

**RETHINKING THE RIGHT TO VOTE: HIV/AIDS AND ITS IMPACT ON ELECTORAL
PARTICIPATION IN SUB-SAHARAN AFRICA**

**A dissertation submitted to the Centre for Human Rights Faculty of Law
University of Pretoria in partial fulfilment of the requirements of the Masters of
Law (LLM in Human Rights and Democratisation in Africa).**

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Declaration

I, Nyasha Constance Chingore declare that the work presented in this dissertation is original. It has never been presented at any other university or institution. Where other people's work has been used they have been acknowledged and full references provided.

This dissertation is presented in partial fulfilment of the LLM in Human Rights and Democratisation in Africa.

Signed

Date.....

Dedication

This paper is dedicated to my little brother, Tichafara Chingore who I promised the next one would be for the guys I never really thought there would be a next one but hey... this is for you little bro...

And to the only other guy in my family, my dad just so that you don't decide the next one should be for you.

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List of Abbreviations

AIDS	Acquired immunodeficiency syndrome
ACHPR	African Charter on Human and Peoples' Rights
HIV	Human immunodeficiency virus
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
PLWHA	People living with HIV/AIDS
UDHR	Universal Declaration of Human Rights
UN	United Nations

CHAPTER ONE: INTRODUCTION

Since the HIV/AIDS pandemic began in 1981, more than 20 million have died of the pandemic. HIV/AIDS is now one of the leading causes of death in sub-Saharan Africa and worldwide, with 6 000 new infections occurring each day. An estimated 40 million people globally are living with HIV/AIDS.¹ Africa is currently the worst HIV/AIDS affected region in the world,² with an estimated 70% of the world's HIV/AIDS cases.³ More than twenty-five million people on the continent are infected with HIV. In Southern Africa the crisis is particularly acute. According to recent estimates, one quarter of the population in the region may carry the virus, with South Africa, Botswana, and Namibia having suffered the worst of the human cost on the African continent.⁴ In Swaziland, Zambia and Zimbabwe, without antiretroviral programmes, average life expectancy is predicted to drop below 35 years.⁵ In Botswana Life expectancy is only 39 years while it would have been 72 if it were not for AIDS⁶

The HIV/AIDS pandemic has become one of the most devastating disease humankind has faced in modern times. Medicine and research have failed to come up with a cure or vaccine against it. Its impact on human life has caused it to take precedence on the agenda of many major international bodies and has commanded the joint cooperation of many different organisations, some of these not health related in the strictest sense with the realisation that impact of the pandemic goes beyond a simple health crisis.⁷

¹ The Joint United Nations Programme on HIV/AIDS (UNAIDS) 2004 Report of the global AIDS pandemic available at <<http://www.unaids.org/wad2004/report.html>> (accessed 8 October 2005)

² UN General Assembly Declaration of Commitment on HIV/AIDS 'Global Crisis – Global Action' available at <www.un.org/ga/aids/coverage/FinalDeclarationHIV/AIDS.html> (accessed 8 October 2005), See also the African Commission Resolution on HIV/AIDS Pandemic-Threat against Human Rights and Humanity, done in Tripoli, 7 May 2001

³ Dr. Peter Piot, the Executive Director of UNAIDS, speaking during the Global Forum on Health and Development at the AU summit, said 'Sixty million Africans are either living with HIV, have died of AIDS or they have lost their parents to AIDS. But the toll of those directly affected is even higher.' UNAIDS Press Release, Maputo, 10 July 2003; <www.unaids.org/EN/media/press+releases> See also the estimates of UNAIDS/WHO available at <www.unaids.org/hivaidsinfo/statistics/fact_sheets/all_countries_en.html#N> (accessed 8 October 2004)

⁴ UNAIDS 2004 Report of the global AIDS pandemic n1 above

⁵ As above

⁶ USAID (2002) 'Life Expectancy will drop worldwide due to AIDS', Press Release, 8 July 2002 <www.usaid.gov/press/releases/2002/pr020708.html> (accessed 8 October 2005)

⁷ UNAIDS, is the programme formed under the UN to unite the responses to the pandemic of nine cosponsoring organizations the United Nations Children's Fund (UNICEF), the World Food Programme (WFP), the United Nations Development Programme (UNDP), the United Nations Population Fund

Indeed issues of access to medication, public health, proper testing for HIV, together with access to condoms, confidentiality, privacy, discrimination and public education have been the subjects of highest priority in international response to the HIV/AIDS crisis since it was first treated as a public health issue. However, even though a cure remains elusive, we have learnt crucial lessons about what works best in preventing new infections and improving the quality and care for people living with AIDS. In the wake of major developments, particularly antiretroviral medicine and as the world begins to move out of the panic stage in its reaction to the pandemic it is slowly becoming more evident that HIV/AIDS does not constitute a medical emergency alone, but also challenges development, national security and maintenance of global peace and security.⁸ This paper argues that a less publicized, but serious impact of the pandemic is the challenges it poses to democracy.

1.1 Rationale for the study

Elections form a key component of democratic governance.⁹ Democracy denotes a political system that, among other things, allows citizens to freely choose their government over time through credible, legitimate and acceptable elections; a system which accords them adequate participation in national affairs and a system in which the national affairs are run in a transparent and accountable manner.¹⁰ Democracy as a concept rests upon the consideration that a political leadership in a country must be chosen through an election governed by fair rules under which social groups and political forces may compete on equal terms.¹¹ Research has shown that HIV and AIDS may have adverse effects on democracy in Southern

(UNFPA), the United Nations Office on Drugs and Crime (UNODC), the International Labour Organization (ILO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), and the World Bank. Its purpose is to lead and assist an expansion of the international response to HIV/AIDS on all fronts. UNAIDS works with a broad range of partners – governmental and nongovernmental, business, scientific and lay – to share knowledge, skills and best practices across boundaries.

⁸ U Kristofferson, Humanitarian Coordinator, Joint United Nations Programme on HIV/AIDS (Sweden) 'HIV/AIDS as a Human Security Issue: A Gender Perspective' <<http://www.un.org/womenwatch/daw/csw/hiv aids/ Kristofferson.htm>> (accessed 8 October 2005)

⁹ T M Frank 'The Emerging Right to Democratic Governance' 86 *Am.J. Int'L* 46, 63 he cites General Assembly Resolution 45/150 (Feb 21, 1991) titled Enhancing the effectiveness of the principal of periodic and genuine elections

¹⁰ K Matlosa Elections and Democracy in Southern Africa, Progress, Problems and Prospects for Electoral Systems Reform: Electoral Systems and Reform in Representation, June 29-July 1, EISA Conference paper.

¹¹ As above

Africa.¹² Electoral systems, voter participation, electoral management and administration and political institutions are among the areas of democratisation most affected by HIV/AIDS.

Some of the effects of HIV and AIDS are that the burden it poses often subtracts from individuals' personal commitments to other important issues including electoral participation. Illness, funerals and caring for the sick and orphans reduce people's ability to participate in politics.¹³ Stigma, cultural taboos and HIV/AIDS-related discrimination often become unspoken sanctions hindering the political response of HIV/AIDS infected and affected people.¹⁴

Over the past two centuries, democracy has come to enjoy a privileged normative status as the preferred type of political regime because it uniquely recognizes the moral agency and dignity of human beings, and thus their right to determine their individual and collective fates,¹⁵ yet it is precisely this moral agency and human dignity that may be most severely challenged by HIV/AIDS.

For a democracy to develop, the widest possible participation is necessary. This is crucial when elected governments will be called on to address the impact of HIV/AIDS on citizens and future generations. The disease challenges us to consider extraordinary ways and means of dealing with it. In light of the above-mentioned debilitating effects of the pandemic on communities, it is imperative and indeed an international human rights obligation for states to consider introducing more voter friendly and inclusive ways of participation in the electoral process. This is to ensure citizen participation and the preservation of one of the most fundamental concepts of democracy.

¹² P Strand, et al 'HIV/AIDS and Democratic Governance in South Africa: Illustrating the Impact on Electoral Processes' Final Report of research done by the Centre for Social Science Research, Democracy in Africa Research Unit University of Cape Town and The Governance and AIDS Programme (GAP) of the Institute for Democratisation in Southern Africa (IDASA) available at <www.idasa.org.za> (accessed 21 June 2005)

¹³ K Chirambo 'AIDS and Electoral Democracy: Applying a new lens to election coverage' where it is stated that According to 2004 results of an Afro barometer survey, up to five percent of South Africans spend more than 5 hours a day tending to orphans. Families are therefore likely to consider elections a lesser priority as they struggle for survival (<http://www.idasa.org.za>)

¹⁴ 'HIV/AIDS democracy and citizenship: The participatory perspective', available at <<http://www.eisa.org.za/PDF/HIVElections.pdf>> (accessed 15 June 2005)

¹⁵ A Sen, 'Democracy as a Universal Value', *Journal of Democracy* 10(3), 1999, p3, 7

Strategies are discussed in this paper which governments may explore in order to remedy the effects of HIV/AIDS on the right to political participation. This right is recognised in international and regional treaties such as the International Covenant on Civil and Political Rights and The African Charter on Human and Peoples' Rights.¹⁶ Given the importance of the balance between good governance and representation for the translation of votes into seats *and* policy choices, it is crucial that HIV affected people are empowered to vote, thus exercising their fundamental human right to political participation.

Proceeding from notions of equity and legitimacy, there are community interests in making voting methods appropriate for different needs and lifestyles. Governments are finding it more and more necessary to be recognised as legitimate in order to avoid persistent challenge to authority causing instability and enabling them to govern with essential societal acquiescence.¹⁷ Beyond that, special voting programmes aimed at expanding or rehabilitating losses in electoral franchise would effectively empower an important and otherwise neglected section of citizens and eligible voters, and uphold the principle of necessary integration.¹⁸ The massive impact of the HIV/AIDS pandemic on the sub-Saharan African continent makes it impossible to ignore its possible impact on the basic political rights of HIV/AIDS infected and affected people.

Considering regional estimates of adult HIV prevalence, upward trends in the spread of HIV/AIDS in communities in Southern Africa and socio-demographic consequences of the pandemic on life expectancy, population and orphan-hood, practical steps are needed to promote innovative strategies to empower citizens to make a real impact on their governments' policies.

Possible strategies for ensuring that voting methods are appropriate for the needs and lifestyles of infected and affected people include ensuring that registration procedures are made less strenuous. A system of "special votes" where it does not exist should be introduced to make voting possible for sick people and their caregivers. South Africa's system of special voting allows people who are unable to

¹⁶ Article 25 and article 13 respectively

¹⁷ T M Franck n9 above p 51, HJ Steiner and P Alston (2000) International Human Rights in Context: Oxford University Press p 892

¹⁸ HIV/AIDS democracy and citizenship: The participatory perspective n14 above

go to a polling station as a result of illness or other disabilities to apply for their vote to be cast in their houses.¹⁹ Where legislation already allows for special votes for disabled people, the definition of people who can apply for special voting in electoral laws should be expanded to include those affected and afflicted by debilitating illness such as AIDS. Logistical measures like increasing the number of registration and polling stations would also make participation more accessible and practical. This research suggests that reforms should not be left to the political will of those running elections but be made effective through legal obligations to ensure participation. This research highlights that states have an obligation to ensure such voter participation under international treaties.

