2002, Law 23/2007 of 1 August 2007, Law 12/2009 of 12 March 2009 and Law 19/2014 of 27 August 2014 were adopted and approved. The latter abrogated and substituted quite explicitly the totality of Laws 5/2002 and 12/2009. Law 5/2002 was the first specifically established Law about HIV/AIDS in the workplace, while Law 12/2009 had a very vast scope of application, reaching all citizens, regardless of whether they were employees or job applicants. Despite being specific, Law 5/2002 in terms of its article 3, was applied without any discrimination to all employees and job candidates in public administration and in other public and private sectors, including in respect of domestic employees.

Despite its vast and dense impact and reach in terms of application, Law 12/2009 failed due to neglect including the terms “public administration”, “job candidates in public and private sectors” and “domestic employees”, as mentioned in article 3 of Law 5/2002. There is no doubt that Law 12/2009 has brought about many significant innovations, such as: the establishment of rights and duties of any person infected and living with HIV (article 4), the emphasis on and support for the rights concerning all adolescent children living with HIV or AIDS (article 5), elder persons or more concretely over aged persons (article 10), deficient persons (article 11), and attention being given to drug addicted persons. Besides the stipulated rights in article 4 of 12/2009, it also established the duties and responsibilities regarding those people living with HIV (article 13).

As has been mentioned, Laws 5/2002 and 12/2009 were abrogated by the Law 19/2014 of 27 August 2014. Law 19/2014 serves as the product of the combined above-mentioned abrogated Laws. The result is that the new and current Law is divided into two main parts: first, articles 1 to 43 (largely corresponding with Law 12/2009) and second, articles 44 to 64 (largely corresponding with Law 5/2002). The first part of the Law contains many modifications to be explored for the purpose of knowing and keeping oneself informed: article 5 of Law 19/2014 and article 4 of Law 12/2009 together establish in the same manner the rights of those people infected by HIV.

4.2. Retrogression

Article 4(2) of Law 12/2009 established the rights of those people infected by HIV to receive free medical aid and supplements from the National Health Service. But the legitimacy of this provision of the Law was replaced by another that establishes the right to compensation in case of severe virus infection due to carelessness, poor medication or tertiary reasons. It is unclear why the legislator removed one of the main rights of people infected by HIV, considering the intimate link between poverty and HIV infection. The general society is presently undergoing an economic and financial crisis, which means that the removal of this provision is a great and negative backward step to the rights of those people infected by HIV. However, despite the abrogation of article 4(2) of the Law, the Mozambican health system continues almost free of charge because the rate paid to buy one medical supplement is reasonable despite being difficult for anyone below the poverty level. In conclusion, the removal of the right to free medical aid from the people who are infected by HIV is a great threat because this stands as a solid barrier to moderate the epidemic. For this reason, the study suggests its removal in the next possible legislative revision process dealing with this matter.

4.3. Innovations

The Labour Law, specifically in article 18 and 19, brought about some crucial innovations, which deserve our attention. This includes, in particular, the responsibilities of the State before its people when involving people infected and living with HIV or with AIDS. During the adopting article 18 of Law 12/2009, the state of Mozambique had few responsibilities towards the general society as a whole because it only assured people living with HIV/AIDS the practice and access of fundamental rights and guarantees from the Constitution and other Laws. The State assured the availability and distribution of necessary and basic means to sanitary units of National Health Service for aiding all those people who are living with HIV/AIDS and at the same time the State guarantees secure blood and their derivatives.

Article 18(1), (2) and (3) of the 2009 Law is largely taken over in article 18 of Law 19/2014, but the State attributes itself more responsibilities under sub-articles 4, 5 and 6 of the 2014 Law. In this evolution of article 18 of Law 19/2014, it clearly observed the increasing of responsibilities towards people living with HIV/AIDS establishing that the State defines and implements preventing methods and strategies, resistance and neutralization

HIV/AIDS impact, ensures access to information about HIV/AIDS and its consequences, also about voluntary testing benefits and lastly assuring social aid of any person living with HIV/AIDS. It is of vital interest to mention the State's social responsibility towards people living with HIV/AIDS. The State's social responsibility towards this social group is satisfying and acknowledgeable because this moderates the removal of article 4(2) of Law 12/2009, which established the right to free aid for people living with HIV.

The State's further responsibility of great value is established in article 19 of Law 19/2014, in respect of which the State is obliged to compensate all persons infected by HIV, resulting from the action of health employees and technicians while performing their duties for the State's service.

