

Full Length Research Paper

Group rights and the right to protection against human immunodeficiency virus/acquired Immunodeficiency syndrome (HIV/AIDS) infection from an industrial relations and public policy perspective

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This paper reflects on the right of protection against HIV infection versus group rights. Various pieces of legislation that recognise group rights are discussed throughout the paper. In so doing the authors have attempted to illustrate that although South African legislation may not clearly demarcate group rights to specific groups, legislators have inadvertently made countless reference to specific groups or grouping of individuals, which suggest that group rights may exist. It is postulated that if individual rights exist, group rights may correspondently co-exist. The aim of this paper is to explore the feasibility of individuals relying on group rights as a means of seeking protection against HIV/AIDS infection.

Key words: Constitution, designated groups, group rights, third-generation right.

INTRODUCTION

The present emancipatory recognition of group rights differ from the oppressive recognition of these rights under apartheid (Oomen, 1999). Such a comparison makes possible an assessment of the differences between the legal recognition of group rights as part of a policy of indirect rule and as a result of the present need for continued democracy.

The right to protection against HIV/AIDS may plead a similar comparison. How does this right differ in post-apartheid South Africa? This right may pose a challenge to individuals seeking to understand the proposal of such a right. Therefore the need to fully appreciate the

necessity for such a right may result in further enquiry.

Does the right to protection against HIV/AIDS, apply to HIV positive individuals seeking medical help as a means of protection against HIV/AIDS? Alternatively, does the right apply to HIV negative individuals seeking protection against individuals infected by HIV?

The question that follows is: are individuals entitled to such protection? If so, does South African legislation recognise the so called group right? The current South African law does not outwardly identify group rights as a classification. However, a limited number of specific legislations make a direct reference to groups of individuals with definite rights. This paper reflects on the right to protection against HIV infection versus group rights and the various pieces of legislation that indirectly recognises group rights.

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Statement of problem

Post-apartheid South Africa and the introduction of the constitution of the Republic of South Africa have encouraged individuals to rely on their legal rights as a means to protection against malpractice, abuse or discrimination. However, when a group of individuals instinctively choose to rely on their right collectively they are often questioned as to the motivation for their need for protection. The problem results in individuals not testing the need for such a right.

Research questions

The following research questions will be considered:

- 1) Can a group of individuals seeking protection against HIV infection rely on group rights?
- 2) Does South African law recognise group rights?
- 3) Should group rights be of equal standing to individual rights?
- 4) Should individuals seeking legal protection as a group be heard?

Aims and objectives

The paper aims to investigate:

- 1) Various sections of South African legislation that recognises group rights.
- 2) The position of group rights in South Africa.
- 3) The various categories of group rights in South Africa.
- 4) The feasibility of individuals relying on group rights as a means of seeking protection against HIV infection.

DESIGN/METHODOLOGY/APPROACH

The paper is a meta-analysis, which relied on secondary sources of information. It is a qualitative study that is based on conceptual analysis. It considers group rights from an "emic" perspective (author's viewpoint). The analysis has included a comparative review of literature relating to HIV/AIDS, the constitution of the Republic of South Africa Act 108 of 1996 and various other significant South African legislations. The right to protection against HIV infection versus group rights has been discussed by examining various pieces of legislation that indirectly or directly recognise group rights. Relevant legislation would be examined as a means of establishing the practicality for seeking such protection.

Employment Equity Act No. 55 of 1998

The Employment Equity Act No. 55 of 1998 (EEA) is

ordinarily known to make a direct reference to designated group rights. The intended purpose of the EEA is to promote equal opportunity and fair treatment in employment through the elimination of unfair discrimination, and the implementation of 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 (Van Niekerk, 2005). The Act obliges employers to take steps to increase the representation of members of so called designated groups in their workforce. The designated groups are black people, women, coloured people and people with disabilities (South African Labour Court, 2004; Jordaan and Ukpere, 2011).

The EE Act in its purpose and application is designed to safeguard the rights of designated group. Non-compliance with the EEA will result in the Department of Labour issuing compliance orders. Should non-compliance persist; the Labour Court will be approached to enforce such compliance orders. The Labour Court is further entitled to issue financial penalties for such non-compliance, ranging from R100, 000 up to R900, 000 for repeated non-compliance (Du Plessis, 2011). The need to enforce rights stipulated in the EEA indirectly emphasises the protection that is awarded to designated groups. This protection reinforces the argument that group rights do exist and therefore the need to test the right to protection against HIV/AIDS can as well be argued as valid.