1.2 Research questions

The research questions are:

1. What does electoral participation mean for democratisation and especially in the context of HIV/AIDS?
2. Does existing domestic legislation adequately ensure participation? Are existing legislations capable of dealing with the current situation due to the HIV/AIDS pandemic?
3. What are the obligations of governments to provide an atmosphere conducive to participation?
4. What are the international obligations to provide an atmosphere conducive to participate in terms of responsibility to promote and fulfill?
5. What are possible domestic legal reforms?

1.3 Significance of the study

Africa has in recent years made significant strides towards democracy. This research recognises that elections cannot be equated to democracy but it works on the premise that regular, free and fair elections are integral part of democracy and democratisation.

The research adopts the view that HIV/AIDS has the potential to reverse hard earned gains towards democracy. Its impact on electoral participation in Sub-Saharan Africa

¹⁹ Section 33 of the South African Electoral Act (Act 73 of 1998)

may soon become significant enough to warrant the questioning of the legitimacy of governments if efforts are not made to address the issue immediately.²⁰ It is in the interests of all on the continent to begin addressing this possible threat to hard earned gains. At the UN Fourth International Conference of New or Restored Democracies delegates stressed that democracy is inconceivable without human rights and, in particular, the rights of women, children and minorities, and that it requires the expansion of political space in order to guarantee the full exercise of the political, economic, social and cultural rights of all.²¹

1.4 Research methodology

The methodology adopted is that of literary review, examination and analysis of international regional and domestic statutes.

The research is divided into two parts. It provides a background to the link between HIV/AIDS and participation in elections. I discuss the international and national constitutional provisions recognising the right to vote and placing an obligation on the state to ensure the fulfilment and protection of this right, thus developing a theory for meaningful democratic participation in southern Africa. I explore whether the current law adequately provides for the right to vote of AIDS affected and infected people and how the law may intervene to ensure the effective realisation of this right of affected voters.

The study investigates how elections are run in Southern Africa and highlights practices which may enable better citizen participation in the light of the HIV/AIDS pandemic. The material used in this paper includes:

1. Articles and texts on the subject
2. International Human Rights Instruments

²⁰ In Zambia, analysis of the HIV and AIDS prevalence per province and the voter population over three national elections indicate that in the provinces hardest hit by pandemic – Lusaka (27.3%), Copperbelt (26.3%) and Western (18.9%) – the number of voters that registered for presidential elections has gradually been declining since 1991. In the Copperbelt region there was a total decline in voter population of 167 349 (from 620 589 to 453 240) suggesting a possible link between reduced participation and the pandemic see K Chirambo n13 above

²¹ UN General Assembly Fifty-sixth session Agenda item 35 Support by the United Nations system of efforts Governments to promote and consolidate new or restored democracies Report of the Secretary General available at <<http://www.un.org/documents/ga/docs/56/a56499.pdf>> (accessed 14 October 2005)

3. International Statements on the Commitment to eradication of HIV
4. National Legislation and policy documents

1.5 Literature review

A large amount of research has been done on HIV/AIDS from many different fields. The initial stage that the pandemic went through was that of a health crisis, as a result initial research also tended to center on issues of HIV/AIDS and public health.²² As the pandemic continued with the numbers of those affected increasing and medical advances were made as regards treatment, human rights discourse in the HIV arena began to dominate and issues of access to healthcare, confidentiality, privacy, discrimination and testing became the most widely researched areas on the topic.²³

Research on HIV/AIDS and its relationship to governance and democracy is still in its infancy and has been carried generally from two perspectives: the impact of democracy, governance, security²⁴, and related factors on the spread and of HIV/AIDS and the impact of HIV/AIDS on democracy, governance and security. Ryann Manning²⁵ has done what seems to be the most extensive literature review on the subject.

²² M Kirby 'Never ending paradoxes of HIV/AIDS and human rights' (2004) *4 African Human Rights Law Journal* 163, See also D Patterson and L London, 'International Law, Human Rights and HIV/AIDS', *Bulletin of the World Health Organisation* (2002) Vol. 80 No. 12

²³ The most notable response in this era are the UN Guidelines on HIV/AIDS and Human Rights which have synthesised and summarised most of the work in this area establishing an international human rights standard to HIV/AIDS

²⁴ In July 2000, AIDS became the first-ever health issue to be addressed by the United Nations Security Council, which issued a resolution on HIV/AIDS acknowledging both that the AIDS pandemic is exacerbated by violence and instability and that the pandemic "if unchecked, may pose a risk to stability and security" Security Council Resolution 1308 (2000) on HIV/AIDS, calls for Pre-Deployment Testing, Counselling for Peacekeeping Personnel," United Nations Press Release SC/6890, July 17, 2000, see also A T Price-Smith, 'Contagion and Chaos: Infectious Disease and its Effects on Global Security and Development', CIS Working paper 1998-001, Program on Health and Global Affairs, Centre for International Studies, University of Toronto, available at <<http://www.utoronto.ca/cis/Chaos.html> > (accessed 22 June 2005) and T I Gizelis' Wealth Alone does not Buy Health: State Capacity, Democracy, and the Spread of AIDS' available at <<http://mediacyber.law.harvard.edu/blogs/gems/politicshiv/gizelis.pdf> > (accessed 22 June 2005)

²⁵ 'AIDS and Democracy: What do we know?' Prepared for AIDS and Democracy: Setting the Research Agenda workshop Co-sponsored by Health Economics and AIDS Research Division (HEARD), University of Natal Democracy in Africa Research Unit (DARU), University of Cape Town Institute for Democracy in South Africa (IDASA) available at <www.heard.org.za/research/ResearchReports/2002/Literature%20Review.pdf> (accessed 22 June 2005)

Many authors have considered factors of democracy and good governance that may help slow the pandemic and minimize its impact, for example that fair legal systems and respect for human rights would help reduce stigma and increase openness, thus aiding prevention, and that legitimate governments would come up with more effective responses to the pandemic, than illegitimate ones. The impacts of a strong civil society and free media, as well as the impact of conflict on HIV/AIDS have been discussed.²⁶ However, this paper discusses HIV/AIDS and its link to democracy from the opposite perspective of highlighting the impact of HIV/AIDS on democracy.

A number of political theorists, public health experts, policy analysts and others have examined the potential impact of HIV/AIDS on democracy, with most concluding that the pandemic is likely to have a dire impact on the effectiveness and long-term sustainability of democracy in heavily-affected regions. Very little of this work is based on substantive evidence of an impact on democracy, and rather presents informed but speculative analyses based on the available epidemiological data and knowledge of political systems, democratic theory, international relations, and related fields.

The basis for much of the thinking around HIV/AIDS and democracy lies in research on the link between poor health and political instability and between good health and democracy.²⁷ In recent years, researchers and analysts have begun to address the specific case of HIV/AIDS and democracy. A few have attempted to tackle the problem holistically, exploring the multiple avenues by which the pandemic may undermine democracy in affected areas. Articles by Robert Mattes and researches of the Centre for Social Science Research, democracy in Africa research unit, University of Cape Town discuss the potential impact of HIV/AIDS on Democracy in Africa from an economic, institutional and cultural perspective. Robert Mattes

²⁶ A Whiteside 'The Threat of HIV/AIDS to Democracy and Governance', Briefing prepared for USAID, 1999 referred to by Manning's n 25 above, see also R Mattes 'Healthy Democracies? The potential impact of HIV/AIDS in Southern Africa' available at <www.iss.co.za/Pubs/Papers/71/Paper71.PDF > (accessed 24 June 2005), P Fourie and M Schonteich, 'Africa's New Security Threat: HIV/AIDS and human security in Southern Africa,' African Security Review 10:4, 2001, available at <<http://www.iss.co.za>> (accessed 24 June 2005), David Patterson, 'Political Commitment, Governance and AIDS: A Discussion Paper', Interagency Coalition on AIDS and Development, available at <http://www.pactworld.org/Aidscorps/tool_kit.htm > (24 June 2005), See also "HIV/AIDS – A Governance Challenge," United Nations Development Programme, Bureau for Development Policy, Special Initiative on HIV/AIDS, July 2001, available at < <http://www.undp.org/hiv/index.html>> (accessed 24 June 2005),

²⁷ TR Gurr, *et al* cited in David Gordon *et al*, 'The Global Infectious Disease Threat and its Implications for the United States, NIE 99-17D, National Intelligence Council, Central Intelligence Agency available at <<http://www.cia.gov/publications/nie/report/nie99-17dhtml>> (accessed 7 October 2005)

argues²⁸ that HIV/AIDS threatens to block even democratic development across the region.

Alan Whiteside's briefing to USAID, lists a number of ways that HIV/AIDS could impact democracy. The illness and death of prime-age adults will affect commerce and development. He argues that these deaths will also represent a loss of human capital and resources invested in education, training and experience.²⁹

Manning quotes Samantha Willan noting the paucity of research on this topic, which she calls "crucial for the survival of democratic governance in some countries." She notes a possible decrease in citizen 'support' for democratic government – "if you have a fatal disease, or if your life is burdened with caring for such people, why does it matter how you are governed?" as well as a possible "desperation to try any form of government that promises to offer a solution." She also notes a possible decrease in citizen participation in democracy, because both being ill yourself and caring for others decreases the time and resources available to get involved in democracy, while being diagnosed HIV-positive may decrease or eliminate the incentives for involvement in political life.

Jeremy Youde³⁰ outlines a link between disease and democratic legitimacy and stability. The impact of the pandemic on democracy, which Youde characterizes as indirect, occurs as HIV/AIDS disrupts the mechanisms that support elections, economic growth and civil society.³¹ Youde believes HIV/AIDS will undermine democracy: by hindering the administration of elections and undermining their legitimacy, retarding economic growth, and weakening civil society. He bases his information on five southern African democracies; Botswana, Lesotho, South Africa, Zambia and Zimbabwe. He argues that electoral administration will be hindered by the increasingly challenging task of updating voter rolls to purge dead "ghost voters," the high and increasingly unsustainable cost of elections, the loss of skilled and impartial civil servants needed to administer elections and the disenfranchisement of infected and affected citizens due to burdensome registration requirements. These

²⁸ R Mattes n26 above

²⁹ See n26 above

³⁰ J Youde, "All the Voters Will Be Dead": HIV/AIDS and Democratic Legitimacy and Stability in Africa, University of Iowa, August 15, 2001 available at <www.ifes.org/searchable/ifes_site/PDF/research_comm/08_15_01_Manatt_Jeremy_Youde.pdf> (3 August 2005)

impacts in turn are likely to undermine the legitimacy of elections and of democracy itself.

Ryann Manning in her review highlights one of her own unpublished works which takes a theoretical perspective to explore conceptually the potential impact of HIV/AIDS on democracy. She identifies ways in which HIV/AIDS could be expected to detrimentally impact some of the central elements of democracy, such as inclusion and the opportunity for effective participation. She considers the potential impact of HIV/AIDS on factors that are believed to help sustain democracy.³² These factors include economic growth; essential political institutions, such as elections, constitutionalism, decision-making and service delivery institutions; a cultural support for democracy and general “civic-ness” in a society, including democratic participation and a strong civil society. She concludes that HIV/AIDS has the potential to undermine democratic institutions and the many of the factors that are believed to help sustain nascent democracies, but that this impact is not certain.