The above provision as to be understood that the State is only obliged to compensate certain citizen for the committed act by a health technician while performing of his/her duties and being at that particular period under the State's service. If the health technician infects someone being for example on formal employee holiday, or not being on holidays nevertheless outside his working post, the State is not held responsible for this deed. The Doctor or health technician will be held responsible and undergo a legal judgment for owns actions on the quality of common a citizen, as its clearly observed that he/her was not under the State's service.

In case the agent or employee on duty infects any citizen, while he or she is on working mission or performing his or her duty, the State is accountable, together with the employee or health technician. The Law regarding deliberately infecting citizens imposing liability on the State does not only happen when involving health technicians but also for any State's employee whether on duty in the Health Ministry or in other public sectors the State. If the State answers is accountable for an act by any of its employees, and provide proof that he or she neglectfully another person, after the State compensates the victim, the responsible employee shall refund the State.

Article 19(3) of Law 19/2014 establishes that public or private employer as the same responsibilities as the State. That is, the State and private as the same responsibilities. This is a new established article based upon the presently employed act, deserving all admire and honor towards the Mozambican legislator. Other innovation deserving a special attention is the establishment of the two new articles that are not verified in Law 5/2002 of February 5. Let's remember that act 5 reflects form article 44 to 64 of Law 19/2014.

In this manner, the article 49 of Law 19/2014 establishes the rights of employees and job candidates: right to medical aid and medical supplements, the right to housing and

education, the right to professional qualification, the right to professional development, the right to be respected due to one's sincerity and progress status, right to colleagues' solidarity, the right to denounce his/her employment premises and to his/her colleagues if is the case and right to receive due compensation in virtue of severe infection from tertiaries or resulting from error, carelessness or poor medical supplements causing other infections or illnesses or from tertiaries.

Article 50 of the same act establishes the duties of employees such as: they should not share razors/blades, needles, other used cut table objects or piercings which permit easy passing of HIV; and there is a need to adopt attitudes, habits and behaviors that may avoid the transmission of HIV. In other terms, at the workplace, employees should abstain from practice of sexual intercourse without the proper protection, and be constantly aware of their work colleagues and other persons living with or without HIV and fulfill the medical prescriptions. This article is an innovation of article 15 of Law 5/2002 of 5 February 2002.

Another important innovation of value is article 53(6) of Law 19/2014 of 27 August 2014. This article establishes the duties of the employing entity toward the employee which are: maintain medical aid even without the working possibilities due to HIV/AIDS infection, assure health standards, hygiene and safety in the workplace, and create informative services in the workplace.

What concerns us is article 53(6) of the Law in which establishes that the employing entity is obliged to subscribe a health insurance, that, among others, may fulfill cases such as occupational infections of employees by HIV, during the performance of one's duties. The introduction of this provision relating to health insurance of infected employees and at risk of infection by HIV on having the right be to assured is a great and significant contribution for the long and effective satisfaction and practice of rights of people living with HIV. This provision is innovative on the evolution of Laws about HIV/AIDS in the workplace.

Other important innovation relates to article 62 of the Law. The article in cause is the development of article 13 of Law 5/2002 of 5 February. In this manner, it is most vital to us the provision of the present act, which finally clarifies the calculation of compensation for anyone who violates the employees' rights has to compensate the victim by four salaries of the employees' category for each work year and if an employee has not completed at least one year working, the fixed compensation is binding upon three salaries of the employee's category and besides the compensation in cause, the employee has right to pension.

The same happens to a candidate who was not admitted due to motives regarding

discrimination of being HIV positive, as an obligation to compensate the offended the sum of six minimum salaries. Also, in this respect, article 47(1) of Law 19/2014 provides that whoever violates the above-mentioned article will be condemned to a penalty of a fine, corresponding between fourteen and forty minimum salaries. One of the major differences between the previous Laws and the new Law is the seriousness and explicitness in the calculations of the penalty compensations. The study concludes that, although the 2014 Law is severe and clear on penalties and compensations, it still needs to be regulated by the State to be more efficient using the effective application for the people living with HIV.

Unfortunately, the Laws on HIV/AIDS did have regulations, among them Law 5/2002 and 12/2009. For example, it is upon the government to regulate the present act within the period of 180 days but until now it has not yet been regulated.

