

**A CRITICAL ANALYSIS OF SOUTH AFRICA'S  
LABOUR LAWS RELATING TO HIV/AIDS AND  
EMPLOYMENT EQUITY AND ITS INCONSISTENCIES  
WITH INTERNATIONAL LAWS**

by

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Submitted in partial fulfillment of the Requirements for the degree  
**MASTERS IN BUSINESS ADMINISTRATION**

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September 2003

## ABSTRACT

The current South African labour laws have evolved through decades of transitions. It originated from an autocratic employment relationship to the fight for worker rights and finally, to the equal rights and freedom of workers. However the rights of workers were always regulated by the idiosyncrasies and oppression of the political fabric of this country. One of the greatest contributing factors that enhanced worker confidence is the introduction of the previous Interim Constitution and the now, Final Constitution, which provided for equality for all South African citizens. All such laws have impacted intensely on the South African labour framework. Currently, we exist in a country where there are laws that ensure worker protection.

On the face of it, the labour laws are clearly democratic. However, in practice, there exist many gaps in the law. This study is primarily based on identifying the areas of the labour laws where such laws do not adequately cater for the South African population and its diversities, and where it is not consistent with the International Labour standards. Major emphasis will be placed on the application of the law and the intention behind the drafters of such legislation.

One area of focus is the application of the law to the HIV/AIDS crisis in South Africa. HIV/AIDS is seen as an epidemic that is adversely penetrating the workforce and a company's productivity. The disease itself is growing at an enormous pace and already, a small percentage of the population is affected by it. The disease inevitably leads to a drop in a company's output through the increase in employee absenteeism and deaths, and it also obligates employers to re-arrange their staff or hire new staff. Companies have been forced to change their policies and to create awareness in the workplace to adequately cater for workers who suffer from this epidemic. The laws itself have not made sufficient provision for applying itself to the growth in the percentage of AIDS employees. With a large percentage of the workforce having the disease, there has not been sufficient protection of such persons and their families. There are three stages in the HIV/AIDS cycle and the last stage weakens employees to the extent that they are unable to work. And with medical costs being as high as it is today, it won't be long before such employees lack the financial means to survive. Hence there is little protection to workers after contracting the AIDS virus. This is merely one of the areas of the HIV/AIDS crisis that requires review of the current labour laws.

The labour laws are new to providing protection to workers. Inevitably, it is the responsibility of workers to protect themselves, either through saving on their own or entering into endowment or similar policies. However, with the instability in our current economic climate, it is difficult for employees to invest or to save.

Employment Equity has been another area that requires development within the South African labour framework. Such equity is based on rectifying the political ravages of the past, where previously disadvantaged persons were prejudiced in various areas of the

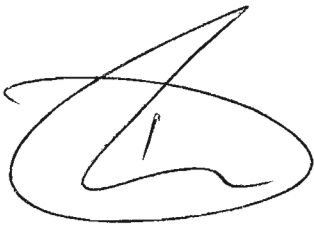
employment arena. Affirmative Action has been one area of change that many companies and corporations were forced to deal with.

The International Labour Organization (ILO) has always attempted to diversify its laws to cater for the diversities of the world population. South Africa adopted many of its laws, specifically with regards to the HIV/AIDS crisis. However, considering that the labour laws are seen as a rapidly-changing area in the world economy, such areas are making it difficult for the current laws to be consistent with such changes. Emphasis is now placed on the application of the laws to such changes.

This study is a very much theoretical to the extent that it identifies the areas of applicable law and the areas that require improvement or change in order to satisfy the “*democracy*” in a democratic country.

## **DECLARATION**

I declare that this research report is my own, unaided work. It is submitted in partial fulfillment of the requirements of the degree of Master of Business Administration in the University of the Natal, Durban. It has not been submitted before for any degree or examination in any other university.

A handwritten signature in black ink, consisting of a large, stylized 'D' with a horizontal line extending from the middle of the vertical stroke.

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Dion Nannoolal

15 September 2003

## **DEDICATION**

This Research Report is dedicated to my parents, Lalitha and Suresh Nannoolal, my brother and sister, Yash and Anoushka Nannoolal, and to my grandparents, Frank and Chanderpathie Chand, for your efforts, guidance and blessing. Most of all, to my wife, Virusha Subban, thanks for the sacrifice, love and support.

## **ACKNOWLEDGMENTS**

I am grateful to :

A special thanks to my supervisor, Ms Elsa Thompson, who has assisted me through my dissertation and gave me encouragement when I needed it.

My wife, for the sacrifice and time spent on assisting me with typing of the report.

Suresh Mohunlal, who directed me in the completion and structure of my report.

Morgan Nadasen for his initiatives and encouragement in ensuring my report was completed timeously.

**Without their assistance, this report would not have been possible.**

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## **List of Abbreviations**

|               |  |
|---------------|--|
| <b>AA</b>     | Affirmative Action                         |
| <b>AIDS</b>   | Acquired Immune Deficiency Syndrome        |
| <b>BMA</b>    | British Medical Association                |
| <b>ECC</b>    | Employment Conditions Commission           |
| <b>EE</b>     | Employment Equity                          |
| <b>HIV</b>    | Human Immunodeficiency Virus               |
| <b>SA</b>     | South Africa                               |
| <b>UK</b>     | United Kingdom                             |
| <b>UNAIDS</b> | Joint United Nations Programme on HIV/AIDS |
| <b>US</b>     | United States                              |

# CHAPTER ONE : INTRODUCTION

## 1.1. Introduction

The current South African labour framework has been the result of historical power struggles, rioting, political interference and economic transitions. The consequence thereof has led to the introduction of various laws and legislative Acts. These include the Industrial Conciliation Act, the Labour Relations Act, the Employment Equity Act and the now Skills Development Act. Following the transition into a political democracy, the Labour Relations Act was a move by the Government to reconstruct and democratize South African society and the economy. Emphasis will be on the application of such laws to the diversities governing the labour environment and the differences accompanied by international laws.

We exist in a country where our current labour laws have to adequately protect and govern the diversities and problems existing within the employment environment. This includes the rapidly-growing HIV/AIDS crisis and the creation of employment equity in the workplace.

It is an important criterion to identify problematic areas in the law and to assist with its improvements. The laws may *prima facie* protect the South African working environment, however, its application thereof is an area of concern. Due to the increasing changes in the workplace, it is significant that these laws be applied correctly and efficiently. The impact of International law is a vital component in the growth and stability of our laws and the consistency to international standards.

This research study will encompass and identify areas in the South African labour law that requires change and it will also provide improvements through the application of international laws. Primary focus will be placed on the increase of the HIV/AIDS epidemic, the success of employment equity procedures and the lack of adequate job

security for employees. These topics can be interrelated and therefore, improvements can apply to all of them.

## **1.2. Background to the Study**

### **1.2.1. HIV/AIDS**

The disease was only identified in 1981. As a result the laws governing the regulation in the workplace are fairly new. No-one has been able to predict with certainty the number of existing HIV/AIDS sufferers and accordingly, it was never taken in a serious light at that time. The virus exists on three stages :

*Acute HIV Infection* – Within two weeks to three months, person start to develop flu-like or mild glandular-fever type illnesses. This is the window phase where many infected persons may not test positive.

*HIV well phase* - This is the silent phase where there are no symptoms that exist external to the body. With children born from infected mothers, there is good probability that they will die within three to five years after birth. In adults, no symptoms are shown but the virus slowly begins to destroy their internal immune system.

*HIV ill phase* - With the immune system slowly deteriorating, the body will not be able to combat any illnesses, which include pneumonia, flu or tuberculosis. This stage generally occurs between seven to ten years from initial infection. This stage causes temporarily loss of memory and rare forms of cancer.

( Giles.J, 1998, p.2-3)

As one can see, the above stages eventually cause infected persons to become weaker and tiresome. For employees, this impedes on their work responsibility. Most of them may be dismissed for lack of proper performance and some may even resign. However the problem arises when some of such employees do not have medical aid or insurance or other protection given to them.

As our current Minister of Labour states,

*While much of the South African data regarding HIV/Aids is pre-1998 and is outdated, the picture it paints, particularly with regards to the position of workers living with HIV and Aids and the barriers placed preventing Blacks from taking their rightful place in the workplace, must be regarded as a clarion call for action. We have created the legal framework to correct past imbalances and deal with discrimination against people living with HIV-Aids, it is the responsibility of employers to adhere to the laws. The Department of Labour will enforce those laws.*

(Internet 1: [www.dol.org.za](http://www.dol.org.za) )

### **1.2.2. Employment Equity**

South Africa has emerged from a history of political prejudice and social inequality. The law governing Employment Equity was promulgated to protect and provide equality to citizens who were previously the consequence of such inequality. This area of the law is newly developed and promulgated.

Employment Equity was a strategy employed by the existing political regime of the country (ANC) to redress the inequalities of the past. Subsequent to the 1994 democratic elections and the introduction of the Constitution, people were guaranteed equality in terms of the rights as existent in the constitution. One of such rights being the Right to Equality. People will and should be treated equally and fair. Since such period, there has been many changes, however these changes have still not improved or corrected the social and economic instability that was previously promised in the 1994 elections.

### **1.3. Motivation for the Research**

HIV/AIDS and Employment Equity are always contentious issues in society. Be it in

respect to its governance, its effects or its causes. However there is hardly any debate on improvements to the laws and its application. There does not exist common laws or historical statutes governing HIV/AIDS and Employment Equity and accordingly, the laws are fairly new. This provides motivation to suggest improvements and developments to the current status of the laws, in the hope that it could become effected at some point in time.

#### **1.4. The Research Question**

HIV/AIDS and Employment Equity are new areas of the law that has been promulgated for about two decades. Both areas are very different but at the same time, it is very similar to the extent that it requires immediate assistance of the law. This research aims to answer the following :

- Has the South African labour law adequately catered for the massive increase in the HIV/AIDS virus and has the law sufficiently been applied to ensure equity in the workplace, between infected and non-infected persons?
- Are the South African labour laws consistent with International standards?
- Are there areas in the law that require change and is the law being applied correctly to give effect to our democratic demands?
- Can there be any improvement in the law taking into consideration the standards set down by International laws?

#### **1.5. Purpose of the Study**

Laws are ardent rules that citizens are required to adhere to. However laws can change to give effect to our democracy. Laws change on a daily basis, be it in the Courts, in Parliament or in the Legislature. Such change is imperative to ensure that there is development and consistency with what is reasonable and justifiable in a democratic country and in adherence to international laws.



This study may be used by HIV/AIDS-activists and by citizens who still feel that there have been no positive changes to their rights since prior to our democracy becoming a dominant feature of our laws. They may evaluate whether there has been an improvement in the laws governing Employment Equity. It will highlight the local and International laws that currently exist with regard to HIV/AIDS and Employment Equity, the areas of our laws that should be or require change and the recommendations of such change.

The study may be used to establish whether there are severe discrepancies between our local laws and the international laws. Such discrepancies may determine improvements in our local laws.

### **1.6. Limitations**

South African and International laws are fixed and can only be changed or amended by specific persons or entities. Accordingly, this study will be limited to the theory of laws that exist with regard to the HIV/AIDS crisis and the lack of proper employment equity laws and procedures in the workplace and the recommendations that can be made to improve it. The study will primarily focus on the identification and application of the labour laws.

Further limitations include the fact that the local legislation will primarily comprise of applicable sections in the Labour Relations Act, Employment Equity Act, Basic Conditions of Employment Act and the Code of Good Practice.

### **1.7. Summary**

The Labour laws relating to HIV/AIDS and Employment Equity is fairly new and is very much current in the South African context. Laws are fixed to the extent that it cannot be changed without proper substantiation at constitutional level. This study will highlight the plight of South African labour laws, international law and the inconsistencies and improvements which can be used to develop our current law.

## **CHAPTER TWO : AIDS AND EMPLOYMENT EQUITY LAWS IN SOUTH AFRICA**

### **2.1. Introduction**

Since the first arrival of Dutch settlers in the country in 1652, there existed labour pressures. The demand and supply of labour and the existence of labour rights was of great concern for the workers themselves and the employers. Skilled workers were mainly expatriated from other countries, such as Australia and Europe. Black workers never had rights and this led to rioting and resistance. Even after the introduction of the various laws, which included the Industrial Conciliation Act, the rights that were afforded to employees, specifically Black employees, were not consistent with the political fabric of the country.

The discovery of diamonds in 1867, and later gold, led to rapid industrialization. The demand for labour became a pressing issue. However with the increase in the supply of labour, there was a lack of labour laws to protect workers. This led to the formation of trade unions. White trade unions at the time, was formed specifically to protect the rights of white workers and to ensure that their statuses were secured. Black trade unions were formed, however, political pressures governed their oppression. In 1914, the great strike against oppression led to hundreds of innocent employees being killed. During the beginning of this century, there was no statutory framework. This led to the revolt by mineworkers in 1922. As a result, the Government introduced the Industrial Conciliation Act of 1924 ( Finnemore, 1999, p.21).

