THE HUMAN RIGHT OF HIV POSITIVE PERSONS TO NON-DISCRIMINATION IN GETTING LIFE INSURANCE IN SOUTH AFRICA

by

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AIDS	Acquired Immunodeficiency Syndrome
ASSA	Actuarial Society of South Africa
BC	British Columbia
BCLR	Butterworth Constitutional Law Report
CC	Constitutional Court
CHRR	Constitutional and Human Rights Report
CLR	Constitutional Law Report
FMC	Federal Magistrates Court
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICESCR	The International Covenant on Economic and Socio-Cultural Rights
IRIN	Integrated Regional Information Network
LOA	Life Offices' Association
NAC	National AIDS Commission
NAPWA	National Association of People Living with HIV/AIDS
NGO	Non-Governmental Organisation
OAU	Organisation of African Unity
SA	South Africa
SADC	Southern African Development Community
SRC	Supreme Court Report
UN	United Nations
UNAIDS	Joint United Nations Program on HIV/AIDS
UNHCHR	United Nations High Commission for Human Rights

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CHAPTER ONE

INTRODUCTION

1.1 BACKGROUND OF THE STUDY

South Africa, like many sub-Saharan countries of Africa,[1] has a serious and ever growing problem of Human Immunodeficiency Virus (HIV), which can progress to Acquired Immunodeficiency Syndrome (AIDS) after damaging the immune and nervous system of an individual, eventually leading to death.[2] According to the *December 2002 AIDS Epidemic Update* by the Joint United Nations Program on HIV/AIDS (UNAIDS), about 5.3 million South Africans were HIV positive by the end of the year 2002.[3] HIV/AIDS is different from other terminal illnesses because of the stigma and patterns of discrimination it is associated with and because no cure exists yet at present.

UNAIDS advocates for a human rights-based approach to the epidemic.[4] A rights-based approach is a 'conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.'[5] It concretely integrates norms, standards and principles of the international human rights system into policies, plans and process of development. The human rights-based approach strongly emphasises on the principles of non-discrimination, accountability, empowerment and linkage with human rights standards.[6]

The insurance industry was among the first to understand clearly the serious nature of the epidemic,[7] as the HIV/AIDS epidemic disintegrates and destabilizes slowly the traditional

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1 A Whiteside and C Sunter *AIDS: The challenge for South Africa* (2002) Introductory part.

2 A Tilley 'HIV/AIDS' <www.stfx.ca/people/x2000/x2000kbh/HIVwebworksheet.htm> [accessed 22 September 2003].

3 UNAIDS *AIDS Epidemic Update* (2002).

4 UNAIDS 'HIV/AIDS, human rights and law' <www.unaids.org/en/in+focus/hiv_aids_human_rights.asp> [accessed 30 September 2003].

5 Office of the United Nations High Commissioner for Human Rights/the Regional Programme Office for Southern Africa *Human rights source book* (2001) 17-18.

6 As above.

7 Institute of Actuaries 'The implications of AIDS for life insurance companies' (1987) Supplement to Bulletin No. 2 of the AIDS Working Party, published as *Proceedings of a Seminar held at Staple Inn Hall on 1st February 1988.*

extended African family system.[8] The extended family, which traditionally constitutes a social safety net in African communities, is not able to cope with the sudden burden of HIV/AIDS orphans,[9] since the age group 20-44 is the most hit by the epidemic.[10] A study commissioned by the Henry Kaiser Family Foundation showed that, by the year 2005, HIV/AIDS is expected to make around one million children under the age of 15 orphans in South Africa.[11] Besides, stigma and secrecy around the disease expose HIV/AIDS orphans to discrimination in their community and even in their extended family.[12] As a result, a large number of HIV/AIDS orphans are abandoned and forced to seek help in the streets, begging for money, a situation that exposes them to abuse and criminality.[13]

Since 1988, most insurance companies in South Africa have had a policy of compulsory HIV testing which excludes HIV positive candidates from their scheme.[14] The reason put forward is that they represent an 'unacceptable' risk.[15] According to the National Association of People Living with HIV/AIDS (NAPWA), this is a widespread problem in South Africa.[16] The impact of discrimination in getting life insurance is catastrophic on the lives of people living with HIV/AIDS and their families. As was noted by the Supreme Court of Canada in the case of *Zurich Insurance Company v Ontario*,[17] there is a fundamental tension between human rights law and insurance

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8 A Okonmah 'Social and economic impact of HIV/AIDS in Africa' <http://democracy-africa.org/hivaids.htm> [accessed 22 October 2003].

9 Rokpa Projects in South Africa <http://www.rokpauk.org/Projects%20South%20Africa.shtml> [accessed 22 October 2003].

10 A Whiteside and C Sunter (n 1 above) 59.

11 Ropka Projects in South Africa (n 9 above).

12 R Jennings, J Mulaudzi, D Everatt, M Richter and M Heywood *Discrimination and HIV/AIDS* (2002) 12. Also available at <http://www.alp.org.za/view.php?file=/resctr/paprs/200210_Research.xml> [accessed 20 September 2003].

13 A Okonmah (n 8 above).

14 Old Mutual *Positive planning handbook: Financial advice for people with a shortened life expectancy* (1996) 15. For instance in South Africa, ABSA Life Ltd, Charter Life Insurance Co Ltd, Discovery Life Ltd, HTG Life Ltd, Momentum Group Ltd, New Era Life Insurance Co Ltd, Regent Life Insurance Co Ltd and Sage Life Ltd do not grant life insurance to HIV positive candidates.

15 LOA 'HIV testing: why we need to do HIV tests for underwriting' <http://www.loa.co.za/downloads/testing_.pdf> [accessed 30 September 2003].

16 IRIN 'Insurance controversy for people living with HIV/AIDS' <http://www.aegis.com/news/irin/2002/IR020513.html> [accessed 22 September 2003].

17 *Zurich Insurance Co v Ontario Human Rights Commission* 1992 (2) SCR at para 224. The case involved a 20-year old unmarried male who applied for automobile insurance from the respondent insurer. He was charged a premium rate higher than unmarried females or married males. He filed a complaint under the Ontario Human Rights Code and contended that he was denied the right to contract on equal terms without discrimination, and

practice. Insurance practices, particularly, impedes on equality and privacy rights of HIV positive persons.

Given South Africa's long history of institutionalised discrimination, the right to equality has become the pinnacle of the post-apartheid legal order and the foundation of all rights enshrined in the Bill of Rights.[18] The right to equality seeks to establish equality of outcomes in a deeply divided society[19] and requires that people in similar situation under similar circumstances be treated alike and people unlike be treated unalike.[20]

Non-discrimination is a derivative of the principle of equality. The Constitution does not create a separate section for unfair discrimination, but instead includes it in the section on equality. Also, the Constitutional Court has situated the anti-discrimination principle at the heart of its approach to equality. It has indicated in its jurisprudence that in order for a claimant to succeed in an equality challenge, it is usually necessary to frame the matter as one of unfair discrimination and not in terms of a general claim.[21] The principle of non-discrimination is entrenched in international laws which South Africa has accepted and translated into national laws. Anyone under the South African legal order, both public and private actors, are bound by the principle of equality and therefore the principle of non-discrimination; it becomes a state responsibility once a non-state actor refuses to comply.

Furthermore, testing as a pre-condition to insurance, especially in the case of life policies, has raised issues of concern as it adversely affects HIV diagnosed persons and definitely violates their constitutional and human rights. It is generally admitted that one cannot claim a right to remain ignorant of his or her own HIV status, especially in circumstances where a person can

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his right to equal treatment in services, goods and facilities has been infringed. The Supreme Court of Canada held that the automobile driver classification of unmarried male drivers under 25 years practiced by the respondent insurer contravened the Ontario Human Rights Code.

18 Section 7(1) of the 1996 Constitution of South Africa affirms that equality is the cornerstone of democracy in the country. In *Fraser v Children's Court, Pretoria North and Others* 1997 (2) BCLR 153 (CC) at para 161F-162D, the Constitutional Court viewed equality as a core value underlying the democratic society envisioned by the 1996 Constitution.

19 J de Waal, I Currie and G Erasmus *The Bill of Rights handbook* (2001) 200.

20 A Fagan 'Dignity and unfair discrimination: a value misplaced and a right misunderstood' (1998) 14 *South African Journal on Human Rights* 239.

21 P de Vos 'The role of equality in the South African legal system' in J Lanotte, J Sarkin and Y Haeck (eds) *The principle of equality: A South African and a Belgian perspective* (2001) 141.

cause harm or wrong to others.[22] However, informed consent to HIV testing and confidentiality of test results are essential because the right to privacy is a human right which is constitutionally protected.

Therefore, at the root of the debate on HIV/AIDS and insurance is the question on how to strike a balance between the need to ensure that insurance companies extend their coverage without being financially endangered and the human and constitutional rights of HIV positive persons.

1.2 OBJECTIVES OF THE STUDY

The general objectives of this study are:

- To examine the actuarial reasons for insurance companies to screen out people infected with HIV/AIDS;
- To discuss the debate on HIV screening in the insurance business after the legislative and jurisprudential changes enhancing the right of people infected with HIV/AIDS to equal treatment in South Africa;
- To give an overview on how the problem has been dealt with in other jurisdictions.

1.3 RESEARCH QUESTIONS

Questions that need to be explored are:

- What are the reasons used to justify the exclusion of HIV positive persons from life insurance schemes?
- How does this exclusion practiced by insurance companies affect the lives of people living with HIV/AIDS and infringe upon their human and constitutional rights?
- How is the problem dealt with in international comparative law?

1.4 LITERATURE REVIEW

The bulk of literature on HIV/AIDS and the insurance industry in South Africa, Canada and the United States was written in the early 1990s when the impact of the epidemic was first felt. The

[22] C Erin 'Is there a right to remain in ignorance of HIV status?' in R Bennett and C Erin (eds) *HIV and AIDS: Testing, screening and confidentiality* (2001) 266.

issue was mainly considered from an actuarial and medical perspective. Very little legal literature tackled the issue.

Booth looked at how HIV/AIDS has affected life insurance and health insurance coverage by insurance companies in South Africa.[23] Visser examined the strategies employed by some insurance companies in South Africa to avoid providing insurance coverage and paying claims to people with HIV.[24] Swanson focused on the major tactics employed by insurance companies in the United States to limit their exposure to claims arising from AIDS and the response to these tactics by legislators and lawmakers.[25]

After the massive amount of publications on the topic in the early 1990s, authors were silent on the issue because no sound solution to the debate could be found. Brackenridge dedicated a chapter on actuarial principles and HIV/AIDS. He concluded that HIV/AIDS is a non-insurable risk because treatment has proven very difficult, and current therapies have been only marginally beneficial.[26] Some authors, while not arguing on the issue of screening out persons living with HIV/AIDS from life insurance schemes, suggest that, new types of financial resources outside the insurance industry or together with it, should be created. They believe that this would be preferable to forcing the insurance industry to take risks that could put the whole system at risk.[27] Others argue that governments can and should bar insurance companies from using tests for HIV antibodies to screen applicants for health insurance policies.[28]

This study differs from previous studies because firstly, it is conducted in an era where human rights are incorporated into South Africa's Constitution. Secondly, the conflict between insurance business practices and human rights is discussed in view of constitutional, legislative and jurisprudential changes affecting the insurance industry over the past few years, and in light of new scientific development on HIV/AIDS.

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23 C Booth 'The insurance industry and AIDS: An insider's perspective' *(*1993) 9 *South African Journal on Human Rights* 151-157.

24 C Visser 'AIDS and insurance law: A preliminary laundry list of issues' (1993) 9 *South African Journal on Human Rights* 130-142.

25 E Swanson 'Life assurance, health insurance and AIDS. Lessons from the United States' (1993) 9 *South African Journal on Human Rights* 143-150.

26 R Brackenridge & W Elder *Medical selection of life risks* (1993) 851-864.

27 See for instance H Grantham 'Le sida et son assurabilité: quelques considérations éthiques' *Assurances* (1988).

28 See for instance R Mohr 'Aids, gay men and the insurance industry' (1980) *Gays / Justice. A case of ethics, society and law* 244-246.