Labour Relation Act No. 66 of 1995

The Labour Relations Act No. 66 of 1995 (LRA) is often regarded as the centerpiece of labour law; all other labour laws are generally seen as subordinate to the LRA. The purpose according to the LRA is to advance economic development, social justice, labour peace and democratisation of the workplace by fulfilling the primary objectives of the LRA. Primary objectives of the LRA are to realise and regulate the fundamental rights of employees and employers. These rights are entrenched within the following rights as set out within the LRA namely, every employee has the right to fair labour practices; every employee has the right to form and join a trade union and to participate in the activities and programmes of a trade union including strike action; every employer has the right to form and join an employers' organisation and to participate in the activities and programmes of an employers' organisation; every trade union and every employers' organisation has the right to determine its own administration, programmes and activities such as to organise and to form and join

a federation; and every trade union, employers' organisation and employer has the right to engage in collective bargaining (Republic of South Africa, 1996a).

The LRA applies to employment relationships between employers and employees. However, South African National Defence Force, the National Intelligence Agency, and the South African Secret Services are excluded. It is interesting to note that the LRA in its comprehensiveness selects and excludes certain groups (Republic of South Africa, 1999). The LRA in this instance is specific in the exclusion of this group in preference to others. Centralised collective bargaining according to the LRA allows groups of employees in the same industry or sector to bargain with the employers in that industry or sector. There would appear to be some merit to the formation of groups in this instance, as it would make little sense for employees in unlike sectors to bargain with one another. The argument to be noted is that the LRA allows for the demarcation of individuals into groups, of which rights are being accorded.

In addition to previous examples the LRA protects HIV positive individuals from discrimination, which includes not being coerced to reveal their HIV status, no forcible medical testing or dismissal based on their HIV status. The dismissal of an HIV positive employee/group has to be carefully considered by the employer. An employee's dismissal cannot be based on the employee's HIV status or ill health due to the infection. These types of employees or group of employees are clearly protected by the act. They form a specific group based on their HIV status. Pregnant women share similar privileges under the LRA.

This group of women cannot be dismissed due to their prenatal status. Dismissal of a pregnant women amounts to an automatically unfair dismissal (Mundi, 2008). In addition to the LRA the Basic Conditions of Employment Act No. 35 of 2003 (BCEA) allows this group of employees' additional benefits. The LRA unlike the EEA appears to demarcate individuals into several groups, and this could be supported by the argument that the LRA is comprehensive and applies to different categories of employees and employers organisation. The thread that emerges is that group rights are prevalent and supported by legislation.

The Sexual Offences Amendment Act No. 32 of 2007

The Sexual Offences Amendment Act No. 32 of 2007 grants victims of sexual offences the right to know the HIV status of the perpetrators (Republic of South Africa, 2007). In a macabre sense, this can be seen as a group right exclusive to victims of a crime of a sexual nature. This right excludes victims of other types of crime.

For example, in the case of assault, which resulted in grievous bodily harm, there may be possibility of the exchange of the assailants' blood yet victims in these instances are excluded from the privilege of knowing the HIV status of their assailant (South African Government Project 85, 2000).

The Sexual Offences Amendment Act is an example of recent legislation that is progressive. The Act speaks directly of a group of individuals that are protected by the Act. Legislators have allowed victims of a sexual crime the right to be informed as to the HIV status of the perpetrator. Individuals are generally against the disclosure of their HIV status. However, this is an instance that compels individuals to reveal their HIV status.

The progressive nature of the protection and the right awarded to this group opens the flood gates to include other individuals seeking protection against HIV infection. Certain groups are more vulnerable to contracting the HIV virus for the reasons that they are unable to realize their civil, political, economic, social, cultural and employment rights. For example, such individuals who are denied the right to freedom of association and access to information may be precluded from discussing issues related to HIV, participating in AIDS service organizations and self-help groups, and taking other preventive measures to protect themselves from HIV infection (UNHR, 2011).

