

THE AMBIT OF PROHIBITED GROUNDS OF DISCRIMINATION: COMPARATIVE JURISPRUDENCE ON HIV STATUS AND SEXUAL ORIENTATION¹

Mandala D. Mambulasa²

Introduction

Since the outbreak of the HIV epidemic in the 1980s,³ many people who have been infected have suffered (and continue to suffer) discrimination⁴ and stigma in different environments – such as their homes, communities, work places, and schools.⁵ Discrimination and stigma increase the vulnerability of people infected and living with HIV. Some countries have responded by passing HIV-related legislation, and specifically providing for HIV status as a prohibited ground of discrimination.⁶

Key questions that arise for consideration include:

- Are the existing laws adequate to effectively protect people against discrimination and stigma based on their perceived or actual HIV status?
- Are our justice systems ready, able, and willing to better the lives of people living with HIV and to ensure that the global epidemic is contained in an environment in which the human rights of all people (both the infected and uninfected), are respected, promoted, and protected?

Similarly, sexual minorities across the globe – and in sub-Saharan Africa in particular – have suffered and continue to suffer stigma and discrimination because of their perceived or actual sexual orientation. Some have been killed;⁷ others have been denied opportunities in social settings, such as housing and employment;⁸ and other people have been subjected to harsher prison sentences than the gravity of the offence required.⁹ In some cases, it is actually laws criminalising same-sex

1 Paper presented at the Judicial Colloquium on the Rights of Vulnerable Groups, held at Sunbird Nkopola Lodge, Mangochi, Malawi, on 6 and 7 March 2014.

2 Managing Partner at Mambulasa & Co. Advocates; Current President of the Malawi Law Society; LLB (Hons) (University of Malawi), LLM (University of Pretoria).

3 It is generally accepted that HIV was discovered in 1981 in the United States of America. See, for instance, P Brouard & J Maritz (eds) *HIV and AIDS in South Africa Training and Information Resource* (2008) 1.

4 See, for instance, AIDS & Rights Alliance for Southern Africa *HIV/AIDS & Human Rights in Southern Africa* (2009) available at http://www.safaid.net/files/ARASA_Human_rights_report_2009.pdf.

5 Malawi Government & UNDP *Assessment of Legal & Regulatory Environment for HIV & AIDS in Malawi* (2012) 28.

6 Thus far, 123 out of about 140 countries that made submissions to the Global Commission on HIV and the Law in 2012 provided for HIV as a prohibited ground of discrimination in their legislation. UNDP, HIV/AIDS Group *Global Commission on HIV and the Law: Risks, Rights & Health* (2012) 7.

7 BK Moon, United Nations Secretary-General's *Statement to Human Rights Council*, Geneva, Switzerland (2012). See also 06 *Human Rights Monitor International Service for Human Rights* 64 (2006) 75.

8 Human Rights Watch *More Than a Name: State Sponsored Homophobia and Its Consequences in Southern Africa* (2003).

9 In the Malawian case of *Republic v Mpanda* MWHC Criminal Appeal Case No. 333 of 2010 [unreported] Kamwambe J opined

relations that are enhancing discrimination and stigma against sexual minorities.¹⁰

With the exception of South Africa – which specifically mentions ‘sexual orientation’ as a prohibited ground of discrimination in its Constitution of 1996¹¹ – the constitutions of all the countries in sub-Saharan Africa do not explicitly provide for sexual orientation as a prohibited ground of discrimination.¹²

Given that many persons are being discriminated against in many countries – based on their HIV status and sexual orientation – should our courts fail to protect such persons simply because HIV status and sexual orientation are not specifically mentioned in the Constitution and other pieces of legislation as prohibited grounds of discrimination? Is there room for an expanded interpretation of the equality and non-discrimination clauses in those laws to protect persons based on their HIV status and sexual orientation? How have treaty monitoring bodies dealt with discrimination based on these two grounds? These are some of the questions that this paper will attempt to address.

