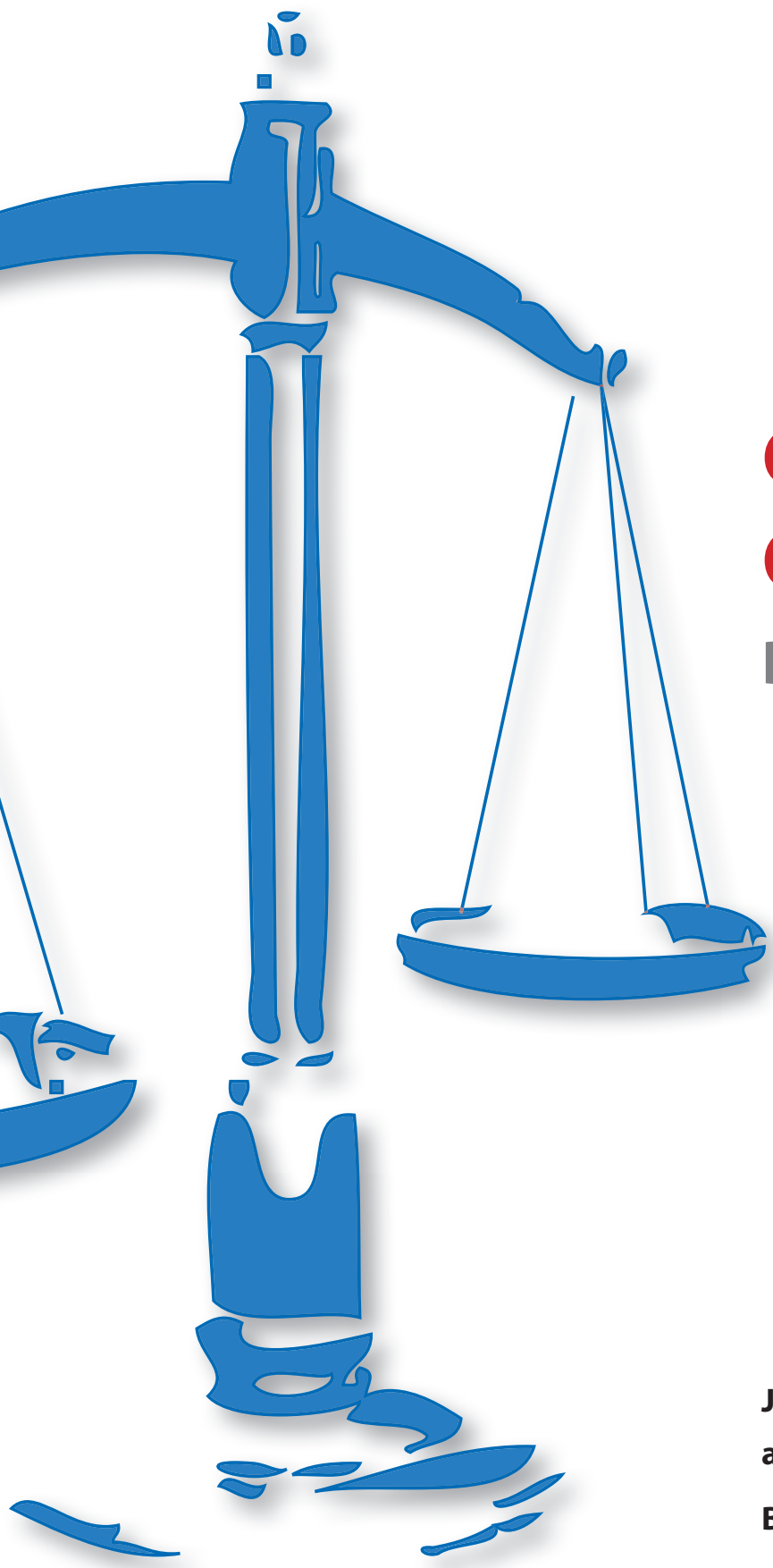




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COMPENDIUM OF JUDGMENTS

Background Material

**Judicial Dialogue on HIV, Human Rights
and the Law in Asia and the Pacific**

Bangkok, 2–4 June 2013

United Nations Development Programme

HIV, HEALTH AND DEVELOPMENT

Disclaimer

The views expressed in this publication are those of the authors and do not necessarily represent those of the United Nations Development Programme (UNDP).

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FOREWORD

HIV continues to be one of the greatest public health challenges of our time. As noted in the landmark report, *The Global Commission on HIV and the Law: Risks, Rights & Health*, HIV is also a crisis of law, human rights and social justice. In the context of recent scientific breakthroughs on HIV prevention and treatment, and the growing epidemic of inequality confounding health and development across the globe, addressing the legal and human rights barriers to effective HIV responses is as important as ever. It is increasingly recognized that protecting the human rights of people living with HIV and key populations is critical to ensuring access to HIV prevention, treatment, care and support for all.

The judiciary, as a protector of human rights, plays an important role in shaping legal environments for effective HIV responses, and in promoting rule of law and access to justice. Jurisprudence has at times had a positive and transformative impact on national HIV responses and on public perceptions of HIV. Across a range of countries, courts have developed enabling jurisprudence on HIV-related issues, such as non-discrimination, employment, access to education, medical insurance, treatment in prisons, segregation, confidentiality, access to medicines, same-sex relations, and the rights of sex workers and transgender people. Beyond the courts, members of the judiciary are leaders in their communities and societies. Their stance, attitudes and behaviour towards HIV-related issues, people living with HIV and key populations can influence social attitudes and challenge stigma and discrimination, inside courts and within the community at large.

As agents of justice, it is critical that members of the judiciary are empowered with up-to-date knowledge and understanding of the science of HIV transmission, prevention, treatment, care and support; epidemiological developments; and the evolving roles of the law and the judiciary in HIV responses. Enhancing the capacity of the judiciary to address HIV-related legal and human rights issues is a vital component of creating enabling legal environments that support effective national HIV responses. Building on the work of the Global Commission on HIV and the Law, *The Compendium of Judgments, HIV, Human Rights and the Law*, is a collation of progressive jurisprudence on HIV-related matters that highlights how the law has been used to protect individual rights. The compendium presents a user-friendly compilation of judgments from different national and regional jurisdictions.



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I. INTRODUCTION

The Compendium of Judgments, HIV, Human Rights and the Law aims to support lawyers' and judges' understanding of how the law has been used to protect individual rights. It is a user-friendly compilation of judgments from different national and regional jurisdictions around the world, representing enabling jurisprudence on HIV-related issues.

HIV remains one of the world's most serious public health challenges. Globally, 34 million people were living with HIV at the end of 2011 and 1.7 million people worldwide died from AIDS-related causes in the same year.¹ In the Asia Pacific region, nearly 5 million people were living with HIV in 2011.² The overall trends in the region hide important variations in the epidemic, both between and within countries.³ Although most countries appear to have stabilized national HIV epidemics, the epidemic remains largely concentrated among key populations. Injecting drug users, men who have sex with men, sex workers and their clients, and transgender people have accounted for most of the new infections in the region.⁴ These key populations are central to the HIV response in Asia and the Pacific.

In addition to serious social, economic and human challenges, the HIV epidemic has raised new and complex legal and human rights issues. Protecting, promoting and fulfilling the human rights of people living with and vulnerable to HIV remain significant challenges in the global response to AIDS. In the June 2011 *Political Declaration on AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*, United Nations Member States—including from the Asia Pacific region—reaffirmed the importance of the full realization of all human rights and fundamental freedoms in the global response to AIDS, including prevention, treatment, care and support for all.⁵

Members of the judiciary play a crucial role in protecting the rights of people living with HIV, as well as the rights of key populations. They also play an important role in ensuring that Member States meet their obligations under international human rights instruments. By interpreting normative standards and by setting important precedents, judges influence social attitudes and shape legal frameworks. In that capacity, they are paramount in the realization of an enabling human rights environment for an effective HIV response.

This compendium focuses on a subset of the many issues that are critical to an effective HIV response. It emphasizes a set of core issues in line with those discussed at the *Judicial Dialogue on HIV, Human Rights and the Law in Asia and the Pacific*, 2–4 June 2013, Bangkok, Thailand. They are:

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- 1 UNAIDS (2012), UNAIDS Report on the Global AIDS Epidemic. Available at: http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf.
 - 2 UNAIDS (2012), Asia and the Pacific, Regional Fact Sheet 2012. Available at: http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/2012_FS_regional_asia_pacific_en.pdf.
 - 3 For example in Cambodia, India, Malaysia, Myanmar, Nepal, Papua New Guinea and Thailand, the rate of new HIV infections fell by more than 25 percent between 2001 and 2011. In Bangladesh, Indonesia, the Philippines and Sri Lanka, the rate of new HIV infections increased by more than 25 percent between 2001 and 2011. See *ibid*.
 - 4 *Ibid*.
 - 5 United Nations General Assembly (2011), Political Declaration on HIV/AIDS: Intensifying our efforts to eliminate HIV/AIDS, June 2011, A/RES/65/277.

- non-discrimination, including employment discrimination, discrimination in health care settings, and discrimination in other settings
- access to medicines
- same-sex relations
- rights of transgender persons
- rights of sex workers
- rights of people who use drugs

Four additional HIV-related topics that are significant in the Asia Pacific region are also included here, although they were not addressed at the Judicial Dialogue: (1) rights of prisoners and detainees; (2) criminalization of transmission, exposure and non-disclosure; (3) discrimination on the basis of sexual orientation; and (4) non-consensual testing, confidentiality and privacy.

The judgments selected for each issue area represent a progression in jurisprudence, moving towards an effective and judicial response to HIV that is consistent with human rights obligations. Many of the judgments are relevant to more than one topic.

The jurisdictions and courts from which the judgments have been selected further limit the scope of the compendium. The large majority of judgments are from Commonwealth jurisdictions, other English-speaking jurisdictions, and regional bodies, including the European Court of Human Rights and the Inter-American Commission on Human Rights. A small, representative sample of judgments has also been selected from domestic courts in Latin America. The compendium focuses on appellate-level judgments in each jurisdiction because they hold the greatest precedential and persuasive authority. As a result, the judgments included in the compendium are not only representative of a progressive jurisprudence, they constitute binding law in the jurisdictions in which they were rendered, as detailed in the “Scope of Authority” field in each summary.

II. JUDGMENT SUMMARIES

2.1 NON-DISCRIMINATION

EMPLOYMENT DISCRIMINATION

CASE NAME	<i>Georgina Ahamefule v. Imperial Medical Centre</i>
YEAR	2012
COUNTRY	Nigeria
CITATION	Suit No. ID/16272000
COURT/BODY	High Court of Lagos State
SCOPE OF AUTHORITY	Highest court in Lagos State. Decisions may be appealed to the Supreme Court of Nigeria.
FACTS AND LAW	<p>The Plaintiff was a nurse at a medical centre. Defendants were the medical centre and a doctor at the centre. While employed at the medical centre, the Plaintiff became pregnant and developed a skin disorder. She sought medical attention and the Defendant doctor performed several diagnostic tests. Neither the nature nor the outcome of the tests was disclosed to the Plaintiff; rather, she was asked to take a two-week medical leave and was referred to a hospital for further testing.</p> <p>At the hospital, blood samples were taken from both the Plaintiff and her husband; the nature of the tests was not disclosed. On a subsequent visit to the hospital, the Plaintiff was informed that she had tested positive for HIV, and her husband had tested negative. The Plaintiff was afforded neither pre-test nor post-test counselling services.</p> <p>The Plaintiff confronted the Defendant doctor and asked why she was not informed of his testing results prior to being referred to the hospital. The Defendant doctor reacted to the Plaintiff with hostility and requested that she collect a letter from the secretary. The letter informed the Plaintiff that she had been terminated from her position at the medical centre. The Plaintiff claimed that she did not receive compensation due to her following her termination.</p> <p>The Plaintiff further claimed that the emotional and psychological trauma she suffered as a result of the Defendants' actions contributed to a sudden miscarriage that she subsequently suffered. She claimed the Defendants denied her access to medical care at the medical centre and refused to perform the requisite cleaning operation following the miscarriage because of her HIV status.</p> <p>The Defendants claimed the Plaintiff was lawfully terminated "based on humanitarian grounds," for reasons of public safety.</p>

Georgina Ahamefule v. Imperial Medical Centre (continued)

FACTS AND LAW
(continued)

The Plaintiff claimed her termination violated section 42(1)(a) and (2) of the Constitution of Nigeria, and article 2 of the African Charter on Human and Peoples' Rights (the Charter). The Plaintiff also noted that section 11(1) and (2) of the Protection of Persons Living with HIV/AIDS Law of Lagos State guarantees employment to people living with HIV, and that section 14(1) of that law provides that any person discriminated against on the basis of HIV can sue in a court of competent jurisdiction.

The Plaintiff also claimed that the Government of Nigeria was required to ensure that its citizens were not denied access to medical care pursuant to the right to health in article 16 of the Charter and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

ISSUE(S) AND HOLDING

1. Was the termination of the Plaintiff on the ground of her HIV status discriminatory and unlawful? Yes.
2. Did the Defendants' failure to seek and obtain consent from the Plaintiff prior to performing a test for HIV constitute unlawful battery? Yes.
3. Were the Defendants required to provide the Plaintiff pre-test and post-test HIV counselling services? Yes.
4. Did the denial of medical care to the Plaintiff on the grounds of her HIV status constitute a violation of the right to health? Yes.

DECISION AND REASONING

1. The Court held that when an employer gives a reason for terminating an employee, it must justify the reason. In this case, the onus was on the Defendants to prove that the Plaintiff's state of health posed a danger to the medical centre's staff and patients, as well as the public at large, as claimed by the Defendants. The Court held that the Defendant failed to show how the Plaintiff, an auxiliary nurse who did not participate in delivery procedures or operations involving the handling of blood or sharp objects, posed such a danger. The Court held that the Plaintiff's termination was "based on malice, done in bad faith and wrongful."
2. Without providing further explanation, the Court declared that the "Defendants' action in subjecting the Plaintiff to HIV testing without her informed consent [constituted] an unlawful battery on her."
3. Without providing further explanation, the Court declared that "Defendants' action in not affording the Plaintiff pre-test and post-test counselling services [constituted] an unlawful negligence of a professional duty to the Plaintiff."
4. Without providing further explanation, the Court declared that "Defendants' action in denying the Plaintiff medical care on grounds of her HIV positive status [constituted] a flagrant violation of the right to health" guaranteed under article 16 of the Charter, Act Cap. 10 Laws of the Federation of Nigeria and article 12 of the ICESCR.

The Court ordered the Defendants to pay the Plaintiff 5 million naira for her wrongful termination, and 2 million naira for unlawfully testing her for HIV without her informed consent, and for the Defendants' negligence.

CASE NAME	<i>J.S.C.H. and M.G.S. v. Mexico</i>
YEAR	2009
COUNTRY	Mexico
CITATION	Report No. 02/09, Petitions 302-04 and 386-04, February 4, 2009; OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 December 2009
COURT/BODY	Inter-American Commission on Human Rights
SCOPE OF AUTHORITY	The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States tasked with promoting and protecting human rights under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.
FACTS AND LAW	<p>The Petitioners lodged a petition with the Inter-American Commission on Human Rights (the Commission) on behalf of J.S.C.H. and M.G.S. (the alleged victims), who were discharged from the Mexican Army because of their HIV status as part of an alleged policy of discrimination against people living with HIV. The decision to discharge the alleged victims was affirmed by Mexican judicial authorities. Mexican army provisions declared servicemen unfit for service and forced them into retirement on the basis of “susceptibility to recurring infections attributable to untreatable conditions of cellular or humoral immunodeficiency of the organism.” Another army provision provided for discharge of servicemen who test positive for “human immunodeficiency virus antibodies, confirmed with supplementary tests in addition to infection with opportunistic germs and/or malignant neoplasia.”</p> <p>J.S.C.H. and M.G.S. claimed they stopped receiving medical treatment upon their discharge and were unable to afford private treatment as a result of losing their military income. The Petitioners alleged violations of articles 4 (right to life), 5 (right to humane treatment), 8 (right to a fair trial), 9 (freedom from ex post facto laws), 11 (right to privacy), 24 (right to equal protection), 25 (right to judicial protection) and 26 (progressive realization) of the American Convention on Human Rights (the Convention).</p> <p>The Petitioners also alleged a violation of article 11 (right to privacy) of the Convention in connection with the disclosure by state agents of the alleged victims’ health condition without observing the required confidentiality.</p>
ISSUE(S) AND HOLDING	Could the alleged victims’ discharge from the Mexican Army on the basis of their HIV status constitute violations of the American Convention on Human Rights? Yes.
DECISION AND REASONING	<p>The Commission found the petition was admissible under articles 5, 8, 11, and 24 of the Convention. However, it declared the petition inadmissible as to alleged violations of rights recognized in articles 4, 9, 25, and 26 of the Convention.</p> <p>The Commission first examined whether the petition was admissible as to the right to equal protection of the law. It stated that if the discharge of the alleged victims affirmed by the judiciary was proven to be due to the alleged victims’ HIV status, it could constitute a violation of articles 24 (right to equal protection) and 8 (right to a fair trial) of the Convention.</p>

J.S.C.H. and M.G.S. v. Mexico (continued)

DECISION AND REASONING
(continued)

The Commission then examined whether the petition was admissible as to the right to humane treatment. It indicated that if a direct causal link was established between the alleged victims' discharge and the alleged suspension of timely and adequate medical treatment, it would amount to a violation of article 5 (right to humane treatment) of the Convention.

Finally, the Commission investigated whether the petition was admissible as to the right to privacy. The Commission stated that if it was proved that state agents disclosed the alleged victims' health condition without observing the necessary confidentiality, it could constitute a violation of article 11 (right to privacy) of the Convention.