These individuals, particularly young women, are more vulnerable to infection if they lack access to information, education and services necessary to ensure sexual and reproductive health, and prevention of infection. The unequal status of women in the community also means that their capacity to negotiate in the context of sexual activity is severely undermined. People living in poverty often are unable to access HIV care and treatment, including antiretrovirals and other medications for opportunistic infections (United Nations High Commissioner for Refugees, 2011). The proposition for the awarding of such protection proves increasingly necessary. The current treatise subsequently looks at various other pieces of legislation that inadvertently recognise group rights.

Broad Based Black Empowerment Act No. 53 of 2003

The Broad-Based Black Economic Empowerment Act No. 53 of 2003 (BEE) aims to address inequalities resulting from the systematic exclusion of the majority of South Africans from meaningful participation in the economy. One of the defining features of Apartheid was the use of race to control and severely restrict black people from the access to economic opportunities and resources

(Republic of South Africa, 2004a). BEE is an integrated socio-economic process that contributes to the economic transformation of South Africa and brings about significant increases in the number of black people that manage, own and control the country's economy, as well as significant decreases in income inequalities. Broad-based black economic empowerment (Broad-Based BEE) according to BEE Draft for Comment (cited in Republic of South Africa, 2004a) suggests the economic empowerment of all black people including women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socioeconomic strategies, that include, but are not limited to: increasing the number of black people that manage, own and control enterprises and productive assets; facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises; human resource and skills development; achieving equitable representation in all occupational categories and levels in the workforce; preferential procurement and investment in enterprises that are owned or managed by black people (Republic of South Africa, 2004a). The above definition expands on the nature of broad-based beneficiaries and must be interpreted in conjunction with the definition of black people. This effectively means that broad-based beneficiaries shall be black people, who would encompass the following: black women; black workers; black youth; black people with disabilities and black people living in rural areas. The detailed explanation as to the definition and application of the BEE is intentional.

The BEE Act categorises certain groups of individuals' according to preferences in organisations. This BEE Act as we have noted, is aimed to rebalance the countries racially-skewed divisions of economic power by promoting the economic empowerment of all black people, while excluding others (Currie and de Waal, 2005). The BEE Act clearly demarcates these individuals as a separate group.

In support of the previous arguments it would appear that group rights are apparent upon scrutiny. However, it becomes apparent that groups seeking protection against HIV should be considered.

Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000

According to the Preamble of Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 Section 9 of the constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of

equality (Republic of South Africa, 2000; Republic of South Africa, 2004b). This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources were deprived of their human dignity and continue to endure these consequences. This Act as stated in the preamble, endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom (Republic of South Africa, 2000).

Currie and de Waal (2005) suggest that this is an extremely ambitious piece of legislation arriving at nothing less than the eradication of social and economic inequalities especially those that are systematic in nature, which was generated in our history by colonialism, apartheid and patriarchy and which brought pain and suffering to the great majority of people. The great majority are a group as opposed to the minority that are currently excluded.

Section 14 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 states that it is fair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

Affirmative Action (Employment Equity Act No. 55 of 1998)

Affirmative action refers to preferential treatment of designated groups of people. Typically, an affirmative action programme will require a member of a designated group to be preferred for the distribution of some benefit over another who may not be a member of that group. The grounds of preference are usually based on race or gender. Affirmative action clearly classifies individuals as 'designated group'. In the South African High Court case of *Motala v University of Natal* 1995 (3) BCLR 374D, Motala an Indian student with five distinctions in matric was refused admission into medical school. The court held that the admission policy was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination. Presiding Judge Hurt concluded, while there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence establishes clearly that the degree of disadvantage to which the African pupils were subjected under the "four tier" system of education was significantly greater than that suffered by their Indian counterparts. The Judge did

not consider that a selection system which compensates for this discrepancy runs counter to the constitution. The apartheid society had a distinct hierarchy of races. Whites were at the top and Africans firmly rooted at the bottom. The coloured and Indian communities were situated in between. It is perfectly legitimate, therefore that in order to achieve genuine equality, the affirmative action programme in proportion to the measure of disadvantage suffered under apartheid should apply as observed by Judge Hurt.

Judge Hurt who clearly based his decision on the interpretation of the statute balanced his decision on the category of the group most disadvantaged. Apartheid being the obvious catalyst allowed for the formation of these groups. However it has taken the courts to acknowledge the group right that emanated from the classification. Had such classification not pre-existed such a group would not have had the opportunity to justify their right to the University quota.