The most recent comprehensive work on this subject is a report, HIV/AIDS and Governance: Illustrating the Impact on Electoral Processes, by the Institute of Democracy in Southern Africa (IDASA). It demonstrates that HIV/AIDS is not just a health crisis, but also a pandemic that has implications for political and social processes. The analysis and results presented in the report show that the pandemic may undermine the democratic project in South Africa and possibly most of sub-Saharan Africa by destabilizing electoral systems, reducing political party support bases and the ability to compete, decreasing the participation in public processes of citizens affected and infected by the pandemic and potentially undermining the capacity of electoral management bodies to conduct elections effectively. This and other Governance and AIDS Programme (GAP) research publications by IDASA³³ set the groundwork for this research.

The aim of this research is to highlight some of the research on the impact of HIV/AIDS on Democracy. However, this paper differs from the works highlighted above in that its main focus is not on establishing a link between HIV/AIDS and democracy in general but focuses on the aspect of participation as a voter in

³² R Manning, ‘Applying Democratic Theory: The Case of HIV/AIDS’, unpublished paper, March 15, 2002. Health Economics and HIV/AIDS Research Division (HEARD), University of Natal, Durban discussed in Manning ‘Democracy and HIV/AIDS: What do we know?’ n25 above

³³ All available at <<http://www.idasa.org.za>>

elections. The paper assumes a link between HIV/AIDS and democracy and interrogates the legal obligations surrounding participation as well as the ways in which states may be required to comply with those obligations. It proceeds from the basis of answering the question if indeed as research has suggested, participation is affected in the context of HIV/AIDS, is there a legal obligation to do anything about it and what can be done? Many have discussed the possible link between HIV/AIDS, democracy and participation but no one has yet taken the step to consider the possible human rights obligations involved. This may perhaps in part be due to the lack of clear obligations surrounding voter participation in elections.

The paper does not purport to give comprehensive and uniform solutions to addressing the impact for every sub-Saharan African country but provides recommendations for concerned activists, electoral management bodies, governments, parliaments and policy makers to consider in addressing the impact of HIV/AIDS on electoral participation.

1.6 Limitations

The most significant limitation to this study is its strong reliance on the results of the IDASA research as the basis for the whole discussion. Due to time, resource and capacity constraints I was unable to carry out my own statistical analysis and therefore premise this paper on the assumption that the results of the IDASA research should be accepted as generally accurate. There is generally very little substantive data and primary research on the topic of HIV/AIDS and electoral participation. The vast majority of sources consulted are theoretical and conceptual pieces which speculate on the possible, probable, or expected impact of HIV/AIDS on democracy. There is to date no substantive proof of these predictions, a fact which however, should not be taken as rendering this discussion as moot. The goal of this paper is to explore the legal obligation of states to ensure electoral participation as a human right and as a requirement for democracy.

The study is also limited to a general discussion on possible amendments to electoral law to deal with the realities of HIV/AIDS in Sub-Saharan Africa. The research is not specific to any country but draws references and general trends from some South

African countries.³⁴ The position drawn from these countries is then considered to be representative of the rest of Sub-Saharan Africa with the result that recommendations can be extrapolated to other parts of Sub-Saharan Africa as a general trend. The paper overlooks intricate details of social, political and economic differences across the region.

1.7 Structure

Chapter One: Introduces the topic, the research questions to be answered by the research and the research methodology. It also contains a brief literature survey of the research on this topic so far.

Chapter Two: Sets out the legal framework, it gives an analysis of states obligation to ensure political participation based on international and regional standards. The rights of HIV/AIDS infected and affected persons to participate in government and the meaning of right to vote is discussed.

The application of the international law obligations to promote and fulfill are discussed and the question *do governments have a duty to set up special mechanisms to address the HIV/AIDS pandemic within the electoral context* is answered.

Chapter Three: Is an examination of the relationship between HIV/AIDS and political participation. A brief overview of current electoral statistics and statistics of the trend of the HIV/AIDS pandemic are given. The chapter examines the possible reasons for lack of participation by HIV/AIDS infected and affected persons.

Chapter Four: Is a critical analysis of some responses that can be adopted to address the situation. It focuses on mechanical and structural reforms to the electoral process.

- Amending electoral laws and policies to include postal, proxy and other special voting mechanisms.
- Providing for specific legal obligations, for example to have mobile registration and polling stations, to ensure that there is a polling station within a specific distance so that people do not have to walk far and stand in long queues in

³⁴ South African countries legislation mostly referred to in this study to include: Botswana, Malawi, Namibia, South Africa, Swaziland, Zambia and Zimbabwe

order to vote. The failure to meet such obligations must have specific legal consequences.

Chapter Five: Suggests a more controversial reform of lowering the voting age to address the impact of HIV/AIDS on democracy and children.

Chapter Six: Conclusion and Recommendations.

CHAPTER TWO: THE LEGAL FRAMEWORK

*States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.*³⁵

This chapter argues that it is an obligation on any state that has signed international human rights documents like the International Covenant on Civil and Political rights to ensure that effective measures are put in place to ensure that all persons are able to exercise their right to vote.

The right to vote must be enjoyed and exercised without discrimination. Everyone must have the right to free and equal access to participate, as well as the effective opportunity to participate, in electoral processes without discrimination of any kind. This right, linked to the right to full life includes the right to take part in cultural, social and political life.

The right to vote is an essential element for democracy. The Human Rights Committee (HRC) in their General Comment 25 state that Article 25 of the International Covenant on Civil and Political Rights (ICCPR) lies at the core of democratic government based on the consent of the people.³⁶

The HRC has confirmed that state parties to the ICCPR have the obligation to take effective measures to ensure that all persons entitled to vote are able to exercise that right.³⁷ In national law the South African Constitution and the Constitutional Court have stated that the right to vote by its very nature imposes positive obligations upon the legislature and the executive.³⁸

The South African constitutional court has described the right to vote as:

³⁵ General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art 25):. 12/07/96. CCPR/21/Rev.1/Add.7, General Comment No. 25. (General Comments) paragraph 11

³⁶ See paragraph 1 of General Comment 25 referred to above

³⁷ See n35 above

³⁸ In the *August and Another v The Electoral Commission and Others* Case CCT 8/99 paragraph 16, the court said that there was an obligation on the Electoral Commission to take reasonable steps to ensure that eligible voters are registered

... [O]ne of the foundational values of our entire constitutional order ... The universality of franchise is important not only for nationhood and democracy. The vote of each and every person is a bandage of dignity and of personhood. Quite literally it says that every person counts.³⁹

This case illustrates the special characteristics of the right to vote. Not only have courts viewed the right to vote as a bulwark against government infringement for example by keeping certain groups from voting but they have also seen the right to vote as imposing a positive obligation on the state to ensure that people can vote by making special efforts.⁴⁰

However, this seems not to be the universal approach. In the Zimbabwean case of *Jeffa Madzingo & 6 Ors v The Minister of Justice, Legal & Parliamentary Affairs & 3 Ors* SC 22/05 the Zimbabwean Supreme Court decided that the right to vote is not a fundamental human right under the Zimbabwean Constitution and refused to allow an order that special measures be provided to allow for about 2 million Zimbabwean living in the diaspora to vote in the parliamentary elections.

Although General Comment 25 expressly states that States must adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights protected by the right to vote⁴¹ international human rights law leaves open the ways of institutionalizing this ideal.⁴² A standard of what would be considered a system with adequate political participation has not clearly been defined. It is my argument that international law should be read as placing an obligation on States to ensure that citizens can effectively exercise their right to vote. Citizens should not only be entitled to take legal action to protect their rights to vote after they have been violated but also to insist on the adoption of policies, plans and programmes related to the general protection of their right to vote as well as demand that appropriate laws be enacted, that governments develop public policies and provide the necessary entities to ensure that affected members of the public benefit from such policies.

³⁹ As above paragraph 17

⁴⁰ A Kirshner, 'The International Status of the right to vote' p1. Democracy Coalition Project available at <<http://www.demcoalition.org>> (accessed 23 July 2005)

⁴¹ See n35 above paragraph 1

⁴² Steiner n17 above p891

2.1 Right to vote in international law

The right to vote is protected in numerous international and regional declarations and treaties. The Universal Declaration of Human Rights (UDHR) adopted unanimously by the United Nations General Assembly in 1948 in article 21 lays out the right of people to participate in government and enjoy universal suffrage. It provides:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The declaration is non-binding; its provisions are not accepted in *toto* as international law. No consensus has been reached as to Article 21 being accepted as generally enforceable customary international law. However, it is particularly significant in this context because of its express mention of ‘the will of the people’ as the basis of the authority of government.

The International Covenant on Civil and Political Rights, in contrast to the UDHR, takes its binding effect from its ratification by a large number of signatories (152 to date⁴³). Article 25 of the ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which, shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

The text of this article closely tracks the language of Article 21 of the UDHR. One important distinction, however, bears noting: the covenant not only protects the right

⁴³ See Table of the Status of Ratification of the Principal International Human Rights Treaties, available at <<http://www.unhchr.ch/pdf/report.pdf>>

of every citizen to vote, but it goes further to requires States to take the measures necessary to *ensure that citizens have an effective opportunity to enjoy the right*—in particular the Committee has emphasized that the right to vote ought to be guaranteed by law.

In the absence of prima facie discrimination written into the text of national law international jurisprudence leaves unclear the question of what exactly the duty of States is in ensuring that citizens none the less disenfranchised by cultural, economic or social reasons can exercise their right to vote. A single paragraph in General comments No. 25 on Article 25 of the ICCPR states that the Covenant requires states to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.⁴⁴ It emphasises that Article 25 of the ICCPR lies at the core of democratic government based on the consent of the people.

Positive measures should be taken to overcome specific difficulties or impediments to freedom of movement which prevent persons entitled to vote from expressing their rights effectively.⁴⁵

The HRC states that the exercise of the right protected under article 25 may be suspended or excluded only on grounds which are established by law and which are objective and reasonable.

General comment No. 31 on Article 2 of the ICCPR⁴⁶ on the nature of the general legal obligation imposed on state parties to the covenant paragraph 7 states that State parties are required to adopt legislative, judicial, educative and other appropriate measures in order to fulfil their legal obligations. Levels of awareness about the Covenant must be raised among public officials, state agents and the population at large.

⁴⁴ General comment 25 paragraphs 2 and 7

⁴⁵ Paragraph 12 of the General comment

⁴⁶ CCPR/C/74/CRP.4/Rev.6. (General Comments)

2.2 Duty of the state to protect, protect and fulfil human rights

The state has a duty to fulfil, promote and protect its human rights obligations. The duty to fulfil implies that States are obliged to take the necessary steps to ensure the realisation of human rights in practice through the adoption of legislative and other measures, such as the provision of education and other public services and policies designed to ensure access for everyone to basic needs. The obligation to fulfil includes the obligations to facilitate, promote and provide. States are obligated to take “effective measures to overcome specific difficulties” to ensure that their citizens are able to exercise the universal right to register to vote, as well as the right to vote in public on equal terms with others. Accordingly, States must overcome impediments to the right to vote by requiring election authorities to conduct voter education, voter registration, and voting at sites which are accessible for citizens with HIV/AIDS or affected by HIV/AIDS; to ensure that voters who reside in short-term or long-term institutions, and those who are home-bound by AIDS, can exercise the right to register to vote and the right to vote.