CASE NAME	<i>Mr. X v. Chairman, State Level Police Recruitment Board and Ors.</i>
YEAR	2005
COUNTRY	India
CITATION	2006 (2) ALD 513; 2006 (2) ALT 82
COURT/BODY	High Court of Andhra Pradesh
SCOPE OF AUTHORITY	Highest court of the state of Andhra Pradesh. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	<p>The Petitioner, Mr. X, was an armed reserve police constable and had applied for the post of stipendiary cadet trainee sub-inspector of police (civil). He passed the physical test and the written exam, on the basis of which he was provisionally selected for the post. During the medical examination, however, he tested positive for HIV. According to the Petitioner, he was not sent for training because he was HIV-positive, although he continued serving in the armed reserve police force. The Police Recruitment Board relied on Order 70(3) of the Andhra Pradesh Revised Police Manual to contend that persons who were HIV-positive were ineligible for recruitment.</p> <p>The Petitioner filed the petition before the Andhra Pradesh High Court under article 226 of the Constitution of India (original writ jurisdiction of High Courts). The petition was filed against the order of the Andhra Pradesh Administrative Tribunal, which held that Order 70(3) prohibiting employment of people living with HIV was legal and valid.</p>
ISSUE(S) AND HOLDING	Was Order 70(3) of the Andhra Pradesh Revised Police Manual, which prohibited employment of people living with HIV, constitutionally valid? No.
DECISION AND REASONING	<p>The Court struck down Order 70(3) as unconstitutional. It directed the Respondents to verify whether the Petitioner qualified for the job in his present state of health and to appoint him if he was deemed fit within three months of the judgment. The Court held that simply because a person had tested positive for HIV did not mean that he was terminally ill or would be soon. After a lengthy analysis of the medical information on HIV and its progression, the Court held that there was no certainty as to when a person living with HIV might develop AIDS. In upholding the Petitioner's argument, the Court noted that a person living with HIV could live a healthy life for up to 18 years, which could be further extended through effective antiretroviral therapy.</p>

Mr. X v. Chairman, State Level Police Recruitment Board and Ors. (continued)

DECISION AND REASONING
(continued)

The Court stated that the issue raised in the petition involved discrimination in matters of public employment and was therefore subject to the right to equality in article 14 and the right to equality of opportunity in matters of public employment in article 16 of the Constitution. The Court held that article 14 did not prohibit classification as long as the classification was (a) not arbitrary and had a reasonable basis, and (b) had a rational nexus with the object sought to be achieved. Equality of opportunity in matters of public employment under article 16, therefore, required equality among members of the same class of employees, not between members of separate classes.

The Court noted that people living with HIV could be viewed as constituting “a class distinct from others who are not so infected and to satisfy the first of the twin conditions for a valid classification.” However, relying on *MX of Bombay Indian Inhabitant v. ZY*, (AIR 1997 Bom 406), the Court also noted that grouping all people living with HIV together did not reflect the medical evidence that not all people living with HIV were equally fit, physically and mentally. The Court, therefore, found that people living with HIV did not constitute a homogenous class based on mental and physical fitness because fitness varied with the stage of disease. The Court concluded that the classification reflected in Order 70(3) did not have any rational nexus with the object sought to be achieved, which was the recruitment of mentally and physically fit people into the police. The Court held that articles 14 and 16 applied to administrative instructions, and justification on grounds of executive policy were not acceptable when the policy was discriminatory and arbitrary.

The Court further opined that because of the prejudice faced by people living with HIV, they constituted one of the most vulnerable groups in society. The Court noted that the systemic discrimination against people living with HIV prevented them from seeking medical help. The Court also noted that people living with HIV, as in this case, were often discriminated against in matters of employment even though their ability to perform their duties was not diminished as a result of their HIV status. Finally, the Court declared that “any discrimination against [people living with HIV] can be interpreted as a fresh instance of stigmatization and an assault on their dignity.”

Case Name	<i>XX v. Ministerio de Defensa Nacional – Escuela de Cadetes “General José María Córdova”</i>
YEAR	2003
COUNTRY	Colombia
CITATION	T-465/03 (Colom.)
COURT/BODY	Constitutional Court
SCOPE OF AUTHORITY	Highest court for matters of constitutional law. Judgments are binding throughout the country.

XX v. Ministerio de Defensa Nacional – Escuela de Cadetes “General José María Córdova” (continued)

FACTS AND LAW	<p>Mr. XX (Petitioner) filed a petition against the Ministry of National Defence-School of Cadets for expelling him after discovering that he was HIV-positive during a blood donation. The discharge occurred two months before the Petitioner was to be promoted to Second Lieutenant. The Petitioner had passed all health exams and was found to be in healthy conditions upon entering the school. The Petitioner claimed violations of the constitutional rights to life, equality, work, privacy and health, and the liberty to choose one’s own profession or career. He requested the Court to direct the Ministry of National Defence-School of Cadets (the Respondent) to (1) reinstitute him as a regular student of the School as Second Lieutenant with all the rights and prerogatives he had prior to expulsion, (2) authorize his promotion to Second Lieutenant of the Army, (3) assign him to an activity in accordance to his health status, and 4) provide him the necessary healthcare treatment required by article 9 of Decree 1543 of 1997.</p>
ISSUE(S) AND HOLDING	<p>Was the Petitioner’s expulsion from the Ministry of National Defence-School of Cadets on the basis of his HIV status constitutional? No.</p>
DECISION AND REASONING	<p>The Court granted the Petitioner’s request for legal protection of his right to equality, right to education, right to choose his profession, right to integrity and right to health. The Court held that the decision to expel the Petitioner amounted to unconstitutional discrimination against a person living with HIV. It held that institutions of greater education did not have absolute autonomy and were required to respect constitutional rights, such as the fundamental right to equality. Decisions to exclude individuals from school activities must be based on objective and reasonable considerations to meet applicable rules. The Court further held that human dignity prohibited the State from allowing discrimination against people living with HIV, and that the right to equality imposed a duty on the State to protect the most vulnerable, including people living with HIV.</p> <p>In order to guarantee the Petitioner’s right to integrity and personal dignity, the Court held that the Petitioner must be assigned to activities tailored to his condition that would allow him to receive antiretroviral drugs and other necessary treatment. In accordance with current norms, the Respondent was also ordered to provide the necessary medical treatment to protect the Petitioner’s right to health.</p> <p>In particular, the Court ordered the Respondent to (1) reinstate the Petitioner as a Second Lieutenant student within 48 hours of the issuance of the Court’s decision, (2) conduct the necessary tests within 10 days of being notified of the decision and allow the Petitioner to perform all the activities from which he was deprived following his expulsion, (3) accommodate the Petitioner during regular school activities in accordance with his condition, and (4) provide comprehensive medical care in accordance with the prescriptions of doctors.</p>

CASE NAME	<i>Hoffmann v. South African Airways</i>
YEAR	2000
COUNTRY	South Africa
CITATION	(2) SA 628; 2001 (10) BHRC 571; (2000) 3 CHRLD 146

Hoffmann v. South African Airways (continued)

COURT/BODY	Constitutional Court
SCOPE OF AUTHORITY	Highest court for matters of constitutional law. Judgments are binding throughout the country.
FACTS AND LAW	<p>In 1996, the Appellant applied for employment as a cabin attendant with South African Airways (SAA). At the end of the selection process, he was found to be a suitable candidate for employment. He was then subject to a medical examination, which found him clinically fit and thus suitable for employment. However, a blood test revealed that he was HIV-positive. SAA subsequently deemed him unsuitable for the position.</p> <p>The Appellant challenged the constitutionality of the refusal to employ him based on his HIV status in the Witwatersrand High Court (the High Court). He claimed unfair discrimination in violation of his constitutional right to equality, human dignity and fair labour practices. SAA denied these claims and argued they were justified in their hiring practices on the basis of safety, medical and operational concerns. They contended that they were attempting to mitigate the risk of transmission of HIV to passengers. SAA further asserted: (1) their hiring practice was aimed at detecting all kinds of disability, and did not single out HIV; (2) life expectancy of people living with HIV was too short to invest in their training; and (3) other major airlines had similar hiring practices.</p> <p>The High Court held in favour of SAA. The Court found SAA's hiring practices to be sufficiently based on considerations of medical, safety and operational concerns. The Appellant filed an appeal of the High Court's decision with the Constitutional Court.</p>
ISSUE(S) AND HOLDING	Was SAA's policy of refusing to hire people living with HIV as cabin attendants in violation of the South African Bill of Rights? Yes.
DECISION AND REASONING	<p>The Court declared that people living with HIV "must be treated with compassion and understanding" and they "must not be condemned to 'economic death' by the denial of equal opportunity in employment." The Court held that "the refusal by SAA to employ the appellant as a cabin attendant because he was HIV-positive violated his right to equality guaranteed by section 9 of the Constitution."</p> <p>The Court stated that SAA's contention that its hiring practices were justified on the basis of safety, medical and operational concerns was not only incorrect, but also in conflict with the medical evidence proffered in the company's defence. In an affidavit, SAA's medical expert testified to the High Court that only people living with HIV who had reached the stage of immunosuppression and whose CD4 count had dropped below 300 cells per microliter of blood were prone to medical, safety and operational hazards. SAA's assertions were therefore not true of all people living with HIV. In particular, they were not true of the Appellant, as he had not reached the immunosuppressed stage. The Court further held that the practice of other airlines was not relevant in determining the constitutionality of SAA's actions.</p> <p>The Court upheld the appeal and set aside the decision of the High Court. The Court ordered SAA to make an offer of employment to the Appellant immediately, and to pay the Appellant the cost of employing legal counsel in both the High Court and the Constitutional Court.</p>

CASE NAME	<i>Haindongo Nghidipohamba Nanditume v. Minister of Defence</i>
YEAR	2000
COUNTRY	Namibia
CITATION	Case No.: LC 24/98
COURT/BODY	Labour Court of Namibia
SCOPE OF AUTHORITY	One of three lower courts in the country. The Court hears disputes under the Labour Act No. 6 of 1992. Its decisions may be appealed to the High Court, then to the Supreme Court of Namibia.
FACTS AND LAW	<p>Pursuant to section 65(2) of the Defence Act, the Applicant underwent a medical examination as part of his application to serve in the Namibian Defence Force. The examination included an HIV test, but did not include a CD4 count test or a viral load test. Nevertheless, the Namibian Defence Force denied the Applicant admission to the force based solely on a positive HIV test.</p> <p>The Applicant, by way of a Notice of Motion, applied to the Labour Court of Namibia for relief, claiming that the Namibian Defence Force's refusal to enlist him violated Namibia's non-discrimination obligations under section 107 of the Labour Act of 1992. Alternatively, he claimed that the Namibian Defence Force discriminated against him on the ground of a disability, which contravened section 107 of the Labour Act. Specifically, the Applicant requested an order directing the Government of Namibia to discontinue discriminating against him by permitting him to enlist in the Namibian Defence Force, as well as directing the Namibian Defence Force to process his application without regard to his HIV status.</p>
ISSUE(S) AND HOLDING	Did the Namibian Defence Force unlawfully discriminate against the Applicant in denying him admission to the force based solely on his HIV status? Yes.
DECISION AND REASONING	<p>The Court held that the Namibian Defence Force had an obligation to enlist the Applicant, if he reapplied for enlistment, as long as the Applicant's CD4 count was not below 200 and his viral load was not above 100,000.</p> <p>Furthermore, the Namibian Defence Force was ordered to include a CD4 count and viral load test, along with an HIV blood test, in all its medical examinations in order to obtain a more accurate bill of health of its applicants and to avoid denying applicants admission based solely on an HIV blood test.</p> <p>In addition to the Labour Act, the Court considered the Government of Namibia's 'Guidelines for the Implementation of a National Code on HIV/AIDS in Employment' (the Guidelines). The Guidelines extended non-discrimination protections to the Namibian Defence Force's enlistment procedures and reinforced the non-discrimination obligations established in the Labour Act.</p>

CASE NAME	<i>X v. The Commonwealth</i>
YEAR	1999
COUNTRY	Australia
CITATION	[1999] HCA 63

<i>X v. The Commonwealth (continued)</i>	
COURT/BODY	High Court of Australia
SCOPE OF AUTHORITY	The highest court and final court of appeal in the Australian judicial system. Its functions are to interpret and apply the law of Australia; to decide cases of special federal significance, including challenges to the constitutional validity of laws; and to hear appeals, by special leave, from federal, state and territory courts.
FACTS AND LAW	<p>X was discharged from the Australian Defence Force after he tested positive for HIV, in accordance with an Australian Defence Force policy that sought to avoid transmission of HIV between soldiers. He subsequently filed a complaint with the Human Rights and Equal Opportunity Commission (the Commission), claiming his discharge constituted unlawful discrimination under the Disability Discrimination Act 1992 (the Act). It is unlawful under the Act to discriminate against an individual on the basis of a disability, including in employment. However, section 15(4) of the Act creates an exception whereby it is not unlawful discrimination if, because of an individual's disability, he or she is unable to carry out the "inherent requirement of the particular employment" or would require assistance to do so, the provision of which would place an unjustifiable hardship on the employer.</p> <p>The Commission found that X's employment had been terminated unlawfully. The Commonwealth appealed the decision to the Federal Court. The Federal Court held that the Commission had made an error of law in its interpretation of the phrase "inherent requirements of the particular employment" contained in section 15(4). It ordered that the matter be remitted back to a differently constituted Commission. X then appealed to the High Court of Australia.</p> <p>During each stage of the proceedings, HIV was considered to be a 'disability' in accordance with the Act. The Commonwealth, in fact, conceded that X had been discriminated against on the basis of this disability. It argued, however, that the discrimination was not unlawful because X was unable to perform the inherent requirements of his particular employment. The Commonwealth argued that deployment was an inherent requirement of service in the army. Because of the risk of injury during training or combat, and because in the case of X, injury could also lead to transmission of HIV to another soldier, X could not be deployed and therefore could not perform an inherent requirement of his employment.</p>
ISSUE(S) AND HOLDING	Did the Australian Defence Force unlawfully discriminate against X when it discharged him after testing positive for HIV? The Court did not reach a conclusion on this issue. Instead, it held that the Commission had interpreted section 15(4) of the Act too narrowly and remanded the matter to be reconsidered in accordance with its decision.
DECISION AND REASONING	<p>The central question in the appeal was how the phrase "unable to carry out the inherent requirements of the particular employment" would apply to an HIV-positive soldier.</p> <p>The majority of the Court held that the Commission had made an error of law in its interpretation of section 15(4) of the Act. The Commission had interpreted the phrase "inherent requirements of the particular employment" too narrowly by limiting it to the "tasks or skills for which [the Appellant was] specifically prepared." The Commission should have instead considered "the places and the circumstances in which the tasks of a soldier are to be performed." The Court did not rule on what the inherent requirements of employment as a soldier in the Australian Defence Force would be.</p>

X v. The Commonwealth (continued)

DECISION AND REASONING
(continued)

The Court observed that in order for discrimination to be lawful under section 15(4) of the Act, five conditions must be met:

- There must be a causal relationship between the disability and the inability to carry out the inherent requirements of the particular employment.
- An inability to perform the inherent requirement of the particular employment, not simply a difficulty, must be demonstrated.
- Reference must be made to the “inherent requirements of the particular employment.”
- The “inherent requirements” are the “characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral.”
- The “particular employment” includes “not only the terms and conditions which stipulate what the employee is to do or be trained for, but also those terms and conditions which identify the circumstances in which the particular employment will be carried on.”

At the initial hearing, the Commission held that deployment was not inherent but rather an incident of employment in the army. On appeal, the question of whether deployment was an inherent requirement was not decided. However, the Court held that an employee must be able to perform the inherent requirements of their particular employment with safety to themselves and to those with whom they come into contact in the course of their employment.

The Court did not determine whether the acknowledged discrimination was unlawful in this case. It did not examine the level of risk that a soldier living with HIV might pose to his fellow soldiers, nor did it examine the lawfulness of the Army’s policy to discharge soldiers living with HIV. The Court declared that these were “not questions that can be resolved in the present appeal.” Only one Justice attempted to quantify, albeit briefly, the risk of transmission of HIV and thereby X’s ability to carry out the inherent requirements of the job.

The appeal was dismissed and it was ordered that the matter be remitted back to the Commission, differently constituted, for further hearing in accordance with the Court’s interpretation of the Act.

CASE NAME	<i>Mx of Bombay Indian Inhabitant vs. MS</i>
YEAR	1997
COUNTRY	India
CITATION	AIR 1997 Bom 406; 1997 (3) BomCR 354; (1997) 2 BOMLR 504
COURT/BODY	High Court of Bombay
SCOPE OF AUTHORITY	Highest court and final court of appeal of the states of Maharashtra and Goa and the Union Territories of Daman and Diu, and Dadra and Nagar Haveli. Decisions may be appealed to the Supreme Court of India.

Mx of Bombay Indian Inhabitant vs. MS (continued)

FACTS AND LAW

The Petitioner, MX, was a casual labourer working for the Respondent, M/s ZY, a state-owned corporation. Before the Petitioner's employment could be regularized, the Respondent required that he undergo medical tests, including tests for HIV antibodies. The Petitioner passed all fitness requirements of the examination except those for HIV antibodies. Upon learning that the Petitioner had tested positive for HIV, the Respondent immediately terminated the Petitioner's employment on the ground that he was no longer "medically fit" for the post.

The Petitioner contended that his dismissal from work violated his fundamental rights under article 21 (right to life) and article 14 (right to equality) of the Constitution. The Respondent contended that though a worker could not be retrenched on grounds of "continued ill health" under section 2 (oo) of the Industrial Disputes Act, 1948, pre-employment tests were not included in the purview of this provision. The Respondent claimed that it could require, under a statutory rule, medical tests for entry-level recruitment to determine medical fitness of the candidate.

ISSUE(S) AND HOLDING

1. Was it permissible for the Petitioner to conceal his name during court proceedings? Yes.
2. Was the Respondent's interpretation of what constituted medical fitness for the purpose of employment valid? No.
3. Was a rule denying employment based solely on a person's HIV status constitutionally valid? No.

DECISION AND REASONING

1. The Court held that a person living with HIV may be subject to great public embarrassment and undue publicity and thus could suppress his identity if he could show that it was in the interest of justice and that revealing his name would make it difficult for him to participate in legal proceedings.
2. The Court held that in the context of employment, medical fitness must be related to the requirements of the job. In considering medical fitness, the Court relied on two judgments from the United States: *Florida v. Gene H. Arline* (1987) 94 L.Ed.2nd 307, and *Vincent L. Chalk v. United States District Court Central District California* (1987) 840 F 2nd 701. The Court further held that an "individualized inquiry" should be undertaken based on "reasonable medical judgments given the state of medical knowledge." The Court held that the inquiry should consider:

"(a) [T]he nature of the risk (e.g., how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."