4.4. Conclusion

Before the approval of Law 5/2002 of 5 February, Law 23/2007 of 1 August and 12/2009 of 12 March, many persons in different social segments in Mozambique were discriminated against and stigmatized on the basis of their HIV status. Groups that were and still are vulnerable include women, children, migrants, persons with disabilities and drug users. Most of those among them who live with HIV suffer discrimination in the workplace on the basis of their HIV status. Some of them are for example dismissed unlawfully. In some instances, some of them are subjected to unlawful pre-employment testing to establish whether they are HIV positive. To be admitted to work, they sometimes have to undergo an HIV diagnosis without their informed consent. However, when the laws mentioned above entered into force, discrimination and stigma reduced significantly and freedom of movement improved.

These laws were used together with non-state actors to disseminate the necessary information to avoid the spread of the pandemic. Nowadays the society and the employers as well as public and private sectors have changed, and display more reasonable attitudes. The news of stigma and discrimination are not frequently given wide publicity. This omission leaves people without an awareness of the need fight together against stigma and discrimination based on HIV status. People understood that the HIV problem is collective in nature, and requires collective responses.

Some of the problems found or raised in the three previous particularly Laws (5/2002 and 12/2009) are that some provision such as article 15 of Law 5/2002 and article 4 of Law 12/2009 violate freedom of thought and conscience by criminalizing transmission of HIV and

do not include issues of gender equality and discrimination and stigmatization under Mozambican law.

Another problem is that the gaps relating to some incompatibility of these laws are not integrated into Law 19/2014 of 27 August 2014, which means that the new Law does not present the innovation relating to these issues of conformity with international law. In other words, the same gaps raised in terms of Laws 5/2002 and 12/2009 are still there in the new Law (19/2014). However, in terms of Law 19/2014 of 27 August 2014, the study concludes that there are some problems relating to the right of free treatment of PLHIV and some innovation in terms of the ambit of its application. To be more precise, the Law covers some sectors such as domestic workers, public and private sectors, but still remains incompatible with article 2 of Recommendation 200. Another two important innovations of Law 19/2014 are: It establishes a new legal regime of compensation (article 62, 63 and 65) and for medical insurance (article 53(6)) in the workplace to benefit employees living with HIV.

4.5. Recommendations

Although the study stated above that the non-incorporation of some of the rights into national laws cannot, by itself, lead to a conclusion that these laws are not compatible with the international instrument of human rights, there is always a need to take the content of the international standards on the rights of workers, which have not been integrated domestically, to be included into domestic law to ensure effective legal protection of PLHIV.

It is recommended that articles 13, 25, 26, 40 of Law 12/2009 of 12 March 2009, which require that perpetrators of rape or sexual crimes be subjected to an HIV diagnosis upon request of the court, the Public Prosecutor or the police, should be revised.

Further, it is recommended that doctors should not be allowed to test patients' blood without their consent and even routine tests on pregnant women should not be allowed. In addition, the courts, Public Prosecutor and Police should not compel the perpetrators or suspects of rape to undergo HIV testing.

This study also suggests that article 37 of Law 12/2009 of 12 March 2009 should include the dependents and families of the migrant workers. In addition, employment interviewees should not be obliged to reveal their HIV status.

It is recommended that article 13 of the Law, mentioned above, which established that persons living with HIV are obliged to reveal their status to their sexual partner, to their physician, which obliges them to adopt attitudes, habits and behaviors that avoid HIV

transmission to others, and prohibits them from donating blood, should be revised.

It is recommended that the State should establish provisions which focus on a secure and healthy working environment in accordance with paragraphs 3, 30 and 34 of Recommendation 200 of 2010.

Further, it is recommended that procedures should be made for the enforcement of rights of workers. Article 16 of Law 5/2002 provides that in case of discrimination against a worker in the workplace, the violator should be punished. However, the Law lacks any procedure which can be used to enforce the rights of the worker and to sanction anyone who violated the worker's rights. This is a gap that needs to be addressed by an effective procedural law.

It is further recommended that the legislative authorities should include into article 2 of Law 12/2009, as vulnerable groups in need of protection, the key groups mentioned in the Strategic Plan such as armed forces, migrant workers and refugees.

It is also recommended that the State should create some specific judicial institution to deal with and protect workers' rights as it is stipulated in article 37 and 44 of the Recommendation.

Finally, the State should undertake measures to revise (in order to comply with international standards of human rights) and disseminate laws relating to HIV/AIDS, so as to ensure that ordinary people and workers in particular are aware of their rights.

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