The paper addresses the above questions, and is divided into four sections. The first is this introduction. The second provides a broad overview of the current prevalence of HIV in the world and in sub-Saharan Africa. This is important, because judicial officers and attorneys are sometimes detached from some of these issues, unless they are either infected or affected, or are working in this area. The third section of the paper will deal with understanding sexual orientation and discrimination. The fourth section will examine international human rights law. The final part of the paper will address comparative jurisprudence on HIV status and sexual orientation as prohibited grounds of discrimination.

Broad overview of the HIV epidemic today

The World Health Organisation (WHO) estimates that, as at 2012, there were 35 million people living with HIV globally.¹³ Specifically, 52 percent of all persons living with HIV in the world are women. As of 2010, 22.4 million of the people living with HIV in the world were in sub-Saharan Africa.¹⁴ In fact, sub-Saharan Africa is said to be the epicentre of the epidemic, with 70 percent

thus:

“Just to entertain a wandering mind the heavy sentences have been meted unjustifiably on “homosexuals” as one may wish to call it, most likely due to the intensive and hounding publicity, negative or positive, that the media has given. Since the act of homosexuality has born acute debate, criticism and abhorrence, the courts have fallen in danger of adopting such strong sentiments and imposing heavier sentences than practice allows. Courts should not be carried away by public opinion anyhow so as to be distracted from the realities of the offence. As such buggery as unacceptable as it may be should not be regarded as the most heinous offence deserving more severe punishment than the law and practice provides. Due and appropriate sentences should be meted...As stated above, I substitute the sentence of 10 years imprisonment with one of 3 years.”

10 UNDP, HIV/AIDS Group *Global Commission on HIV and the Law: Risks, Rights & Health* (2012) 44-48.

11 Section 9(3) of Act 108 of 1996.

12 Increasingly, however, countries have included a prohibition against discrimination based on sexual orientation in employment-related legislation. See for example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 of South Africa; section 23 of the Employment Law as Amended by Act 10 of 2010 of Botswana; the Employment Equity Act 55 of 1998 of South Africa; section 4 of the Employment Rights Act 33 of 2008 of Mauritius; section 46a of the Employment Act 2006 of Seychelles; and articles 4, 5 and 108 of the Labour Law, 2007, of Mozambique.

13 “HIV Infection Rate in the US Falls” *The Nation* (21 July 2014); UNAIDS *Report on the Global AIDS Epidemic* (2013) 78, <http://www.unaids.org>.

14 African Commission on Human and Peoples’ Rights *Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV* (2010) in C Heyns & M

of all new infections in 2012.¹⁵ The 2009 AIDS Epidemic Update noted that within sub-Saharan Africa, southern Africa is the most heavily affected by HIV.¹⁶

In Malawi, the estimated HIV prevalence rate in adults, i.e., the 15-49 age bracket, is 10.3 percent.¹⁷ The prevalence rate among women in Malawi is 12.9 percent and 8.1 percent for men.¹⁸ Clearly, HIV prevalence at all levels (global, regional, or sub-regional) has a gendered dimension. HIV is also prevalent in certain groups such as men who have sex with other men (MSM), transgender persons, and people who inject drugs. In Malawi, for example, while the HIV prevalence rate is 10.3 percent in the general population, the estimated prevalence rate among MSM is 21.4 percent.¹⁹

Sexual orientation and discrimination

The terms ‘sexual orientation’ and ‘gender identity’ send shivers down the spine of some people – even some judicial officers and attorneys. As far as they are concerned, it has a negative connotation, particularly associated with gay persons or alleged sexual perverts. This is not supposed to be the case. In human rights discourse, one must be willing to learn, unlearn and relearn certain concepts – and more so when you are a judicial officer or an attorney.

‘Sexual orientation’ has been defined by many organisations, legal documents and scholars. Cameron J²⁰ defined sexual orientation “by reference to erotic attraction; in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex. Potentially, a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.” The definition propounded by Cameron J is the one adopted in this paper.

Persons who are erotically attracted to persons of a different sex from them, i.e., male to female, or vice versa, are the majority in every society. These are called heterosexuals or ‘straight’ people. They do not suffer discrimination and/or stigma due to their heterosexual identity. That explains why they are not a major concern for this paper, because they are not vulnerable in every sense of the word.²¹ People who do not conform to heterosexuality face numerous challenges, as I have tried to highlight in the introduction. It is as if being different is a crime. It is not. Diversity has always been part of human existence. In the words of Sachs J, “[t]he test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting”²²

Killander (eds) *Compendium of Key Human Rights Documents of the African Union* (2013) 437.