3. Relying on *Anand Bihari v. Rajasthan S.R.T.C.*, 1991 AIR 1003, the Court held that "continued ill health" as used in section 2 (oo) of the Industrial Disputes Act "must have a bearing on the normal discharge of duties." The Court further held that ill health would be relevant only if it interfered with the usual functions that were attached with the post.

The Court held that a rule denying employment to individuals based solely on the ground that they tested positive for HIV was arbitrary, unfair and unreasonable and violated the right to equality in article 14 of the Constitution. The Court relied on the policies and guidelines of the World Health Organization, the International Labour Organization and the National AIDS Control Organization (NACO) of India in making its determination. The Court noted that persons living with HIV could perform "normal job functions" while living with the disease and that the probability of transmission of the virus was low at the workplace.

Mx of Bombay Indian Inhabitant vs. MS (continued)

DECISION AND REASONING
(continued)

The Court further held that the right to livelihood was included within the right to life in article 21 of the Constitution. It held that the right to life for a workman includes the right to be in employment that is not at the mercy of the employer. The Court relied on the right to socio-economic justice as envisaged in the Directive Principles of the Constitution to conclude that the right to work was necessary to the enjoyment of fundamental rights. The Court held that a rule arbitrarily denying the right to livelihood violated the right to life.

The Court reinstated the Petitioner and directed the Respondent to compensate him for loss of income for the period he was unemployed.

CASE NAME	<i>Raintree Health Care Center v. Illinois Human Rights Commission</i>
YEAR	1996
COUNTRY	United States
CITATION	672 N.E.2d 1136 (1996); 173 Ill.2d 469; 220 Ill.Dec. 124
COURT/BODY	Supreme Court of Illinois
SCOPE OF AUTHORITY	Highest court and court of final appeal for the state of Illinois, with limited original jurisdiction and final appellate jurisdiction. Decisions involving federal issues may be appealed to the Supreme Court of the United States.
FACTS AND LAW	<p>James Davis, the original complainant, was a man living with HIV who worked as a cook at Raintree HealthCare Center (Raintree), a nursing home. His job responsibilities consisted of “preparing the evening meal, placing the food on trays, and cleaning and straightening the kitchen and storeroom areas.”</p> <p>Davis filed a discrimination charge with the Illinois Department of Human Rights alleging that Raintree violated the Illinois Human Rights Act by terminating his employment after learning that he tested positive for HIV. An administrative law judge determined that Raintree had discriminated against Davis by “constructively discharging him on the basis of a physical handicap.” The judge ordered that Davis be reinstated to his former position, or a substantially equivalent position, with pay and benefits, and awarded him back pay, plus interest, and reasonable attorney fees. The Illinois Human Rights Commission upheld the judge’s order and decision, and a state appellate court affirmed the decision of the Commission. Raintree appealed to the Supreme Court of Illinois.</p>
ISSUE(S) AND HOLDING	Did Davis’s discharge from his job as a cook at a nursing home based on his HIV status constitute unlawful discrimination under the Illinois Human Rights Act? Yes.
DECISION AND REASONING	The Court stated that the Illinois Human Rights Act (the Act) specifically prohibits “discrimination in employment against the physically and mentally handicapped.” Under the Act, it is thus unlawful for an employer to discharge an employee due to a physical handicap, if the handicap is “unrelated to his ability to perform his job duties.” The Court next established that HIV is a “protected condition” under the Act.

Raintree Health Care Center v. Illinois Human Rights Commission (continued)

DECISION AND REASONING
(continued)

Neither party disputed that Raintree discharged Davis solely on account of his HIV status. The Court thus considered whether Raintree had performed an “individualized determination” as to whether Davis could perform the duties of the job prior to discharging him. It noted that the only evidence presented in this regard was a note from Davis’s doctor stating that his “HIV status did not restrict him from performing his job as a cook and that HIV was not transmitted through food preparation.” Raintree had not presented any evidence to the contrary and nothing in the record indicated that it had looked into how HIV was transmitted or whether there was a risk of an HIV-positive cook transmitting the disease through the preparation of food. The Court thus held that Raintree had not conducted an “individualized determination” as to whether Davis could perform his job duties.

Raintree argued that governing public health regulations in existence at the time prohibited Davis from working in the nursing home. It relied on the following provision in particular: «An employee diagnosed or suspected of having a contagious or infectious disease shall not be on duty until such time as a written statement is obtained from a physician that the disease is no longer contagious or is found to be noninfectious.» The list of diseases under the provision included “AIDS,” but did not mention the status of being HIV-positive. The Court held that the terms “contagious or infectious” in the provision were terms of art defined by the list of diseases. Since HIV was not included in the list and Davis did not suffer from AIDS at the time of his discharge, the provision was held not to apply to him.

Raintree argued that the distinction between HIV and AIDS was “inappropriate and irrational.” The Court, however, noted that the distinction was supported in the public health regulations themselves, as another provision distinguished between showing visible signs of AIDS and being HIV-positive but showing no signs of AIDS. The Court thus held that, on its face, the provision in question did not prevent employees living with HIV from working in nursing homes.

The Court also rejected Raintree’s argument that a “good-faith belief that one’s discriminatory actions are required by state law is a defense to liability.” It further questioned whether the facts in the case supported a finding that Raintree was acting in good faith when it discharged Davis.

CASE NAME	<i>Canada (Attorney General) v. Thwaites</i>
YEAR	1994
COUNTRY	Canada
CITATION	T.D. 9/93
COURT/BODY	Federal Court, Trial Division
SCOPE OF AUTHORITY	A national trial court that hears legal disputes arising in the federal domain, including claims against the Government of Canada, civil suits in federally regulated areas and challenges to the decisions of federal tribunals. Decisions may be appealed to the Federal Court of Appeal and then to the Supreme Court of Canada.

Canada (Attorney General) v. Thwaites (continued)

FACTS AND LAW

Thwaites was a naval electronics sensor operator in the Canadian Armed Forces (CAF). During his service, he tested positive for HIV. The CAF did not immediately act upon learning that Thwaites was HIV-positive. Around the same time, another member of the CAF reported that Twaites was a homosexual. An investigation was conducted and his security clearance was downgraded below that which was required to perform his duties as an electronics sensor operator. He was subsequently assigned to shore duties of a menial nature. Following a number of medical examinations and determinations concerning Thwaites' ability to perform his job duties, he was honourably discharged on medical grounds.

Thwaites filed a claim with the Canadian Human Rights Commission alleging that the CAF discriminated against him in violation of section 7 of the Canadian Human Rights Act (the Act). He claimed he was discriminated against based on his HIV status, which constitutes a disability and a prohibited ground of discrimination under the Act. The CAF contended its discharge of Thwaites was based on a "*bona fide occupational requirement*," which is an affirmative defence to discrimination under the Act. The Human Rights Commission's tribunal determined that the complaint had been established and awarded Thwaites past and future lost wages and additional special compensation. The CAF filed an appeal for judicial review.

ISSUE(S) AND HOLDING

Did the Canadian Armed Forces unlawfully discriminate against Thwaites when it discharged him based solely on his HIV status? Yes.

DECISION AND REASONING

The Court examined the decision of the Human Rights Commission's tribunal and adopted its reasoning as to whether the "*bona fide occupational requirement*" (BFOR) defence was available to the CAF. The Court stated that there were two components of a BFOR defence. First, the employer must provide "subjective evidence of its good faith in establishing its policies or requirements" that led to the discrimination. The Commission decided that the CAF "held the honest belief that Thwaites' medical condition had proceeded to the point where he required ongoing specialist care which could not be made available to him at sea." The Court did not challenge the Commission's decision in this regard.

The second component of a BFOQ defence requires an employer to prove that the occupational requirement is "reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public." The Court explained that the risk of endangerment must not be simply "slight or negligible." When the risk involves health or safety, the Court further explained that the employer must "show that the risk is based on the most authoritative and up-to-date medical, scientific and statistical information available and not on hasty assumptions, speculative apprehensions or unfounded generalizations." Finally, the Court noted that unless it causes an undue hardship, employers have a duty to provide an employee with an alternative job, or an accommodation in order to allow him to perform his present job.

The Court held that the CAF failed to make a full, individualized assessment of Thwaites' condition. It did not determine whether Thwaites was "exposed to risks significantly greater than the usual risks for those who are not disabled of going to sea and being remote from hospital facilities and specialist care should an unexpected medical emergency arise." It did not base its decision on the most authoritative and up-to-date medical, scientific and statistical information available. Moreover, it failed to demonstrate that it could not reasonably and practically

Canada (Attorney General) v. Thwaites (continued)

DECISION AND REASONING
(continued)

accommodate Thwaites' needs, or that a reasonable or practical alternative, other than discharge, was not available.

The Court thus upheld the decision of the Commission's tribunal finding that the CAF unlawfully discriminated against Thwaites when it discharged him on the basis of his HIV status.

CASE NAME	<i>Buckingham v. United States</i>
YEAR	1993
COUNTRY	United States
CITATION	998 F.2d 735 (9th Cir. 1993)
COURT/BODY	United States Court of Appeals, Ninth Circuit
SCOPE OF AUTHORITY	The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam and the Northern Mariana Islands. Decisions may be appealed to the Supreme Court of the United States.
FACTS AND LAW	<p>The Plaintiff was a United States Postal Service employee living with HIV. He requested transfer from an office in Mississippi to Los Angeles to have access to better medical treatment. He was told that the Mississippi division would waive the requirement that employees have one year of seniority before receiving a transfer. He submitted his request for transfer and moved to Los Angeles. Upon arrival, the Los Angeles office denied the Plaintiff's transfer based on a collective bargaining agreement between the Postal Service and unions representing postal employees.</p> <p>The Plaintiff sued the Government for violation of his rights under the Rehabilitation Act of 1973, which requires recipients of federal funds, such as the Postal Service, to provide "reasonable accommodation to handicapped employees." The Government argued that a transfer for medical treatment was "precluded as a matter of law from being a reasonable accommodation" and that transferring the Plaintiff would have contravened the seniority rights of other employees under the collective bargaining agreement.</p> <p>The lower court granted summary judgment in favour of the Plaintiff; the Government appealed.</p>
ISSUE(S) AND HOLDING	Did the Plaintiff's request for a job transfer, in order to obtain better treatment for HIV, constitute a "reasonable accommodation" under the Rehabilitation Act of 1973? Yes.
DECISION AND REASONING	The Court first established that the Plaintiff was a "handicapped individual" entitled to protection under the Rehabilitation Act of 1973 (the Act). It then noted that under the Act, an employer's duty "goes beyond mere nondiscrimination" and encompasses an "affirmative obligation to accommodate." The Court stated that when an accommodation is required to allow the employee "to perform the essential functions of the job," the employer must «gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary." The Court held that there was no merit to the Government's argument that there was a

Buckingham v. United States (continued)

DECISION AND REASONING (continued)

“per se rule against transfers as reasons accommodations,” particularly as the Plaintiff was simply asking for “the same job at a different location.” It was thus not unreasonable under the Act to transfer the Plaintiff to a location where he could obtain better medical treatment.

The Court further held that “employers are not relieved of their duty to accommodate when employees are already able to perform the essential functions of the job.” Instead, it held that an “employer is obligated not to interfere, either through action or inaction, with a handicapped employee’s efforts to pursue a normal life.”

The Court remanded the case to the lower court to allow the Government to present evidence as to whether medical facilities in Los Angeles could provide the Plaintiff with better medical care than he would have received in Mississippi, and whether the Plaintiff was or would be able to perform the essential functions of his job.

The Court stated that upon remand, the Plaintiff could meet his burden in two ways. He could argue that “the accommodation he sought was necessary to enable him to perform the essential functions of his job” or that he was already able to perform the essential functions of the job, but that he required “reasonable accommodation in order to pursue treatment or therapy for his handicap.”

The Court observed that the Plaintiff seemed to have already met his burden under the first option, which would merit a summary judgment in his favour. It noted that an independent medical examiner retained by the Postal Service had determined that the Plaintiff “was able to perform the essential functions of his job after he moved to Los Angeles and would retain such capacity for at least two years as long as he continued to receive medical treatment and follow-up, including testing and therapy.”

DISCRIMINATION IN HEALTH CARE SETTINGS

CASE NAME	<i>Settlement Agreement between United States and Castlewood Treatment Center, Under the Americans with Disabilities Act</i>
YEAR	2013
COUNTRY	United States
CITATION	n/a
COURT/BODY	United States Department of Justice, Office of the Attorney General, Civil Rights Division
SCOPE OF AUTHORITY	The United States Attorney General is responsible for administering and enforcing Title III of the Americans with Disabilities Act.

Settlement Agreement between United States and Castlewood Treatment Center, Under the Americans with Disabilities Act (continued)

FACTS AND LAW

The matter was based on a complaint filed with United States Department of Justice. The Complainant, a woman living with HIV, was denied enrolment in a treatment programme for eating disorders at a private treatment centre based solely on her HIV status. Upon receiving the Complainant's request for admission and learning that she was HIV-positive, representatives of the treatment centre proceeded to intentionally delay her admission so the Complainant "would go somewhere else." After a four-month delay, she was informed that she would not be admitted due to the treatment centre's policy not to "accept clients with high risk communicable diseases." The Complainant's counsel sent a letter demanding the Complainant be offered placement in the treatment programme. The Complainant was subsequently granted admission, but the treatment centre required that all blood drawn from the Complainant, including weekly lab tests required for her treatment, be performed at an outside hospital instead of on-site, as was the general practice for all other patients. Ultimately, the Complainant was granted "immediate admission" into the treatment programme without the requirement that she travel to an outside hospital to have her blood drawn. The Complainant was required to accept this offer within five days; she declined to do so and chose instead to enrol in a different treatment programme.

As a result of the treatment centre's actions, the Complainant was delayed in receiving appropriate treatment for her eating disorder by up to seven months. This delay caused her health to worsen: she experienced rapid weight loss, putting her at high risk for a heart attack, and she suffered stress, anxiety, depression and general emotional distress.

ISSUE(S) AND HOLDING

Did the treatment centre unlawfully discriminate against the Complainant by denying her enrolment in a treatment programme for eating disorders based solely on her HIV status? Yes.

DECISION AND REASONING

Pursuant to Title III of the Americans with Disabilities Act (ADA), the United States Attorney General determined that the treatment centre had unlawfully discriminated against the Complainant on the basis of a disability.

Under the ADA, HIV qualifies as a disability because it is a physical impairment that substantially limits one or more major life activities, including the functions of the immune system, which is a major bodily function. The treatment centre is a private entity and is considered a place of public accommodation because it affects commerce and is a service establishment as defined in the ADA. Finally, under the ADA, "no person who owns, leases (or leases to), or operates a place of public accommodation may discriminate against an individual on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation."

The treatment centre and the Government of the United States entered a settlement agreement. The treatment centre agreed, among other things: not to discriminate against any individual on the basis of a disability, including HIV; to draft and implement a policy stating that it does not discriminate in the provision of services against persons with disabilities, including persons living with HIV; to provide training on the ADA to all employees and contractors involved with the admission or treatment of patients, including training about HIV discrimination; to pay damages to the Complainant in exchange for her release of the claims.

See *Georgina Ahamefule v. Imperial Medical Centre* (2012), **Employment Discrimination**

CASE NAME	<i>LM, MI and NH v. Namibia</i>
YEAR	2012
COUNTRY	Namibia
CITATION	Case No: I 1603/2008, Case No: I 3518/2008, Case No: I 3007/2008
COURT/BODY	High Court of Namibia, Main Division, Held at Windhoek
SCOPE OF AUTHORITY	The Court has original jurisdiction to hear all civil disputes and criminal prosecutions, including cases that involve the interpretation, implementation of the Constitution. The Court also has jurisdiction to hear appeals from lower courts. Its decisions are binding on lower courts and may be appealed to the Supreme Court of Namibia.
FACTS AND LAW	<p>The Petitioners were three women living with HIV who alleged that they were sterilized without consent by doctors employed in the Ministry of Health and Social Services. They claimed the sterilizations were done as part of a practice of discrimination against women living with HIV. They alleged the non-consensual sterilizations violated their basic human rights guaranteed by the Constitution of Namibia, including the right to life, the right to liberty, the right to human dignity, the right to found a family, and the right equality and freedom from discrimination. They also claimed the operations breached the duty of care owed to them by the doctors who performed the sterilizations.</p> <p>The Government of Namibia (the Defendant) contended that the doctors had obtained the written consent of each woman “after the procedure was explained fully . . . together with the risks and consequences thereof and also after alternative contraception methods had been explained.”</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none"> 1. Were the Plaintiffs unlawfully sterilized without their informed consent? Yes. 2. Were the Plaintiffs sterilized because they were HIV-positive, as part of a discriminatory policy against women living with HIV? No.
DECISION AND REASONING	<ol style="list-style-type: none"> 1. The Court held that “the required consent must be given freely and voluntarily and should not have been induced by fear, fraud or force.” It added that consent “must also be clear and unequivocal” and that “[a]dequate information” is a requisite of the knowledge required to make an informed decision. <p>The first Plaintiff testified that she signed a consent form while on a stretcher about to enter the delivery room, in severe pain. A nurse informed her that she would be sterilized “since all women who are HIV-positive go through that procedure.” She did not know whether the consent form was for the delivery or the sterilization and she felt forced to sign the form.</p> <p>The second Plaintiff testified that she was not asked whether she wanted to be sterilized, but was rather told by the doctor that she would be “whether she wanted it or not.” Moreover, the doctor spoke in a forceful manner in telling her so. She was given several forms to sign while she lay on a bed in severe pain, experiencing contractions. When asked about the forms, she was told that the doctor had already explained them and that she simply needed to sign them. She was also “made to understand that there is a policy in place that women who are HIV-positive should be sterilised.”</p>

LM, MI and NH v. Namibia (continued)

DECISION AND REASONING
(continued)

The third Plaintiff requested termination of the pregnancy but was told it was not possible. She was given forms to sign while in severe pain, experiencing contractions. She “did not understand anything contained in the documents,” including the acronym used to represent the name of the sterilization procedure.