1.5 METHODOLOGY

In the course of the compilation of this study, the author had to get familiar with the insurance underwriting process and especially with the actuarial principles according to which insurers assess risks. Most of the literature utilised in this study deals with these principles because very little legal literature tackled the issue. A literature review of primary sources (legislation and case laws) and secondary sources (books and journal articles) has also been conducted in libraries and on the Internet. Interviews with insurance companies' representatives have been carried out. However, due to material constraints, interviews were restricted to few representatives of insurance companies and their medical underwriters. In the course of the study, a comparative approach has been used and the experience of foreign jurisdictions on the topic was considered.

1.6 OVERVIEW OF CHAPTERS

The study is divided into five chapters. Chapter one is the introductory chapter. Chapter two examines the principles of insurance as well as the characteristics of HIV/AIDS. It aims at understanding the arguments in favour of HIV testing and exclusion of persons living with HIV/AIDS from life insurance schemes. Chapter three analyses the problem from the perspective of persons infected with HIV. It investigates the impact of the refusal to grant them life insurance because of their HIV status. This chapter shows how the insurance business infringes the rights of HIV positive persons to non-discriminatory treatment. Chapter four looks at the position of foreign jurisdictions in the conflict of interests and analyses how they have dealt with the human rights implications of insurance companies' policy towards the HIV/AIDS epidemic. Chapter five is the concluding chapter, which puts forward recommendations.

1.7 LIMITATION OF THE STUDY

Although the rights to equality and privacy are equally important, this study only discusses the right to equality because legislations, regulations and jurisprudence already have clear provisions which aim at ensuring the confidentiality of medical results and the necessity of an informed consent.[29]

This study considers private insurance only. In South Africa, social security, that is, benefits paid by the State, are qualified by a means test, so that only the poorest people can benefit from

[29] For instance, the *Life Offices Association HIV/AIDS Protocol* adopted in October 2000. Or see South African Law Commission 'Current legal position regarding consent for medical treatment and confidentiality of medical information' in *Fourth interim report on aspects of the law relating to AIDS: Project 85* (2000) 83-108.

them.[30] Private insurance can either be indemnity or non-indemnity insurance. Health insurance, which may include cover against medical expenses and loss of income as a result of illness, falls into the category of indemnity insurance. Non-indemnity insurance encompasses life insurance, to which this study is confined.

The study focuses on South Africa as a case study for the reasons of exponential growth of HIV/AIDS in the country and for the reason that the author was based in South Africa at the time of the study.

The paper only considers individual life cover, as opposed to group life cover, which is normally associated with one's contract of employment and does not require the applicant to undergo any medical check-up.

Though the insurance industry is discriminatory in essence, the study focuses on the issue of discrimination on the basis of HIV/AIDS status. It is worth mentioning that the paper does not consider HIV as a disability but as should be a prohibited ground on its own.

[30] G Marx *How to buy life assurance in South Africa* (1992) 15.

CHAPTER TWO

EXCLUSION OF HIV POSITIVE PERSONS FROM LIFE INSURANCE SCHEMES

2.1 INTRODUCTION

This chapter analyses the attitude of life insurance companies towards the HIV/AIDS epidemic. It discusses the insurability of HIV/AIDS in order to understand why the majority of life insurance companies in South Africa single out HIV/AIDS and decline life insurance cover to persons who test HIV positive. Firstly, the chapter looks at the principles of insurance. Secondly, it considers the insurability of HIV/AIDS. The objective of the chapter is to understand the rationale for excluding HIV positive persons from life insurance plans.

2.2 THE PRINCIPLES OF INSURANCE

Section one of the *Long-Term Insurance Act*[1] defines a 'life policy' as a contract in terms of which a person (the insurer), in return for a premium (a regular payment or a one-off payment), undertakes to: a) provide policy benefits (the sum assured) upon, and exclusively as a result of a life event or b) pay an annuity for a period. The person who contracted the life policy is called policy holder. There are three important traditional life insurance policies: a 'whole life insurance policy', a 'temporary insurance policy' and an 'endowment insurance policy'. The difference between these three types lays in the moment the sum assured is payable - on the death of the policy holder, whenever it may be, or if it occurs during a specified period or before or after a specified term.[2] The whole life insurance policy (life insurance) ensures financial safety for the dependants of the policyholder, after his or her death.

The principal function of insurance is the spreading of losses by means of a common pool of individuals exposed to similar risks and into which each policyholder pays a fair and equitable premium according to the risk of loss they bring into the pool.[3] In 1966, the Commission on Insurance Terminology of the American Risk and Insurance Association gave a standard definition of risk as the uncertainty as to the outcome of an event when two or more possibilities

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1 *Long-Term Insurance Act*, Act 52 of 1998.

2 J Dobbyn *Insurance law in a nutshell* (1989) 8-11.

3 K Black & H Skipper *Life insurance* (1987) 404.

exist,[4] for instance the death or the survival of an individual. The risks covered by a life insurance policy are the financial consequences of the insured's death on his or her dependants.

The basic idea underlying insurance is that it provides financial protection to individuals.[5] Rather than facing an uncertain amount of financial loss alone, the individual shares the risk with other persons and only pays the cost of insurance. Individuals transfer their financial risks to insurers. Insurers manage these risks by pooling or grouping them.[6] The mechanism of pooling risks is fundamental to ensure that all policyholders included in the same pool are exposed to similar risks in order to establish equity among them.[7]

Insurance is mainly based on the law of large numbers.[8] The principle of the law of large numbers is that risks and uncertainty diminish as the number of individuals included in a pool of similar risks increases.[9] The law of large numbers is very important because even if the probability that an event (death) will occur is calculable, the statistics do not apply to a small group or to an individual exposure.[10] Furthermore, because of the mechanism of pooling risks, insurance companies have to assess as accurately as possible the risk an applicant to a life insurance policy is exposed to. This is the most important rationale for HIV testing in insurance.[11] It is through the process of underwriting that risks are assessed.

2.2.1 UNDERWRITING PHILOSOPHY

Underwriting is the process by which an insurer determines whether or not and on what basis it will accept an application for insurance.[12] The term underwriting, commonly used throughout the insurance business, actually incorporates implicitly two essential elements: selection and classification.[13]

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4 F Outreville *Theory and practice of insurance* (1998) 2.

5 G Marx *How to buy the right life assurance for you in South Africa* (1992) 13.

6 M Atkinson & D Dickson *An introduction to actuarial studies* (2000) 103.

7 K Black & H Skipper (n 3 above) 408.

8 As above 14.

9 F Outreville (n 4 above) 132.

10 As above.

11 K Clifford & R Inculano 'AIDS and insurance: the rationale for AIDS-related testing' (1987) 100 *Harvard Law Review* 1822.

12 LOA 'Life registry enquities protocol' <http://www.loa.co.za/medicalinfo/aidsed.asp> [accessed 17 September 2003].

13 K Black & H Skipper (n 3 above) 406.

When receiving an application for a life insurance, an insurance company first selects the application, that is, it decides on the basis of its underwriting policy - whether or not to provide any insurance cover to the individual.[14] If the application is accepted, it has to go through the process of classification whereby the insurer decides on the terms, conditions, and price at which the insurance will be issued.[15]

Methods of processing applications for life insurance vary slightly from one business to another, but they all follow the same basic principles. Once agreement has been reached on the purchase of life insurance, the applicant must complete a questionnaire, which forms the basis of the insurance contract with the insurance company.[16] The questions on the questionnaire are designed to give the insurance office sufficient information to set up its records and begin the assessment of the risk from an underwriting point of view.[17] The applicant will also be asked to give details on any previous life insurance applications, and details of family history and life style (for example smoking habits, alcohol consumption and leisure activities).[18]

The applicant for a life insurance has a duty by law to disclose any information which may be considered relevant in the assessment of his or her application for life insurance.[19] In order to prevent a significant amount of non-disclosure of important facts as well as to cover the possibility that the applicant is genuinely unaware of any serious medical problem, insurers automatically request a medical examination for any applicant. The type of medical examination the applicant will have to undergo depends on his or her health, age and the amount of cover he or she is applying for. However, all medical examinations include compulsory HIV antibodies tests. The only type of life insurance that generally does not require an HIV test is that which only covers accidental deaths.[20]

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14 As above.

15 As above.

16 Results of the interview with Mr Pat Motsoeni, insurance broker for Sanlam Life on 5 September 2003.

17 G Dickson & J Steele *Principles and practice of insurance* (1981) 6.

18 R Brackenridge & W Elder *Medical selection of life risks* (1993) 33.

19 Non-disclosure of material facts renders the contract null and void and the applicant may be charged with fraud. The contract may entail an 'incontestability clause', which provide that after a certain period of time, a misstatement or omission on an application for insurance does not render the policy voidable or void, except in the case of fraud. For more information on the subject, see: S Park *The duty to disclose in insurance contract law* (1996).

20 Results of the interview with Mr. Pat Motsoeni, insurance broker for Sanlam Life on 5 September 2003.

The primary factor in classifying risks that are not standard is the state of health.[21] Thus, applicants for a life insurance have to undergo a medical examination and HIV testing. Medical impairments such as HIV/AIDS, blindness, cancer, kidney failure,[22] account for the substantial majority of substandard risks, that means with higher-than-average mortality and shorter life expectancy,[23] and are therefore declined,[24] hence the distinction between insurable and non-insurable risks.

In October 2000, the Life Offices' Association (LOA)[25] adopted its *Protocol on HIV/AIDS* which forms part of the Code of Conduct of the Association and is therefore binding on all member offices. The purpose of the *Protocol* is to ensure that the life insurance industry follows the highest standards in all aspects of HIV screening. It particularly stresses the requirement of confidentiality of the results, informed consent before the test, and pre- and post-counselling services. The Protocol was adopted as a response to the numerous claims related to the breach of confidentiality of test results.[26] The legal position regarding consent for medical treatment and confidentiality of medical information in South Africa is consistent. The Constitutional Court in *Bernstein and others v Bester NO and others* held that a breach of privacy can occur either by way of an unlawful intrusion upon the personal privacy of another, or by way of unlawful disclosure of private facts about a persons.[27] Further, the South African Law Commission defined the right to privacy to encompass 'autonomy privacy rights', which means that a person must consent to all forms of medical treatment (including the drawing of blood and HIV test), and has the right to refuse medical treatment.[28]

The underwriting process is concerned primarily with significant risk exposures that are not common to all persons seeking insurance, for instance the risk to die of AIDS. Indeed, risks in each class need to be as homogenous as possible in order to ensure the necessary balance

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21 R Brackenridge *Medical selection of life risks* (1985) 34.

22 Old Mutual *Positive planning handbook* (1996).

23 K Black & H Skipper (n 3 above) 417.

24 As n 18 above.

25 The Life Offices' Association is an association of registered long-term insurance companies conducting business in South Africa. Its primary objective is to ensure the interests of life insurance companies and their policy holders.

26 Aids Law Project & Lawyers for Human Rights 'HIV/AIDS and insurance law' (1997) *HIV/AIDS and the law: a resource manual*.

27 *Bernstein and others v Bester NO and others* 1996 (4) BCLR 449 (CC) at para 483F-484F.

28 South African Law Commission *Fourth interim report on aspects of the law relating to AIDS: Project 85* (2000) 83.

among insured persons accepted in each classification.[29] Therefore, if the overall mortality experience within each classification is approximately the predicted average for the group, every insured within that class whose mortality experience is expected to be higher than average can be offset by one whose experience is expected to be lower than average.[30]

Therefore, access to insurance coverage depends mainly on fitting within one of the pools determined by the underwriting policy-makers.[31] If the risk the applicant is exposed to is not common in the pool, for instance a higher mortality experience due to an HIV-related infection, and no class has been designed to support this special risk, the applicant is likely to be dismissed from the insurance plan.[32] According to insurance companies, this refusal is motivated by their duty to protect their policy holders from higher premiums and unfair burden.[33] Furthermore, they argue that to ignore the risk levels associated with HIV infection and treat HIV positive individuals on the same conditions as non-infected individuals would constitute unfair discrimination against the later policyholders.[34]

Furthermore, one of the objects of underwriting should be to accept as large a proportion of standard lives as possible, leaving only a small percentage of substandard lives to be rated according to the risk of the particular impairment present.[35] Therefore, the agent or the insurance broker, have responsibility, as well as have self-interest, to write applications only on people who need, and are likely to qualify for insurance. Life expectancy, that is the number of years a person is expected to live according to the current statistics on morbidity and mortality, is indeed used as a way of measuring average periods of survival for each pool.[36] However, it does not predict the survival of an individual because of the many variables that can affect each person's lifetime, hence the risk.[37] Therefore, risks are never completely annihilated but only reduced. This is the reason why insurers distinguish between insurable and non-insurable risks.