15 UNAIDS *Report on the Global AIDS Epidemic* (2013) 12, <http://www.unaids.org>.

16 *Id* 16.

17 Malawi National AIDS Commission “Malawi’s Rate of New HIV Infections Drops” available at <http://www.aidsmalawi.org.mw/index.php/8-news/80-malawi-s-rate-of-new-hiv-infections-drops>.

18 *Id*.

19 S Baral *et al* “HIV Prevalence, Risks for HIV Infection, and Human Rights among Men Who Have Sex with Men (MSM) in Malawi, Namibia and Botswana” (2009) 4(3) *PLOS One*.

20 E Cameron “Sexual Orientation and the Constitution: A Test Case for Human Rights” (1993) 110 *SALJ* 450, as quoted in *NAZ Foundation v Government of NCT of Delhi and Others* [WP(C) 7455/2001] (HC).

21 See generally S Nyanzi “Unpacking the [Govern]mentality of African Sexualities” in S Tamale (ed) *African Sexualities: A Reader* (2011) 477.

22 *Minister of Home Affairs and Others v Fourie and Others* Case CCT 60/04 at para. 60.

For various biological and social reasons, and without going into a debate about the causes, there are human beings in every society who have an erotic attraction towards persons of the same sex to them. If they are men and they are attracted to fellow men, their sexual orientation is said to be gay. If they are female and they are attracted to fellow females, their sexual orientation is said to be lesbian. Being gay or lesbian is not an illness or a form of disorder, as it once was thought to be.²³ When it finds expression in a conduct or practice, it is just but another expression of human sexuality.

The ambit of prohibited grounds of discrimination in international human rights law

Many international human rights instruments contain provisions on non-discrimination.²⁴ The United Nations Human Rights Committee (HRC) has defined discrimination as:

Imply[ing] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.²⁵

Discrimination can be direct or indirect. Direct discrimination is said to have “occur[red] when an individual is treated less favourably than another, in a similar situation, for a reason related to a prohibited ground”.²⁶ Indirect discrimination “refers to laws, policies or practices, which appear neutral at face value, but have a disproportionate impact on the exercise of rights as distinguished by prohibited grounds of discrimination”.²⁷ In human rights law, protection against discrimination extends to both direct and indirect discrimination.

Discrimination clauses are also found in many constitutions.²⁸ They are variations of article 2 of the Universal Declaration of Human Rights (UDHR), which provides as follows:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of *any kind such as* race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status*.²⁹

Although non-discrimination clauses do not specifically mention HIV status and sexual orientation as prohibited grounds of discrimination, people in these groups are protected. The United Nations Office of the High Commissioner for Human Rights opines that:

23 *NAZ Foundation v Government of NCT of Delhi and Others* [WP(C) 7455/2001] (HC) 55-56.

24 See for instance, article 2 of the Universal Declaration of Human Rights and article 2 of the African Charter on Human and Peoples' Rights.

25 Human Rights Committee, General Comment No. 18 at para. 7.

26 Committee on Economic Social and Cultural Rights, General Comment No. 20 at para. 10(a). See K Nyirenda “An Analysis of Malawi’s Constitution and Case Law on the Right to Equality” in this publication.

27 *Id* at para. 10(b).

28 See for instance, section 20 of the Constitution of Malawi and section 15 of the Constitution of Botswana.

29 Own emphasis in italics.

The protection of people on the basis of sexual orientation and gender identity does not require the creation of new rights or special rights for lesbian, gay, bi-sexual, transgender and intersex (LGBTI) people. Rather, it requires enforcement of the universally applicable guarantee of non-discrimination in the enjoyment of all rights. The prohibition against discrimination on the basis of sexual orientation and gender identity is not limited to international human rights law. Courts in many countries have held that such discrimination violates domestic constitutional rights as well as international law ... [T]he principle of non-discrimination is cross-cutting and the obligation on the part of States is immediate. Simply put, people may not be discriminated against in the enjoyment of rights on the basis of sexual orientation or gender identity ...³⁰