#### **2.1.1. ERA I - Prior to 1956**

The Industrial Conciliation Act 11 of 1924 provided for the registration of trade unions and employer organizations, however, the Act excluded “pass-bearing” African workers. It regulated strikes and lock-outs and provided a process of Collective Bargaining. Strikes and lock-outs were prohibited between employers and employees if there was an

agreement in place. However it can take place after submission of the dispute to the Industrial Council for settlement.

By 1930, there was an amendment to the Act, providing for minimum wage rates and maximum working hours for persons excluded from the definition of an “employee”. The Act was eventually replaced by the Industrial Conciliation Act of 1937.

Immediately prior to 1956, the National Party government came into power and tried to align the labour legislation with the policy of Apartheid. Three years later, Industrial Conciliation Act 28 of 1956 was promulgated. This Act further provided for racial segregation by prohibiting the registration of new unions for white and coloured members. For existing unions, only white members could hold executive office. The Act also introduced ‘job reservation’, wherein it was stated that certain work could be made for the exclusive use of ‘persons of a specified race’.

#### **2.1.2. ERA II - 1956 -1973**

The Act of 1956 ensured a racially exclusive industrial relations system in South Africa. Managerial positions were primarily occupied by white workers. Wage bills were kept relatively low and up until the 1970s, the country benefited from the worldwide economic boom.

However the racial exclusivity was to be short-lived. Challenges were being faced by the African working class. Numerous strikes took place and one of them being the unorganized African workers strike in 1973 in Durban. The government’s response to these strikes was the amendment to the Bantu Labour Act (Settlement of Disputes Act), which attempted to introduce works committees in the hope of restricting union organization by African workers. These challenges inevitably altered the racially exclusive industrial relations system ( Finnemore, 1999, p.29).

### **2.1.3. ERA III - 1977 - 1989**

In 1977 the Government appointed the Wiehahn Commission of Inquiry to investigate the labour legislation in the country. In 1979 the Commission recommended a number of reforms, which includes to allow African workers to join registered trade unions and be directly represented on industrial councils. There were various other changes that took place and over the next four years, this series of amendments gave rise to the Labour Relations Act. New unions were reluctant to register at the time. This was partially due to the fact that the definition of “employee” under the Act excluded ‘non-residents’ and contract workers.

By 1981 the law governing exclusions were repealed. This induced new unions to register. Slowly a statutory system began to form. However this did not necessarily increase trust and cause a drop in adversarialism. However employer resistance was always confronted by established unions.

Despite the inconsistency with political suppression, the Labour Relations Act gave employees, specifically Black employees, some form of resistance. This Act was later amended in 1981, and eventually, became known as the Labour Relations Act. This Act was principally introduced to govern dispute resolution in the workplace. Of primary importance was the introduction of the Collective Bargaining process, which ensured that employers and employees were entitled to resolve their disputes through civil means (Ibid, 1999, p.31).

### **2.1.4. ERA IV - 1990s onwards**

The introduction of the Reconstruction and Development Programme (“RDP”) in the 1990s was a means to preserve and enhance the gains made by workers through their struggles. Within the RDP, the government undertook to formulate detailed policies and legislation. The rights of labour were given special attention as it was the key to the reconstruction of the country.

The introduction of the Interim Constitution entrenched a statutory Bill of Rights, which provided for the rights to fair labour practices and the right to form and join trade unions and employer organizations. The law was very new to serving the diversities within the country. Issues such as HIV/AIDS or lack of job security were not pertinent to the future success of the country. Priority was given to stabilizing the labour environment and redressing past grievances. The Final Constitution, which was introduced after the democratizing of the country, gave employees equal rights and fair procedures. Labour in terms of the Labour Relations Act and the Constitution ensured that it was no longer seen as a commodity but as a valuable asset of production.

Following the Labour Relations Act, came the Employment Equity Act 55 of 1998, the Basic Conditions of Employment Act 75 of 1997 and the Skills Development Act 97 of 1998. Each Act had a different area of application. The Employment Equity Act serves two purposes: To redress disadvantages experienced by designated groups in the past and to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination. The Basic Conditions of Employment Act provides an individual level of employment standards to all employees covered by the Labour Relations Act and providing security to employees not protected by the Collective Bargaining process ( Finnemore, November 1999, p.310). The Skills Development Act attempts to enhance and grow the skill profiles of the workforce to satisfy the needs of the South African economy.

However, with the rapid spread of the HIV/AIDS virus in the workplace, it became evident that this was infecting both skilled and unskilled employees. It is very much factual that with the increase in the levels of HIV/AIDS infection, would result in the slowdown in economic growth. According to Iraj Abedian, "South Africa's government handling of the crisis has undermined business confidence by causing bewilderment among investors." ( Financial Mail, August 2003, p.43)

The critical issue is that HIV/AIDS causes workers to be less productive and this will lead to the decrease in Company output. A research study was conducted in Kericho

district in Kenya for five years. The results showed that during an AIDS employee’s last three years of life, such person was absent from work almost twice as often as other employees. “HIV/AIDS remains a Human Resource problem and not a boardroom issue. It has not been translated into cost for business.” (Financial Mail, August 2003, p.44) It is apparent that HIV/AIDS has the potential to increase the cost of employee benefits. However it is the perception of small businesses to ignore the impact of HIV or AIDS. Much of the problem arises due to the oversupply of unskilled labour. This makes employers’ to believe that it is easy to replace them.

*HIV/AIDS is still a disease surrounded by ignorance, prejudice, discrimination and stigma. In the workplace unfair discrimination against people living with HIV and AIDS has been perpetuated through practices such as pre-employment HIV testing, dismissals for being HIV positive and the denial of employee benefits.”*

( Labour Relations Act 66 of 1995, 2001, p.317)

Legislation does not have ample protection for such employees. Procedures need to be followed. However this takes time and effort. And for small businesses with little profit margins, it is not worth the effort to pursue the matter. Requesting one’s job is not a solution to the problem, as it does not change the mindset of the employer’s management.

| <b>CURRENT AND PROJECTED AIDS STATISTICS</b> |             |             |             |
|--|-------------|-------------|-------------|
|  | <b>1999</b> | <b>2005</b> | <b>2010</b> |
| % of SA workforce that is HIV+               | 11.5        | 20          | 22.5        |
| % of SA workforce with AIDS                  | 0.4         | 1.65        | 2.7         |
| New AIDS cases per annum                     | 145 256     | 466 365     | 625 180     |
| Number of AIDS orphans                       | 153 000     | 1000 000    | 2000 000    |
| Life expectancy of SA population : Male      | 50          | 43          | 38          |
| Life expectancy of SA population : Female    | 54          | 43          | 37          |

**Figure 2-1: Current and Projected Aids Statistics**

Source : Bisseker. C, *Financial Mail*, August 2003, p.46.

| <b>SUMMARY OF EMPLOYER RESPONSES</b>             |                              |                            |                              |                |
|--|------------------------------|----------------------------|------------------------------|----------------|
| <b>Employer response<br/>% who :</b>             | <b>&lt;100<br/>employees</b> | <b>Between<br/>100-500</b> | <b>&gt;500<br/>employees</b> | <b>Overall</b> |
| Have co-ordinated with industry associations     | 29.0                         | 37.9                       | 60.0                         | 45.5           |
| Have an HIV/AIDS strategy and policy             | 6.5                          | 51.7                       | 82.0                         | 52.7           |
| Have undertaken an HIV/AIDS risk assessment      | 6.5                          | 6.9                        | 52.0                         | 27.3           |
| Offer support for HIV/AIDS-infected employees    | 21.3                         | 42.1                       | 64.8                         | 46.5           |
| Have HIV/AIDS education programmes               | 25.8                         | 72.4                       | 86.0                         | 65.5           |
| Conduct monitoring & reporting of the programmes | 3.2                          | 17.2                       | 48.0                         | 27.3           |

**Figure 2.2 : Summary of Employer Responses**

**Source** : Bisseker. C, *Financial Mail*, August 2003, p.46.

As can be seen from the above statistics, the virus is spreading at an exorbitant rate. The labour laws are not ensuring that employers are adequately educating and training the staff members. Lack of education and means of protection is the resultant cause of the spread of the virus.

Employment Equity was a determining factor in the stability of this country, both in the social and economic context. The creation of the Employment Equity Act and the Constitution assisted with a basis for change but the application thereof, has not been consistent with the demand of South Africans.

## **2.2. Key Definitions**

### **2.2.1. HIV/AIDS**

*“HIV is short for Human Immuno-deficiency Virus. HIV is a virus that is only found in human beings, and it attacks and slowly damages the body’s immune system. HIV causes AIDS and it severely damages a person’s immune system so that the body can no longer fight off infections and other diseases. When this*

*happens, you get a group of particular medical conditions called ' AIDS-defining conditions or illnesses' and we say that you have developed Acquired Immune Deficiency Syndrome. "*

(Achmat.Z, 2001, p.10)

### **2.2.2. Employment Equity**

*"Attainment of equity in the workplace by:*

- *Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and*
- *Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce. "*

(Finnemore.M, 1999, p.294)

## **2.3. CURRENT LABOUR LAW – HIV/AIDS**

### **2.3.1. Introduction**

Due to the fact that HIV/AIDS was only identified in 1981, the related law is fairly new. There has not been strict legislation governing the protection of employees with HIV/AIDS and this has led to the lack of job security for employees suffering with the disease. Currently in South Africa, HIV/AIDS is not a notifiable disease in terms of S32 of The Health Act 63 of 1977 (Giles.J, 1998, p.15-7) The primary reason for not making the disease notifiable, is that it could cause sufferers to be reluctant to come forward, thereby making the process counterproductive. Making the disease notifiable does not have the support of HIV/AIDS supporters and it does not follow international trends.



There are many restrictions should the disease become notifiable. Among them include the restriction on the use of public transport. These restrictions however are not relevant to HIV/AIDS or the prevention of its spread. It gains the support of the World Health Organization that the disease does not become notifiable.

However HIV/AIDS is a communicable disease in terms of The Health Act published in October 1987. The Regulations allows a medical officer of health, who suspects a person on reasonable grounds to be a carrier of the disease, to instruct such person to subject himself to a medical examination and treatment that may be prescribed. A further regulation which was also published in October 1987, includes HIV/AIDS in a list of diseases that will render a person to be a prohibited person in terms of s17 of The Admissions of Persons to the Republic Regulation Act of 1972. This means that immigration officers are empowered to insist on persons who in their opinion are suspicious of being afflicted with the HIV/AIDS disease, to submit to a medical examination. The Minister of Health and Welfare is therefore vested with wide powers to deport persons if it is in the public interest.

Except for the above circumstances, there are no legal provisions for employers to compel employees to submit to medical examination for detection of the virus. S 7(2) of the Employment Equity Act 55 of 1998 provides for circumstances where employers may be allowed to conduct HIV-testing on employees. There has recently being conflicting legislation with respect to HIV-testing of employees. On the one hand, it is submitted that HIV-testing is prohibited in the absence of an order by the Labour Court. On the other hand, it is stated by the Labour Court that voluntary or anonymous testing falls outside the ambit of S7(2) of Act 55 of 1998.

If it is an extreme case, then it is the obligation to request the informed consent of the employee to submit to such examination. However the employee has to be advised that the purpose of the examination is to identify the HIV or AIDS virus. Informed consent

includes the employee being advised of the following :

- i) The reasons or the purpose of which the test is being performed;
- ii) The potential advantages and disadvantages to the client of having his/her HIV status determined;
- iii) The influence the result of the test may have on the clients treatment; and
- iv) The possible psychosocial impact on a positive test.

(Giles.J, 1998, p.15-8)

### **2.3.2. Code of Good Practice**

This Code was launched by the Minister of Labour on 01 December 2000. It is provided for under the Labour Relations Act and the Employment Equity Act. It operates as a guide for employers and employees, however, it is not legally binding upon them. Its adoption in the workplace is not peremptory, but voluntary.

The Code can be used for the following:

- i) to discuss issues around HIV/AIDS in the workplace;
- ii) to campaign for the implementation of the Code in the workplace.

(Achmat.Z; May 2001, p.514)

The Code focuses on reducing and managing the impact of HIV/AIDS in the workplace through the implementation of HIV/AIDS policies and programmes. By addressing this issue in the workplace, it will inevitably obligate employers, trade unions and government to play a positive role towards local, national and international efforts to reduce and regulate the spread of HIV/AIDS.

The Code also places emphasis on achieving broader objectives, which include:

- i) Eliminating unfair discrimination in the workplace based on HIV status.
- ii) Promoting a non-discriminatory workplace in which people living with

HIV/ AIDS are able to be open about their HIV status without fear of stigma or rejection.

- iii) Promoting appropriate and effective ways of managing HIV in the workplace.
- iv) Creating a balance between the rights and responsibilities of all parties.
- v) Giving effect to the Regional obligations of the Republic as a member of the Southern Development Community.