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29 F Outreville (n 4 above) 132.

30 K Black & H Skipper (n 3 above) 407.

31 R Bovbjerg 'Aids and insurance: how private health coverage relates to HIV/AIDS infection and to public programs' (1992) 77 *Iowa Law Review* 1565.

32 As above.

33 D Fine, M Heywood & A Stode 'HIV/AIDS and insurance law' (1997) in *HIV/AIDS and the law: a resource manual* 299.

34 As above.

35 K Black & H Skipper (n 3 above) 418.

36 R Kim & K Mc Mullin 'AIDS and the insurance industry: an evolving conflicting interests and rights' (1988) *Saint Louis University Public Law Review* 162.

37 R Brackenridge & W Elder (n18 above) 32.

2.2.2 INSURABLE RISKS

Risk is the foundation of insurance.[38] However, there are many risks of economic loss that insurance companies are not willing to accept, for instance catastrophic risks such as earthquakes, flood, or damage caused by war, because it may affect a large number of insured persons at once.[39] Therefore, from the viewpoint of the insurer, certain conditions must exist before insurance is possible and the risk insured. Firstly, the requirement for the existence of a large number of similar loss exposures.[40] The pooling of many loss exposures, homogenous and independents into classes[41] as described above is indeed the element that makes insurance feasible. Secondly, the specified event (death) must have some element of uncertainty about it. Although the event of death is bound to happen in the ordinary course of nature, the time of its happening must be uncertain.[42] For a risk to be insurable, the event should preferably occur on the long-term, so that the insurance company is not overwhelmed by claims and is able to get the wages from the collected premiums.[43]

Insurance companies consider HIV/AIDS as a catastrophic risk because persons suffering from AIDS are likely to die shortly after they have been infected. In South Africa, life expectancy for HIV positive persons is estimated between eight and ten years.[44] This means that even if the cost of insurance for HIV positive persons can be calculated, insurance is not practical because the premium that is determined by the insurer would be too high and consequently the individual will not be willing to pay for it.[45] Furthermore, according to LOA, the latest available treatment for HIV positive persons has not improved the life expectancy, thus the non-insurability of these persons.[46] Firstly, the cost of treatment makes it unaffordable for the group with the highest HIV prevalence, that is the estimated percentage of adult population living with HIV at a specific

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38 In 1966, the Commission on Insurance Terminology of the American Risk and Insurance Association defined risk as: 'uncertainty as to the outcome of an event when two or more possibilities exist' quoted by F Outreville (n 4 above) 2.

39 F Outreville (n 4 above) 132.

40 An example is the 'one endowment policy for special risks' offered by Sanlam Life. However, this product is different from a whole life insurance because the benefit is paid only if the policy holder's death occurs during the policy term, or at the end of the term if the policy holder survives until the end of the term. It is worth mentioning that HIV positive persons are not covered in this product.

41 F Outreville (n 4 above) 132.

42 H Ivamy *General principles of insurance law* (1993) 3-4.

43 K Black & H Skipper (n 3 above).

44 LOA 'HIV testing' <http://www.loa.co.za/downloads/testing_.pdf> [accessed 30 September 2003].

45 F Outreville (n 4 above) 132.

46 LOA 'HIV testing' (n 44 above).

time.[47] Secondly, the compliance to treatment protocols such as hygienic lifestyle, regular and fixed hour for taking the medicines is generally poor. The strong side effects of the treatment are also common causes of relinquishment.[48] Thirdly, poor socio-economic conditions with subsequent frequent proliferation of multi-organism infections increases the morbidity of HIV positive persons because their immune system is already vulnerable.[49]

2.2.3 THE PRICE OF INSURANCE

The advantage of being part of an insurance plan is that rather than facing an uncertain amount of financial loss (which could be very large) alone, an individual simply pays the cost of insurance (the premium). To maintain equity among insured persons, each policyholder should be charged a premium rate proportional to the risk he or she transfers to the fund. If one person is allowed to pay less than his or her share, it will necessitate an overcharge against other persons.[50] Premiums differ from one pool to another because of the level of risk covered.

Insurance companies collect premiums to pay back benefits to their policy holders. However, in long-term coverages such as life insurance, a proportion of the amount collected is not needed immediately to reimburse claims. This proportion is invested and produces earnings that are used to supplement premium incomes to fund future expected benefits and ongoing expenses.[51] It appears clearly that it is neither in the interest of insurance companies to issue a life insurance policy to an individual who seems likely to pay only a few premiums, nor is it in their interest to insure an individual whose benefits are likely to be claimed soon after the policy has been issued. It is rather in insurance companies' interest to insure only individuals whose life expectancy is high.

Moreover, insurance companies are under no obligation to accept proposals for insurance, be it life insurance or any other type.[52] They rather have to ensure that their policies are actuarially

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47 'HIV/AIDS in South Africa' <www.journ-aids.org/doc/HIV-AIDS%20in%20South%20Africa.doc> [accessed 24 September 2003].

48 Panel on Clinical Practices for Treatment of HIV infection, convened by the Department of Health and Human Services & the Henry J Kaiser Family Foundation *Guidelines for the use of antiretroviral agents in HIV-infected adults and adolescents* (2002) 16-30.

49 LOA 'HIV testing' (n 44 above).

50 Atkinson M & D Dickson *An introduction to actuarial studies* (2000) 104.

51 Schedule 2 of the *Long-term insurance Act*, Act 52 of 1998. See also F Outreville (n 4 above) 135.

52 The duty of insurance companies to keep their policies actuarially sound in section 46 of the Long-term Insurance Act implies that insurance companies are not bound to issue a life insurance cover to any individual who applies for one. However, they are bound by the principle of non-discrimination.

sound and that premium distinctions are actuarially justified.[53] It is worth mentioning that premiums differ from one insurance company to another because they all have different ways of calculations, priorities in terms of investments and internal policies.

2.3 UNDERSTANDING HIV/AIDS IN SOUTH AFRICA

The Human Immunodeficiency Virus (HIV) weakens the body's immune system, ultimately causing Acquired Immunodeficiency Syndrome (AIDS). AIDS is a cluster of medical conditions, often referred to as opportunistic infections, for which to date there is no cure.[54] Researchers have established that HIV attacks the body's immune system, and ultimately renders the body incapable of combating infections.[55] The agents of the body's immune system are the white blood cells, primarily the T-cells, which are divided into two basic groups: T-8 cells and T-4 cells. In a normal immune system, the T-8 cells attack the invading virus, and suppress the immune response after the viral infection is under control. The T-4 cells coordinate the immune response to a viral infection in the sense that they activate the immune responses of the T-8 cells and other antibodies. HIV has its most devastating effect on the T-4 cells as it destroys them. Therefore, there are fewer T-4 cells to induce immune responses to invading viruses, and there is an abundance of T-8 cells hampering the production of antibodies. This opens the body to attack by the opportunistic infections, which manifest the visible symptoms associated with AIDS.[56]

HIV/AIDS infection is not a disease per se but a syndrome, which weakens the immune system of the individual.[57] Four stages in the progression of untreated HIV infection can be identified:

- The window period, which begins shortly after the infection. The immune system is depressed and for a short period, produces many antibodies in response to the HIV infection. This phase is temporary and the immune system will revert to normal activity once the individual recovers from flu-like symptoms. At this stage, individuals may test negative for HIV when in fact they are already infected with the virus.

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53 Section 46 of the Long-term Insurance Act, Act 52 of 1998. The reason for public authorities to establish such rule is to ensure the economic viability of insurance companies. These latter' s investments indeed play an important role in national economies. However, they are at the same time bound by the principle of non-discrimination.

54 A Tilley 'HIV/AIDS' <www.stfx.ca/people/x2000/x2000kbh/HIVwebworksheet.htm> [accessed 22 September 2003].

55 R Kim & K Mc Mullin (n 36 above) 160.

56 This development is based on material from Patterson and Robichaud, *Managing Your Health*, (1996) 16-17 <http://www.niichro.com/aids/aids1.html#anchor42337> [accessed 22 September 2003].

57 A Whiteside and C Sunter *AIDS: The challenge for South Africa* (2002) 1.

- During the asymptomatic immunocompetent stage, the individual functions completely normally, and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.

- During the asymptomatic immunosuppressed stage, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body. However, at this stage, the amount of virus in the body that has materially eroded the immune system of the patient is increasing progressively and the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-microbials.

- The full-blown AIDS is the end stage of the gradual deterioration of the immune system. Generally, the individual has been living with HIV for many years, before he developed full-blown AIDS. At this stage, a person has been living with HIV for many years. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.[58]

It is difficult to assess the exact number of persons infected with HIV/AIDS in South Africa. Statistic institutions generally extrapolate the results they get from HIV testing carried out on a sample of individuals to the global South African population.[59] However, the statistics thus obtained differ dramatically according to the sampling methodology.[60] For instance, on the one hand, the *National Antenatal Survey*[61] undertaken in 2001, estimated that 24.8% of pregnant women attending antenatal clinics were infected with HIV in the entire country. The survey extrapolated these statistics to find that approximately 4.74 million people in South Africa were living with HIV/AIDS by the end of the year 2001.[62] The Department of Health study takes data from antenatal clinics, and deduces the HIV prevalence amongst sexually active women. However, these conclusions cannot be applied to other groups in the population, such as non-sexually active women or children. The *December 2001 AIDS Epidemic Update* of the UNAIDS uses the same statistics. On the other hand, the *Nelson Mandela HIV Household Survey* found that 11.4% of South Africans, which is 4.5 million people, were living with HIV/AIDS in the same

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58 C Vidal 'The nature and development of HIV/AIDS' < http://www.niichro.com/aids/aids1.html#anchor42337> [accessed 21 September 2003].

59 South African Department of Health *National HIV and syphilis seroprevalence survey of women attending antenatal clinics in South Africa: 2002* (2003) 2; The *Nelson Mandela HIV Household Survey (2001)* <http://www.doh.gov.za/docs/reports/2000/hivreport.html> [accessed 19 September 2003].

60 As above.

61 South African Department of Health *National HIV and syphilis seroprevalence survey of women attending antenatal clinics in South Africa: 2001* (2002).

62 As above.

year. The *Nelson Mandela HIV Household Survey* used blood samples of a lower number of persons than the *National Antenatal Survey* but its study was not confined to pregnant women and was based on a more representative sample of the global population.[63] Both reports however agree that the age group 20-40 of black South African women is the most affected by the epidemic and deaths due to HIV/AIDS increased dramatically in South Africa from 1995 to 2000 (from 9% to 40%).[64]

2.4 INSURABILITY OF HIV/AIDS

Most insurance companies in South Africa view HIV/AIDS as a catastrophic illness that represents a non-insurable risk.[65] Key information on HIV/AIDS that would enable insurance companies to define their underwriting policies towards the epidemic is indeed not available. The reason is firstly that no perfect seroprevalence statistics are available to provide enough information on the extent of the infection in the South African population. These statistics are essential to make projections on the future progression of the epidemic and establish accurate life-tables that take into account morbidity and mortality due to HIV/AIDS. The difficulty to get perfect seroprevalence statistics resides in the impossibility to get the whole population tested.

Secondly, the effects of treatment on the evolution of the disease on an individual's state of health are not yet known.[66] Insurance companies cannot therefore assess accurately the life expectancy of an HIV positive person. The different stages of the disease also constitute a complicating factor. Persons who test HIV positive can be at different stages of development of the disease and therefore have different life expectancies. Additionally, persons who theoretically developed the disease at the same stage also have different life expectancies according to their own metabolism, their lifestyle or whether they take antiretroviral drugs. Statistics around life expectancy of persons infected with HIV/AIDS are therefore difficult to establish because too many variables are at play.