In that regard, it has been argued that the list of categories of discrimination in all human rights treaties is not exhaustive. This is clear from the use of ‘such as’ highlighted in article 2 of the UDHR above. Similarly, the inclusion of ‘other status’ is also indicative of that fact. The United Nations Committee on Economic, Social and Cultural Rights (CESCR), in their General Comment No. 20, explains that the nature of discrimination evolves – requiring a flexible approach to “other status” and the recognition of grounds “when they reflect the experience of social groups that are vulnerable and have suffered and continue to suffer marginalisation.”³¹ The CESCR has included sexual orientation and health status within the category of other grounds.

Thus, grounds that compare favourably with prohibited grounds of discrimination (such as sexual orientation and HIV status) are deemed to be included in the prohibition against discrimination.³² These are referred to as grounds analogous to the prohibited grounds of discrimination. This is also the position adopted by the other UN treaty bodies, including the Human Rights Committee, Committee against Torture, and the Committee on the Rights of the Child.³³

Comparative jurisprudence on the ambit of prohibited grounds of discrimination

This section considers how courts in different jurisdictions, and one treaty monitoring body, have dealt with HIV status and sexual orientation as prohibited grounds of discrimination.

HIV Status as a Prohibited Ground of Discrimination

While not all courts have read the non-discrimination clause to include HIV status as an analogous ground,³⁴ such inclusion has increasingly been seen as the norm by domestic and regional courts and international human rights treaty bodies.

30 UN Office of the High Commissioner for Human Rights *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2012) 10-11.

31 Committee on Economic Social and Cultural Rights, General Comment No. 20 at para. 27.

32 Amnesty International *Making Love A Crime: Criminalisation of Same-Sex Conduct in Sub-Saharan Africa* (2013) 64.

33 For example, sexual orientation is seen to fall within the prohibited grounds of discrimination. See Committee on Economic, Social and Cultural Rights, General Comment No. 20 at para. 32; Committee on the Rights of the Child, General Comment No. 4 at para. 6, General Comment No. 3 at para. 8 and General Comment No. 13 at para. 60.

34 See for example the Nigerian case of *Odafe and Others v Attorney General and Others* (2004) AHR LR 205 (HC) 31 where the Court held that illness is not included in the prohibited grounds of discrimination and thus did not find unfair discrimination based on HIV status. See discussion on this case in P Patel “Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries” in this publication.

In *Hoffmann v South African Airways*,³⁵ the Constitutional Court of South Africa held that the refusal by South African Airways to employ an HIV-positive person as a cabin attendant violated the right to equality and freedom from discrimination, which is guaranteed by section 9 of the South African Constitution. The Court included HIV status as a prohibited ground of discrimination under the South African Constitution, despite it not being specifically provided for under section 9(3).³⁶ This is a ground-breaking decision that has been widely reported and followed in many jurisdictions. The Court noted that:

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination ... People who are living with HIV/AIDS are one of the most vulnerable groups in our society.³⁷

In *Diau v Botswana Building Society*,³⁸ the Botswana Industrial Court commented *obiter dicta* on the list of prohibited grounds in the Botswana Constitution. It opined:

In my mind the grounds listed in terms of section 15(3) are not exhaustive. A closer interrogation of the said grounds show one common feature – they outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational. To dismiss a person because of perceived positive HIV status would offend against human dignity, in addition to being irrational.

Consequently the ground of HIV status or perceived HIV status must be considered to be one of the unlisted grounds of section 15(3) of the Constitution of Botswana.³⁹

In *Banda v Lekha*,⁴⁰ the applicant went for an HIV test and was dismissed, without reason, on her return to work – upon disclosing that she had tested HIV positive. The applicant had, at that stage, never been incapacitated for work. The respondent did not defend the proceedings, despite being served with all the relevant court processes. The Malawi Industrial Relations Court held that even though section 20 of the Constitution of Malawi does not specifically mention HIV status as a prohibited ground, the same should be implied as a prohibited ground and that, consequently, the dismissal of the applicant violated the applicant's right to equality and to fair labour practices.⁴¹