(Achmat.Z, May 2001, p.515)

Considering that the Code's primary objective is to set out guidelines for employers and trade unions to implement, it is also the code's secondary objective to provide guidelines for employers, employees and trade unions on appropriate methods to manage HIV/AIDS within the workplace. These methods include a list of principles for creating a safe environment and for providing regulative measures to assess and reduce the impact of the epidemic. The Code attempts to foster co-operation between the parties in the workplace and between the workplace and other stakeholders at a sectoral, local, provincial and national level.

The Code must always be used in conjunction with other legislative Acts. Read in conjunction with the Employment Equity Act, legislation provides that there should not be unfair discrimination against an employee in the basis of his or her HIV status. Furthermore, no employee or prospective employee may be discriminated against in any employment agreement or for the application of employment.

When the Code is read in conjunction with the Labour Relations Act, an employee cannot be unfairly dismissed as a result of his or her HIV status. However the Labour Relations Act does make provision that in the event of the employee's failure to act in terms of his or her responsibilities, he or she can be dismissed in terms of his or her incapacity to do the job. In this regard, the Act does make clear provision that substantive and procedural fairness must prevail prior to dismissal of an employee. Such fairness can only be determined at a disciplinary hearing held against the employee, at the Centre for Conciliation, Mediation or Arbitration {CCMA} or at the various courts. Substantive

fairness provides that there must be fair reason given by the employer, whilst procedural fairness ensures that the employer acts within the legal framework as set down by legislation.

It is accordingly clear that an employee's HIV/AIDS status can never be the sole determining factor that leads to his dismissal, however this does not preclude an employer from dismissing an employee for poor work performance or an inability to do his job properly, which fact may be a direct result of his HIV status. This inevitably makes it apparent to employees suffering from the epidemic that at some point in time when their health starts to deteriorate, there is a reasonably good probability that he or she could lose their job.

When the Code is read in terms of the Occupational Health and Safety Act, an employer must provide for a safe working environment. As Finnemore M states,

*' the employer's general duty is clearly framed to provide a working environment that is safe and without risk to the health of the employees. '*

*(Finnemore.M, 1999, p. 308)*

This is primarily to protect employees who do not suffer from the epidemic. When an employee is exposed to bodily fluids of infected persons, he or she may apply for remuneration in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993. It is obligatory for employers to train and educate staff on the methods of preventing transmission of the disease and the reporting procedure in the event of transmission.

In terms of the Basic Conditions of Employment Act an employer must maintain certain basic standards within the work environment. These standards include ethical as well as occupational norms. For HIV/AIDS employees, this includes making provisions for sick and medical leave and any other benefits in this regard. It is common cause that many of the current legislative Acts are the product of diversities within the South African labour

environment. It is also common cause that such acts were promulgated to give effect to the objectives of the Constitution.

### **2.3.3 Charter of Rights on AIDS and HIV**

This Charter was introduced in November 1992. It contains basic human rights principles for persons suffering from the epidemic. The Charter applies:

- (i) To claim your rights as a person living with HIV or AIDS.
- (ii) To help other people understand their rights around HIV and AIDS.

(Achmat.Z, 2001, p.528)

This Charter is verily consistent with the rights as stipulated in the Final Constitution. It includes rights relating to the Freedom of Movement for personal suffering from the disease, their Right to Privacy, the Right not to be obligated to submit to an HIV test and the Right to be treated fairly when applying for a job or the termination thereof. The primary Right in this Charter is the Right to Equal Protection of the Law and the Equal Access of Public Benefits.

The Charter is a stepping stone towards creating awareness amongst HIV/AIDS sufferers. It guides employees in the reservation and execution of their rights, should they in any way be violated.

### **2.3.4. National Patients Rights Charter**

This Charter was introduced in 1999 by the Minister of Health. The Charter does not bind parties to the tri-partite structure as the rights that it refers to, are protected by the Final Constitution. The Charter can be used:

- i) To claim your rights as a person using health care services,

- ii) To help other people understand their rights and duties around health services

( Ibid. p.495)

The primary right under this Charter is the Right to Health Care Services, which includes the right to a safe working environment. Employees should be protected against unhygienic conditions, inadequate water supply and occupational hazards.

Access to health-care includes the receiving of medical treatment at health-care facilities. This is an endeavor by the South African government to assist their citizens with health-care problems. The Charter also makes attempts to create awareness that employees should be allowed to gain sufficient benefits and protection from insurance and or medical aid schemes in respect to their health. In receiving health care services, the employee has a right to receive precise details of their illness and the prospective method of treatment.

### **2.3.5. National Policy on Testing for HIV**

This policy was launched in August 2000. It can be used as a guide to understanding the method of HIV testing and when such testing can take place. The policy makes it clear that persons can be tested for HIV/AIDS with their informed consent. When such tests are conducted at health-care facilities, pre-testing consulting is required. Results of the tests must be confidential, however it may be revealed with the consent of the sufferer. Such consent must be received without duress and inducement and must be free and voluntary.

Post-test counseling takes place when the individual receives the results. It will require psychological assistance and treatments details. The standards set down with regards to the procedure for testing of individuals has already become law.

## 2.4. CURRENT LAW LABOUR – EMPLOYMENT EQUITY

### 2.4.1. Introduction

Employment Equity is governed by the Employment Equity Bill. This Bill was put into parliament after significant debate and agreement between government, labour and business in NEDLAC. The Bill itself is the consequence of entrenched economic and social inequalities that existed in South Africa. Income distribution is one of the inequalities that are prevalent in the country. A master-servant relationship was created in the past, where whites overwhelmed the managerial positions as ‘masters’ whilst the blacks accepted their positions as ‘servants.’ This can be substantiated as follows:

| OCCUPATION                    | White | Coloured | Asian | Black |
|-------------------------------|-------|----------|-------|-------|
| Mining                        | 1197  | 361      | 567   | 201   |
| Building industry             | 1069  | 328      | 506   | 193   |
| Manufacturing                 | 1074  | 297      | 336   | 255   |
| Public Services ( Government) | 786   | 307      | 575   | 208   |

**Figure 2.3 : Average monthly earnings (in South African Rands)**  
**Source :International Labour Office, *Apartheid and Labour Law*, 1983, Geneva: Bureau of Public Information, p.24**

As stated by the International Labour Organisation, “According to 1980 census, South African population was estimated to be composed about 20.8 million Black, 4.5 million White, 2.6 million Coloured and just over 80 000 Asian. From the time of the first Dutch settlement at the Cape of Good Hope in the middle of the seventeenth century, the whites progressively extended their rule over the whole of the present territory of South Africa, which when so occupied was lightly populated. This process was accelerated in the nineteenth century when a large part of the Dutch settlers migrated into the interior to escape British rule. As the whites came increasingly into contact with the Black people, they were able to subdue the latter owing to their superior military force and more

sophisticated form of society. *A black man in a white area is there only to sell his labour.*”

( Apartheid and Labour, 1983, p.8)

The inequalities that exist are still extreme and it is well documented that white males earn high incomes while blacks, particularly black females, are ranked at the lowest in the income distribution curve.

*Approximately 25 % of black males as opposed to about 5% white males are unemployed. The disparities that exist is the result of past discrimination in the labour market, apartheid laws as a form of political oppression, the lack of proper education and training, and the unequal distribution of ownership of productive assets.*

( Giles.J, 1998, p.18-3)

It is accordingly apparent that Affirmative Action procedures are needed to redress and provide stability to the labour market and to society as a whole.

The process of equity began since the inception of the Labour Relations Act and the Final Constitution. It is common knowledge that through decades of historical rioting and resistance, people began to develop the realization that every individual has rights. This realization aided them in the fight for freedom of abuse and right to protection from oppression. The Labour Relations Act was a milestone towards creating equality in the workplace through the collective bargaining process. However the strength in the oppressed finally emanated in the 1994 democratic elections and more specifically, the Final Constitution.



#### **2.4.2. The Final Constitution**

The Final Constitution of 1996 was drafted to create a democracy within the country. It was a determining factor in the 'road to freedom for all citizens of South Africa.' The provisions that gave effect to creating employment equity included:

##### **2.4.2.1. The Right to Equality:**

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

( The Constitution of the Republic of South Africa, 1996, s 9)

##### **2.4.2.2. The Right to Freedom of Religion, belief and opinion:**

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*

( Ibid, 1996, s15[1] )

##### **2.4.2.3. The Right to Freedom of Expression :**

- (1) Everyone has the right to freedom of expression, which includes :*
  - (a) freedom of the press and other media;*
  - (b) freedom to receive or impart information or ideas;*
  - (c) freedom of artistic creativity; and*

*(d) academic freedom and freedom of scientific research.*

( Ibid, 1996, s16[1] )

#### **2.4.2.4. Slavery, servitude and forced labour**

*(13) No one may be subjected to slavery, servitude or forced labour.*

( Ibid, 1996, s13 )

The Final Constitution operated as a 'stepping-stone' towards creating awareness amongst persons and employees who were previously socially and economically disadvantaged. The inherent rights as stated above are contained in the Bill of Rights as part of the constitution.

The Right to Equality protects citizens from abuse of inherent rights that is given to all individuals, whilst the rights to freedom of belief, opinion and expression were targeted towards giving persons an opportunity to have and voice their opinions. These rights were designed to protect persons from oppression that existed in the past. Further, the right.

It as stated in s9 [2] is specifically related to redressing the prejudices that employees and persons previously experienced. These included the historic slavery of persons and the oppression of employees, and the fact that slaves and individuals were not given any opportunity to 'voice' their opinions.

#### **2.4.3. The Employment Equity Act**

The Constitution gave rise to the Employment Equity Act which targeted persons, to whom the previous laws and political adversities acted against. The Act applies to all employers except where only "designated" employers are identified, and to all employees except members of the National Defence Force, the South African Secret Service and the National Intelligence Agency.

The Act is divided into two sections, which include the application to all employers and the prohibition of discrimination, and secondly, the application to certain “designated” employers which are designed to redress the disadvantages in the labour market experienced by “designated groups”.

#### **2.4.3.1. Unfair discrimination**

The Act attempts to prohibit discrimination by:

##### **(i) Elimination of Unfair discrimination**

Every employer must reasonable steps to ensure that there is no unfair discrimination in the workplace by removing such discrimination in its policies and practices. The elimination of unfair dismissal will apply to existing employees and prospective employees or job applicants.

##### **(ii) Prohibition of Unfair Dismissal**

An employee or job applicant may not be unfairly discriminated against, directly or indirectly, in any workplace policy or practice, on the basis of gender, race, sex, pregnancy, family responsibility, colour, ethnic social origin, sexual orientation, age, religion, disability, conscience, beliefs, birth, language, culture, political opinion and or HIV status. These grounds are consistent with the Constitution and its application.

The first section is meant to prohibit direct and indirect discrimination. It provides for nineteen (19) grounds for unfair discrimination that is applied to all employers. Such discrimination is punishable through remuneration and punitive damages.

However it is not unfair to discriminate on:

- the adoption of affirmative action procedures that is consistent with the Employment Equity Act, or
- distinguishing, excluding, or providing preference to an employee or prospective job

applicant on the basis of an inherent requirement of a job.

Should unfair discrimination take place, the matter must be referred to the Centre for Conciliation Mediation and Arbitration (CCMA) within a period of six months from the act or omission that was allegedly considered unfair discrimination. Should the referral take place after a period of six months, good cause must be shown. The purpose of referring the matter to the CCMA is to ensure that there is an attempt to settle the dispute via conciliation. If there is still no resolution to the dispute, the matter may be referred to the Labour Court or if possible, to arbitration, if both parties agree.

#### **2.4.3.2. Affirmative Action**

In order to redress employment inequalities that existed in the past, every designated employer must ensure that affirmative action measures are implemented for persons from designated groups. Affirmative action is defined as:

*'a (temporary) strategy to achieve equality at work without lowering standards and without unduly limiting the prospects of existing competent employees.'*

( Andrew Levy & Associates (Pty) Ltd, 1994 p.4.2)

The characteristics of affirmative action include the following;

- (i) It is a strategy, alternatively, a course of action which is directed at achieving equality within the workplace.
- (ii) It is multi-faceted in that it covers work procedures relating to recruitment, selection, promotion, training, education, mentoring, and organizational culture
- (iii) It involves preferential treatment and / or positive discrimination
- (iv) It is targeted at designated groups of previously disadvantaged persons
- (v) It is voluntary to the extent that intended recipients may choose whether to become part of the process or not.