The Court declared that the consent obtained from the Plaintiffs for the sterilization procedures was obtained during the height of labour, in circumstances “under which no consent should be obtained from a patient by a surgeon.” The Court thus held that the women were unlawfully sterilized without their informed consent.

2. The Court held that the onus was on the Plaintiffs to prove “on a preponderance of probabilities” that the sterilization procedures had been performed because they were HIV-positive. The Court, however, found «no credible and convincing evidence” that this was in fact the case. It thus dismissed this claim.

CASE NAME	<i>V., W. J. v. Obra Social de empleados de Comercio y Actividades Civiles</i>
YEAR	2004
COUNTRY	Argentina
CITATION	V. 1389. XXXVIII (Arg.)
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court of appeal in the country, it decides matters of constitutional law.
FACTS AND LAW	<p>The Petitioner brought action against Obra Social de Empleados de Comercio y Actividades Civiles (Osecac) for discrimination and violations of his rights to life and health. The Petitioner had received health insurance coverage from Osecac through his employer for seven years. Following termination of his job, the Petitioner sought to continue coverage with Osecac. However, Osecac refused the Petitioner’s request for insurance coverage when it learned that the Petitioner was HIV-positive.</p> <p>The Petitioner claimed that Osecac’s refusal to continue his insurance coverage was in contravention of Law No. 23.798, which declares a national interest in combating HIV; Law No. 24.455, which provides for universal coverage of HIV medicines by social services; and Law No. 24.754, which provides for coverage by prepaid medical services for people living with HIV equal to coverage provided to other participants under social services laws.</p>
ISSUE(S) AND HOLDING	Was it lawful for Osecac to deny the Petitioner access to health insurance coverage based solely on his HIV status? No.

V., W. J. v. Obra Social de empleados de Comercio y Actividades Civiles (continued)

DECISION AND REASONING

The Court overturned the decision of the appellate court, granted precautionary measures requested by the Petitioner and ordered Osecac to incorporate the Petitioner into the requested health plan. The Court held that Osecac failed to provide evidence that justified its refusal to provide medical coverage to the Petitioner. The Court did not provide its own analysis of the case, but rather based its decision on the Attorney General's analysis. This analysis asserted that upon assuming a welfare-provider role, Osecac lost absolute and full autonomy. Thus if an individual, such as the Petitioner, seeks to remain in the welfare-based relationship he should prevail pursuant to the principle of good faith.

CASE NAME	<i>Bragdon v. Abbott</i>
YEAR	1997
COUNTRY	United States
CITATION	524 U.S. 624 (1998)
COURT/BODY	Supreme Court of the United States
SCOPE OF AUTHORITY	Highest court in the country. Judgments are binding throughout the country.
FACTS AND LAW	<p>After disclosing that she was HIV-positive on a patient registration form, Respondent Abbott was informed by her dentist, the Petitioner, of his policy against filling cavities of "HIV-infected patients." The Petitioner offered to perform the work at a hospital with no added service fee, but with the cost of the use of the hospital's facilities borne by the Respondent. The Respondent declined. The Respondent had not manifested the "most serious symptoms" of her illness when the incidents were reported.</p> <p>The Respondent brought an action in federal district court against the Petitioner under § 302 of the Americans with Disabilities Act (ADA), alleging discrimination on the basis of her disability. The Respondent asserted that her HIV infection substantially limited her ability to bear children, and that this qualified her as a person with a disability under the ADA.</p> <p>Section 302 of the ADA provides: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation," § 12182(a). "Disability" is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment," § 12102(2). "Public accommodation" is defined to include the "professional office of a health care provider," § 12181(7)(F).</p> <p>The mandate not to discriminate is qualified by a later subsection, which provides: "Nothing in this subchapter shall require an entity to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of such entity where such individual poses a direct threat to the health or safety of others." § 12182(b)(3). "Direct threat" is defined in the ADA as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services."</p>

Bragdon v. Abbott (continued)

ISSUE(S) AND HOLDING

1. Is HIV a “disability” under the Americans with Disabilities Act, thus providing people living with HIV protections under the Act? Yes.
2. Did the Respondent’s HIV infection constitute a “direct threat to the health and safety of others” under the Americans with Disabilities Act? No.

DECISION AND REASONING

1. The Court first set out to determine whether HIV was a disability under the ADA when the disease had not yet progressed to the symptomatic phase. The Court held that HIV was a disability under subsection (A) of the definitional section of ADA § 12102(2), i.e., “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”

The Court held that the ADA must be construed to grant “at least as much protection” as provided by the Rehabilitation Act *regulations*, as the ADA’s definition of disability was drawn “almost verbatim” from the definition of “handicapped individual” included in the Rehabilitation Act.

The Court considered subsection (A) of the ADA definition in three steps. First, it considered whether the Respondent’s HIV infection amounted to a “physical impairment.”

The Court held that HIV infection, whether symptomatic or asymptomatic, qualifies as an impairment:

“In light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease, we hold it is an impairment from the moment of infection . . . HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person’s hemic and lymphatic systems from the moment of infection. HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease.”

Second, the Court examined whether the “life activity” upon which the Respondent relied (reproduction and childbearing) constituted a “major life activity.”

The Respondent had claimed from the outset that her HIV infection placed a substantial limitation on her ability to reproduce and to bear children. The Court therefore restricted its discussion to this life activity only. The Court affirmed the appellate court’s finding that reproduction falls well within the phrase “major life activity,” stating that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself.” The Court further held that this interpretation was consistent with the representative list of functions contained within the Rehabilitation Act *regulations*.

Third, the Court considered whether the impairment substantially limited the Respondent’s “life activity.”

The Court held that, based on the medical evidence, the Respondent’s HIV infection substantially limited her ability to reproduce in two independent ways:

- i. A woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected.
- ii. An infected woman risks infecting her child during gestation and childbirth via perinatal transmission.

Bragdon v. Abbott (continued)

DECISION AND REASONING *(continued)*

The Court rejected the contention that the lower risk of transmission of the disease to one's child does not represent a substantial limitation on reproduction. It declared: "The Act addresses substantial limitations on major life activities, not utter inabilities. Conception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation."

The Court further held that "when significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." The Court also noted that "every agency to consider the issue under the Rehabilitation Act found statutory coverage for persons with asymptomatic HIV."

2. The Court also considered whether there was sufficient evidence indicating that the Respondent's HIV infection posed a "direct threat to the health and safety" of her treating dentist (§ 12182(b)(3)). The Court held that the Petitioner did not present any "objective, medical evidence" indicating that it would be safer to treat the Respondent in a hospital than in his office.

DISCRIMINATION IN OTHER SETTINGS

CASE NAME	<i>Payel Sarkar v. Central Board of Secondary Education and Ors.</i>
YEAR	2010
COUNTRY	India
CITATION	AIR 2010 Calcutta 74
COURT/BODY	High Court of Calcutta
SCOPE OF AUTHORITY	Highest court and final court of appeal of the state of West Bengal and the Union Territory of the Andaman and Nicobar Islands. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	The Petitioner, a student, was not allowed to sit for the All India Senior School Certificate Examination because of frequent absences from school. The Court accepted that her poor attendance record was attributable to a "special learning disability." A provision in the school by-laws allowed for exemptions from school attendance policies for blind, physically handicapped and dyslexic students.
ISSUE(S) AND HOLDING	Are students suffering from serious diseases, including students living with HIV and those with special learning disabilities, exempt from the strict enforcement of school attendance policies? Yes.
DECISION AND REASONING	The Court reviewed the school by-laws and stated that the head of the school "must make arrangements for special remedial teaching" for children "belonging to the weaker sections of the community" and those with "special learning disabilities or . . . who require specialized psychoeducational counselling." The Court declared that the current grouping of students who qualified for exemption from school attendance policies was not inclusive enough. The Court held that the "rigidity of attendance should be relaxed" for students with special learning disabilities and others "in exceptional circumstances created on medical grounds, such as candidates suffering from serious diseases like cancer, AIDS, T.B. or similar serious diseases requiring long period of hospitalization."

CASE NAME	<i>Doe v. Deer Mountain Day Camp, Inc.</i>
YEAR	2010
COUNTRY	United States
CITATION	682 F.Supp.2d 324 (2010)
COURT/BODY	United States District Court for the Southern District of New York
SCOPE OF AUTHORITY	The United States district courts are the trial courts of the federal court system. This Court has jurisdiction over the counties of New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess and Sullivan. Decisions may be appealed to the United States Court of Appeals for the Second Circuit, then the Supreme Court of the United States.
FACTS AND LAW	<p>The Plaintiff, Adam, was a 10-year-old boy living with HIV. He was denied admission to a summer basketball camp based solely on his HIV status.</p> <p>The Defendant camp required prospective campers to submit an application for admission, including a medical report and medication forms. Camp nurses were responsible for assessing prospective campers' medical conditions in order to be apprised of potential safety issues that may arise in connection with the campers' conditions and to be aware of potential side-effects of medications. Prior to denying the Plaintiff admission, the camp had never denied admission to a child based on a medical condition. At the time of the Plaintiff's application, the camp had no particular policies in place for children living with HIV.</p> <p>The nurses in charge of investigating the Plaintiff's application informed the Plaintiff's mother that they were "unable to make reasonable accommodations for Adam and, as a consequence, they could not allow him to attend" the camp. They claimed that one of the Plaintiff's doctor had told them that Adam "could potentially transmit HIV through blood in his urine or in his stool" or through the use of a swimming pool.</p> <p>Plaintiff alleged that the denial of his admission to the camp based on his HIV status constituted unlawful discrimination under the Americans with Disabilities Act (ADA). The ADA prohibits discrimination «on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.»</p>
ISSUE(S) AND HOLDING	Did the Defendant unlawfully discriminate against the Plaintiff, a 10-year-old boy living with HIV, under the Americans with Disabilities Act when it denied him admission to the camp based on his HIV status? Yes.
DECISION AND REASONING	The Court first established that HIV constitutes a disability under the Americans with Disabilities Act (ADA). The Court next held that the Plaintiff's HIV status "played a motivating part in [the camp's] decision to deny him admission." The Court noted that each reason proffered by the camp for denying the Plaintiff admission related specifically to his HIV status, as did all aspects of the investigation into his medical report. For instance, the Court held that while the camp may be legitimately concerned about the side effects of campers' medications, discriminating against the Plaintiff because of potential side effects associated with his HIV medications "still constitutes discrimination on the basis of [his] disability."

Doe v. Deer Mountain Day Camp, Inc. (continued)

DECISION AND REASONING
(continued)

The Court next considered whether the Plaintiff's HIV status constituted a "direct threat" under the ADA, which is an affirmative defence to a discrimination claim. The ADA provides that a public accommodation is not required "to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations . . . where such individual poses a direct threat to the health or safety of others." A "direct threat" is defined as «a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.» The chance of a significant harm must be substantial, as the ADA does not allow «deprivations based on prejudice, stereotypes, or unfounded fear.»

The Court held that the camp had presented "no objective, medical evidence to support their threat determination." The Court noted that information was available to the camp through publications of public health authorities that establish that HIV "cannot survive outside the body, and, hence, cannot survive in a swimming pool or on a toilet seat" and that transmission is "highly unlikely through contact sports."

Finally, the Court noted that while the camp was required to protect other campers from a "very serious, life threatening viral infection," this obligation did not excuse the camp from acting based on "unsubstantiated fears" rather than "objective medical evidence."

CASE NAME	<i>Sri Rao Saheb Mahadev Gayakwad v. Life Insurance Corporation of India</i>
YEAR	2004
COUNTRY	India
CITATION	AIR 2004 Kant 439; ILR 2004 KAR 3390; 2004 (7) KarLJ 289
COURT/BODY	High Court of Karnataka
SCOPE OF AUTHORITY	Highest court and final court of appeal of the state of Karnataka. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	<p>The Petitioners were the brother, wife and children of a deceased man who died from AIDS. The Defendant insurance company refused to honour the deceased's life insurance policy because it claimed he "withheld material information regarding his health at the time of seeking insurance." The Defendant contended that the deceased was aware that he was living with HIV two months prior to purchasing his life insurance policy, but failed to disclose the fact on his insurance declaration. The Defendant claimed the deceased had "consulted the National [AIDS] Research Institute" prior to completing the insurance declaration form. It argued that this indicated that the deceased was living with HIV and was in fact aware of his condition. It further noted that it was company policy, when death occurs within three years of the date of the issuance of a policy, to conduct a detailed investigation in order to ascertain the reason for the death and to determine the validity of the information provided in the insurance declaration.</p> <p>The Petitioners asserted that the deceased had neither deliberately suppressed any material fact nor given inaccurate or wrong information to the Defendant.</p>

Sri Rao Saheb Mahadev Gayakwad v. Life Insurance Corporation of India (continued)

ISSUE(S) AND HOLDING	Did the Defendant insurance company act in a “bona fide” manner when it repudiated the deceased’s insurance contract because it believed he had failed to disclose, and in fact was aware, that he was living with HIV at the time the contract was completed? No.
DECISION AND REASONING	<p>The Court first noted that the Defendant had only learned of the deceased’s consultation with the National AIDS Research Institute subsequent to the Defendant’s repudiation of the deceased’s insurance contract. The Court held that, even if the deceased died of AIDS, it did “not necessarily follow that the person was very much aware that he was suffering” from an HIV-related disease. It stated that the deceased “may or may not” have been aware that he was living with HIV when he consulted the National AIDS Research Institute, but that the consultation in and of itself did not definitively prove awareness.</p> <p>The Court held that to justify its repudiation of the contract the Defendant was required to show that the deceased had committed fraud and indulged in material suppression. The Defendant was thus required to prove that the declaration furnished by the deceased was “factually incorrect to the knowledge of the declarant and for the purpose of misleading the Corporation in the sense of obtaining a policy in contemplation of death or with the knowledge that the [deceased was] running a risk against his life.” The Court held that the evidence presented did not lead to this “irresistible conclusion.” It stated that the factual position of the Defendant was only that the deceased died of AIDS. However, this did “not necessarily lead to any other factual inference,” such as the inference that the deceased was aware of his condition. Thus based on the evidence before the Court it was not possible to find that the deceased had committed fraud.</p> <p>The Court directed the Defendant to make a payment on the deceased’s policy. It stated, however, that the Defendant had an opportunity to “make good its plea of fraud by filing a suit for declaration that the contract [was] . . . voidable because of practice of fraud on the part of the insured.” However, it noted that to prevail on such a claim the Defendant must present “cogent evidence.”</p>

CASE NAME	<i>Midwa v. Midwa</i>
YEAR	2004
COUNTRY	Kenya
CITATION	[2000] 2 EA 453 (CAK)
COURT/BODY	High Court of Kenya at Nairobi
SCOPE OF AUTHORITY	Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then to the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights.

Midwa v. Midwa (continued)

FACTS AND LAW	<p>The Applicant was a wife and mother living with HIV. Her husband petitioned for divorce on grounds of cruelty, contending that the Applicant endangered his life because she was HIV-positive. The Applicant sought a stay of execution of an order from a lower court by which she was expelled during the pendency of the divorce proceedings from her “matrimonial home and consigned into the servants’ quarter, euphemistically labeled an outhouse.” The Applicant submitted that the servants’ quarter was “unfurnished, unpainted and incomplete” and that she was denied enjoyment of the matrimonial home while money was deducted from her salary every month for the home’s mortgage.</p>
ISSUE(S) AND HOLDING	<p>Did the lower court err in expelling the Applicant, a wife and mother living with HIV, from her matrimonial home during the pendency of divorce proceedings? Yes.</p>
DECISION AND REASONING	<p>The Court held that the lower court “ignored the medical condition of the wife and the tender age of the children” and “made certain orders which plainly cry loudly for justice.” It stated that the lower court’s ruling “smacks of insensitivity and total inconsideration of the facts” and that it was “traumatizing and dehumanizing to order [the Applicant] to live in the servants quarter of her own house.” It further noted that in such conditions the Applicant’s health was “likely to be adversely affected.”</p> <p>The Court stated that it sympathized with the husband as to the risk the Applicant might pose to his health. However, it noted that the Applicant had submitted that she was “strong and healthy despite the fact that she was diagnosed HIV-positive about five years ago.” The Court further noted that the wife had a 50 percent ownership stake in the entire property and that her salary paid the mortgage of the home. The Court held that it would be “morally wrong” for the husband to desert his wife under such circumstances.</p> <p>The Court also held that the lower court had not properly considered the welfare of the children, which was the “paramount consideration” in a custody case, and that “there were no exceptional circumstances shown to justify depriving the mother of her natural right to have her children with her.”</p> <p>The Court granted a stay of execution of the lower court order expelling the Applicant from her matrimonial home and ordered the Applicant to be put back in the home.</p>

CASE NAME	<i>Nyumbani Children’s Home v. The Ministry for Education and the Attorney General</i>
YEAR	2004
COUNTRY	Kenya
CITATION	Application No. 1521 of 2003 (OS)
COURT/BODY	High Court of Kenya at Nairobi
SCOPE OF AUTHORITY	Court of first instance for the Nairobi District with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals and then to the Supreme Court. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights.

Nyumbani Children's Home v. The Ministry for Education and the Attorney General (continued)

FACTS AND LAW	The Applicant, Nyumbani Children's Home, represented 91 HIV-positive children who were prohibited from attending public schools on account of their HIV status. The Applicant requested a declaration from the High Court requiring public schools to permit HIV-positive children to enrol as students. Of the represented children, 41 attended costly private schools and the remaining 50 studied informally at home. The Applicant alleged that public school officials were using HIV status as a factor in determining which students to admit. Jointly with the Chamber of Justice, the Applicant claimed that the public schools' policy unlawfully discriminated against children on the basis of their HIV status, and that there was no justifiable reason to preclude children living with HIV from attending public schools. The Applicant offered scientific evidence demonstrating that HIV-positive children can live normal and healthy lives without affecting the well-being of other children. Education officials claimed they were willing to accommodate the children subject to the availability of space in the respective schools.
ISSUE(S) AND HOLDING	Did public school officials unlawfully discriminate against HIV-positive children and deny them enrolment based on their HIV status? The Court did not hear the issue because the parties settled out of court.
DECISION AND REASONING	The parties settled the matter privately prior to a hearing. The public schools agreed to abolish the admission policy prohibiting the enrolment of HIV-positive children.