The Extension of Security of Tenure Act No. 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE Act)

The socio-cultural aspects of possession of land include how rights to land connect within wider social and cultural relationships, the impact of the structure of land rights on gender inequality and power relations.

The aim of the Extension of Security of Tenure Act No. 62 of 1997 (ESTA) is to provide for measures with state assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land; to regulate the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land; and to provide for matters connected with such eviction (Republic of South Africa, 1997). The Extension of Security of Tenure Act No. 62 of 1997 (ESTA) and the Prevention of Illegal Eviction (PIE) from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE Act). The ESTA attempts to pursue efficiency and effectiveness in the protection mechanism for the vulnerable groups of occupants (tenants, farmworkers and farm dwellers) on agricultural undertakings; and to monitor unlawful land owner eviction. Many South Africans unfortunately do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction. The PIE Act in the same token protects unlawful occupiers of rural or urban land from eviction (PIE Act). Unlawful occupiers according to the PIE Act is a person

who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the ESTA, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act 31 of 1996), and excluding any person who having initially occupied with such consent thereafter continues to occupy once such consent has been withdrawn (Republic of South Africa, 1996b).

The purpose of the PIE Act is to provide for the prohibition of unlawful eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto. The Preamble of the PIE Act concisely states that no person may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property; and no person may be evicted from their home, or have their home demolished without an order of court made after considering all the relevant circumstances. The Act further emphasizes that it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances.

A special consideration should be given to the rights of the elderly, children, disabled persons and particularly households headed by women, and it should be recognised that the needs of those groups should be considered (Republic of South Africa, 1998a).

The Extension of Security of Tenure Act No. 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No.19 of 1998 (PIE Act) are example of legislation that unmistakably classify individuals into select groups with unique group rights. These classifications are by no means, incidental. Legislators have defined them in relation to their vulnerability and need for protection. It is of no surprise that South Africa, with its specific history of group-based discrimination has chosen to include them in its legislation. For the purpose of this paper it is apparent historical conditioning does have a positive influence in restoring the negative into the positive.

Section 24 of the Constitution of the Republic of South Africa

Section 24 of the Constitution of the Republic of South Africa 1996 states that, "everyone shall have the right to a healthy environment". The right to environmental integrity is traditionally seen as falling within the category

of 'third-generation' rights. Often argued that such rights are collective rather than individual in nature, and therefore they cannot be exercised by individuals but rather by a group (Republic of South Africa, 1998b). Section 24 of the Constitution of the Republic of South Africa encompasses individuals, justiciable right to a healthy environment. However, what is important to note for the purpose of the argument is that harmful environmental conditions are often not restricted to individuals but may profoundly affect groups of people individually who may exercise the right collectively.

The National Environmental Management Act No. 107 of 1998 broadens the narrow locus standi provisions of the common law in the area of environmental law. Section 32(1) of the National Environmental Management Act, states that, "any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act". Section 32 (1) (a) makes reference that a person or group of persons on behalf of a group or class of persons whose interest are affected. The National Environmental Management Act No. 107 of 1998 clearly recognises group rights and allows for groups to be recognised as a class of person with an interest that may be affected.

The Refugees Act No. 130 of 1998

When entering into South Africa (whether by land, sea or air), one has to have valid documents (a passport and a permit or visa) to prove that one is legally allowed to be in the country. However, there is a growing category of people often called refugees or asylum seekers. This group of people may not have the required legal documents to enter South Africa and can, therefore, apply for refugee status to give them legal standing in the country (Republic of South Africa, 1998c). Usually, refugees or asylum seekers are people who have been forced to leave their country of origin for various reasons (for example; war, violent political unrest or genocide). Having a refugee status means that the person has the protection of the South African government and cannot be forced to return home until it is deemed safe to do so. People who have refugee status can access most of the same rights as South African citizens except the right to vote (South African Department of Home Affairs, 2012).