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63 The *Nelson Mandela HIV Household Survey (2001)* The *Nelson Mandela HIV Household Survey (2001)* <http://www.doh.gov.za/docs/reports/2000/hivreport.html> [accessed 19 September 2003].

64 South African Department of Health *National HIV and syphilis seroprevalence survey of women attending antenatal clinics in South Africa: 2002* (2003) 2; The *Nelson Mandela HIV Household Survey (2001)* <http://www.doh.gov.za/docs/reports/2000/hivreport.html> [accessed 19 September 2003].

65 Amongst all insurance companies operating in the country, only Metropolitan and Old Mutual grant a life cover to HIV positive individuals.

66 LOA 'HIV testing' (n 42 above).

Consequently, feasible arrangements throughout the course of the HIV/AIDS disease depends in large measure on better information about the extent of likely burdens at different stages. However, it is agreed that the time from infection to AIDS can be quite long.

A blood test is generally used as part of the medical examination in order to determine insurability of an application.[67] The blood test primarily used by South African insurance companies to detect HIV/AIDS is known as the Enzyme-Linked Immunosorbent Assay (ELISA) test.[68] The ELISA test can only detect the antibodies, which the immune system generates in response to infection by HIV.[69] Persons opposed to the use of the ELISA test for determining insurability argue that the test is not reliable because it can generate both false positive and false negative results. They also argue that it does not test for HIV/AIDS, but rather tests for antibodies, which merely indicate previous exposure to the virus.[70] The LOA HIV Testing Protocol provides for a '3 ELISA tests'. The first ELISA screening test analysis system should identify a specimen by its bar. A second and third ELISA test is performed only if the first test was reactive. The methodology used for the second and third tests must therefore employ different test principles.[71]

Indisputably, HIV/AIDS kills many people in South Africa and affects families and communities.[72] It is becoming a catastrophic plague because of its impact firstly on the individual and secondly on the national economy of South Africa,[73] especially in the absence of a vaccine or a cure. Nevertheless, HIV/AIDS is only one of many fatal maladies that afflict human beings. If the question being addressed is whether HIV/AIDS is sufficiently extraordinary to warrant support for a massive research program and support to affected persons, there is a very persuasive case for an affirmative response. From the point of view of persons infected with HIV/AIDS, as will be discussed in the subsequent chapter, the principle of non-discrimination is particularly important because of the patterns of stigma and marginalization they are enclosed in. However, when

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67 Aids Law Project & Lawyers for Human Rights 'HIV/AIDS and insurance law' in *HIV/AIDS and the law: a resource manual* (1997).

68 LOA 'HIV Testing Protocol' <http://www.loaco>za/codeofconduct/Chapter06.dot> [accessed 22 October 2003].

69 A Whiteside and C Sunter (n 55 above) 16.

70 A Widiss 'To insure or not to insure persons infected with the virus that causes AIDS' (1992) 77 *Iowa Law Review* 1633.

71 LOA ' HIV testing Protocol' (n 68 above).

72 'Report on the causes of death in South Africa' <http://www.statssa.gov.za/> [accessed 24 September 2003].

73 F le R Booysen, JP Geldenhuys & M Marinkov 'The impact of HIV/AIDS on the South African economy: a review of current evidence' (2003) Paper prepared for TIPS/DPRU conference on 'The Challenge of Growth and Poverty: The South African economy since democracy' 8-10 September 2003, Indaba Hotel, Johannesburg <http://www.commerce.uct.ac.za/dpru/conference2003/ Booysen_Geldenhuys_Marino.pdf> [accessed 1st September 2003].

HIV/AIDS is analysed as a disease in terms of its cause, diagnosis, treatment, and prognosis, there is virtually no reason to view it as a medical problem whose uniqueness warrants treating it differently when there are questions about insuring persons who may be infected.[74]

The size of the company, marketing objectives, product type, and other company policies are involved in the decision to provide substandard insurance and in the classifications to be established. Life insurance companies contend that if the insurance industry cannot collect premiums commensurate with the underlying risk, it will simply not have the money to satisfy the inevitable claims that are submitted. If such a policy were implemented, some companies would surely face major solvency problems.

In South Africa, Old Mutual and Metropolitan Life grant life cover to HIV positive individuals. Metropolitan Life has been the first companie worldwide to offer cover to terminally ill patients, including persons with HIV.[75] *Inclusive Life* is a policy specifically designed for HIV positive individuals, and within which Metropolitan Life grant whole life insurance policy to individuals who are at their first or second stage of HIV/AIDS. The condition is that the individual's CD4 cells count are 350 or above, which must be 23% or above of their blood cells. The minimum total premium they have to pay to Metropolitan Life is R125 per month while other 'historically uninsurable conditions', that is other serious health impairments, have to pay R75 per month. There is no waiting period, which means that if the policyholder dies shortly after the policy was issued, benefits can be claimed. However, the maximum amount an HIV positive individual can be covered for is R50 000 while other 'historically uninsurable conditions' are covered for up to R2 000 000.[76]

As part of FlexiDowment (OMUCARE), Old Mutual also grants life cover to HIV positive persons at a minimum premium rate of R85 per month while 'other life threatening conditions excluding HIV' are charged at R50 per month. There is no waiting period after the policy was issued, but although the term of the policy for 'other life threatening conditions excluding HIV' is unlimited (the life of the policyholder), OMUCARE covers the life of the policyholder for a maximum of 15 years only. It means that if the policyholder survives the 15 years after the policy was issued, he or she has to renew the policy. OMUCARE provides extra cash on the accidental death or accidental

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74 A Widiss (n 70 above) 1639.

75 Business Day 'The research' <http://www.bd.co.za/bday/content/direct/1,3523,964789-6132-0,00.html> [accessed 27 October 2003].

76 Metropolitan Life 'Inclusive Life' <http://www.metlife.co.za/default.asp?access_page=247911> [accessed 27 October 2003].

disability of the policyholder, funeral benefits and cash payout if the policyholder has less than 12 months to live.[77]

2.5 CONCLUSION

Insurance companies are bound by their duty to protect their policyholders from an unfair burden as well as their duty to maintain a financially sound underwriting policy towards HIV/AIDS. At the same time, they cannot discriminate against anyone, more precisely against HIV positive persons. Insurance companies refuse to insure the life of HIV positive persons for economic reasons essentially. However, such treatment infringe on the human and constitutional rights of HIV positive persons, in particular their right to equality enshrined in section 9 of the 1996 Constitution of South Africa. As was noted by the Supreme Court of Canada in the leading case of *Zurich Insurance v Ontario*,[78] there is a fundamental tension between human rights law and insurance practice.

When determining whether discrimination is fair or not, the South African Constitutional Court refers to the impact of the discriminatory treatment on the victim. The purpose is to weigh the importance of the limitation with the proportionality of the infringement.[79] Therefore, the impact of the exclusion from life insurance schemes of HIV positive persons is dealt with in the subsequent chapter.

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77 Old Mutual *Positive planning handbook: Financial advice for people with a shortened life expectancy* (1996) 4. See also Old Mutual 'HIV/AIDS' <http://www.oldmutual.com/about_om/corporate_citizenship/2002/hiv_aids/default.asp> [accessed 27 October 2003].

78 *Zurich Insurance Co v Ontario (Human Rights Commission)* 1992 (12) CCLI (2d) 206 (SCC) at para 224. The case involved a 20-year old unmarried male who applied for automobile insurance from the respondent insurer. When he was informed of his insurance premium, he filed a complaint under the Ontario Human Rights Code. The complainant alleged that he was denied the right to contract on equal terms without discrimination, and his right to equal treatment in services, goods and facilities has been infringed. He alleged specifically that he has been discriminated against on the basis of his age, sex and marital status. In this case, the Supreme Court of Canada held that the automobile driver classification of unmarried male drivers under 25 years practiced by the respondent insurer contravened the Ontario Human Rights Code.

79 *Harksen v Lane NO* 1998 (1) SA 300 (CC).

CHAPTER THREE

HIV/AIDS TESTING AND THE HUMAN RIGHTS OF PEOPLE LIVING WITH HIV AND AIDS

3.1 INTRODUCTION

In this chapter, the debate about insuring or not people living with HIV/AIDS would be analysed from the perspective of persons who have been diagnosed HIV positive. It is based on the unquestionable human right of HIV positive persons not to be discriminated against.[1] Firstly, this chapter looks at the legal framework protecting people living with HIV/AIDS against unfair treatment at the international, regional and national levels. Secondly, it analyses the impact of the exclusion of HIV positive persons from life insurance schemes and shows how the refusal of life cover adversely affects them and their dependants.

3.2 LEGAL PROTECTION OF HIV POSITIVE PERSONS AGAINST DISCRIMINATION

Several legislative provisions claim the right of any individual to equality and prohibit discrimination at the international, the regional and the national levels. The South African Constitutional Court interpreted the right to equality as implying the right not to be discriminated against and as being closely related to the right to human dignity.[2] Human History showed many instances where violation of the fundamental right to equality yielded to dramatic consequences on those who have been denied this right.[3] In general, anti-discrimination provisions list prohibited grounds of discrimination. However, although HIV positive persons experience serious patterns of

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1 Section 9(1) of the Constitution states: 'Everyone is equal before the law and has the right to equal protection and benefit of the law.'

2 See for instance *Brink v Kitsoff NO* 1996 (4) SA 197 (CC); *Prinsloo v van der Linde* 1997 (4) SA 1 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *Harksen v Lane NO* 1998 (1) SA 300 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC); and *Hoffmann v South Africa Airways* 2000 (1) SA 1 (CC).

3 For instance slavery, extermination of the Jewish people during the Nazi era in Europe, the Apartheid regime in South Africa and the 1994 genocide in Rwanda.

discrimination,[4] HIV status is not an explicit ground of prohibited discrimination in these provisions.

3.2.1 THE MAIN INTERNATIONAL AND REGIONAL LEGAL INSTRUMENTS PROHIBITING DISCRIMINATION ON THE GROUND OF HIV STATUS

None of the international human rights conventions specifically prohibits unfair discrimination on the basis of HIV status because the problem of HIV/AIDS had not yet arose at the time they were drafted. However, much could have been done since the epidemic took global proportions. Articles 51 of the *International Covenant on Civil and Political Rights*,1966, and 68 of the *African Charter on Human and Peoples' Rights*, 1981, give room for amendment. However, no text providing legal protection to the human rights of persons suffering from HIV/AIDS, as vulnerable group on its own, has ever been adopted neither at the international nor at the regional levels. HIV positive persons are simply protected under the general anti-discrimination provisions that might be interpreted to include HIV status as a prohibited ground.

- The *International Covenant on Civil and Political Rights* (ICCPR)[5] prohibits discrimination in articles 2(1) and 26. Neither article mentions HIV status as a prohibited ground but it could be read in the term 'other status'. The Committee on Human Rights established under the ICCPR is also silent about the issue of discrimination on the ground of HIV/AIDS status. The *International Covenant on Economic and Socio-Cultural Rights* (ICESCR), 1966,[6] which South Africa has signed but has not ratified, takes the same stand and refers to the term 'other status'. The ICESCR is not legally binding on South Africa but judges may take inspiration from its provisions when interpreting domestic laws. However, the United Nations (UN) Commission on Human Rights reiterates in its Resolution 2001/51[7] that discrimination on the basis of HIV or AIDS status, actual or presumed, is prohibited by existing international human rights standards, and that the term 'other status' in non-discrimination provisions in international human rights texts should be interpreted to cover health status, including HIV/AIDS status.

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4 R Jennings, J Mulaudzi, D Everatt, M Richter and M Heywood *Discrimination and HIV/AIDS* (2002) 12. Also available at <http://www.alp.org.za/view.php?file=/resctr/paprs/200210_Research.xml> [accessed 20 September 2003].

5 *International Covenant on Civil and Political Rights*, General Assembly Resolution 2200 A (XXI), UN document entered into force in March 1976, ratified by South Africa in December 1998.

6 *International Covenant on Economic and Socio-Cultural Rights*, General Assembly Resolution 2200 (XXI), UN document entered into force in January 1976, signed by South Africa in October 1994.

7 UN *Commission on Human Rights Resolution 2001/51* <http://www.unhchr.ch/huridocda/huridocda.nsf/(symbol)/E.CN.4.RES2001.51.En?Opendocument> [accessed 17 September 2003].