- (vi) There may be an expectation by other persons not targeted by affirmative action that he or she may have limited prospects. However the affirmative action measures are not designed to restrict their chances of success.
- (vii) The objectives of the measures are that it be operational for a period of time until a balance of representivity is achieved in the workplace.
- (viii) The measures do not overlook the merits of an application, neither does it lower standards in the workplace

Affirmative action measures apply to designated employers only. These include:

- (i) *a person who employs 50 or more employees*
- (ii) *an employer who employs fewer than 50 employees but who has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of schedule 4 of the Act*
- (iii) *a municipality*
- (iv) *an organ of state excluding the National Defence Force, the National Defence Agency and the South African Secret Service*

*Designated groups mean Black people (includes Africans, Coloureds and Indians,) women, and people with disabilities.*

(Finnemore , November 1999 p.296)

Designated employers must do the following:

- (a) Identify measures to eliminate employment barriers including discrimination that could be classified as unfair in the past.
- (b) Design measures to promote diversity in the workplace, the basis of which must be equal dignity and respect.
- (c) Make appropriate provisions for people from designated groups.
- (d) Implement measures to ensure equal representation of suitably qualified persons from the designated groups in all categories and levels of the workforce. These include measures to retain and develop competencies and abilities of persons from the said designated groups.

Included in these measures would be preferential treatment and numerical goals. The quota is excluded. At the same time, it is not required of an employer that decisions concerning employment policy should be taken, that would result in creating an absolute barrier to the prospective or continued employment of persons who fall out of the designated groups. It is imperative that whatever plan is implemented, must be monitored and reviewed regularly. This will ensure consistency in the application of the laws in such workplace.

It is also the requirement of every designated employer to submit a statement to the Employment Conditions Commission in respect to the benefits and remuneration received in every work level of such employer's workforce. The objective of such submission of such statements is to identify income disparities amongst such workers. The objective of the Commission is to attempt to reduce differences in employees' incomes.

Regulation of employment equity measures is attended to by the Commission for Employment Equity. The function of such a commission is to make submission to the Minister on areas relating to the Code of Good Practice, further regulations and policies and other issues that affect the Employment Equity Act. In simple terms, the Commission is involved in monitoring and improving in the current status of the Act.

The Act also makes provision for labour inspectors, who are responsible to enter, question and inspect employer's work environment to ensure compliance with the Employment Equity Act. Should there be non-adherence to the Act, the labour inspector has the power to request a written undertaking from the employer to comply with all or specify provisions of the Act.

The laws governing Employment Equity, specifically the Employment Equity Act, was passed in October 1998 and only became operational in 1999 and in phases. The law is relatively new and the application thereof will require some time before it is entrenched in people's minds and understandings.

## **2.5.Summary**

The history of South African passed through various stages. From the inception of rapid industrialization came slavery and worker oppression, to the fight for worker rights, to the introduction of legislation to protect workers rights and finally, to the creation of our current democracy. South Africa exists as one of the very few countries where people fought for freedom with a successful result.

HIV/AIDS is seen as an epidemic that is infringing on South Africa's freedom of democracy and economic stability. It is a growing disease that infiltrates the labour market and the social status of every employee. Employment Equity on the other hand, is the government's stance on redressing the past economic, political and social upheavals that existed against the oppressed.

Both of these issues are areas of concern for the South African legislature. There has to be laws to protect the spread of the disease and to advance the equity in the workplace. These laws can only be effective when compared to international laws. This leads to the third chapter on the status of laws of other countries.

## **CHAPTER THREE : INTERNATIONAL LAWS**

### **3.1. Introduction**

During September 1996, a Second International Consultation was organized by the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS (UNAIDS), where guidelines were set in respect to the translation of human rights standards into practical observances. The primary objective of such consultation was to ensure that states provide a positive response to the virus and also, that the commission assisted states to implement an efficient, human rights-based response.

Some of the guidelines included:

- (i) That all states should develop a national framework for their response to the virus. This includes creating an accountable, participatory and coordinated approach which integrates policies and programmes across all levels of government.
- (ii) That the states ensure that there is community involvement in the drafting of HIV/AIDS policy designs, implementation of programmes and the monitoring process. Communities should be obligated to ensure that the policies and programmes are carried out effectively, specifically in the field relating to law, human rights and ethics and morality.
- (iii) The states should ensure that their public health laws are reviewed and further, that they are consistent with international human rights regulations. Such laws must address all HIV/AIDS issues and their provisions must be complaint with public demand.
- (iv) It is pertinent for the state to provide laws for the control of HIV/AIDS-related services, goods and information. This is imperative as it ensures the grater availability of HIV prevention measures and services and also, for providing reliable medication at a reasonable price.



- (v) Due to the virus being relatively new, states should adequately provide for the legal support services. This will educate people on the legality of their rights and the enforcement thereof. States should also create distribution channels for the deliverance of HIV/AIDS programmes, education and training, as this operates as a method of creating awareness amongst the public order.
- (vi) In order for universal implementation, specific codes of conduct must be implemented by government and the private sector. The objective is to ensure that all human rights principles relating to HIV/AIDS, is applied in the workplace, thereby creating professional practices.
- (vii) States should also create monitoring mechanisms to ensure that there is adherence to HIV-related human rights.
- (viii) In order to create a greater awareness and development of the rights relating to HIV/AIDS, all states should share their experiences and their application programmes on an international level (Schuklenk.U, 2001, p.187).

It is the general objective of the United Nations to create a unified and universal system of operation with respect to HIV/AIDS laws and also, its application thereof. The benefit of such consultation is to enable each nation to apply its laws consistently and to share current and future problems that may be expected

International laws have also distinguished between employees suffering from the disease and all other employees in the workplace. The American and British philosophies have made it clear that if there is a deliberate or negligent violation of the laws relating to HIV/AIDS, criminal prosecution will take its cause. Criminal procedures are very stringent on employees who are aware of their HIV status and who still spread the disease.

The virus is spreading at an exorbitant pace. Funding and proper regulations is required to contain and control the spread of the disease. This was made clear in the UNAIDS Executive Director statement that,

*There have been recent increases in global AIDS funding by a wide range of international donors, including the US, UK, the World Bank's Multi-Country AIDS Programme of grants to Africa, the Global Fund to fight HIV/AIDS, TB and Malaria, the Gates Foundation as well as governments in affected countries. But still the funding is only half of what is needed by 2005. According to WHO and UNAIDS estimates, over \$US10.5 billion a year will be needed in 2005 for prevention, treatment, care and support programmes in low- and middle-income countries. About half of that total is needed in Africa alone. With up to 1,000 adults and children dying of AIDS each day in some the worst-affected countries in Africa, Africa is losing a significant portion of its young people and productive workforce. Only if AIDS is rapidly brought under control will social and economic development is able to flourish .This can become a reality if African leaders make it their business to invest in both AIDS prevention and care and treatment. Today, fewer than one in five people at risk of HIV infection in Africa are targeted by an HIV prevention programme.*

(Internet 2: [www.mrc.org.za](http://www.mrc.org.za) )

Globally, we find that the disease is increasingly becoming uncontrollable. Specifically, in countries such as Asia, which includes China, Papua New Guinea and Indonesia, there are massive spreads of the virus. Internationally, “forty-two (42) million people are now living with HIV, five (5) million were newly-infected in 2002, and 3.1 million people were killed by AIDS this year. In sub-Saharan Africa, the epidemic continues to expand. An estimated 3.5 million new infections occurred in 2002, and 2.4 million Africans died of the disease. In Asia, 7.2 million people are now living with HIV.” (www.unaids.org.za)

### **3.2. United States**

In most cases in the United States, when an employee is HIV positive, it does not pose a risk to other employees, as HIV is not spread by casual contact with infected persons. Most states allow for “Aids-Phobia” claims. These are claims that provide assistance and

accommodation to HIV infected employees. It may be necessary under the Americans with Disabilities Act or the Family and Medical Leave Act to offer accommodation to employees with Aids or those who are HIV positive. This includes them being given special work schedules or time off to acquire medical treatment. They may also need additional protective equipment to prevent colds and flu and any other infections that may adversely affect a person with a compromised immune system. Some American states do not allow “Aids-phobia” claims unless the employee can prove HIV infection.

However the reasonableness of a proposed accommodation depends on substantive factors such as:

1. Level of work and money involved to make an accommodation.
2. The financial resources of the employer.
3. The number of people employed at the facility where the accommodation is requested.
4. How the proposed accommodation will affect other employees.
5. How the operation where the accommodation is proposed relates to other facilities in a multi-facility operation.

The Department of Labour runs the Job Accommodation Network which provides free advice and consultations on how to implement accommodation on a case-by-case basis. If the problem is the ‘cost-issue’, a federal labour agency called the Equal Employment Opportunity Commission (EEOC) states that it is the employer’s obligation to assist employees to seek grant or other funding. It should also be the employee’s responsibility to pay a portion of the cost that exceeds the amount that is considered reasonable for the employer.

Further, the United States private health care system is open to various areas of skepticism in respect to the treatment of HIV/AIDS. The right to treatment to US citizens is a controversial issue and can only be resolved by law. The United States, similar to South Africa, has a Constitution and Bill of rights. This assures protection to citizens of their constitutional rights, which includes the right to privacy, liberty, or equality.

However similar to South African Law, there exists limitations to all constitutional rights and in this regard the US Supreme Courts have been forced to balance issues.

Many states have introduced mandatory laws demanding that all HIV/AIDS cases and test results be reported and further, the closing down of places where there is possibility of such virus being transmitted or received. Certain other states have amended their laws towards taking action against employees who expose others to the virus.

There is the perception that persons or employees suffering from the disease are secretive about their HIV status. This is attributable to male homosexuals (this group is considered more seriously infected at present) who are considered to be most discriminated against and it is this discrimination that is preventing them from coming forward. In response to such discrimination some jurisdictions specifically Los Angeles has promulgated legislation prohibiting such discrimination.

In terms of the Los Angeles Ordinance, the victim of discrimination is allowed to claim damages, costs and punitive damages by way of civil action. The consequential effect of the ordinance is that it educates the public about the AIDS virus at the same time. This protection is available in many parts of the US.

### **3.2.1. Medico-Legal Matters**

There are two issues which relate to the association of the medical and legal solutions to the impact and effect of HIV/AIDS to the workforce. These refer to:

#### **3.2.1.1. Confidentiality**

The right to privacy is not an absolute right as entrenched in the US Constitution but it becomes pertinent with regard to specific individual matters. State laws and statutes govern for the adherence to such rights, however in many states, it has become obligatory for the medical profession to advise the relevant authorities that a patient has a

communicable disease. However, should this take place, it is necessary for such authority to protect the merits of such information. It is the intention of such legislature to ensure that such information is not laid out in the hands of a third party.

There has also been specific legislation providing for the disclosure of the names of individuals who have been tested at blood banks or other areas. Some states prohibit the use of a positive test result for the use in health, life, disability insurance or for the termination of employment. There is currently an argument that there should be disclosure when and only when there is written consensus from the infected person. The objective of such laws is to protect the individual against discrimination, on eligibility for acceptance to insurance policies, medical aids and dismissal of employment.

#### **3.2.1.2. Testing**

The objective of testing an individual is to protect those who have the disease from those who are uninfected. It cannot be obligatory for a person to submit to testing. Testing must take place with the written and informed consent of the individual. It is also a requirement that prior to such consent, the individual must be informed of the consequences of such decision.

*“American Courts have long recognized that a patient’s consent to a medical procedure is an essential prerequisite to the performance of that procedure, and a physician who performs such a procedure without the patient’s consent does so at the risk of incurring liability.”*

( Schuklenk.U, 2001, p.93 )

It is for this reason that mandatory testing is not permissible. Though, at times it may be necessary to test certain individuals, however, proper justification is required. Currently there are no grounds for proper justification. There has been an instance where testing had to take place, in the case where patients in the dialysis unit in a hospital has to be tested in order to protect transmission of the disease.

### **3.2.2. Criminal Law**

Where a person knowingly transfers the virus to another person or puts another person at risk of getting infected, such person is committing a crime. Unfortunately the Courts in the United States are clear that prosecuting the offender is not a preventive measure to the spread of the virus. Intentionally passing the virus is equivalent to attempted murder, culpable homicide or criminal assault.

The criminal law dealing with HIV/AIDS is relatively new and over time, new developments will be required. Currently, there is an expectancy within the United States court system, the virus may impact on various other areas of the law. An example would include the fact that fear of the virus may be used as a defence to a criminal charge.

### **3.2.3. Employment Law**

In the United States the issue of employment discrimination within the context of HIV/AIDS was based on the issue whether the virus, specifically, AIDS can be classified as a disability, under the federal law. It is considered discriminatory should an employee be dismissed on the basis of his/her HIV/AIDS status. This is unlawful in terms of the employment law and the employee will have a claim for unfair dismissal.

In such circumstances, the employer could raise the defence that the employee's ill-health and absence from work led to the dismissal, alternatively, there was some other substantive reason that warranted the dismissal. In this case, it is appropriate to forward the matter to the Industrial Reconciliation procedure.

### **3.2.4. Insurance**

There are currently disputes whether insurance companies should have access to private and confidential records of its members or prospective members. In the United States, health insurance schemes are relied upon to satisfy medical costs. Considering that

medical and hospital costs are extremely high, should the insurance companies be excluded from bearing the hospital bill, the Medical aid will be responsible for tendering of it. This would result in such medical aids becoming financially 'out-of-pocket'.