Article 2 of the ICCPR provides that State Parties to the Covenant undertake to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The Human Rights Committee has commented that it considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.⁴⁷

2.3 Regional Protection

Article 13 of the African Charter on Human and Peoples’ Rights provides that:

⁴⁷ Office of the High Commissioner for Human Rights General Comment No.03: Implementation at the national level (Art. 2) : . 29/07/81. CCPR General Comment No. 3. (General Comments) (Thirteenth session, 1981) this general comment has been replaced by General Comment 31 discussed in n45 above

1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.

The African Commission has not had occasion to comment on any case specifically regarding the disenfranchisement of voters under the ACHPR where there is no explicit legal discrimination but where the law makes no provision for their special circumstances. Most of the jurisprudence of the African Commission on the right to political participation centres on whether legal provisions amount to reasonable restrictions to participation and the protection of rights to assembly and association which are paramount to the enjoyment of the right to political participation.⁴⁸

Articles 60 and 61 of the African Charter allow the African Commission to apply international law in its interpretation of the African Charter. It would therefore follow that the comments of the UN Human Rights Committee would be applied to interpret the right to political participation enshrined in article 13 of the ACHPR should a case of failure to ensure effective measures come before the commission.

The full participation of all citizens in electoral processes is an underlying principle embraced by the continent of Africa in its goal of fulfilling universal adult suffrage and sustaining democracy. It is implied in many declarations that to the greatest extent possible; nation-states must endeavour to facilitate the expression of the will of all eligible voters on public affairs. The principles are endorsed by the African Union in its Election Guidelines, the Southern African Development Community (SADC) in its Mauritius Charter of 2004 and the SADC Parliamentary Forum in its election norms and standards. Sub-Saharan African countries are thus obliged by their own regional commitments to ensure the participation of all citizens in the electoral process.

2.4 Duties of Saharan Countries with large populations infected and affected by AIDS

⁴⁸ See for example *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000)

Constitutional right to vote articles provide individuals a powerful tool with which to challenge a state action or state inaction that impedes voters from exercising their right to vote. Accordingly, individuals with HIV or AIDS or any secondary conditions caused by it have an equal right to register to vote, and the concomitant equal right to vote. Individuals, who are subject to treatment, compulsory or otherwise, may not be excluded from or suspended in exercising their universal electoral rights where the right to vote is constitutionally protected.

In meeting their obligations to overcome specific barriers, states should consult with democratically elected representatives of organizations of people living with and affected by HIV/AIDS and their families, and through these consultations, identify and make use of appropriate mechanisms to ensure that their human rights can effectively be exercised.

Constitutions in sub-Saharan Africa generally protect the right to vote but often there is no express legal framework that caters for a situation where voters are unable to physically present themselves at the polling station to vote because of illness or other related reason such as caring for the infirmed. The table below shows the legal frameworks of some countries in Southern Africa and how they provide for the protection of the right to vote for citizens with special circumstances.

	Constitutional Right to vote Provision	Laws providing for special onsite assistance for voters	Laws providing for offsite voting.
Angola	Article 28, section (1) of the Constitution ⁴⁹	Article 120 ⁵⁰ of the Constitution.	None expressly provided for in the Electoral Act
Botswana	Article 67 of the Constitution	Article 51 of the Electoral Act	None expressly provided for in the Electoral Act
Malawi	Section 6 ⁵¹ and Section 40(3) ⁵²	Section 13 of the Constitution ⁵³ and	None expressly provided for in the

⁴⁹ Provides for the right and duty of all citizens aged over 18, other than those legally deprived of political and civil rights to take an active part in public life, to vote and stand for election to any State body.

⁵⁰ Section 1, states that electors who are blind and those who are affected by an obvious disease or physical disability may vote accompanied by an elector chosen by them, who is under the obligation of absolute secrecy

	and 77	Section 87 of the Electoral law.	Electoral Act
Mozambique	Article 107 of the Constitution ⁵⁴	The Electoral Law (1993) Article 141, section (1) and (2) ⁵⁵	None in expressly provided for in the Electoral Act.
Namibia	Article 17 section (2) of the Constitution ⁵⁶	The Electoral Law (31 August 1992) Section 84	
South Africa	Section 19(3) of the South African Constitution ⁵⁷	Electoral Law: Section 39(2)	Electoral Law (14 April 1999: Election Regulations) Section 5(1) ⁵⁸

⁵¹ Provides: save as otherwise provided in this Constitution, the authority to govern derives from the people of Malawi as expressed through universal and equal suffrage in elections held in accordance with this Constitution in a manner prescribed by an Act of Parliament

⁵² Provides: save as otherwise provided in this Constitution, every person shall have the right to vote, to do so in secret and to stand for election for public office

⁵³ Takes recognition of special needs with reference to disabled persons and provides that the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals... (g) To support the disabled through ... (iii) the fullest possible participation in all spheres of Malawian society.

⁵⁴ States, "(1) Representative organs shall be chosen through elections in which all citizens shall have the right to participate. (2) The election of representative organs shall take place through universal, direct, secret, personal and periodic vote."

⁵⁵ States that blind and unmistakably ill or physically disabled voters, of whom the polling station board verifies can vote accompanied by another voter of their own choice, who must guarantee the faithful expression of their vote and who shall be pledged to absolute secrecy."

⁵⁶ States: "Every citizen who has reached the age of eighteen (18) years shall have the right to vote and anyone who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein."

⁵⁷ States: "Every adult citizen has the right (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and (b) to stand for public office and, if elected, to hold office."

⁵⁸ "In this chapter the procedure for applying for special votes and the procedures for the casting and counting of special votes are prescribed as required by section 33(2) of the [Electoral] Act, read with the sub regulations. South Africa provides for off-site voting in respect of persons who cannot vote at a voting station in the voting district in which they are registered due to their (a) physical infirmity or disability, or pregnancy..."

Section 6(1) states, "A person referred to ... who wants to vote in the voting district in which he or she is registered, may apply for a special vote..."

Subsection (3) states, "The presiding officer, or a voting officer designated by him or her, must consider every application received and if he or she is satisfied that (a) the applicant is registered as a voter in that voting district; and (b) cannot vote at that voting station due to physical infirmity or disability, or pregnancy, approve the application and if not, reject the application."

Subsection (5) and (6) provide that if the application is approved the applicant may vote at home after meeting the specified requirements. Special voting stations are open the day before the general elections and are located in hospitals, old age homes, prisons, or other places.

Zambia	Article 75 of the Constitution ⁵⁹	The Electoral Act section 17(2) ⁶⁰	None expressly provided for in the Electoral Act
Zimbabwe	Section 58 of the Constitution provides that schedule 3 of the Constitution and the Electoral Law prescribe qualifications for voting. Electoral Act [<i>Chapter 2:13</i>] Section 3 of the Act spells out who can vote. ⁶¹	The Electoral Act sections 59-60	

⁵⁹ Provides: Every citizen of Zambia who has attained the age of eighteen years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections to the National Assembly, be entitled to be registered as such a voter under a law in that behalf, and no other person may be so registered."

⁶⁰ States: "...the Commission may, by statutory instrument, make regulations providing for all or any of the following matters...(s) the manner in which persons who are blind, or otherwise incapacitated, may vote..."

⁶¹ Reads: Subject to the Constitution and this Act, every election shall be conducted in way that is consistent with the following principles- (a) the authority to govern derives from the will of the people demonstrated through elections that are conducted efficiently, freely, fairly, transparently and properly on the basis of universal and equal suffrage exercised through a secret ballot; and (b) every citizen has the right –
a. to participate in government directly or through freely chosen representatives, and is entitled, without distinction on the grounds of race, ethnicity, gender, language, political or religious belief, education, physical appearance or disability or economic or social condition, to stand for office and cast a vote freely...

2.5 Conclusion

Legislation in Africa currently does not expressly provide for special measures for voters who may require special arrangements. In some cases these special measures are provided for by way of electoral commission regulations and directions, For example, a reading of the voter's registration procedures manual for parliamentary and presidential elections produced by the Malawi Electoral Commission (1999) leaves one with the impression that there are special arrangements for hospitalised persons and some form of proxy voting procedures. However, where electoral law delegates this obligation without providing that measures *must* be put in place this has resulted in many voters being disenfranchised. In Zambia such a situation resulted in the adoption of the Lusaka Declaration by Disabled Peoples Organizations (DPOS)⁶² soon after the 2001 tripartite elections where they noted with concern that there is no legal provision that requires that special measures for voting be put in place for those that may require them and that the Electoral Commission had not made adequate provisions for voters with special needs in that election causing affected voters potential disenfranchisement.

The right to vote in secret is a cornerstone of any free and democratic society. Denying effective measures to exercise that right to ill, disabled or otherwise incapacitated voters including those infected or affected by HIV/AIDS undermines democracy. It also violates the right to participate freely and on equal terms in public life, guaranteed by international human rights law. The ability of an infected or affected person to cast her vote speaks of the respect the dignity and self-determination of that person. Any violation of these rights should entitle the victims as a group or as individuals to seek an effective administrative, legal or judicial remedy.

⁶² Adopted at the ZAFOD Post Elections Conference held at Zambia National Association of the Deaf Complex in Chinika Area, Lusaka 5th April 2002 available at <http://www.electionaccess.org/publications/news/02_04_05_Zambia_Declaration.htm> (accessed 8 October 2005)

CHAPTER THREE: THE IMPACT OF HIV/AIDS ON POLITICAL PARTICIPATION

This chapter draws a link between electoral participation and HIV/AIDS in Sub-Saharan Africa. The chapter draws from extensive research done in South Africa in an attempt to test several hypotheses on this link which have been suggested by many scholars. The South African case study contextualizes the possible extents of the constraints on effective democratic participation in states hardest hit by the pandemic. It also provides the reader with a foundation for understanding the environment in which Southern African states must regard their legal obligations to ensure effective participation in the context of HIV/AIDS.

The question of what is the relationship between HIV/AIDS and political participation is difficult to answer. A brief overview of current electoral statistics and statistics of the trend of the HIV/AIDS pandemic will show that it potentially has a huge impact on elections especially in terms of mortality rates.⁶³ In some countries like Namibia and Botswana the impact of HIV/AIDS on sparsely populated countries of 1.8 million and 1.6 million people respectively would be explosive.