- In the absence of international instruments that deal specifically with HIV/AIDS, the *International Guidelines on HIV/AIDS and Human Rights* (*International Guidelines*) are an important indication of the view taken by the United Nations on the rights of people living with HIV/AIDS. The *International Guidelines* was adopted in Geneva in September 1997.[8] Guideline 5, in particular, deals with 'anti-discrimination and protective laws' and provides that states should enact or strengthen anti-discrimination and protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sector. In the insurance sector in particular, 'exemptions from superannuation and life insurance should only relate to reasonable actuarial data, so that HIV/AIDS is not treated differently from analogous medical conditions.'[9] The *International Guidelines* are internal documents of the UN and therefore concern all Member states of the UN. However, the International Guidelines do not have legally binding force, they are not treaties. Lobbying efforts from international non-governmental organisations (NGOs) and advocacy on the part of UNAIDS resulted in the Guidelines being enhanced at the level of international legal standards for the protection of the rights of persons living with HIV/AIDS.

- The non-discrimination clause of the *African Charter on Human and Peoples' Rights (ACHPR)*[10] is enclosed in its article 2. This article is very similar to article 26 of the ICCPR, but it gives more emphasis to the grounds of race, ethnic group and colour because of the history of slavery and apartheid on the continent. Like article 26, article 2 does not mention HIV/AIDS status as a ground on its own, but it is implied in the term 'other status'. The African Commission on Human and Peoples' Rights (the African Commission), which is the main body of the ACHPR, acknowledges the HIV/AIDS pandemic as a threat to human rights and humanity.[11] However, the African Commission refers to the issue of non-discrimination only in connection with the right to health and to access to antiretroviral drugs. Moreover, the African Commission's jurisprudence on issues related to discrimination on the basis of HIV/AIDS status is non-existent. The ACHPR is overdue; amendment in favour of a better protection of the human rights of persons infected and

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8 International Guidelines on HIV/AIDS and Human Rights, UNHCHR Resolution 1997/33, UN Doc. E/CN.4/1997/150 (1997).

9 United Nations *International Guidelines on HIV/AIDS and Human Rights* New York and Geneva (1996) 19.

10 *African Charter on Human and Peoples' Rights* adopted by the OAU at the 18th Conference of Heads of State and Government, entered into force in June 1981, ratified by South Africa in July 1996.

11 *Resolution on AIDS Epidemic in Africa: Progress report and guidelines for action* adopted by the Assembly of Heads of States and Government of the OAU on its twenty-ninth summit in Cairo (June 1993); Commitment at the *Africa Summit on HIV/AIDS* in Abuja (April 2001); and *Resolution on HIV/AIDS Pandemic*, thirty-third Ordinary Session of the African Commission in Niamey (May 2003).

affected by HIV/AIDS should be undertaken. The ACHPR needs to be updated according to the current scourges affecting the continent, among which is the pandemic of HIV/AIDS.

- In 1997, the Southern African Development Community (SADC) adopted the *Code on HIV/AIDS and Employment in SADC*, the provisions of which South Africa has incorporated into her national legislation. The Code aims to ensure non-discrimination between individuals with HIV infection and those without, and between HIV/AIDS and other comparable health-medical conditions. However, the Code does not make mention of insurance businesses and applies only to workplaces.[12] A study compiled by Lirette Louw[13] showed that most insurance companies operating in the Southern African region test applicants for life insurance for HIV and reject the application if the test is found to be positive.[14] However, HIV status is usually not declared as being the ground for rejecting the application.

Most of these countries do not have legislative provisions regulating the granting of life insurance to people with HIV/AIDS. However, their National HIV/AIDS Policies encourage the insurance industry to develop and apply policies which take into account the insurance needs of HIV positive persons. The *Malawi National HIV/AIDS Policy*, in particular, calls upon the Government to revise the Insurance Act to permit testing for insurance purposes and in accordance with the standards of confidentiality and informed consent.[15]

3.2.2 THE DOMESTIC LEGAL FRAMEWORK

Since 1994, a number of laws and policies that protect the rights of persons with HIV/AIDS have been enacted in South Africa. Ten years ago, no explicit legal protection existed for them. At present, special protection in South African law is afforded to persons with HIV/AIDS. These provisions do not apply to the insurance business alone; they also apply to other business fields such as the workplace.

- The equality clause of the South African Constitution of the 1996 (the Constitution)[16] is enclosed in section 9. Section 9(3) of the Constitution provides that:

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12 <http://www.hri.ca/partners/alp/resource/thesdac.html> [accessed 17 September 2003].

13 L Louw 'HIV/AIDS and human rights in SADC' (2003) unpublished. The study focuses on Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

14 The exception is Namibia where, since 1996, Metropolitan Namibia offers life cover to HIV positive persons: Metropolitan Namibia <http://www.metlife.co.za/default.asp?access_page=241161> [accessed 27 October 2003].

15 L Louw (n 13 above).

16 Constitution of the Republic of South Africa, Act 108 of 1996.

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Constitution does not give any limited definition of the term 'discrimination' or any limit to its content, nor did the Constitutional Court when it previously interpreted the Constitution. With regard to the term 'discrimination', the United Nations Human Rights Committee stated,

> The term *discrimination* … should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground[s] … and which has the purpose of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[17]

The South African *Promotion of Equality and Prevention of Unfair Discrimination Act* (the Equality Act)*[18]* defines 'discrimination' as any act or omission, including a policy, law, rule, practice, condition or situation, which directly or indirectly imposes burdens, obligations or disadvantages on any person, or withholds benefits or opportunities from any person, and does so on one or more of the prohibited grounds.[19]

The Constitutional Court (the Court)'s equality jurisprudence[20] contributed largely in giving content to the term unfair discrimination and in applying the limitation clause in section 36 of the Constitution. The right to non-discrimination is not clearly set out in section 9 of the Constitution, but has been implied in *Prinsloo v van der Linde.* In this case, the Court held that the equality right is a composite right, which entails the right to equality before the law and the right to equal to treatment or to non-discrimination.**[21]**

In *Harksen v Lane NO*,**[22]** the Court tabulated the stages of an enquiry into a violation of the equality clause. Firstly, the Court has to find out whether the challenged statutory provision or act differentiates between people or categories of people. If differentiation is established, then secondly the Court has to find out whether the differentiation amounts to discrimination. In *President of the Republic of South Africa v Hugo*, the Constitutional Court held that a classification which is unfair in one context might not necessarily be unfair in a different context.**[23]** In *Prinsloo v van der Linde*, the Court distinguished between discrimination and mere

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17 Human Rights Committee *General Comment 18: Non-discrimination* (1989) <http://heiwww.unige.ch/humanrts/gencomm/hrcom18.htm> [accessed 17September 2003].

18 Promotion of Equality and Prevention of Unfair Discrimination Act, Act 4 of 2000.

19 As above, section 1(1)(viii).

20 Note 2 above.

21 *Prinsloo v van der Linde* (n 2 above) at para 22.

22 *Harksen v Lane NO* (n 2 above).

23 *President of the Republic of South Africa v Hugo* (n 2 above) at para 41.

differentiation.[24] While mere differentiation treats some people differently to others, it does not amount to discrimination. Therefore, in order to determine whether the challenged statutory provision or act constitutes unfair discrimination, the Court considers whether the differentiation is based on one or more of the prohibited ground(s) or on an analogous ground, which is an attribute or a characteristic that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparable manner.[25] The issue in this case was the constitutional validity of section 21 of the Insolvency Act 24 of 1936. This section provides that on the sequestration of the estate of an insolvent spouse, all the property of the solvent spouse vests in the trustee of the insolvent estate. The Court found that this provision constitutes an unfair discrimination on the basis of marital status). If it has been found that the discrimination is based on a listed ground, unfairness is presumed, otherwise, the impact of the discrimination on the complainant and others in his or her situation would determine its unfairness. The Court's jurisprudence linked closely the right to equality with the right to human dignity and held that discrimination is unfair if it impairs on the fundamental dignity of individuals, as human beings.[26]

Thirdly and finally, if the discrimination is found to be unfair, then the Court has to determine whether the challenged provision or act can be justified under the limitation clause. The limitation clause is enclosed in section 36 (1) of the Constitution. It states:

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and is purpose and less restrictive means to achieve the same purpose.

In *Harksen v Lane NO*, the Court stated that the limitation analysis involves a weighing of the purpose and effect of the provision in question and a determination of the proportionality of the impairment and the purpose targeted.[27] The values taken into account when doing so are those of an open and democratic society.

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24 As above at para 25.

25 *Harksen* case (n 2 above) at para 46.

26 *Harksen* case (n 2 above) at para 1508F-G.

27 As above at para 52.

- The *Promotion of Equality and Prohibition of Unfair Discrimination Act* (Equality Act)[28] covers virtually every conceivable sector of economic activity. The Act lists 17 grounds on which unfair discrimination is prohibited. These are 'race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth'. Section 13(2) of the Equality Act presumes discrimination on an analogous ground to be unfair. HIV/AIDS has been removed from this list, but remains a prohibited ground vis-à-vis the insurance sector. A Schedule attached to section 29 of the Act names discrimination on the grounds of HIV/AIDS in the provision of insurance as an example of unfair practices in the insurance sector. It says that 'no person may unfairly discriminate against another … by refusing an insurance policy.' The bill explicitly provides that insurance services may not be refused to persons 'solely on the basis of HIV/AIDS status'. According to Professor Shadrack Gutto, a member of the drafting unit of the Equality Act, HIV/AIDS was omitted from the list because 'there were fears about how to deal with it', and 'an argument had been made that it was included under the category of disability.'[29]

- The *Consumer Affairs Act*[30] amended by the *Harmful Business Practices Amendment Act.*[31] It was enacted to provide for the prohibition or control of certain business practices. The Act covers businesses such as storage, transportation, banking services and insurance business but doe not cover services in terms of a contract of employment. It defines 'unfair business practice' as any 'business practice which, directly or indirectly, has or is likely to have the effect of unreasonably prejudicing any consumer; deceiving any consumer or unfairly affecting any consumer.' Consumer means any person to whom any commodity is offered, supplied or made available. In terms of the *Harmful Business Practices Act*, a policy that excludes unreasonably a group of persons from insurance schemes would constitute unfair discrimination if it unfairly affects the members of this group.

Section 12 of the Amendment Act of 1999 establishes a Business Practices Committee which is mandated to make known information on current policy in relation to business practices in general and unfair business practices in particular, to serve as general guidelines for persons both consumers and business actors. The Committee shall also receive and dispose of particulars of the result of any investigation made by a competent authority in relation to any reported case of

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28 Equality Act (n 18 above).

29 A Jeffery 'A Bill too far' <www.sairr.org.za/wsc/pstory.htx?storyID=133> [accessed 14 September 2003].

30 *The Consumer Act*, Act 71 of 1988.

31 *Harmful Business Practices Amendment Act*, Act 23 of 1999.

unfair business practices or a case that may come into existence. However, no reported cases of unfair insurance practices toward HIV positive prospective policyholders are known.

3.3 THE RIGHT NOT TO BE UNFAIRLY DISCRIMINATED AGAINST BY INSURANCE COMPANIES

The above anti-discrimination provisions, whether international, regional or national, do not apply to the public sector only; they equally bind private actors.[32]

3.3.1 THE PROHIBITION SET OUT IN THE EQUALITY CLAUSE OF THE SOUTH AFRICAN CONSTITUTION

The equality clause of the South African Constitution requires that people who are similarly situated, for example persons having similar medical conditions, be treated alike.[33] Besides, an insurance company has the responsibility to treat all its policy holders fairly by establishing premiums at a level consistent with the risk represented by each individual policy holder. The right to equality is very important in South Africa because of South Africa's history of institutionalised segregation.