In some states, it is prohibited for the insurance companies to oblige employees to submit to testing. However, the insurance have manipulated the system and found other ways of gathering such information. Such companies have also merely opted to deny acceptance of new insurance policies to such employee.

### **3.2.5. Conclusion**

The United States has stringent laws governing the protection, abuse and application of HIV/AIDS laws. The criminal laws have become very strict on the deliberate spread of the virus by individuals. Unfortunately, the intention of the legislature is to prevent spread of the virus and to consolidate it. This process is still being undertaken.

The medical aids and insurance policies are attempting to discard persons who are infected with the virus. However the legislation protecting such persons and this is a measure which is consistent with the United States Constitution and Bill of Rights.

### **3.3. Britain**

Unlike the United States, Britain does not have a Constitution or a Bill of Rights. Accordingly, it very difficult to prove discrimination on the basis of an employee's HIV or AIDS status. However, the issue of discrimination has been addressed on the legislative level, only with regard to race and sex. The viable option for a person who has been discriminated against, is to rely on other forms of legislation, which includes unfair dismissal.

There are laws in the United Kingdom which has referred to the virus. These include:

- (i) The Public Health (Infectious Diseases) Regulation of 1985, which did not make AIDS a notifiable disease as it was not considered infectious. A further reason includes the fact that it will cause sufferers to drive the disease underground (similar to the South African circumstance).
- (ii) The Public Health (Control of Diseases) Act of 1984, which obligates persons who are believed to have been infected to the virus to compulsorily submit to an examination, and those who have the disease must be sent to a hospital and detained. This law has not been applied regularly.

Considering that the British legislation on HIV/AIDS is fairly undeveloped, the legislature is attempting to change their current status in relation to the laws governing the control and transmission of the virus.

### **3.3.1. Medico-legal matters**

Such matters relate to the link between Medical interference and legal recourses. These relate to:

#### **3.3.1.1. Confidentiality**

The General Medical Council in the United Kingdom permits the disclosure of privileged information, if the 'public interest' demands that the doctor's right to confidentiality be overridden. It is the doctor's prerogative to first attempt to receive the informed consent of the patient. The doctor must balance the interest of the patient and other individuals. Should the doctor find that the patient could be a risk to other persons or employees, and then such doctor may be allowed to inform the other individual, who could be the patient's sexual partner. However, the doctor must at all times, request the consent of the patient prior to acting.



Further the National Health Service (Venereal Diseases) Regulations of 1974, makes exception by ensuring health authorities to keep the records and identity of an infected person secretive. This circumstance occurs where the partner of the infected person is aware of the status of his/her partner and where such partner is being treated to prevent the spread of the virus. The regulation also makes provision that those persons who are in the high-risk category must be told, but persons including the family and friends should not be informed. This includes medical aid and insurance companies.

### **3.3.1.2. Testing**

As applied in the United States, universal mandatory testing is not permissible. However, there may be testing of certain groups should there be adequate justification that justifies an overriding of an employee's inherent rights.

There has been considerable debate in this area in Britain. The British Medical Association (BMA) advises that persons should be informed if they are to be tested for the virus and such persons should consent to the testing. If no consent is provided, such persons should be presumed to be infected. The BMA also advises that any doctor who performs an HIV/AIDS test in an individual without consent must be prepared to provide a justification for such action, before the courts or the medical council.

Currently in the UK and the United States, anonymous testing is taking place. This occurs where persons are tested for HIV/AIDS without providing their consent. Such persons do not disclose their identities, however they do provide certain information for reference. This form of testing precluded doctors from discussing the results of the tests. Furthermore, anonymous testing may be debatable from a moral perspective, however it would be difficult to prove that such actions constitute a 'legal wrong.'

In the UK, specifically Scotland, the Offences Against the Persons Act of 1861 states that "*All intentional infliction of physical injury is criminal.*" The objective of this provision is to prohibit the intentional administering of any destructive or noxious substance to

another individual. Such persons who are guilty of the above offence may be liable for prosecution. Thus far no citizens in the United Kingdom have been prosecuted for the transmission of HIV/AIDS. This is due to the following:

- (i) That the current criminal law makes it clear that where sexual encounters are consensual, the prosecution of such offenders may become impossible,
- (ii) It may be difficult to prove the merits of such transmission. This relates to the collation of evidence against the offenders. Furthermore, prosecution may not be cost effective and it may create time wastage,
- (iii) The prosecution of offenders may not be an effective strategy for prevention of the disease.

### **3.3.2. Employment Law**

In Britain the HIV/AIDS virus is not a notifiable disease. It is in this regard that there is no obligation on an employee to disclose his or her HIV/AIDS status to his or her employer. The British Department of Employment advises that there is no potential risk to other employees in the workplace where there is no contact with bodily fluids of infected persons. There are very limited occupational categories that deal with the contact of bodily fluids and accordingly, most work environments are safe from spread of the virus.

However, employers are of the view that due to HIV/AIDS not being a notifiable disease and the fact that employees are not obligated to submit to tests, employers should be able to demand submission to the test provided that advanced notice is given to the employees.

### **3.3.3. Insurance**

It is a fact that in British hospitals, medical fees are publicly funded. This is a direct benefit to British citizens as:

- (i) the cost of providing care to AIDS patients is extremely high
- (ii) insurance companies will be preclude from settling hospital bills

The British health care system has the upper hand as opposed to the United States and the South African health care system. British employees have the security that in the event that they do contract the disease, health care will be provided at no extra expense.

The greatest benefit to Britain is that,

*'those with the disease should not be deterred from going to hospital because of their fear of discovery and that free, informed debate about the disease could take place without publication of this confidential information.'*

(Ibid, p.174)

### **3.4. EMPLOYMENT EQUITY**

#### **3.4.1. Introduction**

The fight for employment equity and human rights has played a dominant role in the International arena since the end of World War II and the introduction of the United Nations. South Africa has never played a major role in the development of International human rights and the creation of a standard basis in employment equity. However South Africa did assist to the extent that much of the international laws were created and developed on the basis of our previous Apartheid system. The world is aware of the prejudices, upheaval and turmoil that Apartheid created and this aided the international communities, specifically the United Nations, to identify with human rights and the law.

The United Nations created the United Nations Charter which affords commitment to fundamental human rights in dignity and person and in the equal rights for women and men. Article 55 of the Charter provides for the “universal respect for, and observance of

human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (Van Wyk, Dugard, DeVilliers, Davis, 1994, p.172).

With the problems that existed between East and West countries in the past, two covenants were passed. These were named as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. The ICCPR Covenant recognizes the rights to equality, freedoms of movement, assembly, expression and association. Every person has the right to vote and everyone was treated equal before the law and equal protection of the law. The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes secondary rights, such as the right to work, fair wages, safe and healthy working environment and the right to education.

### **3.4.2. United States**

#### **3.4.2.1. Affirmative Action**

There are various views about the validity of Affirmative Action and preferences as a solution to past discrimination. One view is that unless traditionally disfavored groups are given preferential treatment over job selection, there will never be a critical mass that redresses the former inequalities in the workplace. Furthermore since many promotions take place within a Company's ranks, the Company will never have women and minorities with management experience who qualify for promotions unless they have women or minority staff on the entry-level.

The other view is that where justice calls for merit job selection, only the best-qualified individuals will be hired. This will in all probability mean that there will be perpetual preponderance of white males in good jobs. In 1977, the Supreme Court stated that it is acceptable for preferential hiring of minorities and women, as a means to correct the imbalances in the workforce that is a consequence of past discrimination.

Between 1980 and 2000, Affirmative Action has been most prominent in the allocation of Government contracts, specifically in the private sector operations. Many Companies have been subjected to Affirmative Action requirements at any one point in time. Unfortunately in California, there was a law passed called Proposition 209, which forbids Affirmative Action in the allocation of public contracts. The Supreme Court has upheld this law as valid and constitutional.

Recent cases state that employers should not uphold Affirmative Action programs as a means to promote diversity in the workplace. However, if there is a history of racism in the workplace, an Affirmative Action program may be an acceptable solution to apply.

Gender equality is also an area of concern under Affirmative Action. In the United State's constitution history, the Supreme Court differentiated between gender and racial equality. Gender equality has been subjected to a test that would permit gender based discrimination to survive legal criticism. The test is known as "heightened scrutiny" and it requires the courts to evaluate whether specific types of gender discrimination are constitutional. The courts are also required to ensure that there is adherence to the government's objective of creating and maintaining gender equality.

Heightened scrutiny test in the United States allows the courts to assess whether the legislature engages in legitimate gender discrimination. It is a fact that all acts of gender discrimination will not always be considered unconstitutional. Gender based equality is not an absolute right. In some circumstances gender based discrimination will be justifiable and reasonable. The United States application of the heightened scrutiny test has opened the doors for men and women to enter employments positions that were formally occupied by men. It has also allowed for equivalent remuneration for both sexes who performed the same jobs.

The problem that arises is the fact that gender discrimination is difficult to detect and resolve. The test requires a high degree of care and evaluative judgment on the part of the courts. The duty of care operates as a contributing factor toward analyzing and supporting

gender discrimination. The courts, in applying such tests, are required to examine two areas. The initial area relates to the significance of government's objective being adhered to and secondly, whether the measures taken to achieve the objective are adequately structured to achieve that objective.

Gender discrimination to a woman includes the lack of proper legislative measures in the following areas: maternity leave and maternity benefits; lack of recognition during job applications and job promotions; retirement benefits; unequal remuneration between male and female employees. In respect to male discrimination, inequality can exist with respect to the lack of legislative means towards paternity leave and benefits; lack of recognition in job applications and promotions due to affirmative action measures and the fact that the law allows women to qualify for retirement benefits at an earlier age than men.

The introduction of the Equal Pay Act, 29 U.S.C §206, provides that all employers with two or more employees are not permitted to discriminate in remuneration on the basis of sex, if the jobs require equal skills, effort and responsibilities and to be performed in a similar working environment. The Act does not permit a cost-based defence but its objective is to create a standard remuneration basis for male and female employees. Should the employer be guilty of such discrimination in a court of law, the employer can be charged criminally and subjected to civil penalties as prescribed by the Fair Labor Standards Act §216(a). The employer may also be required to pay the attorney fees and costs and punitive damages.

Laws giving effect to gender equality safeguards a woman's right to equality, ensures women independence and also ensures that the rights to equality are enforced. Providing legislation on gender equality is necessary for political and socio-economic development of society. In South Africa it is an imperative requirement to give effect to our diversities. As Liebenberg.S. (1995) states, "there are two reasons why it would be beneficial for South African courts to turn to United States decisions for interpretive guidance. Firstly, the outcomes have been favourable to achieving at least formal equality between men and women. Secondly, although this has not been the consistent outcome in the United States,

the decisional methodology allows for the flexibility necessary to achieving a level of substantive equality.”

#### **3.4.2.2. Equality and Equal Protection**

The United States Bill of Rights has been operational for approximately two centuries. Its constitutional position to equality originates from the Fourteenth Amendment to the Constitution. This states that all states cannot deny any person within its jurisdiction the equal protection of the law. According to the United States Supreme Court, Equal protection,

*“contains the necessary implication of a positive immunity or right, most valuable to the coloured race; the right to exemption from unfriendly legislation against them distinctively as coloured, exemption from legal discrimination, implying inferiority in civil society, lessening the security of their employment from the rights which others enjoy, and discriminations which are a step towards reducing men to the condition of subject race”.*

(Ibid, 1994, p.198)

The law regulating equality is not obligated to adhere to differentiated treatment of individuals. If the law imposes certain rights and obligations on a specific group, this does not mean that another group, who is part of the same legal system, is entitled to the same rights and obligations. The law operates on different levels and classifies matters on its merits. This is non-discriminatory and reasonable.

Discrimination in terms of the International Covenant on Civil and Political Rights is classified as any form of distinction, restriction, exclusion or reference that is based on race, colour, language, sex, religion, political opinion, social origin, birth or other status or property, which may cause an infringement to the exercise of a person’s rights and freedoms. This means that discrimination is not considered an isolated issue. It requires scrutiny and decisiveness to establish the contents of such discrimination.

### 3.4.2.3. Equity in International Laws and Rights

The most pertinent international laws relating to Employment Equity include:

#### ❖ The Right to Life

The Right to Life has not been elaborately explained in legal jurisprudence in the United States and Canada. However it is confirmed that such right is the most basic human right that exist in any society. It is an inherent right and one that is imperative in any society. The Right to Life has been confirmed in many human rights declarations such as the Declaration of Virginia of 4 July 1776 and the United States Declaration of Independence of 4 July 1776.