South Africa did not recognise refugees until 1993. Subsequently the country became a signatory to the United Nations (UN) and African Union (AU), and implemented a new Refugees Act in 1998. South Africa does not have any refugee camps, so asylum seekers and refugees live mainly in urban regions and survive largely without assistance (South African Department of Home Affairs, 2012). The Refugees Act No. 130 of

1998 provides for the rights of refugees and asylum seekers. The Act recognises members of a particular 'social group' who are victims of persecution as eligible to apply for refugee status. In a 2003 case brought by the Legal Resources Centre in Cape Town on behalf of Dabone and others versus the Minister of Home Affairs and another (Cape Provisional Division, 2003) an order of Court was issued by the Cape Provisional Division (2003) (High Court) ordering the Minister of Home Affairs to allow asylum seeker permit holders and refugees to apply for temporary and/or permanent residence in terms of the Immigration Act No. 13 of 2002. It was a further term of the Court order that such asylum seeker permit holders and refugees are no longer required to give up their asylum seeking or refugee status in order to do this.

Refugee and asylum seekers are a category of individuals who have temporarily forfeited their rights in their country of origin often to secure protection of the South African government. Their circumstances unfortunately group them into either category of refugee or asylum seeker which nevertheless for the purpose of the argument drives the point that a wide number of groups exist within South African legislation.

CLASSIFICATION OF GROUP RIGHTS

It is generally accepted that group rights can be divided into two categories:

- 1) Firstly, the right of the group to share in primary societal relations. For example, same race groups, and,
- 2) Secondly, the spontaneous participation of the individual in the other looser societal relations. For example, individuals that shares like interest or experiences (Fredricks, 1990).

Groenewald quoted by Fredricks (1990) states that the inevitability of group formation is a spontaneous phenomenon in a society. One determining factor for group formation is the naturalness and un-stressful way in which intra-group communication takes place. A shared language, custom, tradition, shared values, norms and views of reality, together with compatible aspirations to promote group membership and develop towards identifiable cultural groups (Fredricks, 1990). Group rights in South Africa are far from black and white groups as previously made obvious during apartheid. The type of group right as described by Fredricks (1990) is that of secondary societal relations. It is a group that forms or joins alliances not because of colour/race but rather 'shared language, custom, tradition, shared values norms and views of reality together with compatible aspirations' (Fredricks, 1990).

Unconventional classification

The following are examples of an unconventional classification of a group. The case of Van Biljon versus Minister of Correctional Services 1997 (4) SA 441 (C) for instance is a case in point. In this case the applicants were HIV infected prisoners who applied for a declaratory order that their right to adequate medical treatment entitled them to the provision of expensive anti-viral medication. Although the applicants were unsuccessful in their application but what they inadvertently presented was a group right class action against the Minister of Correctional Services. Class action suits are seldom used as a vehicle in South African courts. However, the Van Biljon case is an example of a group of prisoners with the same interest, same concerns against the Minister of Correctional Services (AIDS Legal Network, 2004; South African High Court, 1997). and similar needs, acting as a group. Nursing mothers are another example of an unconventional classification. Activists of mother to child transmission are reputedly a group of individuals that have acquired rights for a group that seek protection against HIV/AIDS. The intention is to prevent the transmission of the virus to the unborn child. This is group right that was successful in acquiring a judgement in their favour and the favour of many more in 2002. Minister of Health versus Treatment Action Campaign (2) 2002 (5) SA 721 (CC) dealt with the violation of section 27 (2) of the 1996 Constitution of the Republic of South Africa (Constitution), failure to develop a comprehensive programme to combat mother-to-child transmission of HIV. Pregnant women were classified as a special group entitled to ARV's in order to avoid transmission to unborn babies (South African Constitutional Court, 2002).

An unlikely classification of group rights although mentioned in the EEA and the BECA are disability rights. These rights are an example of a type of group right exclusive to certain individuals with disabilities. The same right would apply to pensioners, Chinese nationals who are included as previously disadvantaged group under the Broad Based Black Empowerment Act No. 53 of 2003 and patients infected with multiple-drug resistant tuberculosis (MPR-TB), who are placed in isolation due to the infectious nature of the disease. Patients infected with MPR-TB as suggested in the case of Minister of Health versus Cedric Goliath and another (South African Cape High Court, 2008), could have succeeded in a class action suit against the Minister of Health had their papers been in acceptable order.