The equality clause does not prohibit discrimination but rather unfair discrimination.[34] Section 9 lists sixteen grounds of unfair discrimination, among which is disability. HIV status is not mentioned as a prohibited ground but has been considered as a disability in Canadian, Australian and American courts. The Canadian Human Commission, for instance, has delivered a number of decisions where it acknowledged HIV/AIDS as a disability. For instance, *Fontaine v Canadian Pacific Limited*,[35] a case involving a cook whose employment was terminated after it was discovered that he was HIV positive, is one of these cases. In other jurisdictions, the Federal Court of Australia, in *Commonwealth of Australia v The Human Rights Equal Opportunity Commission and X*,[36] found that the exclusion of a recruit with HIV from military service constituted discrimination on the basis of disability. The United States Supreme Court also

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32 Section 8 (2) of the Constitution provides: 'A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.' In terms of section 9, insurance companies are bound by the duty to treat their clients without any unfair discrimination.

33 J De Waal, I Currie & G Erasmus *The Bill of Rights handbook* (2001) 198.

34 As above 210.

35 Canadian HIV/AIDS Legal Network & Canadian AIDS Society 'Responding to stigma and discrimination' <http://www.aidslaw.ca/Maincontent/issues/discrimination/e-info-da7.pdf> [accessed 17 September 2003].

36 The case involved an army recruit who was discharged because he was infected with HIV/AIDS. <http://www.austlii.edu.au/au/cases/cth/federal_ct/1998/3.html> [accessed 17 September 2003].

decided in *Bragdon v Abbott* in 1998,[37] that HIV is a protected disability and that people with HIV have a right to anti-discrimination protection under the *Americans with Disabilities Act* of 1990.

The ground of disability may not adequately cover HIV/AIDS status since there may be a dispute as to whether certain stages of the illness, in fact amount to a disability. Disability may be defined as the inability to engage in *any* substantial, gainful activity due to any medically determinable physical or mental impairment.[38] In the case of HIV/AIDS, a person who is just HIV-positive is not totally disabled. Disability only comes into play once the individual is physically or mentally incapable of performing due to the direct or indirect effect of the virus. As a result, the inclusion will create certainty in law as to the protection of people who are HIV-positive or have AIDS, without leaving it to courts to determine on a case-by-case basis in which instances discrimination on the ground of the HIV/AIDS status can be justified.

The South Africa Constitutional Court uses the notion of an 'analogous ground' and has held that differentiation on grounds that are analogous to those listed in section 9(3) will constitute discrimination. Accordingly, an analogous ground is one which is 'based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable serious manner.'[39] In line with this reasoning, the South African Constitutional Court acknowledged HIV status as a prohibited ground of discrimination on its own but not as a disability in the *Hoffmann* case.[40] This case dealt with pre-employment testing of a cabin attendant by South African Airways.

3.3.2 HIV/AIDS AND OTHER FACTORS SHORTENING LIFE EXPECTANCY

Applicants for life insurance who have a shortened life expectancy (for example people suffering from heart disease, cancer and HIV/AIDS)[41] are treated in one of three ways. Their applications are either accepted with a premium loading,[42] they are postponed, or their applications are declined. In general, applications of persons tested HIV positive are automatically dismissed.

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37 *Bragdon v Abbott* 524 US 624 (1998). Dr Randon Bragdon, a dentist, refused to fill the cavity of Ms Abbott when he realized she was HIV positive <http://supct.law.cornell.edu/supct/html/97-156.ZO.html> [accessed 17 September 2003].

38 W Meyer *Life and health insurance law* (1992) 518.

39 Goldstone J in *Harksen v Lane NO* (n 2 above) at para 46.

40 *Hoffmann v South African Airways* 2000 (11) BCLR 1235 (CC) at para 40.

41 LOA 'Code of Conduct' <http://www.loa.co.za/codeof conduct/Chapter05.dot> [accessed 22 October 2003].

42 The term loading is used to describe the process used to adjust the pure premium to take into account all the costs of administrating an insurance contract and eventually to provide a profit to the insurer (F Outreville *Theory and practice of insurance* (1997) 148).

Only very few companies[43] offer special life cover to people infected with HIV. Not all LOA member offices provide policies for HIV positive applicants. The bulk of insurance companies in South Africa are still declining applications of HIV diagnosed persons and, at best, would offer a policy that only covers the funeral costs if the insured person dies of HIV/AIDS.[44] However, premiums in life insurance for HIV positive persons are higher, the amount covered for is limited and the policy may have a waiting period of a number of years before the death benefit is paid out. Further, only people with HIV who are asymptomatic, meaning those who are not showing any sign of infection yet, are considered for a life cover.[45]

Persons who are HIV positive are excluded from insurance coverage while other groups with conceptually similar risks, such as skydivers, recreational fliers, race drivers and even persons living with analogous medical conditions such as heart disease, diabetes and cancer, are granted life cover. This kind of treatment is discriminatory and more so because it constitutes blanket discrimination that does not take into account the different stages of development of HIV/AIDS infection. The life expectancy of a person infected with HIV depends on the stage of development of his or her illness. A person who is at the first stage of the infection can live for an average of twelve years without medical attention and can even live far longer if they are on medication and follow a certain lifestyle.[46]

3.3.3 UNFAIR DISCRIMINATION ON THE GROUND OF HIV/AIDS IN THE LIFE INSURANCE INDUSTRY

At the heart of the prohibition of unfair discrimination is the recognition that under the Constitution of 1996, all human beings, regardless of their position in society, must be accorded equal dignity.[47] In the *Harksen* case, the Constitutional Court held that the position of the victims of discrimination in society, whether they experienced past patterns of discrimination as well as the

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43 Metropolitan Life (<http://www.metlife.co.za/default.asp?access_page=241164>) and Old Mutual (<http://www.oldmutual.com/about_om/corporate_citizenship/2002/hiv_aids/default.asp-31K>).

44 For instance in South Africa, ABSA Life Ltd, Charter Life Insurance Co Ltd, Discovery Life Ltd, HTG Life Ltd, Momentum Group Ltd, New Era Life Insurance Co Ltd, Regent Life Insurance Co Ltd and Sage Life Ltd do not grant life insurance to HIV positive candidates.

45 Metropolitan Life 'Inclusive Life' <http://www.metlife.co.za/default.asp?access_page=247911> [accessed 27 October 2003].

46 Panel on Clinical Practices for Treatment of HIV infection, convened by the Department of Health and Human Services & the Henry J Kaiser Family Foundation *Guidelines for the use of antiretroviral agents in HIV-infected adults and adolescents* (2002) 16-30.

47 *President of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at para 41.

impacts of the discriminatory treatment, must be taken into account when determining whether discrimination is unfair.[48]

People living with HIV are a very vulnerable group in South African society. They are vulnerable to opportunistic infections, which can be fatal to them, and they are vulnerable to the stigma attached to them by a generally unsympathetic society.[49] They are discriminated against in their personal relationships with others and in institutions such as the employment sector, education, banking and insurance. Certain groups of people are even more likely to experience HIV/AIDS discrimination in more severe forms. These groups of people constitute already vulnerable groupings in society and are identified by markers such as race, gender, sexual orientation, class, level of education and economic activity. As stated by Mark Heywood:

> The poor, the vulnerable, the unschooled, the socially marginalized, the women and children; those who bear the burden of colonial legacy - these are the sectors, which bear the burden of AIDS.[50]

Black African women constitute the group hardest hit by the epidemic of HIV/AIDS in South Africa.[51] Gay and lesbian youths are also considered as the most vulnerable group in the epidemic because very few safe sex education initiatives are geared specifically towards gay and lesbian sexual practices.[52]

Society's response to people living with HIV/AIDS used to be violent. Fear of rejection and marginalisation has forced many of them not to reveal their HIV status. This in turn has deprived them of the help they would otherwise have received. Persons with HIV/AIDS are stigmatised and marginalised because of the stereotypes and prejudices accompanying the modes of transmission of HIV/AIDS. HIV/AIDS is generally associated with what is perceived as depraved

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48 *Harksen* case (note 2 above) at para 52.

49 The Constitutional Court identifies in the *Hoffmann* case patterns of systemic disadvantage and discrimination as a crucial indicator when defining unfair discrimination. Systemic discrimination, according to Thesaurus Dictionary, is one that has effect on the whole of something. Applied to HIV/AIDS, this means that HIV positive persons experience discrimination in every aspects of their lives: discrimination in their relations with institutions such as the insurance business or the workplace, discrimination in the community due to their social position, whether they are black, women, homosexual or poor, and finally discrimination in their interpersonal relationships mainly because of the misbelief associated to HIV/AIDS.

50 M Richter 'Preliminary Assumptions on the Nature and Extent of Discrimination Against PWA in South Africa – Interviews and a Study of AIDS Law Project client files 1993 – 2001 in *Aids Law Project Discussion Document 1/2001* (2001) 51.

51 Department of Health <http://www.doh.gov.za/search/index.html> [accessed 19 September 2003].

52 Interview of Paddy Nhalpo, the NAPWA Provincial Co-coordinator for the North Western Province, conducted by AIDS Law Project in April 2001, Aids Law Project 'Discrimination and HIV/AIDS' (2002) 20<http://www.alp.org.za/view.php?file=/resctr/paprs/200210_Research.xml> [accessed 20 September 2003].

practices and behaviours such as prostitution, promiscuity, homosexuality and drug consumption. In the *National Coalition for Gay and Lesbian Equality v Minister of Justice* case, Sachs J said that

> At the heart of the equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group.[53]

Furthermore, besides being refused life cover, HIV positive persons are card-indexed in the LOA's Life Registry.[54] A person whose application for a life cover has been declined on the basis of his or her HIV status is registered in LOA's Life Registry as a person who has been refused life insurance on the basis of his or her health conditions. The consequence of this registration is that the person's application for a life cover to another insurance company, which is a member of LOA, will automatically be declined without examining the application in-depth.[55]

HIV related discrimination has implications beyond equality. It adversely impacts on other fundamental rights. It certainly detracts from the right to dignity in section 10 of the Constitution in that it renders the victim a pariah and undermines his or her sense of self-worth. People usually take a life cover mainly to protect their family from the consequences of the precocious death of the breadwinner.[56] Without this financial security, the remaining family is very likely to be forced into poverty. It is also common for people to cede their life policies to a financial institution as security for a loan or an overdraft, especially when their financial assets do not cover the loan.[57] Without life cover, people living with HIV/AIDS will not be able to get loans from financial institutions or if they do, though their assets are not sufficient, the financial institutions may seize their property and expel the remaining family members.

At the level of society as a whole, discrimination against people with HIV/AIDS reinforces the mistaken belief that such action is acceptable and that those infected with HIV/AIDS should be ostracised and blamed. In turn, this kind of attitude endangers public health because people are unwilling to disclose their HIV status for fear of rejection and marginalization.

In the *Hoffmann* case, Justice Ngcobo had this to say about discrimination of HIV persons:

> People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this virus is transmitted, the prejudices and stereotypes

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53 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 132.

54 LOA 'The underwriting process: What, how, why' <http://www.loa.co.za/medicalinfo/inquiry.asp> [accessed 17 September 2003].

55 Results of the interview with Mrs. Lyn Drake, Office Manager, Sanlam Life Hatfiled on 9 September 2003.

56 G Marx *How to buy the right life assurance for you in South Africa* (1992) 15.

57 As above.

against HIV positive people persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this an assault on their dignity. The impact of discrimination on HIV positive people is devastating.[58]

3.4 CONCLUSION

Refusal of the benefits of a life cover to persons living with HIV/AIDS and their family amounts to unfair discrimination on the part of insurance businesses mainly because of its impacts on persons living with HIV/AIDS and their families. This refusal is very likely to lead them to their financial ruin and deny financial security to their families. Such practice unfairly discriminates against them, firstly because their health condition is treated differently from other medical conditions. Secondly, blanket discrimination is not justified because it does not take into account the stages of development of the disease. The practice is all the more discriminatory as the insurance industry only puts forward financial and economic motivations while HIV positive persons merely claim their human and constitutional rights.

Section 36 of the Constitution basically states that if it appears that the actions of any persons infringe the rights of others, that person must justify their conduct and bears the onus of showing that the infringement is reasonable and justified in an open and democratic society based on human rights, equality and freedom. This provision allows the Constitutional Court to consider the decisions of courts in other open and democratic societies. Therefore, the subsequent chapter deals with the manner in which foreign jurisdictions handled the conflicting interests between the life insurance business and human rights in general. The focus is on the position of these foreign courts towards the anti-discrimination principle in the insurance business.

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58 *Hoffmann* case (n 40 above) *at* para 28.