CASE NAME	<i>Doe v. County of Centre</i>
YEAR	2001
COUNTRY	United States
CITATION	242 F.3d 437 (2001)
COURT/BODY	United States Court of Appeals, Third Circuit
SCOPE OF AUTHORITY	The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in the following US states and territory: Delaware, New Jersey, Pennsylvania and the Virgin Islands. Decisions may be appealed to the Supreme Court of the United States.
FACTS AND LAW	<p>The Appellants, the Does, were an interracial couple with an HIV-positive foster son (Adam). The Appellants approached the Respondents, Centre County (the County), seeking to adopt another child through the County's foster care programme.</p> <p>The County had a statutory duty to investigate foster parent applications in order to protect the physical and emotional health of foster children. The Does disclosed their child's HIV status to a County employee during the preliminary home study. Prior to the Does application, County officials had never knowingly placed a child in a foster home where someone was living with HIV. Therefore, no policy existed to address any limitations that may apply to such a home.</p> <p>County officials were concerned that a foster child might sexually assault Adam and thereby contract HIV. The County adopted a policy that stipulated that foster families whose members</p>

FACTS AND LAW
(continued)

had “serious infectious diseases” could only care for children with the same diseases. However, the policy permitted the Does to care for uninfected children if they agreed to release information regarding their son’s HIV status and if the biological parents of the prospective foster child executed a written consent releasing the County from potential liability.

The Does challenged the policy and brought an action against the County, alleging discrimination based on a disability in violation of Title II of the Americans with Disabilities Act of 1990 (ADA) and § 504 of the Rehabilitation Act of 1973.

Title II of the ADA provides: “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity.”

The Does also brought an action alleging racial discrimination in violation of Title VI of the Civil Rights Act of 1964 and an action alleging racial and disability discrimination under the Equal Protection Clause of the Fourteenth Amendment to the Constitution, pursuant to 42 U.S.C. § 1983. They sought invalidation of the policy, approval as foster parents, and compensatory and punitive damages.

The District Court held that Adam’s HIV status “posed a significant risk to foster children who might sexually assault [him], and that therefore, the direct threat exception to the [ADA] and Rehabilitation Act applied, justifying discrimination via the infectious disease policy.” The District Court also held that the Does’ racial discrimination claims were not ripe. The Does appealed.

ISSUE(S) AND HOLDING

1. Was the County’s policy stipulating that foster families whose members had “serious infectious diseases” could only care for children with the same diseases or, alternatively, only allowing the Does to adopt a healthy child if they released information regarding their son’s HIV status and obtained written consent from the biological parents of the prospective foster child unlawful? Yes.
2. Were the Does’ racial discrimination claims under the Equal Protection Clause of the Constitution ripe? Yes.

DECISION AND REASONING

1. The Court held that the County’s policy that foster families whose members had “serious infectious diseases” could only care for children with the same diseases was in violation of Title II of the ADA and § 504 of the Rehabilitation Act.

The ADA defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual.” The Court held that Adam’s HIV status “clearly constitute[ed] a disability as it [was] a physical impairment that substantially limited several of Adam’s major life activities such as walking, talking and digestion.” The Court also stated, citing *Bragdon v. Abbott*, 524 U.S. 624 (1994), that even in the “asymptomatic phase,” HIV falls within the definition.

The protections of the ADA extend to “qualified individuals who are discriminated against because of their relationship or association with individuals who have a known disability.” The Court held that, as the adoptive parents of Adam, the Does had a close relationship entitling them to protection.

The Court noted that that the “direct threat exception” under the ADA allowed discrimination if a disability posed “a direct threat to the health or safety of others.” As defined in the

**DECISION AND
REASONING**
(continued)

ADA, a “direct threat” existed when there was a “significant risk to the health or safety of others that [could not] be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”

The Court held that the District Court erred in concluding “there was a high probability that HIV [would] be transmitted through sexual contact to children placed in foster care with the Does.” The Court stated that this conclusion “relied on a bland and generalized set of statistics, lacking in individual specificity.” The statistics relied upon broadly defined “sexual abuse” to include activities that carried no risk of transmitting HIV. Furthermore, the Does had stated a preference for foster children under the age of 12, an age group “extremely unlikely to commit forcible sexual intercourse leading to transmission of HIV.” The Court also discussed the negligible risk of transmission through casual contact, rough play, or fighting. It concluded that a reasonable jury could find that the risk of another foster child contracting HIV from Adam was insufficient to fall within the direct threat exception.

The County argued that a more stringent standard should be used to determine a direct threat in situations concerning placement in a private home, as opposed to inclusion in a public sphere. The Court held that such an argument did not justify the type of blanket policy implemented by the County, and that the distinction between the public sphere and a private home had no material effect on the significance of risk analysis in this case. The County further argued that the policy was permissible because it was based on the principle of informed consent by providing parents of a foster child with additional information. The Court noted that no provision of the ADA incorporates the concept of informed consent. Finally, the County contended that the policy was justified by the limited time and resources available to the County in making a foster care placement, and that psychological damage could occur should a child need to be moved at a later time due to their sexual development. The Court held that this argument ignored the principle of individualized evaluation.

2. The Court additionally held that the Does’ racial discrimination claims were ripe under Title IV of the Civil Rights Act *and* 42 U.S.C. §1983. The District Court had erroneously focused on the alleged denial of placement as the Does’ sole claim. The Court held that the Does’ discrimination claims were ripe because withholding judicial consideration would cause “an immediate and significant hardship on the Does, who [would] be deprived of their right to present their federal statutory and constitutional claims for redress.”

The Court reversed and remanded the District Court’s grant of summary judgment against the Does, but affirmed the District Court’s determination that the County officials were entitled to qualified immunity and that punitive damages were unavailable against County entities.

2.2 ACCESS TO MEDICINES

CASE NAME	<i>Novartis AG v. Union of India</i>
YEAR	2013
COUNTRY	India
CITATION	Civil Appeal Nos. 2706-2716 of 2013
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters.
FACTS AND LAW	<p>In 1998, Novartis AG, a multinational pharmaceutical company based in Switzerland, filed a patent application in India for the beta-crystalline form of Imatinib Mesylate, a drug used to treat chronic myeloid leukaemia, a type of blood cancer. In 2005, the Chennai Patent office heard patent oppositions to this application, including one filed by the Cancer Patients Aid Association. The challenge was prompted by concern about the high price Novartis set for its version of the drug, marketed in India as 'Gleevec'. Novartis set the price at Rs 1,20,000 (approximately US\$ 2,400) per month, compared with generic versions that were available for Rs 8,000 to 12,000 (approximately US\$ 160 to 240) per month.</p> <p>In 2006, the Patent Office rejected Novartis's patent application on several grounds. In particular, it concluded that the application had not met the standard established in section 3(d) of the Indian Patent (Amendments) Act, 2005 (the Act). Section 3(d) states that the following are not considered "inventions" within the meaning of the Act and are thus not patentable:</p> <p style="padding-left: 40px;">"[T]he mere discovery of a new form of a known substance which does not result in the <i>enhancement of the known efficacy</i> of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant" [emphasis added].</p> <p>Novartis challenged the constitutional validity of section 3(d) before the Madras High Court. It argued that the term "efficacy" in section 3(d) was "vague," not in compliance with India's obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and in violation of the right to equal protection of the law under article 14 of the Constitution of India. In 2007, the Madras High Court dismissed the suit and held that the word "efficacy" had a definite meaning in the pharmaceutical field, namely "therapeutic efficacy."</p> <p>In 2009, the Intellectual Property Appellate Board rejected Novartis's appeal of the Patent Office's rejection of its patent application, again on the ground that it did not satisfy section 3(d) of the Act. Novartis appealed to the Supreme Court, requesting a liberal interpretation of section 3(d) that would allow it to obtain a patent for Gleevec.</p>
ISSUE(S) AND HOLDING	Did Novartis's beta-crystalline form of Imatinib Mesylate, a drug used to treat chronic myeloid leukaemia, meet the standards of "patentability" under the Indian Patent (Amendments) Act, 2005? No.

DECISION AND REASONING

The Court first examined the intent of the Patent (Amendments) Act, 2005, including the standard of enhanced efficacy established in section 3(d). The Court noted the concern that patent protection of pharmaceutical and agricultural chemical products “might have the effect of putting life-saving medicines beyond the reach of a very large section of people.” It examined the legislative history of the Indian Patents Act, including the impact of the TRIPS agreement and the subsequent Doha Declaration.

The Court noted that after patents for pharmaceutical and chemical substances were barred in India, India’s pharmaceutical industry grew dramatically and became “the major supplier of drugs at cheap prices to a number of developing and under-developed countries.” The Court therefore noted that the reintroduction of product patents in India, including for pharmaceutical and chemical substances, was a cause of great alarm for those concerned with ensuring continued access to affordable medicine in India and abroad. To this end, the Court reproduced, in full, letters from the World Health Organization and the Joint United Nations Programme on HIV/AIDS (UNAIDS) expressing concern about the potential impact that India’s forthcoming modifications to its patent system could have on access to affordable medicines throughout the world, particularly for HIV treatment.

The Court concluded that:

“[T]he Indian legislature attempted to address [these concerns] and, while harmonizing the patent law in the country with the provisions of the TRIPS Agreement, strove to balance its obligations under the international treaty and its commitment to protect and promote public health considerations, not only of its own people but in many other parts of the world (particularly in the Developing Countries and the Least Developed Countries).”

After examining the parliamentary debates surrounding the enactment of the Act, the Court held that section 3(d) was undoubtedly meant to address chemical substances, and pharmaceutical products in particular, and that it clearly established a “second tier of qualifying standards” for pharmaceutical products meant to “leave the door open for true and genuine inventions but, at the same time, to check any attempt at repetitive patenting or extension of the patent term on spurious grounds.”

The Court next held that Imatinib Mesylate was a “known substance” because it had previously been patented and sold in the United States and thus did not qualify as an “invention” in terms of clauses (j) and (ja) of section 2(1) of the Act. The Court then considered arguments on both sides as to whether the beta-crystalline form of Imatinib Mesylate enhanced the “known efficacy” of a “known substance” pursuant to section 3(d) of the Act. Novartis argued that the physicochemical properties of new forms of old medicines should be considered in determining whether efficacy has been enhanced pursuant to section 3(d) of the Act. In particular, it contended that the physicochemical properties of its polymorph form of the Imatinib molecule, including better flow properties, better thermodynamic stability and lower hygroscopicity, resulted in improved efficacy. It argued that these properties made the product “new” because it “stores better” and is “easier to process.” The Court rejected this contention and held that, for medicines, efficacy means “therapeutic efficacy.” The Court declared that this standard must be interpreted “strictly and narrowly” and that while improvements in physicochemical properties may be beneficial to some patient, they do not meet the standard for “therapeutic efficacy” under section 3(d).

Novartis also argued that increased bioavailability—the degree and rate at which a drug is absorbed into a living system or is made available at the site of physiological activity—constituted

Novartis AG v. Union of India (continued)

DECISION AND REASONING
(continued)

enhanced efficacy under section 3(d). The Court held that “increased bioavailability alone may not necessarily lead to an enhancement of therapeutic efficacy.” Rather, whether an increase in bioavailability leads to an enhancement of therapeutic efficacy “must be specifically claimed and established by research data;” a “bald assertion” of increased bioavailability alone does not meet the standard under section 3(d). The Court held that there was “absolutely nothing,” save the submissions of counsel, to show that Novartis had enhanced the efficacy of its product through increased bioavailability.

The Court further held that patent applicants must prove the increased therapeutic efficacy required under section 3(d) based on research data *in vivo* in animals.

CASE NAME	<i>Patricia Asero Ochieng and Ors. v. Attorney General</i>
YEAR	2012
COUNTRY	Kenya
CITATION	Petition No. 409 of 2009
COURT/BODY	High Court of Kenya at Nairobi
SCOPE OF AUTHORITY	Court of first instance for the Nairobi District, with unlimited original jurisdiction for criminal, civil and constitutional matters. Decisions may be appealed to the Court of Appeals, then to the Supreme Court of Kenya. The High Court may convene a Constitutional Division consisting of three judges specially assigned to hear matters arising from the Bill of Rights.
FACTS AND LAW	<p>The Petitioners were citizens of Kenya living with HIV. They claimed that provisions of the Anti-Counterfeiting Act, 2008 (the Act) severely restricted access to affordable, essential medicines, including generic medicines for HIV-related diseases, in violation of their fundamental rights to life, dignity and health protected under articles 26(1), 28 and 43 of the Constitution of Kenya.</p> <p>The Petitioners and others unable to afford branded medicines began receiving regular supplies of medicines for HIV-related diseases free of charge following the passage of the Industrial Property Act in 2001, which allowed for the importation of affordable, generic drugs into the country. The HIV and AIDS Prevention and Control Act, 2006 established the Government’s obligation to ensure the availability of resources to guarantee access to medicines to treat HIV. The Petitioners submitted that 90 percent of people living with HIV in Kenya used generic medicines imported by the Government or donors.</p> <p>The Petitioners argued that the Government failed to specifically exempt generic medicines from the definition of “counterfeiting” in section 2 of the Act. They argued that the definition of counterfeit goods in the Act was unclear and could be interpreted to include generic medicines. This would effectively prohibit the importation of generic medicines into Kenya and allow generic medicines to be seized at any time by authorities. This in turn would severely reduce access to affordable, life-saving medicines, including for HIV-related diseases.</p> <p>The Petitioners further contended that the Government failed to consider how the Act would affect the rights and obligations accrued under the HIV and AIDS Prevention and Control Act, 2006 and the application of the Industrial Property Act.</p>

FACTS AND LAW
(continued)

The Petitioners also claimed that the definition of ‘counterfeit’ in the Act went beyond the internationally accepted meaning of the term, as established in article 51 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization, which limits the use of the term to counterfeit trademark goods.

The Petitioners also noted that generic HIV medicines in transit to developing countries had in fact already been seized in the Netherlands and Germany pursuant to laws similar to the Act.

The Court also considered arguments submitted in an amicus brief from the United Nations Special Rapporteur on the Right to Health. The Special Rapporteur contended that the definition of counterfeiting in the Act effectively conflated generic medicines with medicines produced in violation of private intellectual property rights. He asserted that this would have a “serious adverse impact on the availability, affordability and accessibility of low-cost, high-quality medicines.”

Respondent Attorney General argued that the term “generic drugs” was not synonymous with “counterfeit drugs.” It was the Government’s responsibility to protect people from the latter, which may lead to harm or even death. Respondent contended that the definition of counterfeit in the Act was sufficiently precise and did not encompass generic medicines. She argued that the Act provided “sufficient safeguards for users of antiretroviral drugs against those who market counterfeit goods but also ensures that they access antiretroviral drugs.”

ISSUE(S) AND HOLDING

Did the Anti-Counterfeiting Act, 2008 infringe upon the fundamental rights to life, dignity and health protected under the Constitution of Kenya? Yes.

DECISION AND REASONING

The Court first noted the socio-economic context in which the petition arose. It held that there “can be no dispute that HIV AIDS constitutes a serious threat to the health and life of the petitioners,” as well as the general public, particularly women and children. It noted that HIV continued to be a major challenge to Kenya’s socio-economic development.

The Court stated that the availability of affordable antiretroviral drugs in Kenya under the Industrial Property Act had greatly enhanced the life and health of people living with HIV. The Court stated that the Act should be considered within this context.

The Court declared that the rights to life, dignity and health are “inextricably bound” and that without health, the right to life would be in jeopardy. It held that if a law had the effect of limiting the accessibility and availability of HIV medicines, it would “ipso facto threaten the lives and health” of people living with HIV “in violation of their rights under the Constitution.”

The Court examined the scope of the right to health under the Constitution in light of the right to health in international agreements, including article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), article 12 of the Convention on the Elimination of All Forms of Discrimination against Women, and article 24(1) of the Convention on the Rights of the Child. The Court noted that General Comment 14 of the Committee on Economic, Social and Cultural Rights, which interprets and elaborates the right to health in ICESCR, states that “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life.” The Court interpreted this to mean that the State must ensure people have access to the medicines they require to be healthy. The Court also noted that the right to access medicine has been recognized as an essential component of the right to health in other jurisdictions, including South Africa.

DECISION AND REASONING
(continued)

The Court held:

“The state’s obligation with regard to the right to health therefore encompasses not only the positive duty to ensure that its citizens have access to health care services and medication but must also encompass the negative duty not to do anything that would in any way affect access to such health care services and essential medicines. Any legislation that would render the cost of essential drugs unaffordable to citizens would thus be in violation of the state’s obligations under the Constitution.”

The Court examined the definition of “counterfeiting” in section 2 of the Act and compared it with the World Health Organization’s (WHO) definitions of counterfeit medicines and generic medicines. It noted the overlap between the definition of “counterfeit” in the Act and the WHO’s definition of generic medicine and concluded that section 2 of the Act was “likely to be read as including generic medication.” The Court declared that the danger that generic medicines could be seized under the Act was thus “manifest.”

Finally, the Court noted that the tenor and object of the Act was to protect intellectual property rights, as evinced by the authority granted to the Commissioner appointed under section 13(1) of the Kenya Revenue Authority Act to “seize suspected goods upon the complaint of a patent holder.” The Court found that the Act’s purpose was not to safeguard consumers from counterfeit medicine. Had this been the Act’s intention, it would have placed greater emphasis on standards and quality of medicines.

The Court held that sections 2, 32 and 34 of the Act threatened to violate the rights to life, dignity and health and must be reconsidered in light of the Government’s constitutional obligation to protect the fundamental right to health, which encompasses access to affordable medicines, including generic medicines. The Court declared: “There can be no room for ambiguity where the right to health and life of the petitioners and the many other Kenyans who are affected by HIV/AIDS are at stake.”