The various group rights isolated in the earlier stated examples in case law or written legislation are examples of individuals that have, migrated towards identifiable cultural groupings (Fredricks, 1990) as a consequence of life experiences, shared values or past experiences that

have joined them into groups.

The question postulated is; does such a classification exist? These groups are silent in their association. They may not belong to club houses or fraternity. However, their shared experiences have classified them as such. For example, pregnant women, pensioners, previously disadvantaged individuals, gay and lesbian people belong to their respective groups. Legislation has carefully identified these individuals when placed together in larger numbers to form groups that share similar rights or enjoy special rights independent of other individuals or groups (Isaack, 2003).

It is therefore, important to note that groups cannot be classified in a predictable manner as black or white, male or female. This stereotypical classification can easily elude one into believing that groups and group rights are non-existent. Literature on the other hand suggests that group rights originate from individual rights. It is important to consider that individuals with similar rights and reason for dispute may gradually form a group due to like circumstance or experience. The inevitable formation of groups cannot be prevented. Section 18 of the Constitution speaks of freedom of association. The section as set out in one line leaves the section open to interpretation. Does the public have a right to be protected against HIV/AIDS as a group right? Why not! If the constitution is compatible with the rights that are sought this right could in fact be recognised by legislators (Republic of South Africa, 2006). Should a group of individuals seeking protection against HIV/AIDS infection request statutory protection? Legislators and policymakers would be forced to analyse the impact of such protection. At the outset this type of protection appears prejudicial whilst limiting significant Constitutional rights such as equality, expression, life, privacy, freedom and security of the person.

Section 36 of the Constitution of the Republic of South Africa 108 of 1996

In order for such protection to come into effect legislators would have to consider Section 36 of the Constitution of the Republic of South Africa which instructs that the rights as set out in the Bill of Rights maybe limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the nature of the right and the purpose of the limitation. Therefore, the relation between the limitation and its purpose and the least restrictive means to achieve the purpose has to be weighed before a limitation can be imposed.

Limitation according to Currie and de Waal (2005) is a

synonym for the infringement or perhaps justifiable infringement. One needs to carefully consider the impact of the limitation as a law that limits a right infringes the right. However, such infringement will not be seen as unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom. Where an infringement can be justified in accordance with the criteria set out in Section 36 it will be seen as constitutionally valid. The limitation of rights can not be seen as justification whenever legislators seek to secure a right that may elude to personal or political gain. It must be emphasised that the existence of a general limitation does not mean that the rights in the Bill of rights can be limited for any reason. The reason for limiting a right needs to be exceptionally necessary.

The South African Constitution permits the limitation of rights by law but requires the limitation to be justifiable. This means that the limitation must serve a purpose that most people regard as compellingly important (Section 18 Constitution of the Republic of South Africa). A very important purpose of the limitation, the restricting of the right will not be justified unless there is a good reason for thinking that the restitution would achieve the purpose it is designed to achieve and there are no other options in achieving the right without restricting it.

In order for groups seeking protection against HIV/AIDS to be granted protection, this right has to be measured against Section 36 of the Constitution of the Republic of South Africa in order to determine whether the right requesting protection would be upheld and in compliance with the section. A court can not determine in the abstract whether the limitation of a right is reasonable or justifiable in an open and democratic society based on human dignity, equality and freedom. This determination often requires evidence (such as sociological or statistical data) as to the possible impact that the legislative restrictions would have on society (Section 36 Constitution of the Republic of South Africa).

In *State versus Makwanyane 1995 (3) SA 391 (CC)* presiding Judge, Chaskalson P, recognises that a general limitation clause does not translate into a standard limitation test (South African Constitutional Court, 1995). This means that the limitation test and not merely the application of the test depend on the circumstances. Should the right to protection against HIV/AIDS be tested, one has to consider proportionately the purpose for which the right is limited and the importance of that purpose to such a group. At this point of reflection, it is important to consider that should this right be requested by a group of nurses based in an emergency facility or paramedics on duty, the proportionality would be different had the request been made by a group of house wives whose possible

exposure to HIV/AIDS would be quite remote. The protection of nurses against HIV/AIDS can be regarded as significantly important when requesting such protection.