Kurt Herndl comments on the Right to Life and its significance in the modern-day application of international law,

*'Of all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their raison d'être and must take their lead. Protection against arbitrary deprivation of life must be considered as an imperative norm of international law which means not only that it is binding irrespective of whether or not States have subscribed to international conventions containing guarantees of the right., but also that non-derogability of the right to life has a peremptory character at all times, circumstances and situations'.*

( Ibid, p.214)

The Right to Life has to be narrowed to confirm that no person should be deprived of his or her life. This includes the loss of life from armed conflict and environmental disasters; failure to support millions of starving people; lack of protection from the law and the excessive use of force by military and law-enforcement officials; slavery and destructive measures to prevent insubordination and the inherent moral issues relating to euthanasia, abortions and the applications of the death penalty. The aforementioned issues are



significant to the extent that international laws have not implemented universal standards to govern against the abusive and unethical destruction of life. For South Africa, this lack of security has violated the inherent right to life of millions of people who fought for democracy and freedom. The law at the time, was applied on a unilateral basis, where the inherent rights of the oppressed and unskilled remained unprotected.

The Right to Life is contained in article 3 of the Universal Declaration of Human Rights and in article 6 of the International Covenant on Civil and Political Rights and it is stated, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (Ibid, p.216). Article 2(1) of the European Convention on Human Rights makes it clear that the Right to Life must at all times be protected by law. This is the basic right channeling the way for the introduction for other rights. Not only must this right be protected by law but it must also be protected from the moment of conception.

The Right to Life is very much consistent with its existence in South Africa laws. However, it has only become apparent since the introduction of the Final Constitution. The application of such right is the primary concern of International Councils. The problem raised is whether the legislature of the various countries has in fact, made it clear and apparent that this right is entrenched and there can be limited deviation from its significance and application.

#### ❖ **Freedom and Security of the Person**

This includes the freedom from torture, inhuman or degrading treatment of any nature, usually associated with violations of due process rights and slavery, abortion and euthanasia. The factual application of such rights, are consistently considered in criminal laws and procedures. However as with many international constitutions and laws, there can be limitations to the rights to protect the actions creating these violations.

Under the United States Fifth and Fourteenth Amendments, the Right to Liberty and Security is inherent in procedural due process. There is also general consistency amongst many of the covenants, which includes the International Covenant on Civil and Political Rights and American Convention on Human Rights, that such right is enshrined to protect the cruel, degrading and inhuman punishment on people.

In terms of United States 'due process', this right is versatile in its application, to include the freedom from bodily restraint; to participate in the various occupations of life; to marry and have children; to acquire knowledge, and to observe religious worship of God and receive the privileges attached to such worship. The United States legislature has attempted to broaden their scope of the application of this right, as it is very much linked to the Right to Life.

#### ❖ The Right to Privacy

This right has also been universally stated in many of the International laws and Covenants. These include the Universal Declaration on Human Rights ('article 12'), the International Covenant on Civil and Political Rights ('Article 22') and the American Convention on Human Rights ('article 11'). The American Courts have always adopted the decision of Judge Brandeis, who states that,

*'the makers of our Constitution recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilization.'*

(Van Wyk, 1994, p.243)

The Right to Privacy extends to procreation, marriage, motherhood, education and family relationships. However in many States, the Right to Privacy is not consistently applied. These include Georgia and Connecticut, which states that Right to Privacy does not

extend to the right of homosexuals to engage in acts involving consensual sodomy. Such States make it a criminal offence when consensual or related sodomy takes place between homosexuals, in spite of it taking place within their own home. As compared to South Africa, this does not provide for equity in diversity. Such restriction adversely affects homosexuals, and increases levels of brain-drain and the inherent lack of confidence in the legislature. The laws governing the Right to Privacy have many limitations attached. This inhibits growth in diversity, which is not consistent with what is considered 'equity'.

The Right to privacy is not consistently applied to the electronic communications between work employees. In some states, the electronic eavesdropping on conversations constituted a search and seizure that impinges on the privacy of communications between employees. However in other states, this is allowed to the extent that it is procedurally and substantively correct. This extends to the privacy of post, correspondence and telecommunications.

### ❖ **Freedom of Expression**

The South African law has recognized this right in its Constitution to be individualistic based and it also includes the freedom of the press and the freedom of artistic creativity and scientific research. This right is wide in its application to include non-verbal and verbal acts and to apply to the household, workplace and political environment. There are many restrictions imposed on this right as it can easily infringe on other rights as entrenched in the Constitution, and this can include the right to privacy.

The Freedom of Expression is also a fundamental right in international human rights laws. This is entrenched under article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights. The initial amendment to the Constitution in the United States has made it a precedent that Congress cannot make any law that abridges the freedom of speech or the media.

The Freedom of Speech and Expression is considered an expression of self. Preventing a person from expressing such freedom is tantamount to denying such person of his or her basic right to privacy, dignity and beliefs. Further this right is an inherent requirement to the creation and development of 'democracy'. People need to express and convey their views and thoughts, and this is a contributing factor towards the advancement of democratic laws and decisions. Success in a workplace is verily dependent on the actions and reactions of employees. Employees have rights and their rights must be channeled and responded through themselves, shop stewards and trade unions. Should this right not exist, it destroys the object of a 'democracy'.

From the perspective of democracy, the value of the right is not only derived from the fact that what is received may be true or useful. The United States Supreme Court has confirmed that the constitutional position of freedom of expression does not necessarily provide for the truth, social utility or popularity of the ideas or beliefs that is received. The credibility of such right comes from the fact that people are free to express themselves and to play a role in society. For example, 'team building' in a corporate institution is a contributing factor towards inducing creativity, building social and professional team-players and ensuring that employees are given an opportunity to express their views and ideas. Whilst, in an autocratic work environment, employees are not given the opportunity to air their views and this may inhibit an employee's progress in his or her work. Similarly, in a country that commands authoritarianism, it will restrict development within the economic, political and social fabric of such country.

### **3.4.3. India**

#### **3.4.3.1. The Right to Life and Equality**

The Indian continent is known to be at the forefront of the struggle for human rights. However the area of concern is not as much the racial discrimination but the discrimination based on religion and cultures. This was pointed out by Judge Sorabjee and who stated,

*'the problems of inequality and the perceptions of it are not the same in both countries. In India the source of discrimination does not mean legislation by the states of codified or white majority. In India invidious discrimination evolves from religious "personal" customs or practices. In the United States may states laws perpetuate racial discrimination and generally survived a tax based on the equal protection clause for many years'.*

(Ibid,1994, p.203)

Section 14 and 21 of the Indian Constitution entrenches the inherent Right to Equality and to Life. The Constitution makes clear reference to the fact that no person may be deprived of his or her right to life or liberty, however this right is limited to the extent that such violation is in accordance with a procedure established by law. The Indian uphold the fact that the violation must be 'reasonable, fair and just'.

India's economy is verily dependent on a society that is labour-intensive. As a result the Labour laws governing such conduct are stringent and protective. The introduction of the Equal Remuneration Act prohibited discrimination of remuneration for male and female employees. In 1994, it was discovered that there was a difference in the payment of wages to labour contractors who were involved in the construction of stadiums and roads for the Asian Games. The minimum wage stipulation at that time was 9.25 rupees per day. However males were receiving 8.25 rupees a day whilst females were being paid only seven rupees per day. This discrepancy made it clear to the drafters of legislation that female employees were involved in the same type of work and in a similar environment, were being discriminated against. Furthermore, their wages were being paid to an agent, who was paying the wages to the labourers and pocketing the balance of the monies (Liebenberg.S, 1995, p.101).

The legislature thereafter provided that in the case where contracts were being awarded by the state, there must be two responsibilities attached to it. Firstly, all wages must be paid to the employees directly and secondly, the government must always take steps to ensure that the provisions of the labour laws are always observed.

The Indian laws have made it peremptory for workplaces to ensure consistency in its application of its labour laws. This specifically relates to the prohibition of discrimination based on sex, gender, equality and life. Forced labour and slavery is prominent in the country, which exists as one of the most of populated countries in the world. The labour laws are strict but the application of such laws are difficult to implement.

Section 14 and 21 of the Indian Constitution has also been applied to the provision of legal representation to poor and indigent accused in prisons. Further, the interrogation of women in prisons may only be done in the presence of female police officers. The law has targeted the protection of the plight of the poor and the disadvantaged and women, in general. Conditions of women prisons and lock-ups have improved and the legislature has attempted to sensitize the police. This has been the basis of gender equality, to protect the status of women and the disadvantaged.

#### **3.4.3.2. Social and Economic Rights**

The social and economic rights are entrenched in many Constitutions and it includes, the right to shelter, good health and employment and the freedom from hunger. The Indian provided for the Directive Principles of State Policy as a chapter in its Constitution. This section ensured that there is an obligation by government to provide assistance to the poor.

The Directive Principles attempts to convince the government to ensure that there is a greater awareness by the judiciary for proper working environments and social restructuring. The principles have also been applied to the regulation of minimum wages, worker participation in the management of companies, equal pay for equal work and gender discrimination and the standardizing of employee remuneration.

The above rights and freedoms are inherent requirements for employment equity in the workplace. India's diversities are verily based on the differences in people's cultures,

religions and language preference. This is the contributing factor towards the difficulties that the legislature experiences in creating equity in the workplace. However there have been many positive changes that have assisted the workplace to cater for such diversities. This is slightly different from the South African employment equity procedures, as our equity relies on preventing inequalities relating to gender discrimination and fair procedures. The consistencies between the South African and International laws relating to HIV/AIDS and Employment Equity will be summarized in the next chapter.

### **3.5. Summary**

International labour laws are significant to the extent that South Africans are able to make comparisons and improvements based on international standards. The United States and Britain are important countries to make comparisons with, as these countries are developed and their laws are linked to standards as imposed by the United Nations.

Both countries are also good examples relating to the HIV/AIDS virus. The countries are new to the virus and may suggest ideas not previously considered. The United States is also an excellent country to evaluate the application of its employment equity policies and procedures. Its past is also noted for its power struggles and freedom fights. Furthermore, India is also a country that exists in the Far East, where there is a greater level of diversity. India is a developing country and its labour-intensive work environment may aid in the building of a diverse and content workforce.

Their laws can assist South Africa to promote and improve on its laws, where necessary. A Gap Analysis of such laws is therefore imperative to ascertain whether South Africa is at the forefront of proper legal implementation of its laws.

## **CHAPTER FOUR: GAP ANALYSIS BETWEEN SOUTH AFRICAN AND INTERNATIONAL LAWS**

### **4.1. Introduction**

The study thus far has identified the local and international laws existent for HIV/AIDS. Indeed the consequence of proper laws is pertinent to the development and growth of the socio-economic status of every country.

It has already been pointed out that HIV/AIDS is a 'death-trap' that could cause the economic fabric of a country to become unproductive and uncompetitive. Control and regulation of the epidemic is imperative in order to sustain the demographics of a skilled and unskilled workforce. And the failure to take heed of this can lead to disastrous results. South Africa is already streaming with the brain-drain of skilled workers and now, it is required to control and regulate on the effect of the spread of the disease to employers and productivity.

Of the 40 million people who had the virus globally, approximately 28 million lived in sub-Saharan Africa. Since 1996, the income in each of these countries has declined considerably. The problem that arose in such countries were the lack of financial support for medical assistance. It is estimated that the cost per patient for medical and drugs support is approximately \$1000 per year. In South Africa, it is not been possible to establish the exact amount of persons suffering from the disease. This is primarily due to the fact that many of the infected persons drive the disease 'underground.' However the Ministry of Health has indicated that the 2002 figures for HIV infection rate has not dramatically increased since 2001. This relates to an increase of 1.7% from 2002 (26.5%) from 2001 (24.8%) (Internet 1: [www.unaids.org.za](http://www.unaids.org.za)). This increase is considered to be a minor as compared to the previous years. A breakdown of the AIDS virus globally as at 2001 is stated as follows:



| No. | Countries                       | No. of adults & children |
|-----|---------------------------------|--------------------------|
| 1.  | North America                   | 940 000                  |
| 2.  | Latin America                   | 1.4 million              |
| 3.  | Caribbean                       | 420 000                  |
| 4.  | Western Europe                  | 560 000                  |
| 5.  | North Africa and Middle East    | 440 000                  |
| 6.  | Eastern Europe and Central Asia | 1 million                |
| 7.  | East Asia and Pacific           | 1 million                |
| 8.  | South and Southeast Asia        | 6.1 million              |
| 9.  | Australia and New Zealand       | 15 000                   |
| 10. | Sub-Saharan Africa              | 28.1 million             |

**Table 4.1: Global Statistics on the HIV/AIDS virus - 2001**

**Source : The World Bank, 2002, *Education and HIV/AIDS- A Window of Hope*, Washington: World Bank, p.2**

South Africa ignores the fact that the disease is growing by numbers, as stated above. The effect of such high numbers is difficult to ascertain in monetary terms. It creates the scenario that the legislation and programmes are not being effective enough to reduce the spread of the virus. The following sections will derive the inconsistencies between South African and International labour laws and their applications on the HIV/AIDS and Employment Equity crisis. A breakdown of the inconsistencies is also attached as Appendix 1: HIV/AIDS.