In *Satellite Investments v Dlamini and Others*,⁴² the Industrial Court of Appeal in Swaziland noted that section 20 of the Swaziland Constitution does not include health or other status. The Court stated:

[S]ociety throws up a vagary of new and unprecedented situations that the Legislature, in

35 [2000] ZACC 17. This case is also discussed in P Patel "Realising the Full Potential of Civil and Political Rights for Marginalised Populations in African Countries" and C Bandawe & A Meerkotter "Developing a Conceptual Framework against Discrimination on the Basis of Gender Identity" in this publication.

36 *Id* at para. 40. Compare with *Kanane v The State* 2003 (2) BLR 67 (CA) and *State v Banana* 2000 (1) ZLR 607 (SC).

37 *Hoffmann v South African Airways* [2000] ZACC 17 at para. 28.

38 IC Case No. 50 of 2003. This case is also discussed in H Ruhukya "The Role of International Labour Standards in Decision-Making on the Rights of Vulnerable Groups in Botswana" in this publication.

39 *Id* 37.

40 [2008] MLLR 338. This case is also discussed in K Nyirenda "An Analysis of Malawi's Constitution and Case law on the Right to Equality" in this publication.

41 *Id*.

42 [2011] SZICA 5.

all its manifold wisdom would not have anticipated. The question then is, if there is a type of discrimination, which is obviously untenable and totally insupportable, should the Courts, when approached by a litigant to distraint such conduct, turn a blind eye thereon for no other reason than that it is not specifically proscribed in either section? My answer is an emphatic No!

If that were to be so, it would mean that the Courts would thereby fail to protect victims of overt discrimination and the Courts' hands would be withered and be unable to move in order to give needed protection for no other reason than that the Legislature, many years ago, in 1980, for argument's sake, never anticipated the type of discrimination alleged by a complainant before Court. This would amount to the Courts failing to perform their duties.⁴³

In *Nanditume v Minister of Defence*,⁴⁴ the Namibian Labour Court held that exclusion from employment with the Namibian Defence Force (NDF) – solely on the grounds of HIV status – constituted unfair discrimination, as contemplated in section 107 of Namibia's Labour Act. The Court relied on the fact that the NDF did not dismiss existing HIV-positive employees from employment, but merely required that all prospective employees be tested and denied employment if they were HIV-positive.

Sexual Orientation as a Prohibited Ground of Discrimination

International human rights treaty bodies and courts have increasingly recognised that sexual orientation falls within the prohibited grounds of discrimination – either as falling within the grounds of 'sex' or 'other status' or as an aspect of diversity, akin to the listed grounds, and therefore an analogous ground.

In *Toonen v Austria*,⁴⁵ the HRC held that 'sex' includes 'sexual orientation'. The HRC made a similar finding in the cases of *Young v Australia*⁴⁶ and *X v Columbia*,⁴⁷ which both related to different treatment of pension benefits for same-sex partners, and held that it violated the right to be free from discrimination on the grounds of sex or sexual orientation.

In *Suratt and Others v Attorney General of Trinidad and Tobago*,⁴⁸ the Court of Appeal, per Archie JA, held that irrespective of whether same-sex sexual activity is a crime, sexual orientation is not a reasonable basis for distinction:

The effect of specifically excluding a particular category of persons, on the ground of sexual orientation, from the protection afforded by the Equal Opportunity Act to others, is to deny them a fundamental right on a basis analogous to one of the grounds enumerated under section 4 of the Constitution (i.e. 'sex'). It is a denial of the protection of the law and of equality of treatment under the law.⁴⁹

43 [2011] SZICA 5 at paras. 25-26.

44 LC Case No. 24 of 1998.

45 Comm. No. 488 of 1992 reported in International Covenant on Civil and Political Rights *Selected Decisions of the Human Rights Committee under the Optional Protocol 5* (2005) 133.

46 Human Rights Committee Comm. No. 941 of 2000 at para. 10.

47 Human Rights Committee Comm. No. 1361 of 2005 at para. 9.

48 Civil Appeal No. 64 of 2004. This judgment was set aside by the Privy Council, [2007] UKPC 55, but on grounds not related to sexual orientation.