In sub-Saharan Africa, HIV/AIDS has followed the dominant pattern of typical transmission where the pattern has been one of transmission through contact between persons of the opposite sex with subsequent mother to child transmission. The result has been that unlike in the pattern in most developed countries HIV/AIDS has leapt beyond small minority groups in the community entering the cohort of the population comprising the overwhelming majority of the community. It has reached a level in terms of numbers and distribution that without radical interventions will mean increased and ongoing dangers to the entire population- or at least a large proportion

⁶³ It was established in the IDASA South Africa study that 1 488 242 of the country's registered voters died between 1999 and 2003 out of a total of 20 674 926 who were on the voters' roll for the 2004 general elections. Of the deceased voters, 714, 561 were female and 765, 031 were male registered voters. The concentration of mortality is higher in the 20-49 age cohorts and the 60-79 age groups. They argue that the sharp increases in mortality-in some cases up to 200 percent- among registered voters between the ages of 20-49 and particularly the women in the 30-39 year bracket-can to a large extent, if not wholly, be explained by AIDS basing their argument on the strong correspondence between the profiles that our analysis generated and those that have been described by the expert demographers in the field of HIV/AIDS. They note that it is fortunate that South Africa has citizen and voter registration systems that are directly compatible and therefore equipped to timeously update the voters' roll. However, this is not the case in most of sub-Saharan and the possibilities of electoral fraud through "ghost voting" are very real. See K Chirambo 'AIDS and electoral Democracy: What do we know' Presentation to the International Conference for Democracy Promoting Foundations, Stockholm 27-30 August, 2005 p16

of those in the ages most vital to the economy, being the ages of work, sexual activity, child bearing⁶⁴ and political participation.

However, the impact of HIV/AIDS on elections is not limited to the number of lives the pandemic has claimed. The population group that is most affected by the pandemic either as infected or affected people is the most economically and politically active. In hard-hit countries, AIDS is likely to reduce the growth rate of the labour force, as it primarily strikes the working-age population International Labour Organization projects that the labour force in 38 countries (all but four in Africa) will be between 5% and 35% smaller by 2020 because of AIDS.⁶⁵ The pandemic also has a particularly wider impact on women and members of the lower economic class, who are usually the majority in most sub-Saharan African societies.⁶⁶

Research has established that participation is not affected simply by illness but rather by stigma, poverty and the time consuming nature of the disease. A worrying scenario is how much time the burden that comes as a result of HIV and AIDS subtracts from individuals' personal commitments to other important issues including elections. Illness, funerals and caring for the sick and orphans may reduce people's ability to participate in politics. According to 2004 results of an Afrobarometer survey, up to five percent of South Africans spend more than 5 hours a day tending to orphans. In 2001, there were 660 000 orphans in the country as a result of HIV and AIDS deaths.⁶⁷ Where households are evidently over burdened as a result of HIV and AIDS, families are likely to consider elections a lesser priority as they struggle for survival.⁶⁸

With this in mind one could critically analyse voting trends that are usually attributed to voter apathy. It has been suggested that perhaps the definition of apathy needs to be expanded to take into account the circumstances brought to bear upon society by

⁶⁴ M Kirby n22 above p 164

⁶⁵ The Joint United Nations Programme on HIV/AIDS (UNAIDS) 2004 Report n 1 above, An example is that many reports have also been written on the impact of HIV/AIDS on teachers, teachers are vital to development and usually very active in politics in different ways J Youde discusses this link in his paper, J Youde n30 above p 37

⁶⁶ The UNAIDS 2004 Reports states that as of December 2003, women accounted for nearly 50% of all people living with HIV worldwide and for 57% in sub-Saharan Africa. Women and girls also bear the brunt of the impact of the pandemic; they are most likely to take care of sick people, to lose jobs, income and schooling as a result of illness, and to face stigma and discrimination.

⁶⁷ UNAIDS country profiles

⁶⁸ R Mattes n26 above

HIV/AIDS, which may lead to a complex range of personal situations that relate to declining participation rates⁶⁹

In their study on political opinions and degree of political activism, IDASA came up with interesting conclusions on HIV/AIDS and electoral participation which deserve consideration particularly when accessing how the right to political participation of HIV/AIDS infected and affected persons may be made to become tangible.⁷⁰ Their research on political opinion in South Africa, made use of the afrobarometer. The afrobarometer is a systematic survey of ordinary Africans' views toward democracy, economics and civil society, conducted in countries that have introduced a degree of democratic and economic reform. Because the instrument asks a standard set of questions, countries can be systematically compared.⁷¹ Each survey is based on a random, stratified, nationally-representative sample and the results of trained enumerators conducting face-to-face interviews in local languages. The 2004 IDASA Report is the latest research which set out to discover the link between HIV/AIDS and democracy using attitudinal data to confirm epidemiological data.⁷²

The first round of the Afrobarometer survey was conducted in nine countries in Southern Africa during the course of 1999 and 2000. Information from this survey indicates that many people in South and Southern Africa are very ill and are dying in increasing numbers. A second round of the Afrobarometer survey was conducted in 15 countries in the subcontinent during 2002 and 2003. The results from this second survey still need to be analysed in further depth, but initial analyses indicate a number of potentially important changes.

3.1 Civil society participation

⁶⁹ K Chirambo, 'AIDS and democracy: new lens on elections [2004 August 20]' available at <www.idasa.org.za>

⁷⁰ P Strand et al, n12 above The findings of this report in Part 3 (Chapters 7-10) of this report will be referred to extensively in this chapter

⁷¹ R Mattes, 'Examining HIV/AIDS in Southern Africa through the eyes of ordinary Southern Africans' Centre for Social Science Research Democracy in Africa Research Unit CSSR Working Paper No. 11 p12

⁷² Youde claims to have used a similar methodology but using a sample of 5 African democracies but how he exactly went about doing this research is not very clear from his paper, see J Youde n30 above p11

A problematic hypothesis as has already been alluded to is about how the impact of the pandemic relates to levels of participation in the democratic process and in civil society activism in general. High levels of the pandemic can either reduce or boost participation. There are several examples of how, in South Africa for example, the fight against the pandemic by civil society organisations has successfully boosted participation not only by infected and affected people but the community as a whole. The activism of the Treatment Action Campaign (TAC) is the most notable example.⁷³

However, other indications suggest that people are de-mobilised by the pandemic, either because they have lost hope of an effective political response or because they are too busy with providing home-based care for their own or someone else's AIDS related illness or AIDS orphans to engage themselves politically. Both these experiences exist and both simultaneously give shape to what is society's joint response to the pandemic.

There are a number of possible general explanations for the differences between the experiences and response in African sub-Saharan countries. One would be the ability of the health care system in the countries to provide the necessary care so as to alleviate the burdens placed on private citizens. The argument has been made that the relatively low numbers of people who provide home based care in South Africa⁷⁴ can be explained by a better than average health care system. Another possible explanation for South Africa's 'profile' could be the very heterogeneous character of South African society.

The results of the IDASA analysis on South Africa indicate that a person's responsibility for providing home-based care was a poor predictor of the degree to which she took active part in civil society activism.

3.2 Willingness or ability to perform civic duties necessary to vote

A related set of hypotheses predicted what home-based care implies for a person's willingness or ability to perform the civic duties necessary to vote – to obtain the relevant ID-document and to register to vote in South Africa. As was the case with

⁷³ R Mattes n28 above, P Strand et al n12 above p162

⁷⁴ P Strand et al n12 above p164 table 7.3 Average amount of home based care per day per person

civil society participation, either a person's motivation to perform these 'duties' is reduced by the despair and frustrations caused by having to provide home-based care, or these hardships generate an awareness and mobilises a determination to ensure that as many votes as possible are cast in favour of a political programme that people hope will assist them in their harsh situation.

Youde suggested that the impact of voter registration laws for states with high levels of HIV/AIDS could be tremendous. By requiring multiple trips and multiple forms of identification for registration, people with HIV/AIDS will be at a great disadvantage, as their illness can make it difficult for them to make any long journey, let alone multiple ones. These rules not only affect those with AIDS, but also those people caring for the sick.⁷⁵ A person is unlikely to be able to take a few days off to travel to register to vote. If someone is not registered, they cannot vote. Thus, burdensome registration requirements could effectively prevent large segments of the populations of some countries from having the option of exercising their right to vote.

The IDASA results indicate that, in South Africa in 2002, the responsibility for providing home-based care does not interfere with people's ability or undermine their willingness to perform these critical civic duties. If anything, a few significant positive coefficients suggested that people with responsibility for home-based care are more likely to also take a responsibility to ensure their active participation in the electoral process.

However IDASA noted that while these comments, arguably, are valid on the basis of their analysis of the data, it was important to also point out the limits of these conclusions. The first limitation is that the data is somewhat outdated. Research on survey data often seeks to test general theoretical hypotheses of a kind that does not require current data. But this is not the case with analyses of the impacts of the HIV/AIDS pandemic on the democracies in South and Southern Africa. A pandemic does not, by definition, cause a constant level of impact on a society. Since it spreads rapidly in the population, its effect also increases rapidly, albeit with a time lag in relation to its incidence in that population. They argue that in the context of AIDS in Southern Africa, two years is a long time in which the effects of the pandemic rise sharply. This means that the impact noted in South Africa on the basis of data from 2002 is not necessarily accurate for what impact the pandemic has at present. A

⁷⁵ J Youde n30 above p15

further limitation is that a single survey is a 'snap-shot' of reality that does not tell anything about trends in the impact being analysed. It is only when they can work on the data from the third round of surveys, planned for 2004- 2005, that comment on the direction of any such trends may be made. Taken together, these drawbacks with the data should caution one to remember that the pandemic is not only a 'moving target' but it is also a target with an impact that grows constantly both in extent and severity.

3.3 Impact on the levels of registration and voter turnout

Although the research did not find a direct negative impact of HIV/AIDS on participation in civil society, as regards the impact of HIV/AIDS on levels of registration and voter turn-out, the electoral statistics for the 2004 elections in South Africa set a downward trend in voter participation. Despite the fact that increasing numbers of South Africans have the right to vote and more of them registered to take part in the democratic process than in the two previous elections, fewer of them actually turned out to vote, either by choice or by circumstance.

Different hypotheses in trying to understand what causes the differences in participation across different countries and different categories of voters have been suggested. Factors such as the level of development and institutional differences, that is, mainly the electoral system and processes of registration, are said to play a part in the explanation. These hypotheses, however share the basic assumption that the potential voter can take part in the election but that she for one or other reason does not want to. What has been suggested in the literature is that the HIV/AIDS pandemic introduces a new hypothesis with the reverse logic that the voter wants to take full part in the election but that she cannot. IDASA put this hypothesis to the test in the context of the 2004 elections by analysing trends on voter registration and voter turn out in South Africa. Their tests of the hypotheses to explain the variations in participation indicated that there is a link to be explored further between non-participation and the HIV/AIDS pandemic.

3.4 Focus Group Results

Public opinion data from the Afrobarometer survey provided a snapshot in time of generalised public perceptions on the effects of the pandemic and the political dynamic introduced by it. However in the last analysis IDASA admitting their critical

awareness of the limitations and impersonal nature of statistics in general also used focus group discussions which tend to lend themselves to deeper qualitative analysis.⁷⁶ They reasoned that their appraisal of people who have had practical experience of the problem being studied constitutes a fundamental component of the research, as it helps in the attempt to understand the inter-relationship between those affected by the pandemic and their capacity to participate in elections.

They admitted that the intervention does not pretend to provide a representative sample but rather presents readers with a valuable insight into some of the realities of HIV/AIDS as endured by HIV-positive voters and those associated with caring for infected and affected persons.