The nature of the right may weigh more heavily than others example if such a right was allowed. However, the debate worth reflecting on is, would legislators encourage a new form of discrimination. Alternatively, should such a right not be granted would a greater number of individuals not be susceptible to the virus due to the lack of protection provided for by legislators? Importance and purpose of the limitation therefore 'requires the limitation of a right to serve some purpose' (Section 36 of the Constitution of the Republic of South Africa). Would this right help reduce HIV/AIDS in South Africa? What would its purpose be? Well the right if in place could protect vulnerable groups like children affected by HIV/AIDS, the elderly people, nurses, paramedics, sex workers etc. These individuals would be entitled to seek protection against HIV/AIDS infection from their society.

In terms of the nature and extent of the limitation, 'this factor requires the court to assess the way in which the limitation affects the right concerned' (Section 36 of the Constitution of the Republic of South Africa). This means that the limitation should not be given to a separate province or district or to be confined to one particular group. For example, whites seeking protection against HIV/AIDS but rather through secondary societal relations. Where an individual fall under a group defined as vulnerable group, such protection should be afforded.

The relation between the limitation and purpose for the limitation in the interest of the rights of the individual or groups of individuals must be reasonable and justifiably weighed. There has to be a link between the law and the objective it intends to reach. This group could address the HIV prevalence in South Africa and equate that with the rate at which crime is on the increase especially rape assault and murder. This type of protection would help reduce HIV prevalence and crime simultaneously. Perpetrators found responsible for the transmission of the virus would be severely dealt with and in a greater extent than that explained in the Sexual Offences Amendment Act No. 32 of 2007.

Less restrictive means to achieve the purpose; 'the limitation of a fundamental right must achieve benefits that are in proportion to the cost of the limitation' (Section 36 of the Constitution of the Republic of South Africa). This would be difficult to achieve as the protection requested is either protection or not. There are no middle grounds to the protection requested.

Limitations of rights by other provisions of the Constitution of the Republic of South Africa, is that the demarcation of rights are unsupported in the literature as it is difficult to determine if the protection sought, which

may limit any right entrenched in the Bill of Rights, for instance, the right to life whose scope is unqualified (Section 11 Constitution of the Republic of South Africa). The right to life can be addressed by the group as reason for the protection against HIV transmission.

On completion of the limitation test one could argue that the group is entitled to protection against HIV/AIDS as each subsection of Section 36 of the Constitution of the Republic of South Africa has been satisfied. This type of right would be like the many others identified in legislation. However, one has to heed the advice given by presiding Judge Chaskalson P that the limitations test and not the mere application of the test depends on the circumstances surrounding the need for such protection.

Conclusions

In *Hoffmann versus South African Airways 2001 (1) SA 1 (CC)* the presiding Judge had to consider the right of Hoffmann against the safety of the passengers of South African Airways (SAA) after careful consideration, the learned Judge had to determine the value of the right of one individual against the rights of a larger group (South African Constitutional Court, 2001). The presiding judge argued that the right of an individual can not be compromised at the cost of a group. Simultaneously, the presiding Judge did not say that group rights did not exist. It is clear from South African legislation that both individual and group rights are recognised provided the means of acquiring these rights are both procedurally and substantively in line with the South African Constitution.

The question in the research question is whether a group of individuals seeking protection against HIV infection may rely on group rights. Literature suggests that such rights are available to individuals that seek protection as a group. The paper has outlined examples in South African law that confirm such rights. Literature has provided no indication as to whether group rights are of a lesser standing than individual rights nor does the literature suggest that individuals seeking legal protection as a group cannot be heard?

What does appear to come through the literature in the choice is clearly upon the individual to decide whether he/she chooses to rely on these rights as an individual or as a group. The common adage 'strength in numbers' may appear attractive. However, for the purposes of seeking protection against HIV/AIDS, the nature of the infection and the stigma that the disease attracts are factors to consider. It is however, recommended that protection should be awarded to groups that are most vulnerable to exposure to the disease. Mandatory testing of patients should be considered as a form of protection afforded to nurses, doctors, paramedics and other groups

of individuals that find themselves susceptible to the disease. This article does not propose radical exclusion of HIV infected individuals but suggests the protection of 'vulnerable' groups. The South African Constitution does not preclude such protection. In fact, one could argue that the South African Constitution provides a legislative framework that could assist in the implementation of such protection. The challenge now lies with legislators. Are they willing to take on the challenge or opt out for the fear of being controversial?

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