49 Civil Appeal No. 64 of 2004 at para. 43.

In *Salgueiro da Silva Mouta v Portugal*,⁵⁰ the European Court of Human Rights held that sexual orientation is a concept that is undoubtedly covered by the open-ended prohibited grounds of discrimination listed in article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In *Egan v Canada*⁵¹ and *Vriend v Alberta*,⁵² the Supreme Court of Canada held that sexual orientation was a prohibited ground of discrimination analogous to the grounds listed under section 15 of the Canadian Charter of Rights and Freedoms. In *Vriend*, the appellant was employed as a laboratory coordinator at a college. His performance appraisal was highly satisfactory – such that he received salary increments and promotions. When Vriend disclosed to his employers that he was a gay man, however, the college requested him to resign. When he refused to resign, he was dismissed. At issue was whether the omission of sexual orientation as a prohibited ground of discrimination in Alberta’s Individual Rights Protection Act infringed the appellant’s right to equality and, if so, whether the infringement was justified.

The Court followed a two-stage inquiry to determine whether there was a violation of the right to non-discrimination, looking at whether there was a distinction which resulted in the denial of equality before or under the law, or of equal protection or benefit of the law; and whether this constituted discrimination on the basis of an enumerated or analogous ground.⁵³

The Court held that the exclusion of sexual orientation from protection in the Individual Rights Protection Act, was offensive in that it “in effect, stated that ‘all persons are equal in dignity and rights’ except gay men and lesbians.”⁵⁴

In his minority opinion, L’Heureux-Dube J, emphasised that the question of whether discrimination falls within a prohibited or analogous ground of discrimination is not a rigid and formulaic question:

Section 15(1) is first and foremost an equality provision. Its primary mission is the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings equally deserving of concern, respect and consideration. A section 15(1) analysis should focus on uncovering and understanding the negative impacts of a legislative distinction (including, as in this case, a legislative omission) on the affected individual or group, rather than on whether the distinction has been made on an enumerated or analogous ground. Integral to an inquiry into whether a legislative distinction is discriminatory within the meaning of section 15(1) is an appreciation of both the social vulnerability of the affected individual or group, and of the interest which is affected in terms of its importance to human dignity and personhood. Section 15(1) is engaged when the impact of a legislative distinction deprives an individual or group who has been found to be disadvantaged in our society of the law’s protection or benefit in a way which negatively affects their human dignity and personhood. Although the presence of enumerated and analogous grounds may be indicia of discrimination, or may even raise a presumption of

50 European Court of Human Rights, Application No. 33290 of 1996 at para. 28.

51 [1995] 2 SCR 513.

52 [1998] 1 SCR 493.

53 *Id* 496.

54 *Id* 497.

discrimination, it is in the appreciation of the nature of the individual or group who is being negatively affected that they should be examined.⁵⁵

The Hong Kong Court of Appeal arrived at the same conclusion as the Canadian Supreme Court in holding that sexual orientation is a proscribed ground for discrimination that is analogous to race and sex.⁵⁶

Conclusion

Discrimination based on sexual orientation and HIV status has become so prominent that it requires protection by our judicial systems, especially in sub-Saharan Africa.

Consensus has emerged from treaty-monitoring bodies (using an expanded interpretation of the equality and non-discrimination clauses) that HIV status and sexual orientation are prohibited grounds of discrimination in their own right. A quick survey of the emerging jurisprudence reveals that national courts are now more inclined than ever before to ensure protection on the basis of HIV status and sexual orientation.

The list of prohibited grounds of discrimination specifically mentioned in the equality and non-discrimination clauses of constitutions and international treaties are only illustrative and not exhaustive. Our courts have a solemn responsibility to protect persons infected with HIV and to ensure that people are not discriminated against because of their sexual orientation. We can all make a difference and ensure that people infected with HIV and those belonging to sexual minority groups feel protected and secure in our communities.

55 *Id* 499.

56 *Secretary for Justice v Yao Yuk Lung Zigo and Lee Kam Chuen* [2007] 10 HKCFAR 335.