From the focus group discussions it would appear that HIV/AIDS did not of itself dampen the political enthusiasm of People living with HIV and AIDS (PLWHAs). Rather, the environmental factors within a community played a major role, particularly the extent of stigma and discrimination.⁷⁷ The extent of illness in the main would pre-determine the degree of enthusiasm to override any perceived prejudice amongst the community and engage in public voting.

It would seem, however, that PLWHAs were more likely to take part in elections if they had not publicly declared their status or if they do not exhibit any symptoms of AIDS. But that would largely depend on whether they are in an urban or rural setting. There seemed to be stronger and more consistent references to stigma and discrimination from the rural-based groups than their urban counterparts. The discussions showed that care givers tended to find political activities time consuming, while some of the PLWHAs thought they were potentially damaging should their status be unduly exposed beyond known family circles.⁷⁸

The most dominant opinion amongst the PLWHAs and care givers interviewed in this study suggested that elections are viewed with utmost importance by the majority of both infected and affected persons. Amongst the larger pool of respondents, voting was closely related to change or high expectations of change in personal and

⁷⁶ P Strand et al n12 above p205

⁷⁷ as above p220

⁷⁸ As above p 222

societal circumstances. Respondents gave a number of reasons for voting or wanting to vote.

IDASA reports that the groups hold some relative regard for elections. However, the flip-side of this explains why persons who should have voted opted out. The factors that cause people not to vote were divided into two and called attitudinal and structural factors.⁷⁹

Attitudinal refers to factors that would cause PLWHAs and care givers not to participate in elections due to the negative pre-dispositions (real or imagined) of the community toward them. Structural factors relate to logistical arrangements put in place to facilitate processing of electors; it includes natural barriers such as distance and time.

Attitudinal factors that were identified included;

- Stigma and discrimination;
- Political disillusionment;
- Reacting to physical health circumstances (personal or another's);
- Contending priorities (care for orphan's vs. elections).

IDASA reports that stigma and discrimination resonated as the single most dominant determinant for lack of participation in elections. The PLWHAs harboured seemingly well founded fears that communities will ostracise or marginalise them further if they exposed themselves to major public events. The sense of stigma is seemingly strongest amongst people who are symptomatic: respondents apparently argued that most members of the communities would not stand in the same queue with someone with visible signs of the disease e.g. body rashes and sores. Some care givers tending to sick relatives or to AIDS orphans were similarly apprehensive of participation in public affairs: Mere association with AIDS sick or AIDS orphans may also cause them to become targets of discrimination.

The report also states that personal illness and care giving came through as important determinants of whether one participates in elections or not. Male participants in the 18-24 cohort and females in the 25-49 age bands emphasised their personal state of physical health, and attendance to sick relatives or orphans as

⁷⁹ As above p 221

major impediments to participation. Persons who had AIDS-related complexes were least likely to expose themselves at public events such as elections. Chores associated with care giving, such as drawing water, finding food for the ill and orphaned children, and gardening, occupy more importance in the hierarchy of their priorities, according to the care-givers in the 35-49 age band, who called for the voting period to be longer than two days to allow them to participate.

In addition to societal attitudes, respondents mentioned logistical or structural factors as contributing to non-participation, lack of toilet facilities, lack of water, lack of seating facilities, long queues and lack of transport. According to the report a recurring viewpoint amongst the groups was that failure to participate in elections by PLWHAs was accentuated by the limited (or lack of) toilet and water facilities at polling stations. The overbearing opinions in this regard indicated that people who had AIDS tended to be afflicted by diarrhoeal diseases and would require regular visits to the toilet/bathroom. In the absence of running water such regularity would generate embarrassment, gossip and discrimination. It appears that it was more a concern for the rural folk, particularly the 24-49 female participants.

It seems the consensus of the focus groups was that, like everybody else, PLWHAs value the dividends of democracy and that, given the right conditions, they would, to a great extent, express their will in the electoral arena.

3.5 Conclusion

This study on South Africa gives an insight to the fact that indeed a certain percentage of HIV/AIDS infected and affected persons in other countries similarly affected by the pandemic may find themselves staying away from the polling stations for various reasons, thus failing to exercise their right to vote even though they may be willing to. It is indeed admitted that the first point of call in addressing the pandemic for any state is to deal with stigma, discrimination and poverty. However, since stigma cannot be legislated away, the voting community affected by HIV/AIDS has needs that require us to rethink electoral participation in the face of the reality of the stigma and discrimination associated with many HIV/AIDS infected and affected people. If political participation is to mean anything in the context of HIV/AIDS legislation and policy must find a way of mitigating the effects of stigma and discrimination so that a reasonable percentage of the population may exercise their right to vote.

CHAPTER 4: STRATEGIES FOR REFORM

This chapter highlights some possible reforms to electoral law that can help overcome some of the obstacles to participation by HIV/AIDS affected and infected persons highlighted in chapter three. Where States have absolutely no mechanisms in place to ensure that a significant population of potential voters can exercise their right to vote, chapter two of this study has highlighted that there is an international human rights obligation to adopt such measures.

The chapter above highlights correlation between low voter turnout and HIV/AIDS related issues. Voters too ill to cast a vote or people pre-occupied by HIV/AIDS related demands are often effectively disenfranchised.⁸⁰ States are obligated to take “effective measures to overcome specific difficulties” to ensure that their citizens are able to exercise the universal right to register to vote, as well as the right to vote in public on equal terms with others. Accordingly, States must overcome any impediments by requiring that election authorities conduct voter education, voter registration, and voting at sites which are accessible for citizens with or affected by HIV/AIDS and to ensure that voters who reside in short-term or long-term institutions, and those who are home-bound by AIDS, can exercise the right to register to vote and the right to vote. It must be noted that although this discussion focuses specifically on PLWA’s the suggestions for reform would apply and benefit a whole range of other voters infirmed and homebound or caring for the infirmed and homebound. This paper does not suggest that PLWA must be treated as a special exclusive group but rather that electoral laws must recognise the potential of disenfranchisement as a result of infirmity, illness and the care of such ill persons.

In the context of disabled persons there are some international standards and guidelines for ensuring effective measures for people with disabilities to exercise their right to vote.⁸¹ The standards for electoral access for disabled persons provide that

⁸⁰ Chirambo & Caesar “Emerging Theories and Perspectives” Aids and Governance, v 1(1), march 2003) quoted in ‘P Strand et al HIV/AIDS and Democratic Governance in South Africa: Illustrating the Impact on Electoral Processes’ n12 above

⁸¹ The "Bill of Electoral Rights for Citizens with Disabilities" calls on states to meet their obligation to take effective measures to ensure that all citizens with disabilities are able to exercise their universal right to participate fully and on equal terms in electoral processes. The "Bill of Electoral Rights for Citizens with Disabilities" was drafted and endorsed by participants attending a four-day workshop held from 14-17 September, 2002, in Sigtuna, Sweden. Participants from twenty-four nations included disability rights experts and activists, senior election administration officials, and representatives of the Inter Parliamentary Union, the Council of Europe, and the Organization for Security and Cooperation in

the right to vote in secret is a cornerstone of any free and democratic society. The state is thus obliged to take effective measures to ensure the right to vote in secret at public polling stations. Off-site voting procedures must be available to voters who are unable to vote at public polling stations, and must ensure ballot secrecy. They state that the process by which a voter casts her or his vote must respect the dignity and self-determination of the voter. The electoral system must provide the opportunity for all individuals to vote in public and in secret.

The UN Guidelines on HIV/AIDS note that the people affected and infected by HIV/AIDS have a right to political participation⁸² and that it must be states must provide legislative and policy measures to ensure that this right is protected.

The Administration and Cost of Elections Project, a joint endeavour of International IDEA, UN-DESA and IFES (ACE PROJECT),⁸³ points out at the importance of providing special voting facilities for voters who on voting day are unable to access a normal voting station in the electoral district in which they are registered to vote. From this derives the need for reasonable accommodations in the voting process through special voting schemes.

4.1 Voting at polling stations

4.1.1 Structural and Logistical Arrangements

As regards voting at polling stations for AIDS patients the major issues that came up in the focus group discussions and that may need attending to were what IDASA termed logistical and structural difficulties.⁸⁴ Respondents mentioned logistical or structural factors as contributing to non-participation. These included lack of toilet facilities, lack of water, lack of seating facilities, long queues and lack of transport. People who have AIDS tend to be afflicted by diarrhoeal diseases and would require regular visits to the toilet. In the absence of running water such regularity was said to

Europe (OSCE). The Workshop was jointly convened by the International Foundation for Election Systems (IFES) and the International Institute on Democracy and Electoral Assistance (IDEA).

⁸² UNIADS: The Joint UN Programme on HIV/AIDS 'HIV/AIDS and Human Rights – International Guidelines p49

⁸³ The Administration and Cost of Elections Project, a joint endeavour of International IDEA, UN-DESA and IFES (ACE PROJECT), available at <<http://www.aceproject.org/main/english/po/poa02.htm>>

⁸⁴ P Strand et al n12 above p221

generate embarrassment, gossip and discrimination.⁸⁵ It should be imperative upon election authorities to ensure that such logistical issues do not result in disenfranchisement of potential voters. Electoral authorities should have specific regulations regarding structural designs of polling stations. Although these are not issues that can be targeted specifically by national legislation, right to vote provisions should be read to include the duty on state to ensure facilities that do not disenfranchise a large group of people should such a matter on behalf of a significantly affected group end up in courts.

4.1.2 Extending voting times

Limits on polling hours have a convenient way of discouraging the participation of lower-income workers who are stuck at their jobs during the day⁸⁶ as well as caregivers. Turnout of caregivers would likely increase especially in urban areas if voting time is extended such that the caregiver may be relieved of their duty to remain beside the bedridden ill person when those who go to work have returned. Also if election day was declared a national holiday or non-working day the same advantages would be achieved. The question of the duration of voting is often addressed in regulations by the electoral authorities who are encouraged to recognise these special circumstances that may affect many in their countries. The Zimbabwean Electoral Act⁸⁷ places an obligation on employers to allow their employees a morning or afternoon off to vote. This type of provision though ensuring that employees vote does not meet the need described above as the employee would have to return to work after voting and not go and give a caregiver at home the opportunity to do the same.

4.2 Alternative Off-site voting measures

Infirm and aged persons too ill or frail to leave their homes or in permanent institutions of care may be unable to visit a polling station to vote. Equitable voting systems would contain provisions to allow such people and their caregivers the opportunity to vote without having to leave their homes. It can be appropriate to

⁸⁵ as above p223

⁸⁶ The Administration and Cost of Elections Project, n83 above

⁸⁷ Section 92

require prior registration or applications to vote according to legislatively defined criteria, either as part of the voter registration process or as separate exercise, for those wishing to vote from home. As has been discussed in the country survey of electoral legislation in Chapter 3 above very few countries in sub-Saharan Africa⁸⁸ have express legislative provisions that allow for special mechanisms by which the sick and affirmed can apply to vote at home. Many only go as far as requiring on-site assistance for people with visible disabilities.