CHAPTER FOUR

ANALYSIS OF FOREIGN JURISPRUDENCE IN RELATION TO THE TENSION BETWEEN INSURANCE BUSINESS PRACTICES AND THE RIGHT TO NON-DISCRIMINATION

4.1 INTRODUCTION

When interpreting the Bill of Rights, the Constitution invites judges to refer to foreign jurisprudence if local jurisprudence is not helpful.[1] This chapter analyses legal cases where insurance companies refused to grant life insurance policy to individuals on the basis of a physical impairment. Most legal contentions between insurance companies and HIV positive individuals are cases in which AIDS exclusion clauses included in the contract allow insurance companies to refuse to pay out the benefits of a policy upon the death of the policyholder subsequent to HIV/AIDS infection.

Cases relevant to the purpose of this chapter are to be found in Australia and in Canada in favour of persons who are discriminated against. In France, although an agreement on the insurability of HIV positive individuals was signed between the public authorities and representatives of the insurance business, insurance companies still exclude HIV positive individuals from their insurance schemes.[2]

4.2 ANALYSIS OF THE AVAILABLE JURISPRUDENCE

Cases dealing with the tension between the non-discrimination principle and insurance practices are analysed in this section. The purpose is to extract the legal principles these jurisdictions applied to deal with this tension.

4.2.1 AUSTRALIAN COURTS

- The Australian High Court decided the *Australian Mutual Provident Society v Goulden*[3] case in favour of the insurance industry in 1986.The case dealt with the inconsistency between

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1 Section 39 (1) (a) and (b) says that 'when interpreting the Bill of Rights, a court, tribunal or forum…must consider international law and foreign law.'

2 National Aids Commission 'Press release on the opinion of NAC relating to insurance and HIV' <http://www.cns.sante.fr/web_sida/uk/htm/avis/assurance/05_10_99/fr_1_d.htm> [accessed 30 September 2003].

3 *Australian Mutual Provident Society v Goulden* 1986 (160) CLR 330.

section 49K(1) of the Australian Anti-Discrimination Act of 1977 and section 78 of the Life Insurance Act of 1945. Section 49K(1) of the Anti-Discrimination Act renders unlawful any refusal to insure a person or the creation of any adverse differentiation in insurance terms on the ground of 'physical impairment' of the person concerned. Also, section 78 of the Life Insurance Act expresses a legislative intention to protect the interests of policyholders by allowing registered life insurance companies to classify risks and fix premiums according to their own judgment, based on actuarial advice and prudent insurance practice.

The inconsistency between the two legal provisions arose from a case which involved a man, Ewan McIntosh Goulden, who was totally blind since birth. He alleged that the Australian Mutual Society (the Society), violated his right to non-discrimination. The Society issued a policy which, in return to an annual premium, it would pay a stipulated sum immediately before the insured's sixty-first birthday or on his prior death "not being death by accident or specified sickness only". The insured later applied for an extra-premium to add a "waiver of premium benefit" to his initial policy. The effect of this amendment would be that, the insured would pay a higher premium and in return, if he becomes totally disabled, the insurance company would have to waive each premium due during the uninterrupted continuance of the disablement. The Society refused to amend the policy and stated that the reason for refusal is the insured's blindness.[4] Indeed, the insurer perceived the insured physical impairment as putting him more at risk for total disability. By proceedings in the High Court, the Society claimed a declaration that section 49K of the Anti-Discrimination Act was invalid on grounds that included its inconsistency with the Life Insurance Act of 1945.

Section 78(1) of the Life Insurance Act of 1945 provides that:

> A company shall not issue any policy unless the rate of premium chargeable under the policy is a rate which has been approved by an actuary as suitable for the class of policy to which that policy belongs.

Section 49K(1) renders unlawful 'any discrimination against a physically handicapped person on the ground of his physical impairment with respect to the terms of which an annuity, a life insurance policy, an accident or insurance policy or other policy of insurance is offered or may be obtained.'

Before the High Court, the Society alleged that "discrimination", in an objective sense, is of the essence of insurance business and the spreading of risks.[5] It argued that if State legislatures could prevent insurance companies from classifying risks differently, from setting varied

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4 As above at para 3.

5 As above at para 4.

premiums for different risks or from refusing to insure those risks, the insurance system would be altered and the right to carry on life insurance business interfered. The same result would follow if States or States tribunals could compel such companies to cease differentiating between applicants for insurance on the grounds of physical condition.

The High Court of Australia found that the provisions of the Life Insurance Act were directed towards ensuring adequate supervision and regulation of the insurance practices of life insurance companies to protect policyholders in respect of the financial soundness of such companies, their statutory funds and the financial viability of the rates of premium charged for particular classes of insurance.[6] The High Court acknowledged that the classification of risks and the setting of premiums are the essence of the life insurance business. It found that life insurance companies are more likely to prosper and the interests of their policyholders more likely to be protected if they are permitted to classify risks and fix rates of premium in accordance with its own judgment founded upon the advice of actuaries and the practice of prudent insurers. The High Court Australia therefore declared section 49K(1) of the Anti-Discrimination Act invalid under the Australian Constitution.

The High Court adopted the same position in Dixon J in *Victoria v The Commonwealth*,[7] when it said that a State legislation which makes it generally unlawful for a life insurance company to take account of physical impairment in determining whether it would or would not accept a particular proposal or the terms upon which it would grant insurance cover would be inconsistent with the essential scheme of the provisions of the Act regulating the issue of policies and the fixing of premiums.[8]

- In 2001, the Australian Federal Magistrates Court also found that exception to the prohibition of discrimination might be found in the practices of insurance companies. The *Theodore Xiros v Fortis Life Assurance Ltd*[9] case dealt with the refusal of the Fortis Life Assurance Ltd to pay out the benefits of a policy of insurance. The concern of this case does not fit within the scope of this study, that is the difficulties of HIV positive persons to obtain life cover. However, the principles the Australian Federal Magistrates Court referred to are relevant.

In February 1994, the applicant, Theodore Xiros, took out a mortgage for $35,000.00 and in March 1995 a further $25,000.00 loan with the Adelaide Bank. He took out mortgage protection

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6 As above at para 18.

7 *Victoria v the Commonwealth* 1937 (58) CLR (618) at para 630.

8 *Australian Mutual Provident Society v Goulden* (n 3 above) at para 20.

9 *Theodore Xiros v Fortis Life Assurance Ltd* 2001 FMC (15).

insurance for both loans. The mortgage protection insurance was provided by a firm called Covercare and was underwritten by Fortis Life Assurance Ltd, the respondent. The policies included death and permanent disablement plus temporary disablement cover. In December 1995, the applicant was diagnosed HIV positive. In December 1996, he ceased work due to deteriorating health and in March 1997 was granted a disability pension. In February 1997, he submitted a claim to Covercare under the insurance policies. On 11 March 1997, he was told that the claim was declined on the basis that 'the policy excludes all claims made on the basis of the condition of HIV/AIDS'.

In this case, the Australian Federal Magistrates Court based its findings on section 46(2) of the Disability Discrimination Act of 1975. This section makes it lawful for a person to discriminate against another person on the ground of that person's disability with respect to policies on insurance where the discrimination is based upon actuarial or statistical data on which it is reasonable for the first mentioned person to rely and is reasonable having regard to the matter of the data and other relevant factors.[10]

The Australian Federal Magistrates Court was concerned about the risk of anti-selection, described as the risk that persons will intentionally select a policy of insurance offered by a particular insurer to provide cover against risks to which those persons are peculiarly susceptible.[11] The risk of anti-selection is a major fear for insurance companies. If the non-discrimination principle was indeed to be applied toward HIV positive persons, and insurance companies were not allowed to refuse them life cover, insurance companies fear that individuals who are at the last stage of the disease would run for a life insurance policy, knowing that given their short life expectancy, they would pay little premiums but their dependants would still be covered after their death.

4.2.2 CANADIAN COURTS

- In *Zurich Insurance Co v Ontario Human Rights Commission*,[12] the Supreme Court of Canada (the Supreme Court) had to settle an appeal on an alleged case of discrimination on the ground of age, sex and marital status in regard to differentiation in automobile insurance rates.

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10 As above at para 7.

11 As above at para 8.

12 *Zurich Insurance Co v Ontario Human Rights Commission* 1992 (2) SCR. Also available at <http://www.lexum.umontreal.ca/csc-scc/en/pub/1992/vol2/html/1992scr2_0321.html> [accessed on 3 October 2003].

The complainant, a young unmarried male driver, was charged higher car insurance premiums than similarly situated females or married males.

The Supreme Court acknowledged the intrinsic conflict between the insurance business practices and the traditional human rights concepts.[13] It stated that the underlying philosophy of human rights legislation is that an individual has a right to be dealt with on his or her own merits and not on the basis of group characteristics. However, insurance business practices are based on statistics relating to the degree of risk associated with a class or group of persons, as it is very impractical to assess each risk individually. Nevertheless, the Supreme Court, referring to its former decision in *Saskatchewan Human Rights Commission v Saskatoon City*[14] found that individualised testing could be considered as an alternative to a discriminatory practice.

The Supreme Court said that human rights values cannot be over-ridden by business convenience alone.[15] It added that exemptions from human rights principles must be narrowly construed because to allow 'statistically supportable' discrimination would ultimately defeat the purpose of human rights legislation of protecting individuals from collective fault. Moreover, it would perpetuate traditional stereotypes with all of their invidious prejudices.

The respondent, Zurich Insurance Co, contended that the very essence of its business would be undermined if it could no longer rely on discriminatory group characteristics for its risks and rates classification system. It added that such standard is too high and is not required by section 21 of the Code.

The complainant based his arguments on section 21 of the Canadian Human Rights Code (the Code) of 1981, which provides a defence to a prima facie discriminatory practice if reasonable and bona fide grounds for that practice exist. When applying this section to the insurance business, the Supreme Court said that a discriminatory practice is 'reasonable' within the meaning of section 21 of the Code if it is based on a *sound* and *accepted* insurance practice and if there is no practical alternative. It added that a practice is sound if it desirable to adopt it for the purpose of achieving the legitimate business objective of charging premiums that are commensurate with risk, and went on to say that the availability of a practical alternative is a question of fact to be determined having regard to all the facts of the case.[16] Also, to meet the test of bona fides in section 21, the practice must be adopted honestly, in the interests of sound and

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13 As above at 4.

14 *Saskatchewan Human Rights Commission v Saskatoon City* 1989 (2) SCR 1297.

15 *Zurich Insurance Co v Ontario Human Rights Commission* (n 12 above) at para7.

16 As above at para 6.

accepted business practice and not for the purpose of defeating the rights protected under the Code. Therefore, the practice would not be bona fide if a practical alternative to the discriminatory practice exists.[17]

The Supreme Court further stated that the simple existence of accepted insurance practices is not enough to justify distinction between individuals or groups of individuals. The insurance industry cannot rely on its inaction and its self-serving claim that the practice 'has always been this way' to defend its discriminatory practices on grounds of a lack of statistical data. Rather, insurance companies must establish a rational connection between the distinction and the risk to be insured.[18] However, the connection must not merely be a statistical correlation but rather one of causal connection.[19] On this point, LOA is of the view that there is a causal connection between HIV and AIDS.[20]

Moreover, the Supreme Court found that the mere absence of statistics is not enough to prove that there is no alternative to the discriminatory practice.[21] It only establishes that it is not known whether or not other viable alternative bases of risk evaluation exist and that the insurer does not have the means to establish them. On this point, the Supreme Court pointed out that difficulty alone has never been accepted as an excuse for discriminatory conduct contrary to human rights legislation.[22]

- In *J v London Life Insurance Co*,[23] the British Columbia (BC) Human Rights Tribunal found that London Life Insurance Co discriminated against the complainant on the grounds of marital status and physical disability, by denying him individual life insurance cover without any reasonable justification.

J's wife was HIV positive consequent to a blood transfusion in 1980. J sought to purchase life insurance on his own life with London Life Insurance Co (London Life). The respondent denied J's application upon being informed that his spouse was HIV positive. London Life was not the first insurance company to deny J coverage. Consequent to a routine medical examination, New York

17 As above at para 11.

18 As above, Sopinka J at para 19.

19 As above.

20 LOA 'The evidence that HIV causes AIDS' (2000) <http://www.loa.co.za/downloads/evidence.pdf> [accessed 17 September 2003]. The contention of the LOA is supported by A Whiteside and C Sunter *AIDS: the challenge for South Africa* (2002) 3.