#### **4.1.1. HIV Testing**

The South African and International labour laws governing the testing of HIV, have recognized the fact that an infected person should have the right to consent to the testing. This is consistent in terms of their Constitutions and the individual's freedom of privacy.

However the problem has been raised by the employers of infected persons, who have stated that the failure to test and confirm an employee as HIV, acts as a detriment to uninfected employees.

In South Africa, employers and their organisations have moaned the fact that the prohibition on HIV / AIDS testing imposed by the Employment Equity Act will prohibit all testing including where consent has been granted. The South African AIDS Law Project has put forward an argument against the amendment to the Act, stating that voluntary HIV testing (for example, after an accident in the workplace where there may have been a risk of HIV infection) would be unlawful if conducted at a clinic controlled by the employer. It is also being suggested that the Act prohibits a workplace clinic from testing an employee for HIV, even though the employee provided the consent to such testing.

The purpose of the prohibition is to prevent HIV testing conducted at the request of the employer with the intent of denying employment benefits to an employee with HIV/AIDS. By contrast, voluntary HIV testing carried out in the interest of the individual and public health would not fall foul of the prohibition. It is also proposed that the employer's concerns can be addressed via a Code of Good Practice issued by the Employment Conditions Commission (ECC) rather than amending the Act. The primary purpose is to prohibit testing for the sole intention of discriminating against employees suffering from HIV/AIDS (Internet 3: [www.cosatu.org.za](http://www.cosatu.org.za))

South Africa, United States and Britain have prohibited mandatory testing and this is the commonality between the countries. There are conditions attached for an employer to test an employee for HIV infection. Testing can only take place when there is written consent by the employee. Such consent must be free and voluntary and cannot be induced by duress.

However South African law provides for an employer to test an employee without his or her consent is only possible with the approved order of the Labour Court. The simple basis for this argument is that it infringes on the employee's right to freedom of person and privacy, as entrenched in the Constitution. There has been considerable debate about this issue, as such action is cost-consuming and the time delay can lead to disastrous effects.

However, in the United States and the United Kingdom, it has been provided that testing may take place without the consent of the employee, only where there is justifiable reason to do so. There have been a few circumstances where such action has taken place. These related to the type of work environment and occupation that such employee is occupies.

However in general, the law attempts to protect the rights and dignity of the infected person. There is currently considerable debate in the International legislature that employers should be given some right to test employees who are perceived to being infected, as such infection could be a occupational hazard to fellow employees. In Britain, the British Medical Association has stated that should an employee refuse to consent to a medical test, such employee must be perceived to be infected with the virus.

#### **4.1.2. Criminal Law**

It is trite law that the intentional conduct by an infected person or employee in deliberately transferring the disease upon a fellow person or employee, should be subjected to a criminal hearing and prosecution. Unfortunately in South Africa, there has been not sufficient legislation providing for the prosecution of persons or employees, in the even that there is intentional transmission of the virus to another person or employee.

This type of action generally occurs where there is rape and sodomy and sexual intercourse. In South African law, rape and sodomy is considered a more serious offence

as opposed to the deliberate transmission of the disease. Thus the essence of the criminal act is limited to the 'act itself' (rape or sodomy') as opposed to the consequence of the act ('HIV-infection').

The United States and British laws have made it clear that the infected will be prosecuted in the event that he or she knowingly transmits the virus to another employee or person. Though the legislature confirms that this is not a preventive measure, it is quite clear that such actions will not be tolerated within their countries.

#### **4.1.3. Benefits - Medical and Insurance**

There is currently a debate with the International arena, specifically the United States, health insurance schemes should not pay for the hospital costs of an infected person, it should in fact be the medical aid that should be liable. However the legislature has provided that medical aid schemes will run into financial difficulties and eventually bankruptcy, should such companies be obligated to pay for hospital fees.

In Britain, there is public funding of medical expenses and this operates as a benefit against many other countries, including South Africa. Employees infected with the virus will be allowed treatment at hospitals at the government's expense. The objective of the legislature in creating such a benefit, is to prevent infected persons from driving the disease underground. It is an inherent requirement for the relevant entities, such as the government, AIDS campaigns and companies, to be aware of the statistics of HIV infection within the country. This assists the economy to the extent that it allows the legislature to prepare for future progress. Should the number of infected persons within a country not be identified, it may lead to a situation which is being experienced within the sub-Saharan continent, where the spread of the disease is moving into uncontrollable phases. Should there have been proper education and training in the initial stages, it could have regulated the current effects.

Unfortunately, in South Africa, all medical and hospital expenses are not paid by the government. Many of the infected persons have to rely on medical aids to settle their medical costs. A further problem is that most medical aids and insurance companies require employees to undergo HIV tests prior to acceptance. This limits the employee's eligibility to medical aid and insurance. Such infected employees therefore lack the security required to protect themselves.

Furthermore, the lack of security impacts on family members who are borne with the medical and hospital costs after the death of the infected member. This has disastrous effects as it creates a chain of events which involves more than one person. South African legislation provides that there cannot be discrimination based on an employee's status. However many companies have found ways to protect themselves from offering acceptance to infected employees. These can include increasing the insurance or medical premiums to an exorbitant amount or limiting the amount of benefits that may be due to the infected person. In the United States, the insurance companies have found ways of 'tapping' into the medical records of employees and this has prepared them not to offer insurance to employees.

#### **4.1.4. Right of recourse by employers**

The South African Labour Relations Act has upheld the constitutional rights of employees by ensuring the employers cannot terminate an employee's employment contract on the basis of his or her HIV/AIDS status. This right is also extended to job promotions and applications for new jobs. However the Act has provided for the dismissal of employees, in the event that he or she cannot perform their job properly.

The Act does however state that the employee must be given a fair and impartial hearing and such employee must at all times, be given an opportunity prior to the hearing to rectify and improve on their job. However, it is inevitable with most HIV-infected persons that when such person contracts the AIDS virus, their health deteriorates to such an extent that he prevents such person from adequately performing in their lives.

Furthermore, the infected will require more sick leave and benefits to protect them at all times. South Africa does not provide for such benefits to employees.

In the United States, there is ample protection given to employees in the form of ‘AIDS-phobia claims’. These are claims given to employees who suffer from the epidemic. It provides assistance and accommodation to employees in terms of the Disabilities Act or the Family and Medical Leave Act. Such benefits include providing separate time schedules for infected persons and extra leave for acquiring treatment. A further benefit includes the provision of protective equipment in the workplace, so as to prevent the spread of the disease. There are also support services which assist employees with the procedure of acquiring assistance and accommodation. The limitation attached to this benefit is for employees to prove their HIV/AIDS status.

The objective of the United States in providing this service is to assist infected persons from making their illness known. It prevents this epidemic from spreading without the state knowing about the volumes of persons infected. As long as the state is aware of the increase of this epidemic, it would assist the state to provide regulatory mechanisms to protect against its further growth.

## **4.2. Employment Equity**

### **4.2.1. Introduction**

Employment Equity laws have severely reformed over the past few decades. There exists universality and consistency in identification and applications of equity laws in the different countries. Some of the common rights include the Right to Life, Right to Freedom of Expression, the Right to Privacy and the right not to be discriminated upon. However each of these rights has been curtailed in terms of the limitations in the country’s constitution or related laws.

The laws governing human rights and its application have been a contentious issue in many countries, including South Africa. The Affirmative Action concept was a step towards creating democracy in the country. Affirmative Action related to redressing and restoring the prejudices which occurred in the past. This law is inherent amongst all designated companies, and it is still developing to give effect to the demands of society.

Equity also includes the prohibition relating to the inequalities surrounding the rights and plights of women, the disabled and homosexuality. The history of many countries included a patriarchal society where men were considered the 'bread-winners', whilst women were labeled housewives. Currently, the local and international laws have changed their approach towards providing diversities in the workplace. Presently many females are even writing the laws of each country. This is a stepping stone from the past. A breakdown of the differences between South African and International labour laws relating to Employment Equity is attached as Appendix 2: Employment Equity.

The objective of the Employment Equity was to close the apartheid wage gap. The issue of closing the massive income disparity between the various strata of the work force, which included management and unskilled and semi-skilled workers, men and women, blue collar and white collar workers, was a central element of the employment equity strategy in South Africa. The intention was to create a diverse and representative work force particularly at the upper echelons, as well as to eliminate the apartheid wage gap. The drive towards employment equality was meant to assist in workplace restructuring by ensuring flat hierarchies.

#### **4.2.2. Affirmative Action**

South African labour laws governing Affirmative Action are entrenched in our Constitution and Employment Equity Act. It is a clear objective of such to move away from our patriarchal and racial-prejudice past, to creating a democracy based on freedom and equality. The local laws apply to 'designated' employers and this is a limitation to the inherent right of every citizen.

However the application of such laws is a problem which has not been resolved. It has been approximately nine years since South Africa became a democratic country and the local perspective provides that there has been little change. Recent legislation has provided that all designated employers must submit Employment Equity procedures and statistics for review. This is to assist in establishing that employers are compliant with the laws governing the Employment Equity Act. However there has not been significant implementation in the laws to adequately ensure the employers are complying with the rules. As is stated by the Congress of South African Trade Unions (2003),

*There is entrenched hostility towards employment equity by employers and conservative trade unions in some sectors. The role of opposition parties in fuelling such hostile attitudes should also be taken into account. Some employers are either totally hostile to employment equity or do not involve unions and workers in the assessment of the workplace as required by the EEA. The hostility is to be expected given the fact that the Act directly challenges inherited privileges. This underlines the need for systematic programme to implement the legislation. While it is important to address legitimate fears and suspicion through a process of education and training. This should not result in further delay in the implementation of the law. Despite the fact that Public Service has an affirmative action policy in addition to the EEA, employment equity has not received the necessary attention in the Public Service Co-ordinating Bargaining Council (PSCBC). This argument indicates the employer's fundamental opposition to employment equity and absence of legislation is used as a scapegoat. The need for legislative interventions to address past imbalance is vindicated by obstructive actions*

(Internet 4 : [www.cosatu.org.za](http://www.cosatu.org.za))

The laws governing Affirmative Action must be implemented to the extent that there is compliance by all designated companies. In the United States, there are Affirmative Action programs introduced if racism occurs in the workplace. Certain states do prohibit



Affirmative Action programs, however recent cases have promoted the development of equity in the work environment. The Supreme Courts have supported and consistently applied the right to equality and fair treatment as stated in the United States Bill of Rights. There is also consistent review of the application of such laws to society and the workplace. This has helped contribute to the growth in affirmative action awareness.

#### **4.2.3. Gender Equality**

The South African Constitution and the Employment Equity Act have also provided for the development of gender equality within the workplace. This is a pertinent area of focus as it involves creating a standardized system of operation for men and women and the disabled.

In the United States, the legislature has made provision for the “Heightened Scrutiny” Test, which allows the courts to evaluate the constitutionality of gender discrimination and also, to apply their decisions according to the government’s objective of enhancing and maintaining gender equality in the workplace. The Courts correspond directly with the citizens and this is a contributing factor for creating awareness to such laws. The “Heightened Scrutiny” is limited to the extent that the Courts indicated that gender discrimination can sometimes be reasonable and justifiable. However this area of concern is dependent on the Court to decide.

The United States legislature have introduced this test to ensure there is compliance with the Bill of Rights and further, the problem of gender discrimination is not driven ‘underground’. It is apparent that females are and were prejudiced, however, the law ensures that there is no discrimination to males and there is consistency in all its applications. The Equal Pay Act has also been a contributing factor towards success in the gender discrimination laws. Unlike South Africa, the Equal Pay Act applies to all citizens, which include skilled and unskilled, and domestic workers.

In India, the introduction of the Directive Principles of State Policy has prohibited gender discrimination. In a society previously governed by patriarchy, this law attempts to sever the domination of males. The Policy attempts to create a safe working environment and an unbiased organizational culture. In a country that is regarded as one of the most populated regions in the world, and due to the level of unskilled workers existing in the workforce, it has been extremely difficult to regulate the equity in the working environment. However, the legislature has recently targeted gender discrimination and improved on the status of women's prisons and the rights of women. For instance, a woman may only be interrogated by or in the presence of another woman.

#### **4.3. Summary**

There are many differences between South African and international labour laws. This does not mean that our law is inferior, but it does mean that South Africa can utilize international laws as a basis for the development of improved laws.

It is expected that there exists differences between the laws, as HIV/AIDS and Employment Equity are relatively new to all countries. The ultimate objective is to ensure that there is consistency in all laws and this may lead to global growth and development. However in South Africa, improvements can be suggested as a means of comparing and establishing if the current status of our laws can be changed for the better. Chapter five provides for recommendations for the creation of unified and consistent labour law relating to HIV/AIDS and Employment Equity.

## **CHAPTER FIVE : RECOMMENDATIONS**

### **5.1. Introduction**

The growth of the epidemic has already reached extreme proportions. The laws governing the regulation of the virus has not sufficiently controlled the spread of it. In Africa alone, there are over 28.1million people infected with the virus. The labour laws between South Africa and internationally, differ to the extent that improvements are required within South Africa and specifically within the workplace.