CASE NAME	<i>State of Rio Grande do Sul v. Silvio André Wottrich</i>
YEAR	2010
COUNTRY	Brazil
CITATION	AI 780709/RS
COURT/BODY	Supreme Federal Court
SCOPE OF AUTHORITY	Highest court in the country. Final court of appeal, including for constitutional matters.
FACTS AND LAW	The State of Rio Grande do Sul (the State) brought an interlocutory appeal against a judgment of the Court of Justice of Rio Grande do Sul. The Court of Justice had held the State responsible for providing medicines free of charge to an individual living with HIV who was unable to afford medicines of his own accord. The State argued that protection of public health was a federal responsibility and thus it was unconstitutional to require the State to provide medication free of charge to those determined to be needy. Further, the State argued that the Court’s blocking of public funds to the State was illegitimate.

State of Rio Grande do Sul v. Silvio André Wottrich (continued)

ISSUE(S) AND HOLDING	Does the State of Rio Grande do Sul have a constitutional obligation to provide free medicines to people living with HIV who cannot afford them? Yes.
DECISION AND REASONING	The Court dismissed the interlocutory appeal, finding that national and state governments were responsible under articles 5 and 196 of the Constitution for implementing the constitutionally guaranteed rights to life and health. The Court held that this included providing medications free of charge to those in financial need, including people living with HIV.

CASE NAME	<i>Jorge Odir Miranda Cortez et al. v. El Salvador</i>
YEAR	2009
COUNTRY	El Salvador
CITATION	Report No. 27/09, Case 12.249; OEA/Ser.LV/II., Doc. 51, corr. 1, 30 December 2009
COURT/BODY	Inter-American Commission on Human Rights
SCOPE OF AUTHORITY	The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States tasked with promoting and protecting human rights under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man.
FACTS AND LAW	<p>The Petitioner, Jorge Odir Miranda Cortez, filed a petition on behalf of himself and 26 other people living with HIV against the Republic of El Salvador. He alleged violations of the American Convention on Human Rights as a result of El Salvador's failure to provide free antiretroviral therapy essential for the treatment of HIV-related illnesses and for its failure to improve the quality of life of people living with HIV. The Petitioner maintained that El Salvador's negligence constituted cruel, inhumane, and degrading treatment. He further alleged that the Salvadorian Social Security Institute discriminated against him and the other petitioners based on their HIV status.</p> <p>The Petitioner claimed violations of articles 4 (right to life), 5 (right to humane treatment), 24 (right to equal protection), 25 (right to judicial protection), and 26 (progressive realization) of the American Convention; article 10 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador); and "other provisions consistent with the American Declaration on the Rights and Duties of Man and other human rights instruments."</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none">1. Did El Salvador violate the right to health in failing to provide free antiretroviral therapy to people living with HIV? No, but the Commission stated that a violation would have occurred if El Salvador had not taken reasonable steps to provide medical treatment to the persons included in the petitioner subsequent to the filing of the petition, or if El Salvador had refused to provide them with care.2. Did El Salvador violate the right to equal protection of the law? Yes as to Petitioner, no as to the 26 other persons living with HIV who were included in the petition.

DECISION AND REASONING

1. The Commission determined that El Salvador did not violate article 26 of the American Convention pertaining to the progressive realization of the right to health. El Salvador demonstrated to the satisfaction of the Commission that it took what steps it reasonably could to provide medical treatment to the Petitioner and the other persons included in the petition. The Commission mentioned that economic, social, and cultural rights have both individual and collective dimensions and stated that it could not speak to any direct violation of the right to health of the Petitioner or the 26 other persons included in the petition. This would not have been the case, however, if the Petitioner showed that El Salvador refused to provide care to any of the persons included in the petition. The Commission noted that during the processing of the petition, the Salvadoran health services broadened the free treatment coverage of persons living with HIV. Furthermore, it noted that the Petitioner did not allege that El Salvador had revoked or suspended the treatment benefits that people living with HIV were already receiving.
2. The Commission found that El Salvador violated the Plaintiff's right to equal protection of the law by, *inter alia*, forcing him to use a drinking glass with a label displaying a row of three "X's" used to indicate the glass belonged to a person living with HIV. However, with respect to the 26 other persons included in the petition, the Commission found that El Salvador had used legitimate means, similar to those used for other infectious diseases, of preventing the spread of the virus and thus did not violate their right to equal protection of the law.

The Commission noted, however, that the principle of non-discrimination was part of the very essence of the Inter-American system of human rights. The Commission declared:

"Generally speaking, it should be mentioned that persons living with HIV/AIDS very often suffer discrimination in a variety of forms. This circumstance magnifies the negative impact of the disease on their lives and leads to other problems, such as restrictions on access to employment, housing, health care, and social support systems. There can be no doubt that the principle of nondiscrimination must be very strictly observed to ensure the human rights of persons affected by HIV/AIDS. Public health considerations must also be taken into account since the stigmatization of, or discrimination against, a person who carries the virus can lead to reluctance to go for medical controls, which creates difficulties for preventing infection."

The Commission did not issue an opinion on the allegations regarding articles 4 (right to life) and 5 (right to humane treatment) of the Convention, citing the "subsidiary nature" of these arguments.

The Commission also considered what remedies ought to be available. The Commission issued interim precautionary measures recommending that El Salvador provide antiretroviral therapy and any necessary hospital, pharmaceutical and nutritional assistance to the Plaintiff and the 26 other persons included in the petition.

The Supreme Court of El Salvador, prompted by the Commission's report, ordered the State to provide antiretroviral therapy to the petitioners. The Legislative Assembly also passed the Law on the Prevention and Control of the Infection caused by the Human Immunodeficiency Virus. The law addressed many of the Commission's concerns.

CASE NAME	<i>Novartis AG v. Union of India</i>
YEAR	2007
COUNTRY	India
CITATION	(2007) 4 MLJ 1153
COURT/BODY	High Court of Madras
SCOPE OF AUTHORITY	Highest court and final court of appeal of the state of Tamil Nadu and the Union Territory Puducherry. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	<p>The Petitioner, Novartis, had its patent application rejected by the Controller General of Patents and Designs (Patent Controller), because it did not meet the requirements of section 3(d) of the Indian Patent (Amendment) Act, 2005 (the Act). Section 3(d) states that following are not “inventions” within the meaning of the Act and thus not patentable:</p> <p style="padding-left: 40px;">“[T]he mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant.”</p> <p>Petitioner’s patent was rejected, <i>inter alia</i>, on the grounds that the drug in question “did not result in the enhancement of the known efficacy of that substance,” as required by section 3(d).</p> <p>The Petitioner appealed to the High Court, claiming that section 3(d) was incompatible with India’s obligation under the World Trade Organization’s Trade-Related Aspect of Intellectual Property Rights Agreement (TRIPS), which provides for the right to have an invention patented. The Petitioner also argued that section 3(d) was vague, arbitrary and gave uncontrolled discretion to the Patent Controller in violation of article 14 of the Constitution, which guarantees equality before the law and equal protection of the laws.</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none"> 1. Is section 3(d) of the Indian Patent (Amendment) Act compatible with TRIPS? The Court declined to decide the issue. 2. Is section 3(d) of the Indian Patent (Amendment) Act constitutionally valid? Yes.
DECISION AND REASONING	<ol style="list-style-type: none"> 1. The Court declined to decide whether section 3(d) was compatible with TRIPS. It reasoned that since a comprehensive dispute settlement mechanism existed under TRIPS, deference must be paid to such mechanism and Indian courts should not interfere. <p>The Court also declined to grant declaratory relief to the Petitioner because its challenge to section 3(d)’s compatibility with TRIPS was not made on the ground that it infringed upon a fundamental right, and because such relief would not have been “a stepping stone to claim relief at some other stage.” The Court held that even if it were to decide that section 3(d) was incompatible with India’s obligations under TRIPS, the decision would be unenforceable because Parliament could not be forced to pass a law.</p> <ol style="list-style-type: none"> 2. On the question of the constitutionality of section 3(d), the Court held that the section was neither arbitrary nor vague and therefore did not violate article 14 of the Constitution.

Novartis AG v. Union of India (continued)

DECISION AND REASONING
(continued)

to the Court, the Patent Controller would be guided by the relevant details that every patent applicant is required to disclose, i.e., the materials in section 3(d) and its explanation. The Court noted that the Petitioner was not a novice in the pharmacology field and was capable of determining, through scientific research, any enhancement in the efficacy of the known drug and illustrating the same to the Patent Controller. The Court defined 'efficacy' as used in section 3(d) as "the ability of a drug to produce the desired therapeutic effect." The Court reasoned that the patent applicant would know the difference between the therapeutic effect of the patented drug and the drug for which the patent was sought, and needed only to record that difference. The Patent Controller, therefore, did not have unguided discretion in deciding the application.

Moreover, the Court held that it could not strike down section 3(d) solely on the grounds that there was a possibility of an arbitrary exercise of discretionary power. It also noted that the Act had a hierarchy of forums to review decisions of the Patent Controller.

The Court held that article 14 could only be invoked when it was shown that "in the exercise of a discretionary power there is a possibility of a real and substantial discrimination and such exercise interferes with the fundamental right guaranteed by the Constitution." The Court did not find that any of the fundamental rights of the Petitioner had been violated.

Finally, the Court noted that in arriving at its decision, it kept in mind the object of the amended Act: "to prevent evergreening; to provide easy access to the citizens of this country to life-saving drugs and to discharge their Constitutional obligation of providing good health care to its citizens."

CASE NAME	<i>A.V. et al. v. Estado Nacional (Ministerio de Salud de la Nación- Programa Nacional de Lucha contra el S.I.D.A.)</i>
YEAR	2004
COUNTRY	Argentina
CITATION	Caso n° 3223/02 [Cám. Nac. Civ. y Com. Sala II]
COURT/BODY	Federal Civil and Commercial Court of First Instance, 2nd Chamber
SCOPE OF AUTHORITY	Federal court of first instance, decides matters of federal law. Decisions may be appealed to the Court of Appeals and then to the Supreme Court of Argentina.
FACTS AND LAW	The Petitioners were persons living with HIV. They brought action against the Ministry of Health of Argentina for failing to provide necessary medical treatment guaranteed by the Programa Nacional de Lucha contra el S.I.D.A. (National Programme Against AIDS). Petitioners filed a writ of amparo requesting judicial protection of their right to health and requesting that the executive branch comply with the mandate to realize an effective health policy against HIV. The Petitioners claimed the case was admissible as a collective action for legal protection based on articles 42 and 75 (22) of the Constitution of Argentina, which establish the obligation of the State to protect the health of its citizens. The Petitioners argued that the failure to provide adequate treatment for people living with HIV threatened the life and health of the community.

A.V. et al. v. Estado Nacional (Ministerio de Salud de la Nación- Programa Nacional de Lucha contra el S.I.D.A.) (continued)

ISSUE(S) AND HOLDING	Did Argentina have an obligation to ensure the Petitioners had access to treatment for HIV? Yes.
DECISION AND REASONING	<p>The Court held the State responsible and ordered it to adopt all necessary measures to guarantee access to treatment for HIV for the Petitioners and all beneficiaries of the National Programme Against AIDS. The Court considered General Comment 14 of the United Nations Committee on Economic, Social and Cultural Rights, which interprets and elaborates the right to health in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Court stated that under General Comment 14, Argentina had an obligation to provide a health system that ensured equal opportunity for everyone to enjoy the highest attainable standard of physical and mental health. Moreover, the Court emphasized that Argentina Law No. 23.798 declared the response to HIV to be a national interest and required the State to take necessary measures to realize the law's objectives.</p> <p>The Court discussed Argentina's international obligations to ensure access to medical assistance and care for its citizens, including article 12 of ICESCR, article VII of the American Declaration of the Rights and Duties of Man, article 25(2) of the American Convention of Human Rights, and article 24(1) of the International Covenant on Civil and Political Rights. Insofar as the State's failure to provide adequate medical treatment to people living with HIV posed a risk to the Petitioners' life, bodily integrity and health, Argentina was in violation of its domestic and international obligations.</p>

CASE NAME	<i>Meza-García, Azanca Alhelí v. Peru</i>
COUNTRY	Peru
YEAR	2004
CITATION	Sentencia 2945-2003-AA/TC (2004)
COURT/BODY	Constitutional Court
SCOPE OF AUTHORITY	Highest court for matters of constitutional law. Judgments are binding throughout the country.
FACTS AND LAW	<p>The Petitioner filed a writ of amparo (appeal for legal protection) against the Ministry of Health of Peru. She sought free administration of comprehensive medical treatment for HIV, including both the continuous delivery of necessary medicines and the performance of periodic CD4 cell count and viral load tests upon medical indication and/or the patient's urgent needs. The Petitioner submitted that she lacked the financial means to obtain the medicines herself and contended that the State's failure to provide such treatment constituted violations of the principle of personal dignity, the right to life and the right to health under the Constitution of Peru. She also claimed violation of the right to medical treatment pursuant to Peru Law No. 26626, which recognized the fundamental rights of autonomy, confidentiality and non-discrimination of people living with HIV and guaranteed provision of treatment according to the State's capacity.</p> <p>The State's Attorney argued that the Petitioner had failed to claim a specific violation of any rights under the Constitution. He contended that while the Constitution of Peru did recognize</p>

Meza-García, Azanca Alhelí v. Peru (continued)

FACTS AND LAW <i>(continued)</i>	the right to life and physical integrity, the State did not have a positive obligation to provide free treatment for HIV. He further argued that the right to health, established in articles 7 and 9 of the Constitution, represented merely a programmatic action plan that provided for no specific, justiciable rights.
ISSUE(S) AND HOLDING	<ol style="list-style-type: none">1. Is the right to health a justiciable right under the Constitution of Peru? Yes.2. Did the State have an obligation to provide the petitioner treatment for HIV? Yes.
DECISION AND REASONING	<ol style="list-style-type: none">1. The Court held that Peru was a liberal democracy in which it was necessary to secure minimum material conditions in order to achieve the country's social ends. Economic and social rights were therefore not merely programmatic goals of gradual efficacy, but rather fully justiciable, concrete rights of immediate efficacy; the State's failure to fulfil those rights required a judicial remedy. The Court further stated that the right to health was a fundamental right, given its close relation to the right to life. The Court declared that the right to health comprised the right of every human being to maintain normal organic functioning, both physical and psychological, and the right to re-establish such functioning when it was subject to interruption. The Court, however, qualified its ruling by noting that social rights, such as the right to health, could not be adjudicated in the same fashion in every case, given that the Constitution did not refer to specific obligations of the State. Judicial recognition of a violation of a social right would depend on factors such as the severity of the case and the reasonability of the appeal.2. The Court held that the Petitioner's case represented one in which judicial recognition of the right to health and appropriate remedy was required. It thus acknowledged the Petitioner's appeal for legal protection and ordered the State to provide the requested medical treatment.

CASE NAME	<i>AIDS Access Foundation et al. v. Bristol Myers-Squibb and Department of Intellectual Property</i>
YEAR	2002
COUNTRY	Thailand
CITATION	Black Case No. Tor Por 34/2544, Red Case No. 92/2545 (2002)
COURT/BODY	Central Intellectual Property and International Trade Court
SCOPE OF AUTHORITY	The Court has exclusive jurisdiction in both civil and criminal matters involving the enforcement of intellectual property rights and international trade.
FACTS AND LAW	The Plaintiffs were the AIDS Access Foundation, a non-governmental organization committed to protecting the rights and welfare of people living with HIV, and two persons living with HIV. The Defendant, Bristol Myers-Squibb, is a multinational pharmaceutical company based in the United States. The Court also summoned the Department of Intellectual Property as co-defendant.

FACTS AND LAW
(continued)

Defendant Bristol Myers-Squibb applied for a patent for didanosine, a reverse transcriptase inhibitor effective against HIV and used in combination with other antiretroviral drug therapy. The patent claim stated that it was a “better formula for oral use” and stipulated the dosage “from about 5 to 100 mg per dose.” Defendant later amended the patent claim to delete the dosage stipulation.

The Plaintiffs claimed the amendment to the patent was unlawful and requested the Court to amend the patent to include the dosage stipulation. They contended that without the stipulation Defendant’s patent protection would be so broad as to severely restrict access to HIV medicines in Thailand by reducing access to affordable drugs, in violation of the rights of people living with HIV. They noted that didanosine was unaffordable for many people living with HIV and could not be replaced by other medicines. The Plaintiffs claimed that the Thai Pharmaceutical Authority (the Authority) had attempted to manufacture didanosine tablets of more than 100 mg per dose to market at an affordable price. However, the Authority decided not to manufacture the drug because the Defendant’s representative claimed the scope of its patent prohibited them from doing so.

The Defendant claimed the Plaintiffs did not have standing to challenge its patent, as they were not manufacturers or sellers of the medicine protected by the patent. The Co-defendant Department of Intellectual Property argued that the Plaintiffs were not injured or interested parties and were not entitled under the Patent Act to assert the invalidity or request the revocation of the patent. The Co-defendant also contended that the patent amendment was not a material amendment and that the Defendant was not permitted to manufacture any dosage of the patented drug simply because the dosage stipulation had been removed. Rather, according to the Patent Act, the “scope of invention shall be determined by the Patent claim, taking into account the nature of invention from the details of the invention.”

ISSUE(S) AND HOLDING

1. Were the Plaintiffs interested parties entitled to assert their claim? Yes.
2. Was the deletion of the dosage stipulation from the patent claim unlawful and must the claim be amended to include the stipulation as requested by the Plaintiffs? Yes.

DECISION AND REASONING

1. The Court held that injured parties were not limited to the manufacturers or sellers of the medicine protected by the patent. Rather, patients and those in need of the medicine, as well as organizations that help people living with HIV to access the medicine, were also interested parties entitled to bring suit.

The Court stated that medicines were fundamental to the well-being of human beings and were thus distinct from other patented inventions that people may or may not choose for consumption. It stressed that treatment for the life and health of human beings was “[more] important than other property.” It noted that the Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and Public Health, adopted by the World Trade Organization in 2001, declared that the TRIPS Agreement was to be interpreted and implemented so as to promote the rights of Member States to protect public health, particularly in regard to access to medicines.