4.2. 1 Early Voting in person and by mail

Providing facilities for early voting will allow those voters who cannot attend a voting station on the general voting day to vote on a special day, or series of days, prior to voting day. This system would be useful particularly for caregivers where voting is officially on a single day.

The two basic methods of early voting are:

- In person, at an office of the electoral management body, a normal voting station or other premises opened for early voting.
- By mail, in which the voter requests, or is automatically sent, the relevant ballots and other voting material, which are then returned by the voter to the electoral management body.⁸⁹

It is important that electoral legislation in Africa should provide for early voting mechanisms with critical issues such as the period for early voting and any qualifications required of early voters also defined in legislation.

As there are additional costs involved with early voting, legal frameworks may include special qualifications for voters using early voting these facilities. However, these restrictions should accommodate voters who may not be able to attend their voting stations during normal voting hours including such circumstances as being a patient in a hospital or other institution, being pregnant, being too ill or infirm to attend a voting station on voting day or being engaged in caring for a pregnant, infirm or ill

⁸⁸ The author only managed to find South African Legislation which expressly referred to special provisions for sick and affirmed persons

⁸⁹ The Administration and Cost of Elections Project, n83 above

person throughout voting day. Currently postal voting provisions are usually limited to the States uniformed forces and their spouses.⁹⁰

Periods designated for early voting often vary widely. In restrictive systems, where relatively small numbers of voters will be eligible for an early vote, a single early voting day can be designated. It is encouraged that early voting periods should be for a longer range before the actual voting day.

Voting by Mail

Voting by mail is the most widespread form of early or absentee voting used in developed States.⁹¹ Following a request by the voter, voting material is mailed to the voter's specified address by the electoral management body. The voter completes the ballot and returns it, either by mail or in person, to an electoral management body office. Integrity checks would generally rest on the requirement for a statement of the voter's identity and eligibility to accompany the returned ballot material. Successful mail voting systems depend on an efficient mail delivery service throughout the area under election.

Mail voting is often regarded as being more susceptible to fraud.⁹² Integrity problems with mail voting are that the high level of proof of identity and eligibility standards that can be applied in voting stations cannot be applied to mail voting, there is also no opportunity for party or candidate representatives to observe voting by mail, there is no guarantee that the voter is the one who actually in completed the ballot or was not subject to influence or intimidation when completing the ballot.

⁹⁰ See for example S71 of the Zimbabwean Electoral Act (Chapter 2:13) which limits postal ballots to members of the army and diplomats and their spouses these provisions were repeated in electoral regulations (2005). What is interesting about the Zimbabwe case is the Act before it was amended provided in Section 53(1) "When an election is to take place in a constituency a voter ordinarily resident in Zimbabwe who is resident in that constituency or was, within twelve months of the polling day or first polling day, as the case may be, fixed in relation to that constituency, resident therein and...(b) *has good reason to believe that on account of ill-health, infirmity or other like cause...he will be prevented from attending at a polling station on any such polling day...may apply to the constituency registrar for that constituency for a postal ballot.*"

⁹¹ Mail voting is now extensively used in Australia, Canadian, Denmark, Germany, Finland, Iceland Spain, Sweden, the United Kingdom and the United States of America. In most of these systems the system is available in national and federal elections and is available to any voter who wishes to use it, See 'Postal voting and voting on the internet' available at <www.idea.int/vt/postal_voting_internet_voting.cfm> (accessed 29 October 2005)

⁹² The Administration and Cost of Elections Project, n83 above

For these reasons of lack of security mobile voting stations, though more costly, are generally held to be a more effective means of enabling access to voting for homebound voters and voters in care institutions.

4.2.2 Mobile Voting Stations

Legal frameworks should allow mobile voting stations to operate during any period designated for early voting. Use of special mobile voting stations for house-to-house visits to the homebound in urban areas will enhance the integrity of the voting system, but it can be an expensive exercise. It is generally considered not be an efficient method in terms of cost per voter, primarily due to the small number of votes likely to be taken at each location visited, increased workloads in managing voting materials and the large component of polling official's time spent on travelling.

However, in the context of HIV/AIDS in sub-Saharan Africa where significant numbers of voters may be homebound especially in the rural areas it is a method that warrants consideration even where resources are not plentiful and especially where there is high concern about the integrity or reliability of mail voting or other alternative methods.

Where such a system is implemented, prior registration for home voting by should be mandatory and locations and timing of visits made public. This serves to ensure integrity and to allow party and candidate representatives who may want to observe the mobile to do so.

Some international guidelines for ensuring secrecy and security for mobile voting have been established such as those by the Organization for Security and Cooperation in Europe's Office of Democratic Institutions and Human Rights.⁹³

4.3 Setting up polling stations at institutions

In larger institutions, setting up a normal voting station with absentee voting facilities within the institution on voting day to service bedridden patients, would be an effective special measure. Additionally appointed mobile polling officials attached to this voting station could move through the relevant parts of the institution. This

⁹³ Available at http://www.electionaccess.org/rs/Mobile_Voting.htm

measure would be beneficial not only to ill patients but would also allow hospital staff to vote on election day where they may have been unable to do so.

4.4 Proxy Voting

Some systems allow voters who fulfil certain legislative qualifications to appoint a proxy voter to vote for them.⁹⁴ Such conditions might include their inability to attend a voting station through infirmity, employment requirements, or being absent from the area on voting day.

Proxy voting is at odds with the usual notions of integrity of voting practice and a throwback to notions of voting accessibility. It allows registered voters to appoint another person to vote in their name. There can be no controls to ensure that the registered voter's instructions on how to vote are followed by the appointed proxy, and, therefore, it may very easily be subject to abuse.

Election integrity is much better served by implementation of other measures to assist voters who may not be able to attend the voting station at which they are registered to vote, that is, through provision of more comprehensive absentee voting facilities, early voting services and mobile voting station facilities for the infirm

4.5 Promulgation of Instructions

In meeting their obligations to enable voters affected and infected with HIV/AIDS to fully exercise their electoral rights, election authorities should promulgate non-discriminatory regulations and instructions to educate polling staff, election authorities, and society about the electoral rights of persons affected by HIV/AIDS, and about the manner in which these voters can exercise their right to vote.

4.6 Conclusion

Developed countries are also considering new ways of voting - such as internet voting, mobile phone voting, and text messages voting to extend the franchise but for economic reasons it is likely that these methods would result in an increase in voter turnout in Africa at this point in time.

⁹⁴ The Administration and Cost of Elections Project, n83 above

In South Africa the “special vote” is a very useful institutional arrangement to ensure, as far as possible, that people are not disenfranchised by being ill, disabled or pregnant. The mere fact that it exists and was delivered to more than 650 000 voters in the last election⁹⁵ is a powerful indication of the commitment of the South African authorities to making democratic participation through the vote as inclusive as possible. However, the South Africa model is not the dominant one in the region. Electoral law provisions of most countries in the region do not expressly mention the special vote for non disabled but ill persons or its equivalent. Most of the laws provide for special measures at the polling station for people with disabilities but does not provide for special measures for those with illnesses which would not strictly speaking be called disabilities. Where the words ‘special measures for people with disabilities’ are expressly used in legislation it is not clear whether it includes people with illnesses caused by HIV and AIDS.⁹⁶ There seems to be no universally accepted definition of the term disability itself.⁹⁷ Suffice to say that the ordinary polling agent in Africa who is not so trained would not include ill persons in the definition of disability.⁹⁸

This section gives a series of possible legal reforms that would bring states to compliance with their international obligations. These suggested reforms are drawn from other countries and tailored to address the needs of individuals affected by HIV/AIDS. In those countries where it can be argued that provisions for special voting alternative do exist these should be made clear and unambiguous in the text of the law. What is noted in the South African case study is that there is a need to categorically state to the public whether people suffering from debilitating or chronic illnesses qualifies them for this special vote facility.⁹⁹

⁹⁵ P Strand et al n12 above p17

⁹⁶ Guideline 5 of the UN Guidelines provides that legislation should ensure that disability laws include HIV/AIDS in the definition of disability p18

⁹⁷ See UN Enable World Programme of Act for Disabled Persons. WHO defined disability (1976) as any restriction or lack (resulting from an impairment) of ability to perform an activity in the manner or within the range considered normal for a human being. It has been argued that some effects of AIDS may result is a situation fitting into this definition

⁹⁸ The Supreme Court of the United States of America in the famous case of *Bragdon v. Abbot* (97-156) 107 F.3d 934 (1998), held that HIV in its asymptomatic stage could be defined as a disability under the American Disabilities Act.

⁹⁹ The IDASA research found for instance that some PLWHA who might wish to have access to the special vote lacked sufficient information on whether they are eligible or not. This is likely to have implications for participation by people who are infected by diseases such as HIV/AIDS that are accompanied by stigma and discrimination, See P Strand n12 above p17

CHAPTER 5: REDUCING THE VOTING AGE

The previous chapter recognises the need for reform in electoral law in order to meet the international obligation to provide effective measures to ensure that those legally entitled to participate in elections can effectively exercise this right. This chapter introduces an innovative but controversial reform to electoral law in the context of democracy and electoral participation in the HIV/AIDS era. One of the problems currently overlooked by scholarly analysts and policymakers has been the link between the effect of HIV/AIDS on children and voting. The subject of HIV/AIDS orphans and child headed households has been focused on purely from protection, care and support point of view. This section suggests that states may need to reconsider fundamental voting laws in order to protect and fulfil the rights of their populations to participate in elections and accept norms of democracy.

5.1 The link between HIV/AIDS and children

It has already been established that HIV/AIDS mortality is higher in the 20-49 age group, individuals are generally the most economically and politically viable group in society. In South Africa it is argued that the sharp increases in mortality –in some cases up to 200 percent- among registered voters between the ages of 20-49 and particularly the women in the 30-39 year bracket can to some extent, if not wholly be explained by AIDS.¹⁰⁰ The result of this is that large percentages of the population in Africa are children under 18 years of age.

AIDS has also killed one or both parents of an estimated 12 million children in sub-Saharan Africa. In some countries, a larger proportion of orphans have lost their parents to AIDS than to any other cause of death - meaning that, were it not for the AIDS epidemic, these children would not have been orphaned. In Zimbabwe and Botswana HIV/AIDS orphans make up 78% and 77% respectively of the total orphan population.¹⁰¹ The impact of HIV/AIDS on children in Africa cannot be ignored. In addition to the emotional and psychological toll, the economic burden on children affected by AIDS is significant. The presence of AIDS in a household often causes children to assume responsibility for generating income and providing food for their

¹⁰⁰ K Chirambo n35 above

¹⁰¹ UNAIDS, UNICEF, USAID 'Children on the Brink 2004' A joint report of new orphan estimates and a framework for action' available at <www.unicef.org/publications/index_22212.html> (accessed 23 October 2005)

families, as well as caring for their ill family members.¹⁰² With a total population of 1.6 million Botswana has around 60,000 registered orphans in the country but it is feared that Botswana will have about 200,000 orphans in 2010 if the current situation is not reversed.¹⁰³

Research has shown that governments are failing to cope with their obligations to protect the rights of children affected and infected with HIV/AIDS.¹⁰⁴ They have often left the responsibility to charity organizations and the community which is also failing to cope with the demands brought about by HIV/AIDS. The phenomenon of child headed households is growing in Africa.