Chapter four provided for the inconsistencies that exist between our laws and its international counterparts in the work environment. With many employers, insurance and medical aid companies pleading for changes in the laws, such requests must be given come credence. Consistency between local and international labour laws relating to AIDS is imperative for the growth and development of legislative regulations to prevent the spread of the virus. The labour laws should target employees, employers and trade unions and also, medical aids and insurance companies.

It should be the primary objective of the legislature to properly implement the rights as entrenched in the Constitution, which govern the AIDS epidemic. There does not exist common law or historical statutes and it is in this regard, that current law must be amended and developed to channel the way forward. As the Honorable Justice Kirby AC CMG (1999) states, "The first responsibility of the judiciary is consciousness about HIV/AIDS, and about the relevant legal principles which affect the performance of their professional tasks. I cannot do justice to all of the aspects of the judiciary's response to the HIV/AIDS epidemic. The response is not confined to interpreting, developing and applying HIV/AIDS law. The judiciary must do more than this, for the epidemic is fundamentally about human beings, fellow citizens."

### **5.1.1. HIV TESTING**

It is trite law that mandatory testing of employees is not permissible within the South African or international legislation. There are also clear provisions that in the event that testing does take place, the infected employee must prior to testing being performed, be informed of the nature of the test, the consequences of the test and counseling where necessary. In South Africa, it has been stated that the employer can approach the Labour Court to request authorization to proceed with the testing of an employee. For instance, in circumstances where there are occupational hazards or, where negligence on the part of the infected employee may cause spread of the disease in the workplace to other employees or customers. However this is a very stringent method for employees as it is expensive and time-consuming. Most employers will not want to go through the effort of litigating and this may detriment other employees in the workplace. International laws have applied the same principles, except in circumstances however, obligatory testing may take place where there is proper justification to do so. There have been very few cases where proper justification did exist.

The South African labour laws require proper drafting and substantiation on HIV/AIDS testing. The right to test another human being without his or her consent is a clear violation of the rights as entrenched in the Constitution. However these rights are subject to limitations. The laws need to dwell on such limitation and draft legislation which take into consideration the needs of the employees and the employers. For instance, mandatory testing should be allowed in certain work environments, which include hospitals and blood donor clinics. In the event that the employee refuses to submit to a test, the matter may be referred to the Conciliation for mediation and arbitration. This is a cost-effective method for all parties involved.

### **5.1.2. Criminal law**

The United States and British legislature have made clear provisions for the prosecution

of infected offenders who knowingly transfer the virus to another employee, customer or person. This is not considered a preventive measure however, the legislature has applied it as a deterrence to the deliberate spread of the virus.

South Africa requires legislation providing for the criminal justice to take its course in the event that an infected person is proved to have intentionally spread the virus to an innocent person. Currently more preference is given to the criminal act as opposed to the consequence of the act. Sodomy and rape are given preference to the unlawful and deliberate act of transmission. South African legislature needs to address this issue as a preventive measure to spread of the virus.

The existing fact in South Africa is increasing levels of rape on a daily basis. Of the number of rapes that do occur, the few HIV/AIDS persons that actually induce such rape causes the further spread of the virus. Such persons should in fact be initially charged with the intentional and unlawful spread of the virus and thereafter, with the intentional and unlawful infliction of bodily harm and sexual assault. Implementing the death penalty would be an appropriate sanction, however, such punishment currently has no place in our laws.

### **5.1.3. Benefits**

The British have provided adequate protection for its citizens in regard to the hospital benefits. This is also existent within Canada. In South Africa, the cost of medical expenses is extremely high and the provision of such expenses is very limited to HIV/AIDS employees.

Many insurance companies and medical aids have found ways not to offer infected persons their benefits. Most of such companies have requested that the prospective employee undergo HIV testing prior to acceptance of the benefits. Should the result of the test be positive, such companies have either refused to enroll such person as a member, alternatively, enrolled such person with exorbitantly high premiums. Medical

aids have also provided for a three-month window period where the infected person pays the regular monthly premiums, however, there is no protection by the companies to pay for the medical expenses.

South Africa needs to address the issue that insurance companies and medical aids are required to assist the infected employees. This is a primary step towards preventing the disease from being 'driven underground.' The State should provide for public and private hospitals to provide medical treatment to infected persons at a reasonably cheap price. This is lined with the current debate for the provision of anti-retroviral drugs to citizens.

#### **5.1.4. Right of Recourse by Employers**

It is currently common practice for employers to dismiss employees for poor work performance. Such performance can be consequence of personal and social problems of the employee. The South African labour laws have made clear provisions that employees can be dismissed for the incapacity to do the job properly. The labour laws have stated that fair procedure and reason needs to be provided for the dismissal of an infected employee for poor work performance.

Unfortunately the fair procedure and reason are dependent on a chairperson's or commissioner's observations from the CCMA or work hearing. The issue that needs to be asked is 'Can the chairperson be impartial?' There does not always the guarantee that such employee will be given an impartial hearing.

The Americans have provided for the Disability Act and Family and Medical Leave Act, which regards HIV/AIDS as an act of disability. This enables the employee to be able to claim benefits from the current legislative stance.

The State needs to play a larger part in the protection of HIV-infected persons. There should be added benefits to such persons, in order to accept the financial support required.

#### **5.1.5. Strategy forward**

An expansive response is rooted in the education and training of employees and must be set on a local and national context. The approach thus far has been on small-scale and in piecemeal. Stronger political commitments are a key area for the improvements to the country's shortcomings. Further commitment is required from religious leaders, educators and influential people.

It should be the objective of the South African legislature to ensure that the spread of the disease is under control, but mostly, the disease is not run underground. There has to continue to be awareness of the disease and the preventive measures that are designed to prevent it. The legislature should initially target certain areas, such as the benefits to be given to employees suffering from the virus. If and when the laws for such area meets with public approval, should the next step for rectification and improvement take place.

## **5.2 Employment Equity**

### **5.2.1. Introduction**

Employment Equity is a new concept that requires proper implementation of its laws for effectiveness. If equality always reigned in every country since the presence of mankind, there would not be the need to implement equity procedures. However, our past has caused the obligatory stance to protect those citizens who were previously prejudiced, disadvantaged and abused.

Employment equity procedures have become universally applied across most countries around the world. Women, disabled and previously disadvantaged are benefiting from the current status of the laws. Development in all laws is dependent on the input of all citizens, be them black, white, coloured or Indian persons; be it women; or be it disabled persons. The democracy which we created and developed is in the hands of all citizens and not just a few. This is greatness of a democracy.

The International arena has commended South Africa on a peaceful and fruitful transition into a 'democracy'. Gender equality and affirmative action were some of the major concerns at the time.

### **5.2.2. Affirmative Action**

The area of concern for Affirmative Action is 'for how long does this policy and procedure have to be valid and obligatory before choices are made on merit as opposed to making choices as a result of the past?' The South African legislature have made it clear that this policy will be removed if and when there is consistency and equity in the workplaces. The greatest attribute of affirmative action is the fact of the provision of jobs in all sectors of government and the private sector.



However South Africa laws have not adequately applied themselves to the improvement in the disease. There has not been sufficient implementation, and this has caused the companies to become bankrupt. The South African legislature requires better implementation procedures to ensure that there is consistency in the application of all laws within the workplace. Requesting a report from the employer does not confirm that employers are compliant with the law. What is required is an awareness of the rights and obligations of persons.

### **5.2.3. Equality**

South Africa has immense laws to protect against gender discrimination in the workplace. This relates to male and females; applications and promotions for new jobs and the benefits received between employees. The United States have introduced an excellent concept called the 'heightened scrutiny' test which is an initiative from the government to ensure that the applications of Court decisions is verily based on the objectives of the government. This allows for compliance of states laws and it also creates an awareness to the citizens of their rights and choices. A further advantage is the fact that the problem will remain 'surfaced' and it ensures that evaluations are always done to protect gender equality. In India, the states introduced the Directive Principles on State Policy and this was a contributing factor in India's fight for equality in religion, cultures and gender.

South Africa requires more laws to bridge the gap between international and local standards. There are currently numerous changes to the laws and its practicalities, however, such changes have not been substantive enough for the creation of an effective system of gender equality. In the private sector, most managerial positions are still occupied by males. The philosophies of women being characterised as 'house-wives' will only changed when the legislature, government and media exploits this area for development.

Furthermore, the adequacy of the legal provisions to deal with the closure of the apartheid wage gap and income disparities remains to be tested. In terms of section 27(1) of the Employment Equity Act, it is requirement of every designated employer to submit a statement to the Employment Conditions Commission (ECC) on the remuneration and benefits received in each occupational work category and level of that employer's workforce. Should the statement reveal disproportionate income differentials, it is the prerogative of the employer to employ measures to progressively reduce such income differentials. Suggestive methods to reduce the remuneration disparities include collective bargaining, the setting of norms and standards and benchmarking.

Furthermore South Africa cannot afford to drive these issues underground. It could disastrous effects for the economy and the socio-economic status of the country.

#### **5.2.4. Way Forward**

The timeframes for the development of standards and norms for the restoration of the apartheid wage gap and income inequalities must be set as a matter of urgency. This also includes the timeframe for the finalization of affirmative action implementation to enable all appointments, promotions and selection criteria to be based on 'merit.'

The power of employers and trade unions must be reviewed and evaluated in order to give effect to efficient collective bargaining. In certain areas, employers remain hostile and opposed to employment equity and the legislature has to provide other measures to ensure compliance to the Employment Equity Act. For instance, the appointment of inspectors to conduct inspections at workplaces and to review the status of employment equity operations in public, private and semi-private companies.

Smaller businesses should also be obliged to set up employment equity plans as this will expedite the process of redressing the prejudices of the past.

### **5.3. Conclusion**

The South African labour laws relating to HIV/AIDS and Employment Equity have developed over the past few decades. However, in order for there to be success in all its precedents and operations, the legislatures must benchmark its laws with its international counterparts. This provides for consistency in its operations and also, ensures that problems can be curtailed expediently. The improvements and the 'way forward' for South African labour laws is to target its laws first and thereafter, the application of the laws.

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Internet 1 : [www.dol.org.za](http://www.dol.org.za)

Internet 2 : [www.mrc.co.za](http://www.mrc.co.za)

Internet 3 & 4: [www.cosatu.org.za](http://www.cosatu.org.za)

## **APPENDIX**

### **Gap Analysis 1 : HIV/AIDS**

|                            | <b>Locals Laws</b>   | <b>International Laws</b>   |
|----------------------------|--|---|
| <b>P<br/>R<br/>O<br/>S</b> | <ol style="list-style-type: none"> <li>1. Final Constitution and EEA to protect infected employees</li> <li>2. No mandatory testing.</li> </ol>  | <ol style="list-style-type: none"> <li>1. Constitutions and other laws to protect infected citizens.</li> <li>2. No mandatory testing.</li> <li>3. Provision of accommodation and assistance to infected persons.</li> <li>4. Government assistance to hospital expenses.</li> <li>5. Prosecution of offenders who deliberately transmit the virus.</li> <li>6. Objectives are not to drive the disease underground.</li> </ol> |
| <b>C<br/>O<br/>N<br/>S</b> | <ol style="list-style-type: none"> <li>1. No provision for prosecution of offenders.</li> <li>2. Lack of adequate legislation governing medical aids and insurance.</li> <li>3. Failure to provide financial assistance to employees.</li> <li>4. Easy recourse to employers.</li> <li>5. No special provisions for extra leave to acquire medical treatment or protective equipment at work.</li> </ol> | <ol style="list-style-type: none"> <li>1. Consent of employees can be overridden through proper justification.</li> </ol>   |

## Gap Analysis 2 : Employment Equity

|                            | Local Laws   | International Laws   |
|----------------------------|--|--|
| <b>P<br/>R<br/>O<br/>S</b> | <ol style="list-style-type: none"> <li>1. Provision of laws to redress prejudices of the past.</li> <li>2. Provision of the final constitution and the Employment Equity Act.</li> <li>3. Recognizes the significance of Gender Equality.</li> </ol> | <ol style="list-style-type: none"> <li>1. Provision of the Constitution and other laws to govern for effective implementation.</li> <li>2. Provision of the 'Heightened Scrutiny' test to give effect to Government's objectives.</li> <li>3. Stepping-stone towards restoration of past prejudices.</li> <li>4. Recognizes the significance gender equality.</li> </ol> |
| <b>C<br/>O<br/>N<br/>S</b> | <ol style="list-style-type: none"> <li>1. Poor implementation procedures and lack of monitoring.</li> <li>2. Employers not adhering to basic laws.</li> <li>3. Restricted to designated employers.</li> </ol>  | <ol style="list-style-type: none"> <li>1. Affirmative Action programs implemented in the U.S where there are signs of racism.</li> </ol>   |