2. The Court held that deletion of the phrase “from about 5 to 100 mg per dose” from the patent claim was a material amendment that granted the Defendant protection for all dosage amounts of the medicine. The Court held that the phrase “material to the invention” includes

AIDS Access Foundation et al. v. Bristol Myers-Squibb and Department of Intellectual Property (continued)

DECISION AND REASONING
(continued)

amounts of the medicine. The Court held that the phrase “material to the invention” includes both details of the invention and the patent claim itself. The Defendant’s amended patent claim went beyond the scope stipulated in the original claim and the scope of invention was thus extended beyond what was disclosed in the details of the invention.

The Court held that the Defendant must register the amendment of the patent, to reintroduce the dosage stipulation, or the Department of Intellectual Property would amend the claim pursuant to the Court’s ruling.

CASE NAME	<i>Minister of Health v. Treatment Action Campaign</i>
YEAR	2002
COUNTRY	South Africa
CITATION	2002 (5) SA 721
COURT/BODY	Constitutional Court
SCOPE OF AUTHORITY	Highest court for matters of constitutional law. Judgments are binding throughout the country.
FACTS AND LAW	<p>The Government of South Africa developed a national public health programme to address mother-to-child transmission of HIV. The programme offered HIV-positive pregnant women, at no cost, nevirapine—a drug that prevents the transmission of HIV at birth. The programme was, however, limited in scope. It only offered nevirapine at certain pilot sites, none of which were public health institutions, and it did not establish a time-frame for national expansion of the programme. The Treatment Action Campaign (TAC) filed a complaint in the High Court challenging the Government’s programme, alleging that the restrictions in scope violated sections 27 and 28 of the Constitution of South Africa, which guarantee the right of access to public health care services and the right of children to be afforded special protection.</p> <p>The High Court found that the Government had not taken reasonable steps to address the need to reduce mother-to-child transmission of HIV and thereby violated the Constitution of South Africa. The High Court ordered the Government to develop a comprehensive countrywide programme and to make nevirapine available in public health facilities, if necessary. The Government appealed.</p>
ISSUE(S) AND HOLDING	Were limitations of the Government’s programme to address mother-to-child transmission of HIV, including only offering nevirapine at certain pilot sites and the lack of a time-frame for national expansion of the programme, in accordance with sections 27 and 28 of the Constitution? No.
DECISION AND REASONING	The Court first examined whether socio-economic rights were enforceable under the Constitution of South Africa. Based on previous jurisprudence, it concluded that they were. The Court thus determined that the issue in this case was whether the Government was meeting its obligations with respect to those rights based on existing policies to provide access to health services for HIV-positive mothers and their newborn babies.

**DECISION AND
REASONING**
(continued)

The Court then addressed whether there was a “minimum core” of the rights in question that the Government must immediately provide. It declined to recognize a “minimum core.” Rather, it held that sections 27(1) and (2) must be read together. Under such a reading, the Government was constitutionally obliged only to take reasonable steps to progressively realize the rights.

After these threshold determinations, the Court examined whether the High Court’s ruling must be upheld. It considered whether it was reasonable for the Government to exclude access to free nevirapine from public hospitals and clinics where testing and counselling services were available and where the administration of the drug was medically indicated. The Appellant raised four issues: whether the drugs were efficacious, whether there were resistance concerns, whether there were safety concerns, and whether there were administrative capacity concerns. The Court dismissed each issue as unwarranted or hypothetical.

Regarding the reasonableness of restricting the Government programme to certain pilot sites, the Court indicated that it was reasonable for the Government to gather evidence regarding the scalability of the programme and to examine resistance and efficacy concerns associated with nevirapine. It was, however, not reasonable for the Government to wait until the best possible programme was developed before expanding it to the national level, denying women and children access to the drug in the meantime. Moreover, the safety and efficacy of nevirapine had been established and administration was relatively simple and within the available resources of the Government. Under such circumstances, the Court stated that the provision of a single dose of nevirapine to mother and child where medically indicated was a simple, cheap and potentially lifesaving medical intervention. The Court thus held that the Government must remove the restrictions that prevented nevirapine from being made available at public hospitals and clinics pursuant to section 27(2) and section 27(1)(a) of the Constitution.

The Court further held that the Government was obliged to ensure that children were accorded the protection contemplated by section 28 that arises when parental or family care was lacking. These cases involve children born in public hospitals and clinics to indigent mothers who are unable to gain access to private medical treatment. The Court noted that these mothers and children were dependent upon the Government for health services.

The Court stated that it was implicit in its holding that a policy of waiting for a protracted period before deciding whether to use nevirapine beyond the dedicated research and training sites was also not reasonable within the meaning of section 27(2) of the Constitution. The Court therefore ordered the Government to take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector.

Finally, the Court held that sections 27(1) and (2) of the Constitution required the Government to devise and implement, within its available resources, a comprehensive and coordinated programme to progressively realize the right of pregnant women and their newborn children to access health services to combat mother-to-child transmission of HIV. Such a programme must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and ensuring appropriate treatment was available to women for such purposes.

CASE NAME	<i>López, Glenda and Ors. v. Instituto Venezolano de los Seguros Sociales</i>
YEAR	2001
COUNTRY	Venezuela
CITATION	Expediente No. 00-1343, Sentencia No. 487
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court in the country, final court of appeal, replaced with the Supreme Tribunal of Justice in 1999. (This case was filed and proceedings began in 1997.)
FACTS AND LAW	<p>The Petitioners were a group of people living with HIV covered by the Venezuelan Institute of Social Security (IVSS). They filed an amparo action against the IVSS requesting that it ensure a regular and consistent supply of HIV triple-therapy drugs and other medicines necessary for treatment of opportunistic diseases, and that IVSS cover the expense of all necessary medical tests.</p> <p>The Petitioners also requested that the effect of the Court’s decision be extended to all people living with HIV covered by the IVSS.</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none"> 1. Does the IVSS have a constitutional obligation to ensure access to a regular and consistent supply of HIV medicines and testing services for people living with HIV covered by the IVSS? Yes. 2. Does the Court’s holding extend to all people living with HIV covered by the IVSS? Yes.
DECISION AND REASONING	<ol style="list-style-type: none"> 1. The Court held that the omission alleged by Petitioners, namely the lack of access to HIV medicines and testing services, constituted a violation of the right to health. It further held that the omission was a threat to the right to life and a breach of the right to the benefits of science and technology and the right to social security enshrined in the Constitution of Venezuela and international conventions. 2. The Court extended the scope of the decision to include all people living with HIV covered by IVSS who legally qualified for social security benefits and who requested IVSS to supply drugs. This coverage included the cost of treatment-specific medical tests. All people living with HIV covered by IVSS were thus empowered to invoke this decision rather than resort to litigation to obtain medicines and treatment services.

CASE NAME	<i>Asociación Benghalensis & Ors. v. Ministerio de Salud y Accion Social- Estado Nacional</i>
YEAR	2000
COUNTRY	Argentina
CITATION	A. 186. XXXIV (Arg.)
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court of appeal in the country, decides matters of constitutional law.

Asociación Benghalensis & Ors. v. Ministerio de Salud y Accion Social- Estado Nacional (continued)

FACTS AND LAW	Asociación Benghalensis and other non-governmental organizations involved in HIV work brought action pursuant to the Constitution of Argentina and Law No. 23.798 against the Government for its failure to provide health services, treatment and special administration of medicines to people living with HIV. Law No. 23.798 declared the response to HIV to be a national interest and directed health authorities to develop programmes to detect, diagnose and treat HIV, and to ensure the availability of necessary resources from national and local budgets to fund them. The Petitioners argued that the Government's failure to provide medicines for people living with HIV constituted an omission that violated the right to life and the right to health recognized in the Constitution and other human rights instruments. The Government argued that it was arbitrary to hold it solely responsible for the provision of medicines to all people living with HIV. It further claimed that holding in favour of the Petitioners would interfere with the management and distribution of public resources for health, which it contended was not within the scope of authority of the judicial branch.
ISSUE(S) AND HOLDING	Did the Government have an obligation to provide medicines and treatment for people living with HIV? Yes.
DECISION AND REASONING	The Court held that the right to health was part of the right to life. It defined the Government's obligation under the right to health as an investment of high priority that could not be deferred. The Court further held that the Government had not met its obligations under article 1 of Law No. 23.798, which held the Government responsible for ensuring the continuity and regularity of treatment for people living with HIV.

CASE NAME	<i>Cruz del Valle Bermúdez and Ors. v. Ministerio de Sanidad y Asistencia Social</i>
YEAR	1999
COUNTRY	Venezuela
CITATION	Expediente No. 15.789, Sentencia No. 196
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court in the country, final court of appeal, replaced with the Supreme Tribunal of Justice in 1999.
FACTS AND LAW	The Petitioners were a group of persons living with HIV. They filed a writ of amparo against Venezuela's Ministry of Health and Social Assistance (the Ministry). The Petitioners asked the Court to enjoin the Ministry to provide, free of charge: (1) the regular and periodic delivery of antiretroviral drugs and medication for opportunistic diseases; (2) the administration of tests, such as viral load tests and white blood cell count tests, in order to monitor their health status; (3) the development of information campaigns aimed not only at the Petitioners but the general population and all people living with HIV. The Petitioners also requested that the Court's ruling be extended to all persons living with HIV.

Cruz del Valle Bermúdez and Ors. v. Ministerio de Sanidad y Asistencia Social (continued)

FACTS AND LAW <i>(continued)</i>	<p>The Petitioners argued that they lacked the economic means to procure treatment for HIV, and that expenses associated with such treatment were not covered by any social security institution. They claimed that the State, through the failure of the Ministry to provide necessary treatment and medication, had violated their Constitutional rights to life, health, liberty and personal security, non-discrimination, and the benefit of science and technology.</p> <p>The Respondent Ministry contended that it had not violated any rights of the Petitioners. The Ministry claimed that it lacked the economic means to deliver appropriate treatment to all people living with HIV. It further argued that allowing the Court's judgment to extend to all persons living with HIV was contrary to principles of judicial process in Venezuela.</p>
ISSUE(S) AND HOLDING	Had the Ministry of Health and Social Assistance met its constitutional obligations to the Petitioners and all other people living with HIV in Venezuela? No.
DECISION AND REASONING	<p>The Court held that the rights to health, life and benefit from science and technology were inextricably linked to the subject matter of the case. In particular, the Court held that, due to Venezuela's international obligations, fulfilment of right to life and the right to health was of the highest concern. Accordingly, the Court held that although the Ministry could not be held responsible for an omission per se, the fact that the Ministry's budget was insufficient to cover treatment expenses for people living with HIV was enough to enjoin the State to increase funding for health so as to comply with the Petitioners' demands. The Court further held that the Ministry was obligated to study appropriate means to develop social awareness campaigns.</p> <p>The Court held that although the ruling would not extend to all persons living with HIV, it was nevertheless the duty of every administrative body to comply with the Court's interpretation of the Constitution.</p> <p>The Court held that the rights to personal liberty and security and to non-discrimination were not implicated in this case, given the Court's established understanding of these rights.</p>

CASE NAME	<i>Sahara House v. Union of India</i>
YEAR	1998 to present
COUNTRY	India
CITATION	W.P. (Civil) No. (s) 535 of 1998; W.P. No. (C) 513 of 1999; W.P. No. (C) No. 311 of 2003; W.P. No. (C) 61/2003 (Unreported)
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters.
FACTS AND LAW	The Petitioner, Sahara House, was a centre for residential care and rehabilitation. The Petitioner filed a public interest suit in the Supreme Court under article 32 of the Constitution of India (original writ jurisdiction of the Supreme Court). The Petitioner sought a ruling establishing that

Sahara House v. Union of India (continued)

FACTS AND LAW <i>(continued)</i>	<p>the denial of treatment to persons living with HIV violated, inter alia, article 14 (right to equality), article 21 (right to life) and article 47 (duty of the state to improve public health) of the Constitution of India.</p> <p>A second petition, filed by Sankalp Rehabilitation Trust (Petitioner No. 2), also sought directions from the Court regarding discrimination against people living with HIV in health care settings. Other petitions were filed by Voluntary Health Association of Punjab and Common Cause. During the pendency of the petition, Petitioner No. 2 raised the issue of problems in the 2004 National Antiretroviral Rollout Programme (the Programme). The Court asked Petitioner No. 2 to file a request for the remedy they sought with respect to the Programme, along with justifications. In one of its applications, Petitioner No. 2 argued that the National AIDS Control Organization's (NACO) criteria for restricting the provision of second-line antiretroviral treatment to certain categories of persons was unconstitutional. Petitioner No. 2 argued that antiretroviral treatment should be made available to everyone in need of the treatment, irrespective of other criteria.</p>
ISSUE(S) AND HOLDING	<p>Does the Government of India have a constitutional obligation to ensure access to second-line antiretroviral treatment for people living with HIV who needed such treatment? Yes.</p>
DECISION AND REASONING	<p>The Court ordered, among other things, the upscaling of antiretroviral treatment centres, including provision and maintenance of adequate infrastructure and CD4 testing machines, provision of redress mechanisms for people living with HIV, free treatment of opportunistic infections, and non-discrimination of people living with HIV in health care settings.</p> <p>Taking note of the irrational prescription of treatment and medicines by private doctors, the Court ordered the Medical Council of India to ensure that all private sector health care facilities followed NACO protocol guidelines. It also ordered all health care providers to submit quarterly reports on the treatment provided to people living with HIV, in a format that could be made available by NACO on its website.</p> <p>Regarding the provision of second-line antiretroviral treatment, the Court held that second-line treatment should be universally available to people in need, without additional criteria. Taking into consideration capacity constraints, the Court held that such treatment should initially be made available in four centres. The Court clarified that persons from all over the country could be referred to these centres. The Court further held that the Government should study the pilot initiative for three months, during which time capacity would be increased and the number of people in need of treatment could be determined. The Court held that NACO should make second-line antiretroviral treatment universally available as quickly as possible.</p>

CASE NAME	<i>Muñoz Ceballos, Alonso v. Instituto de Seguros Sociales</i>
YEAR	1992
COUNTRY	Colombia
CITATION	Sentencia T-484/92 (Colom.)
COURT/BODY	Constitutional Court

Muñoz Ceballos, Alonso v. Instituto de Seguros Sociales (continued)

SCOPE OF AUTHORITY	Highest court for matters of constitutional law. Judgments are binding throughout the country.
FACTS AND LAW	<p>The Petitioner, a Colombian national living with HIV, filed an appeal for legal protection against the Colombian Social Security Institute. The Petitioner claimed that his right to medical services was threatened when a doctor at the Cali Social Security Institute informed him that his treatment would cease in 30 days. However, medical directors at the Tuluá Social Security Institute (a different hospital within his insurance plan) permitted a 180-day extension of his treatment. Pursuant to the constitutional right to health, the Petitioner requested the Court to define his right to access to medical services beyond the 180-day extension. The Petitioner argued that the State's failure to continue his treatment beyond the 180-day extension would violate of his right to health. The Petitioner claimed that the right to health, when read in conjunction with the constitutional right to equal protection, required the State to ensure special protection of the health of population groups facing economic, physical or mental vulnerabilities.</p>
ISSUE(S) AND HOLDING	Did the Petitioner have a right to receive continued treatment for HIV? Yes.
DECISION AND REASONING	<p>The Court held that the State, because of its limited resources, was not required to provide free health care to all persons. However, pursuant to the constitutional right to equal protection, the State was required to provide special protection to individuals lacking economic resources who were subject to suffering, discrimination or social risk associated with serious illnesses. The Court stated that the State was required to provide health services that were fundamental in nature, as opposed to those of a more general character. Although it did not define a line between the two kinds of services, the Court held that the right to health was a fundamental right when related to the protection of life.</p> <p>The Court found that the Petitioner was a member of a vulnerable population group in need of special protection due to the fact that he was living with HIV. Accordingly, the Court ordered the Social Security Institute to continue providing the Petitioner free treatment while the competent authorities at the Institute determined how best to proceed in line with the Court's ruling.</p>

2.3 SAME-SEX RELATIONS

CASE NAME	<i>Naz Foundation v. Government of NCT of Delhi</i>
YEAR	2009
COUNTRY	India
CITATION	(2009) DLT 27
COURT/BODY	High Court of Delhi
SCOPE OF AUTHORITY	Highest court and final court of appeal of the Union Territory of Delhi, including the Indian capital New Delhi. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	<p>This decision resulted from a public interest litigation brought by a non-governmental organization, challenging section 377 of the Indian Penal Code, which criminalized “unnatural offences” including certain consensual sexual acts between adults in private. Section 377 was introduced in British India in 1861. Britain repealed its laws punishing same-sex relations in 1967, but the law remained in force in India after independence.</p> <p>The High Court of Delhi initially dismissed the petition as an academic challenge to the constitutionality of the legislation. The Supreme Court overruled the dismissal and remitted the case for decision.</p>
ISSUE(S) AND HOLDING	Did section 377 of the Indian Penal Code infringe fundamental rights to life, liberty and privacy guaranteed under the Constitution of India? Yes, to the extent the statute outlaws consensual sexual acts between adults in private, it violates constitutional guarantees of liberty, equality, privacy and dignity.
DECISION AND REASONING	<p>The challenge was based on several articles of the Constitution. Article 21 protects the right to “personal liberty” and has been judicially interpreted to include a variety of related rights. Articles 14 and 15 guarantee the right to equality and non-discrimination. The Preamble to the Constitution protects the “dignity of the individual” and forms part of India’s “constitutional culture.” In addition, a right to privacy has been found by the courts to arise from other constitutional protections, including the right to life, freedom of speech and expression, and the right to freedom of movement.</p> <p>The Court referred extensively to foreign and international law in reaching its conclusion that section 377 infringed on the constitutional rights to privacy and liberty. The Court rejected the arguments of the Ministry of Home Affairs that the provision was supported by a legitimate governmental interest in public health or popular morality. Instead, it accepted the arguments of the National AIDS Control Organisation and the Ministry of Health and Family Welfare. Both entities asserted that the criminalization of consensual sex between men inhibits and impedes interventions to prevent and treat HIV in India.</p> <p>The Court further held that the term “sex” in article 15 of the Constitution, which prohibits discrimination based on sex, includes “sexual orientation.”</p>