Paragraph 12 of the Convention on the Rights of the Child affords children the right to be consulted on matters affecting them. In addition to legal protection however, children and youths require room to develop and express their own opinions.¹⁰⁵

In these circumstances there is a strong case for considering enfranchising children to vote. Most sub-Saharan countries are signatories to several human rights instruments that provide for basic rights of children to health, education and food.¹⁰⁶ African children who are mature and capable should certainly be empowered both economically as well as politically to make a valuable impact on policies that directly affect their health, education and general welfare. Since political and civil rights most often precede economic, social and cultural counterparts, it is justified to treat civil and political rights as a springboard towards socio-economic change where these are

¹⁰² A case study by the Joint United Nations Programme on HIV/AIDS (UNAIDS) points out that "[t]he death of a mother or father[M1] can leave unsettled debts which impact negatively on the future care and resources left for the remaining children." In Zimbabwe, when a family's breadwinner is ill or its income is spent on medical treatment for HIV/AIDS, children are often forced to drop out of school and work. In Uganda, 25% of children whose parents have HIV/AIDS drop out of school. Children orphaned by AIDS often leave school to care for parents or younger siblings because they cannot pay school fees, or because of discrimination or emotional distress. These children are also at greater risk of illness, abuse, and sexual exploitation compared to children see United Nations Children's Fund (UNICEF) et al., *Young People and HIV/AIDS: Opportunity in Crisis* 23 (2002); UNAIDS, *Investing in our Future: Psychological Support for Children Affected by HIV/AIDS: A case study in Zimbabwe and the United Republic of Tanzania* 6 (2001); USAID et al., *Children on the Brink 2002: A Joint Report on Orphan Estimates and Program strategies*

¹⁰³ UNAIDS, UNICEF, USAID 'Children on the Brink 2004: A joint report of new orphan estimates and a framework for action' n100 above

¹⁰⁴ See for example 'Letting Them Fail Government Neglect and the Right to Education for Children Affected by AIDS' a recent report by Human Rights Watch available <>(accessed 23 October 2005)

¹⁰⁵ J Escoto, 'Youth between political participation, exclusion and instrumentalisation' available at <<http://www.ifsa.net/files/political-participation.pdf>> (accessed 27 October 2005)

¹⁰⁶ The UN Charter on the Rights of the Child, the African Charter on the Rights of the Child and International Covenant on Economic, Social and Cultural Rights,

easier to obtain, as an alternative enforcement approach to improve the fortunes of these rights. It therefore becomes a democratic imperative to enfranchise all citizens, notwithstanding the fact that this would foster positive, issue-based voting and representation.¹⁰⁷

African countries should consider reducing the voting age to at least 16 years of age for two reasons. First, individuals under the age of eighteen make up a significant percentage of the population and if democracy is based on the will of the people it is important to realise that a significant number of those 'people' have no regular say in the decision of who will govern them. Secondly, many children affected by HIV/AIDS are taking on adult roles and responsibilities and should therefore enjoy the right to vote.

5.2 Why children traditionally do not vote

It is argued that children are subject to parental control because they lack the ability to reason that would develop with age.¹⁰⁸ Liberty is inherited in the human condition because of the inborn capacity to develop reason, but full liberty does not arise until reason was fully developed at adulthood. As a class, children range from infants who are completely dependent on others to seventeen-year-olds who are on the verge of maturity. Throughout this range, children lack legal autonomy to make their own decisions. With a few exceptions like minors making health care decisions and children who are tried as adults for some crimes, the general rule is that minors may not contract and are not held responsible for their actions on the same terms as adults.

Indeed, there are sound arguments for treating children and adolescents differently from adults. At some ages children simply lack the capacity to reason, the emotional maturity to exercise sound judgment, the experience necessary to weigh likely consequences, and the bargaining power to protect themselves in part because of legal restrictions on their capacity, and in part because of a lack of financial opportunities. Teens routinely are limited in their capacity to hold jobs and suffer from unemployment at levels higher than that of adults. Because children and adolescents lack financial resources, their choices are quite limited. Both descriptively and legally children of all ages lack meaningful autonomy. Without autonomy, they acquire few

¹⁰⁷ 'HIV/AIDS democracy and citizenship: The participatory perspective' n14 above

¹⁰⁸ J Rutherford, 'One Child, One vote: Proxies for parents' *Minnesota Law Review* June, 1998 1463

rights. Consequently, children have no right to exercise political power to protect their interests.¹⁰⁹

It also makes sense to limit the right to vote to those who are capable of exercising it. Equal protection cannot protect children because they are not identical to adults. Children are denied the vote because they are considered irrational, emotional, inexperienced, immature, and uneducated.

5.3 The justification for departing from this norm

Children are endangered by a theory that presumes they are completely cared for. The Constitutional Court of South Africa implied this thinking that the duty to protect and provide for children is first on the parents and only alternately on the state.¹¹⁰ Although this approach may correctly impose an individual duty on parents to support their own children, it sometimes fails to provide an adequate safety net for impoverished children. Those who acquire the duty to support children do not necessarily have the financial capacity to do so.

The right to vote entitles the otherwise disenfranchised to engage in the discussion of how their needs should be met. The less power a segment of the population has, the more it needs rights or entitlements to protect it from the larger group. Given the unique circumstances caused by HIV/AIDS in southern African children need to be considered both as individuals and as members of various communities in order to meet their needs. Voting is the mechanism for resolving competing needs in a democracy. That tool is not available to children.¹¹¹

The vote should also be seen as not merely a measure of capacity for political autonomy but also a mechanism to balance power to assure that interests are included in the political negotiations.

Lowering the voting age because of a special circumstance has been legitimately done in other parts of the world. 1971 the United States ratified the 26th Amendment to the Constitution – granting the right to vote to 18 – 20 year olds as a result of the Vietnam War when youths were sent to fight without the right to vote.¹¹²

¹⁰⁹ As above p 1658

¹¹⁰ *The Government of the Republic of South Africa and Others v Irene Grootboom and Others Case CCT 11/00 paragraph Para 77*

¹¹¹ J Rutherford n109 above at p1661

The franchise assures that individuals and groups are able to claim an equal share of state attention and services, and enables individuals to band together to negotiate for their collective interests and influence public policy. When children with particular needs are denied access to the political system, they lose this valuable weapon.

Before children can be taken seriously they need to be counted as valuable members of the political community. Voters garner more of a representative's time and attention. Various issues compete for the attention of politicians, and politicians are most responsive to input that could affect their political future. Although the most influential voices are unfortunately those that are best funded, politicians also respond to large quantities of votes. In some cases children need to be counted in the vote both to get their issues on the agenda and to have their perspectives on those issues heard especially where despite the magnitude of the issues that affect them politicians are not addressing their needs appropriately as with the particular environment created by the devastating effects of HIV/AIDS in southern Africa.

Of course, the most effective lobbying groups are those that are well-organized. That is a problem for children given their lack of resources and, depending on their age and lack of organizing abilities. The vote reinforces the individual's capacity to influence social policy. Policymakers and elected officials pay close attention to the opinions of their constituents; on contested issues, politicians often "count noses."

5.4 Conclusion

Of course the vote alone is rarely sufficient to transform a relatively powerless group into an influential political actor. However, the vote is one crucial step toward empowerment. Most political parties will not seriously address the needs or interests of young people until they have a powerful voice through the ballot box. The power of government comes from the consent of the governed, as it stands now a significant percentage of the population in most sub-Saharan countries are governed but do not consent. Currently HIV/AIDS affected youth are no one's constituency; therefore politicians are not representing a group who has no vote. Lowering the voting age would give young people and particularly those affected by the pandemic confidence that their views are important to politicians and can make a difference. This would be

¹¹² Dunn P 'Lowering the voting age: A global perspective' available at <http://pphsp.uis.edu/WordDocs_vol1/Lowering%20the%20Voting%20Age%20editorial1.pdf> (accessed 15 October 2005)

significant step in sub-Saharan Africa, which has a high proportion of young people whose needs need to be seriously considered by those in power.

The United Nations Convention on the Rights of the Child provides in Article 12 that the right to express views freely in all matters affecting the child is given to every child who is capable of forming his or her views, the views of the child being given due weight in accordance with his or her age and maturity. Although not literally a 'right to participate' in matters affecting the child, it can be interpreted as such. It can be argued that this treaty provides legal grounds for lowering the voting age where maturity can be proved. Where children are providing for the economic care of a family it can be argued that some level of maturity has been reached, although this arguably is a forced maturity.

Presently all countries in sub-Saharan Africa have 18 as the minimum voting age. Lowering the voting age will involve changes to the constitution of those countries. This will require long legal processes. Admittedly this is a controversial reform which parliaments in the various countries need to debate on fully within their own specific contexts. However, it is a reform that would result in the enfranchisement of an important sector of the community whose voice is currently not heard and as a result whose needs are not currently being met adequately by politicians.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

HIV/AIDS challenges us to consider innovative ways to ensure that people infected and affected by the disease can live a dignified life where they are capable of participating in the governance of their countries. This paper calls on governments, electoral management bodies and activists in the field of human rights and HIV/AIDS to confront the issues raised by the pandemic as regards the electoral participation.

Recommendations:

To governments and parliaments

States must establish an effective legal framework for the response to HIV/AIDS and its possible impact on electoral participation in order to comply with their international obligations.

Although legislation need not distinguish HIV/AIDS infected and affected persons as a special class of people, especially when stigma and discrimination are still of great concern, there is a need for national electoral legislation to clearly state that voters who require special voting alternatives have a legal entitlement to such alternatives.

In those countries where it can be argued that provisions for special voting alternative do exist these should be made clear and unambiguous in the text of the law that people suffering from debilitating or chronic illnesses qualify for these special voting facilities.

Parliamentarians must acquaint themselves with matters regarding the political rights of PLWHA. They must also begin debating the impact of HIV/AIDS on democracy in their countries with the issues of reducing the voting age being a possible area for debate.

To electoral management bodies and other institutions that run elections

Where the law prescribes that election authorities will regulate special voting requirements, these authorities should consider mechanisms that will expand the franchise.

In meeting their obligations to enable voters affected and infected with HIV/AIDS to fully exercise their electoral rights, election authorities should promulgate regulations

and instructions to educate polling staff, election authorities, and society about the electoral rights of persons affected by HIV/AIDS, and about the manner in which these voters can exercise their right to vote. In meeting their obligation electoral authorities should consult with representatives of organizations of people affected by HIV/AIDS and through these consultations, identify and make use of new and appropriate mechanisms to ensure that their needs are met.

To Non-Governmental Organisations and other activists

NGOs and interest groups working in the fields of HIV/AIDS and human rights, democracy and elections must begin lobbying for legal reform that responds to the particular obstacles to voting faced by people affected by HIV/AIDS.

NGOs involved in voter education should prioritise on educating voters on the right to political participation and how to use the alternative voting mechanisms that may exist for those with special needs.

Organisations for PLWHA's must create awareness about how their needs in the voting can be met by the relevant authorities in order to ensure that their members are not disenfranchised.

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