21 *Zurich Insurance Co* case (n 12 above), Mc Lachlin J at para 19.

22 As above at para 23.

23 *J v London Life Insurance Co* 1999 (36) CHRR D/43.

Life Insurance and Canada Life Insurance refused him cover because he was a high risk. J then applied for life insurance through NN Financial, which also declined coverage, without any medical examination.

London Life viewed J as someone who is at high-risk to contract HIV. Therefore, although J was HIV negative and was suffering from no disability at the time the decision was made to refuse him access to insurance, he was classified as non-insurable. According to London Life, the main reason was that J was having or continued to have sexual relations with a person who is HIV positive.[24]

In making a decision to deny insurance to persons in J's situation, London Life did not undertake any actuarial studies to determine the risk of HIV infection. It simply relied on the fact that no actuarial data regarding transmission rates of HIV were available. London Life argued that in 1994, there was no way to actuarially determine the mortality rate or the life expectancy of someone in J's situation. It pointed out that in order for an insurance company to offer insurance to an individual, the mortality rate for the individual's condition must be determined.[25]

J brought a claim alleging unfair discrimination on the ground of physical disability and marital status with respect to a service customarily available to the public. He founded his claim on section 8 of the Canadian Human Rights Code which provides:

> A person must not, without a bona fide and reasonable justification deny to a person or class of persons any accommodation, service or facility customarily available to the public, or discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of race, colour, ancestry, place of origin, religion, marital status, familial status, physical or mental disability, sex or sexual orientation of that person or class of person.

The exception to this provision is found in the subsequent section of the Canadian Human Rights Code:

> A person does not contravene this section by discriminating on the basis of physical or mental disability if the discrimination relates to the determination of premiums or benefits under contracts of life or health insurance.

The BC Human Rights Tribunal referred to decisions of the Supreme Court of Canada[26] in which fire insurance and automobile insurance were defined to be a service customarily available to the public. It therefore concluded that life insurance is a service customarily available to the public

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24 As above at para 12.

25 As above at para 23.

26 *I.C.B.C v Heerspink* 1982 (2) SCR 145 and *Zurich Insurance Company v Ontario* 1992 (16) CHRR D/255.

and should not, in terms of section 8 of the Canadian Human Rights Code, be denied to a person who applies for it.[27]

In this case, the main issue was to determine whether discrimination based on a perceived disability contravenes human rights legislation. J was not disabled at the time of his application, but was only perceived as being at high-risk to become disabled. The BC Human Rights Tribunal considered HIV status as a disability.[28] Not all HIV positive individuals develop full-blown AIDS.[29] Otherwise, they do not develop the disease at the same pace, depending on the stage of the infection,[30] whether or not they are under medication, comply with the lifestyle protocol or depending on their own metabolism. By analogy, the arguments of the BC Human Rights Tribunal are relevant because South African companies proceed on the assumption that all HIV positive applicants will develop full-blown AIDS and would therefore die from HIV infection or AIDS.[31]

The BC Human Rights Tribunal made a clear distinction between a perception that a person is disabled at the time of application and a perception that a person has a propensity or predisposition to become disabled in the future. It viewed that myths and fears about HIV are prevalent and varied and that the term 'physical disability' in section 8 of the Canadian Human Rights Code prohibits discrimination on the basis of a perceived propensity to become disabled in the future.

London Life relied upon the exception to section 8 and the principles found in *Zurich Insurance Company v Ontario* case. The respondent claimed that a discriminatory practice is reasonable if it is based on a sound and accepted insurance practice and there is no practical alternative. In the *Zurich* case, Justice Sopinka said:

> A practice is sound if it is one which is desirable to adopt for achieving the legitimate business objective of charging premiums that are commensurate with risk. The availability of a practical alternative is a question of fact to be determined having regard to all the facts of the case.[32]

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27 As above at para 28.

28 This is not the point of view of this study. However, this paper conceives full-blown AIDS, which is the final stage of HIV/AIDS as a disability that seriously threatens the life of the patient.

29 A Whiteside and C Sunter (n 20 above) 3.

30 As above.

31 LOA 'The evidence that HIV causes AIDS' (n 20 above).

32 N 12 above.

Although the Zurich case dealt with an issue involving a group insurance scheme, the BC Human Rights Tribunal said that there are no compelling reasons for restricting the Zurich test to cases involving group insurance.[33]

London Life argued that the decisions made by three other companies to deny insurance to J confirm the existence of an accepted industry practice to refuse coverage to an individual in his risk category. London Life claimed that there was no way to actuarially determine the mortality rate of someone in J's situation at the time of the facts. As a result, it could not assess the risk presented by J and therefore, could not determine the risk category to which he belongs or the premium associated to J's presented risk. This argument is similar to the argument that statistical and actuarial studies on HIV/AIDS are not available and therefore risks presented by HIV positive individuals to life insurance companies are not assessable.

In South Africa, the argument of non-availability of statistical and actuarial data on the epidemic of HIV/AIDS is not viable. Metropolitan Life has indeed undertaken research into HIV/AIDS and launched the Metropolitan Doyle Model in the late 1980's. It was the first statistical model to estimate the effect of the disease in South Africa.[34] The Doyle Model enabled Metropolitan Life to predict, within a few percentage points, HIV prevalence in South Africa,[35] and to design a special life insurance policy for HIV positive individuals. More recently, the Actuarial Society of South Africa's (ASSA) AIDS even developed another model, which basic principles are based on the Doyle Model.[36]

Moreover, the BC Human Rights Tribunal found that in the absence of actuarial and statistical evidence establishing the risk of ensuring J, London Life could not justify its practice of refusal.[37] Accordingly, the insurance company was found to proceed on the assumption that it could not quantify the risk, and consequently refused to insure people in J's situation. On this basis, the BC Human Rights Tribunal concluded that the decision of London Life to refuse life insurance cover to J was not in accordance with a sound and accepted practice.

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33 *J v London Life Insurance Co* (n 22 above) 53.

34 S Wood 'HIV/AIDS: a complex issue in the assurance industry' <http://free.financial.mail.co.za/report/metropolitan03/cmetropol.htm> [accessed 27 October 2003].

35 As above.

36 UN Wire 'South Africa's latest AIDS projections spark controversy' <http://unwire.org/UNWire/20031023/449_9718.asp> [accessed 27 October 2003].

37 As above at para 55-56.

In its findings, the BC Human Rights Tribunal reasoned on the basis of a case by case approach and considers any blanket policy of excluding coverage for spouses of HIV positive individuals as unjustified.[38]

4.3 CONCLUSION

In Canadian courts, life insurance is considered as a service which should not b denied to a person who applies for it. The equality clause of the South African Constitution should have the same effect and prohibit insurance companies from discriminating between individuals. It transpires from the above analysis that the non-existence of statistical and actuarial data is not enough justification to a discriminatory practice. The only exemption should be based on a sound and accepted business practice, and should be justified if there is no practical alternative to the discriminatory practice. In South Africa, actuarial models have been developed to enable insurance companies to design life policy for HIV positive persons. Moreover, the fact that Metropolitan Life and Old Mutual provide life cover for HIV positive persons proves that the discriminatory practice is not largely accepted and there is a practical alternative to it.

Furthermore, the insurance business should not be based on a blanket discriminatory practice, but rather on a case by case approach, in which individualised testing could be considered as an alternative to a discriminatory practice. Accordingly, the life insurance business should not practice blanket discrimination toward HIV positive individuals. Instead of excluding all HIV positive individuals, the number of T-4 cells in their blood could be used to determine their insurability, as Metropolitan Life and Old Mutual practice it.

[38] As above at para 38.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

South Africa has transformed her legal order to comply with the international human rights standards she acknowledged, by adopting a Bill of Rights as well as various examples of legislation to uphold the human rights of all South Africans. The right to equality and its derivative, the principle of non-discrimination, is fundamental to post-Apartheid South Africa, and more so in the context of the HIV/AIDS epidemic and the systemic discrimination HIV positive persons encounter. All sectors, public as well as private, are bound by the principles of equality and non-discrimination. Therefore, insurance companies cannot unfairly discriminate against HIV positive persons and exclude them from their schemes. At present, however, many life insurance policies are at variance with the above standards, as they exclude HIV positive persons from such schemes solely on the basis of their HIV status.

From the point of view of insurance companies, the rationale for exclusion is mainly the difficulty of defining a life-table for HIV positive individuals, reflecting their mortality rate their mortality rate or their life expectancy. International, regional and national legislation prohibit discrimination on the basis of 'prohibited or listed grounds'. Although HIV status is not a listed ground, this study argued that it is an analogous ground, which should be considered as a prohibited ground on its own. Insurance practices have to evolve in line with human rights standards, as well as new actuarial and scientific developments on HIV/AIDS.

The discrimination practice in the insurance business dramatically affects the lives of HIV positive individuals and their dependants, especially as they already experience a pattern of discrimination in the society. Therefore, this discrimination is unfair because it adversely impinges on the human dignity of HIV positive individuals. An analysis of foreign jurisprudence revealed that in 'other open and democratic societies', exemption to the non-discriminatory principle in the insurance business is justified only if the discriminatory practice is sound and accepted and no practical alternative is available. In the South African context in particular, the fact that two insurance companies grant life cover to HIV positive persons is enough to prove that there exists an alternative and the practice of exclusion is not widely accepted. Therefore, this study concludes that the exclusion of HIV positive persons from life insurance schemes is unfair in South Africa.

Consequently, the challenge would consist of ensuring that insurance companies comply with their obligations to non-discrimination. The following recommendations are made:

5.2 RECOMMENDATIONS

- International and regional human rights instruments should be amended to include HIV status as a separate prohibited ground of discrimination. Given the scale of the epidemic, stronger attention should be paid to the conditions of HIV positive individuals. A straightforward prohibition of discrimination on the ground of HIV status would achieve this purpose. Moreover, it should be clearly mentioned that economic justifications should not prevail on the right of HIV positive persons to life, human dignity, non-discrimination and health. Indeed, even though several declarations and resolutions on HIV/AIDS have been adopted, they do not have any binding force and do not imply legal obligations on the part of States.

- At the regional level, it is recommended that the African Commission on Human and Peoples' Rights urge States to include in their reports on the situation of human rights, a section on HIV/AIDS in their respective countries. The information in this section should be the result of the monitoring of HIV related discrimination in the private sector, especially sensitive sectors such as the insurance business, the workplace and the sector of education.

- States, NGOs, other entities and individuals should strive towards changing the environment of secrecy around HIV/AIDS. Fear of discrimination and stigmatisation increase the devastating potential of the pandemic of HIV /AIDS. Therefore, relentless campaigns of sensitisation about HIV/AIDS, geared towards eradicating misbelief about the disease, should be promoted. Such campaigns should constitute the priorities of Third World countries in terms of public health policy because the economic impacts as well as the costs of HIV/AIDS are likely to impoverish them more. Moreover, in fighting this environment of secrecy, victims of discrimination, whether in the private or the public sectors, should be encouraged to bring their claims before courts.

- The scientific community should also strive towards a better knowledge of HIV/AIDS, particularly life expectancy at each stage of disease. This would enable insurance companies to define life-tables for HIV/AIDS and design life policies for HIV positive persons. Research for efficacious medicines should also be made the most important

component of the fight against the HIV/AIDS epidemic. Medicines stemming from such research must be made accessible to HIV positive persons.

- Insurance companies should be made accountable and more responsive to the principles of human rights. They should adopt their underwriting criteria on the basis of neutral grounds. They should be made to take into account the different actuarial models and design a policy for HIV positive individuals. By having more companies providing life cover to HIV positive persons, the insurance premiums may drop, in virtue of the law of supply and demand. However, as South Africa has ratified international instruments prohibiting unfair discrimination, state responsibility towards her citizens would be engaged once private actors do not comply. Therefore, if insurance companies still refuse life cover to HIV positive persons, the South African government should include a program to subsidise special life cover for HIV positive individuals as part of the national plan of action against the epidemic.

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