CASE NAME	<i>Secretary for Justice v. Yau Yuk Lung</i>
YEAR	2007
COUNTRY	Hong Kong
CITATION	[2006] 4 HKLRD 196
COURT/BODY	Court of Final Appeal
SCOPE OF AUTHORITY	Court of last resort with the power of final adjudication of the law of Hong Kong and the power of final interpretation over local laws. This includes the power to strike down local ordinances on the grounds of inconsistency with the Basic Law.
FACTS AND LAW	<p>The Defendants were two men who engaged in a sex act in a private car parked beside a public road. They were charged with violation of the Crimes Ordinance provision that criminalized “homosexual buggery committed otherwise than in private.” The provision stated that a man “who commits buggery with another man otherwise than in private shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for 5 years.”</p> <p>The trial magistrate dismissed the charges, upholding Defendants’ constitutional challenge. The Government appealed the ruling and the Court of Appeal affirmed the magistrate’s ruling and dismissed the appeal. The Government then appealed to the Court of Final Appeal.</p>
ISSUE(S) AND HOLDING	Is the Crimes Ordinance provision that criminalized “homosexual buggery committed otherwise than in private” inconsistent with the Basic Law and the Hong Kong Bill of Rights? Yes.
DECISION AND REASONING	<p>Article 25 of the Basic Law provides that “All Hong Kong residents shall be equal before the law.” Article 22 of the Hong Kong Bill of Rights, which implements the International Covenant on Civil and Political Rights, provides for equality under the law and prohibits discrimination on grounds such as race, sex or other status. The Court held that sexual orientation falls within the phrase “other status.” Therefore when differential treatment under the law is based on sexual orientation, the Court will scrutinize “with intensity whether the differential treatment is justified.”</p> <p>The Court noted that while all persons are subject to the common law offense of committing an act outraging public decency, only men who have sex with men were subject to the statutory offense of committing anal sex otherwise than in private. The Court further held that the Government failed to meet its burden of showing that this differential treatment was supported by a legitimate governmental purpose. The Court thus held that the challenged provision of the Crimes Ordinance was unconstitutional.</p>

CASE NAME	<i>Leung T.C. William Roy v. Secretary of Justice</i>
YEAR	2006
COUNTRY	Hong Kong
CITATION	[2006] 4 H.K.L.R.D. 211

<i>Leung T.C. William Roy v. Secretary of Justice (continued)</i>	
COURT/BODY	Court of Appeal of the High Court
SCOPE OF AUTHORITY	The second highest court in the Hong Kong judicial system. It hears all criminal and civil appeals from the courts of first instance.
FACTS AND LAW	Applicant was a homosexual man under the age of 21. He brought a civil action challenging the constitutionality of the Crimes Ordinance (the Ordinance) provision that prohibited consensual same-sex sexual acts between men until a man reached the age of 21. The Applicant was not charged with a criminal offense, but he sought a declaration that the Ordinance violated the rights to equality and privacy in the Basic Law and Hong Kong Bill of Rights. He contended that the Ordinance impermissibly distinguished between the age of consent for heterosexual sexual acts (16 years) and the age of consent for same-sex sexual acts (21 years).
ISSUE(S) AND HOLDING	Does the age-of-consent provision in the Crimes Ordinance for same-sex sexual acts between males violate constitutional protections of privacy and equality? Yes.
DECISION AND REASONING	<p>The Court first held that it had jurisdiction to render a declaratory judgment on the constitutionality of the criminal provision in the absence of a prosecution because the statute in question affected “the dignity of a section of society in a significant way” and the issue was of considerable public interest.</p> <p>The Court next held that the challenged statute significantly affected homosexual men in an adverse way as compared to heterosexuals and therefore violated the constitutional right to equality. The Court further held that the Government failed to meet its burden of showing a legitimate justification for the distinction between homosexual and heterosexual behaviour.</p> <p>The Court rejected the argument that deference should be given to the legislation, as no such deference is given in cases involving breach of rights based on race, sex or sexual orientation. Instead, the Court held that it will “scrutinize with intensity” the justification for legislation that infringes upon fundamental rights.</p>

CASE NAME	<i>DW v. Secretary of State for the Home Department</i>
YEAR	2005
COUNTRY	United Kingdom
CITATION	[2005] UKAIT 00168
COURT/BODY	Immigration Appeal Tribunal
SCOPE OF AUTHORITY	Established in 2005, the Tribunal had jurisdiction to hear immigration and asylum decisions, including appeals against decisions made by the Home Secretary and Home Department officials in immigration, asylum and nationality matters. The Tribunal was abolished in 2010 and replaced by the Asylum and Immigration Chamber of the First-tier Tribunal.

DW v. Secretary of State for the Home Department (continued)

FACTS AND LAW

The Appellant, DW, was a Jamaican citizen who sought asylum in the United Kingdom. He claimed to have been persecuted in Jamaica on the basis of his sexual orientation. He recounted two instances of being assaulted on the basis of being a homosexual. DW feared reporting these incidences to the Jamaican police because he believed that the police force in Jamaica was “corrupt and homophobic” and that the police would not protect him. He claimed homophobia was endemic to Jamaican society and that there was nowhere in the country he could safely be returned to.

The Secretary of State for the Home Department (the Secretary) refused DW’s application for asylum. The Secretary claimed that DW’s statement of events was false and that he was not a homosexual. The Secretary argued that DW’s harassers did not “persecute” him and that any failure on the part of the police to apprehend the perpetrators did not prove complicity in or support for such attacks. The Secretary also argued that DW could be safely returned to other parts of Jamaica. The trial judge accepted the Secretary’s arguments. DW appealed.

ISSUE(S) AND HOLDING

Did DW’s sexual orientation and fear of persecution in his home country constitute sufficient grounds to challenge his removal from the United Kingdom? Yes.

DECISION AND REASONING

The Court was presented with evidence that demonstrated that homosexuals in Jamaica were the subject of endemic discrimination and violence. There were also reports that health workers in Jamaica had refused medical treatment to men who had sex with men, made abusive comments toward them, and disclosed their sexual orientation to others, putting them at risk of homophobic violence. As a result, many men who had sex with men delayed or avoided seeking healthcare altogether, especially for health problems that might reveal their sexual orientation, such as sexually transmitted diseases including HIV. One report concluded that “[p]ervasive and virulent homophobia, coupled with fear of the disease, impedes access to HIV prevention information, condoms, and healthcare” in Jamaica.

The Court further held that DW’s sexual orientation placed him in a particular social group, and that his membership in that group had led to his persecution. It held that his two previous assaults, together with a number of other incidents of harassment, amounted to persecution, and that the persecution had come about as a direct result of his homosexuality, or more importantly, the perception that he was a homosexual. The Court further determined that because Jamaica was a small country and homophobic attitudes were endemic throughout the country, DW could not be expected to relocate within Jamaica to avoid persecution. The Court also held that it was not reasonable to expect him to hide his sexual orientation to avoid persecution. The risk of persecution was to be assessed in light of the course of behaviour DW was most likely to adopt.

The Court thus held that unless there had been a material change in his circumstances, removing DW to Jamaica would put him at risk of persecution and infringe his right to life under article 3 of the European Convention on Human Rights.

CASE NAME	<i>Nadan and McCoskar v. State</i>
YEAR	2005
COUNTRY	Fiji
CITATION	[2005] F.J.H.C. 500
COURT/BODY	High Court of Fiji
SCOPE OF AUTHORITY	The Court has unlimited jurisdiction to hear civil and criminal matters under original jurisdiction or on appeal from subordinate courts. Decisions may be appealed to the Court of Appeal, then the Supreme Court of Fiji.
FACTS AND LAW	<p>The first Appellant, McCoskar, was an Australian man who visited Fiji on holiday. While in Fiji, he engaged in what the parties agreed to be “consensual, intimate, [and] private” conduct with the second Appellant, Nadan, a Fijian male.</p> <p>Nadan was arrested by police on other charges and admitted having sexual relations with McCoskar. Both were convicted under Fijian laws that outlawed carnal knowledge “against the order of nature” and acts of “gross indecency.” They were sentenced to two years imprisonment.</p> <p>Fiji Penal Code section 175 stated that any person who “(a) has carnal knowledge of any person against the order of nature; or . . . (c) permits a male person to have carnal knowledge of him or her against the order of nature is guilty of a felony,” and could be imprisoned for up to 14 years. Section 177 provided that any male who publicly or privately commits “any act of gross indecency” was guilty of a felony and could be imprisoned for up to five years.</p> <p>The Appellants argued that their rights to privacy, equality and freedom from degrading treatment under the Constitution of Fiji were violated.</p>
ISSUE(S) AND HOLDING	Did sections 175 and 177 of the Fiji Penal Code violate the Appellants’ constitutional rights of privacy, equality and freedom from degrading treatment? Yes.
DECISION AND REASONING	<p>The Court held sections 175 and 177 of the Penal Code invalid as applied to private consensual sexual conduct between adults. The Court held that section 177, which applied only to male persons, on its face violated the right to equality before the law. Section 175, which was gender and sexual orientation neutral, violated the Fiji Constitution as applied to consensual sexual acts between adult males. In this regard, the Court noted that the provision had never been used to prosecute couples who engage in heterosexual sex.</p> <p>Section 37 of the Constitution of Fiji guarantees the right of personal privacy. In interpreting the scope of the right to privacy, the Court cited international law, which the Constitution declares shall be an aid in interpreting constitutional provisions. The Court held that the right to privacy “extends beyond the negative conception of privacy as freedom from unwarranted State intrusion into one’s private life to include the positive right to establish and nurture human relationships free of criminal or indeed community sanction.” The Court thus held that section 175 violated the Appellants’ constitutional right to privacy. The Court further held that the Government failed to show that criminalizing private sexual intimacy between consenting adult males was a “proportionate and necessary limitation” to their right to privacy.</p>

CASE NAME	<i>Lawrence v. Texas</i>
YEAR	2003
COUNTRY	United States
CITATION	539 U.S. 558 (2003)
COURT/BODY	Supreme Court of the United States
SCOPE OF AUTHORITY	Highest court in the country. Judgments are binding throughout the country.
FACTS AND LAW	Police officers entered a private residence in response to a report of a disturbance and came upon two men engaged in a sexual act. The men were arrested for and charged with violating a Texas state criminal law that prohibited “deviate sexual intercourse [defined as oral or anal sex] with another individual of the same sex.” Defendants contended that the statute was unconstitutional.
ISSUE(S) AND HOLDING	Did the Texas law that criminalized private, consensual sexual conduct between adult men violate the Due Process Clause of the Fourteenth Amendment to the US Constitution? Yes.
DECISION AND REASONING	<p>The Court overruled its earlier decision in <i>Bowers v. Hardwick</i>, 478 U.S. 186 (1986), which upheld a similar state law prohibiting sodomy. The Court noted that since the <i>Bowers</i> decision had been rendered, a number of US states had repealed or invalidated similar laws prohibiting sodomy. It further noted that many other countries affirmed the right of adult men who have sex with men to engage in intimate, consensual sexual conduct.</p> <p>The Court declared that freedom “extends beyond spatial bounds” and that liberty “presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” The Court held that individual decisions by adults concerning the intimacies of their physical relationship are a form of liberty protected by substantive due process under the Fourteenth Amendment to the Constitution. It further held that the Texas statute furthered no legitimate state interest justifying interference with that liberty interest.</p>

CASE NAME	<i>Yasser Mohamed Salah et al. v. Egypt</i>
YEAR	2002
COUNTRY	Egypt
CITATION	Opinion No. 7/2002 (Egypt); E/CN.4/2003/8/Add.1 at 68 (2002)
COURT/BODY	Working Group on Arbitrary Detention
SCOPE OF AUTHORITY	United Nations body with a mandate, <i>inter alia</i> , to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned. Decisions of the group are not binding on States parties.

FACTS AND LAW

At least 55 men were arrested in Cairo on grounds of their sexual orientation during a police raid of a discotheque. The raid occurred after undercover officers entered the bar and observed and filmed dancing. The police targeted men who appeared to be homosexuals or who were not accompanied by women. One man was slapped by officers and called a derogatory name when he refused to leave the club. The men were held in incommunicado detention at the police station and denied access to a lawyer. The men were charged with immoral behaviour and contempt of religion, both punishable as criminal offenses. They were later subject to an anal examination to determine whether they had engaged in sexual acts with other men.

The Government of Egypt claimed that the men were not arrested on account of their sexual orientation. It stated that there were no laws in Egypt that provided for the prosecution of a person on account of his or her sexual orientation. It also claimed that the laws under which the men were charged did not take account of gender or sexual orientation, but were neutral in their proscription of particular conduct.

The Working Group on Arbitrary Detention (the Working Group) learned from an independent source that all but two of the men were charged with “making homosexual practices a fundamental principle of their group in order to create social dissensions, and engaging in debauchery with men.”

ISSUE(S) AND HOLDING

1. Does the term “sex” in the prohibitions on discrimination in article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights include “sexual orientation or affiliation”? Yes.
2. Did the detention of the men constitute an arbitrary deprivation of liberty in contravention of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights? Yes.

DECISION AND REASONING

1. The Working Group examined the approach of UN human rights bodies in their interpretation of the term “sex” in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and concluded that the term includes “sexual orientation and affiliation.” In particular, the Working Group noted the Human Rights Committee’s decision in *Toonen v. Australia*; paragraph 18 of General Comment 14 of the Committee on Economic, Social and Cultural Rights; and the Office of the United Nations High Commissioner for Refugees’ “Guidelines on International Protection: gender-related persecution within the context of article 1 A (2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees.”

2. The Working Group held:

“[T]he detention of the above-mentioned persons prosecuted on the grounds that, by their sexual orientation, they incited ‘social dissension’ constitutes an arbitrary deprivation of liberty, being in contravention of the provisions of article 2, paragraph 1, of the Universal Declaration of Human Rights, and articles 2, paragraph 1, and 26 of the International Covenant on Civil and Political Rights.”

The Working Group requested the Government of Egypt to amend its legislation to bring it in line with the Universal Declaration of Human Rights and other relevant international instruments to which Egypt is a party.

CASE NAME	<i>Smith and Grady v. United Kingdom</i>
YEAR	1999
COUNTRY	United Kingdom
CITATION	Applications nos. 33985/96 and 33986/96
COURT/BODY	European Court of Human Rights
SCOPE OF AUTHORITY	The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case.
FACTS AND LAW	<p>The Applicants were two former Royal Air Force personnel who claim they were discharged from the Royal Air Force solely on account of their sexual orientation. They argued that their discharges violated article 8 of the European Convention on Human Rights (the Convention), which recognizes the right to private and family life, and article 14, which provides that enjoyment of the rights and freedoms in European Convention “shall be secured without discrimination on any ground such as sex, race . . . or other status.”</p> <p>The Applicants also alleged that there was a policy in the Ministry of Defence against homosexuals in the armed forces. They claimed this policy violated article 3 (the prohibition against degrading treatment or punishment) and article 10 (the right to freedom of expression) of the Convention.</p>
ISSUE(S) AND HOLDING	Does the European Convention on Human Rights prohibit termination of employment in the armed forces on the basis of sexual orientation? Yes.
DECISION AND REASONING	<p>The Court held that sexual orientation was not a valid ground under the Convention upon which to refuse men who have sex with men or women who have sex with women national service.</p> <p>The Court held that investigations by military police into the Applicants’ private sexual lives, including detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with preparation of a final report to authorities on these matters, constituted a direct interference with their right to respect for their private lives in article 8 of the Convention. The Applicants’ subsequent administrative discharge on the sole ground of their sexual orientation constituted a further violation of article 8.</p> <p>The Court found that both the investigations and the discharges were performed pursuant to a Ministry of Defence policy barring homosexuals from the armed forces. The Court rejected the Government’s assertion that the policy, and the actions taken thereunder, were justified by the need to maintain morale in the armed forces so as to maximize fighting power and operational effectiveness. While a margin of appreciation is open to the State in matters of national security, particularly convincing and weighty reasons must be given to justify interference with an individual’s right to respect for his or her private life. However, the Court held that the reasons proffered by the Government—the negative attitudes of heterosexual personnel toward homosexual personnel—were not sufficient justification for the intrusive investigations and discharges.</p> <p>The Court also found a violation of article 13 of the Convention, which guarantees the availability of a domestic remedy to enforce the substance of rights and freedoms under the Convention.</p>

CASE NAME	<i>National Coalition for Gay and Lesbian Equality v. Minister of Justice</i>
YEAR	1998
COUNTRY	South Africa
CITATION	1999 (1) SA 6 (CC)
COURT/BODY	Constitutional Court
SCOPE OF AUTHORITY	Highest court for matters of constitutional law. Judgments are binding throughout the country.
FACTS AND LAW	<p>The Applicants were the South African Human Rights Commission and a coalition of 70 organizations representing lesbian, gay, bisexual, transsexual, transgender, transvestite and intersex people in South Africa. They brought a constitutional challenge to various statutory provisions in South Africa criminalizing homosexual acts.</p> <p>The Applicants claimed that the statutes in question violated sections 9, 10 and 14 of the Constitution of South Africa. Section 9 provides that every person has the right to equal protection and benefit of the law, and the Government may not unfairly discriminate against any person on grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth. Section 10 guarantees the right to human dignity. Section 14 guarantees the right to privacy.</p>
ISSUE(S) AND HOLDING	Do statutes criminalizing homosexual acts in South Africa violate the Constitution? Yes.
DECISION AND REASONING	<p>The Court held that statutes criminalizing sodomy violate the constitutional right to protection from discrimination on the ground of sexual orientation, and the rights to human dignity and privacy. The Court further held that the criminal statutes bore no rational connection to any legitimate governmental purpose. The Court also held that the common-law offense of sodomy was unconstitutional.</p> <p>The Court stated that discrimination on the ground of sexual orientation was unfair and unjustifiable. It declared that, even if unenforced, the existence of a statute criminalizing consensual sexual behaviour between males “reinforces the misapprehension and general prejudice of the public” against male homosexuality. The Court further held that such statutes violate the right to dignity as they put gay men at risk of arrest and conviction “simply because they seek to engage in sexual conduct which is part of their experience of being human.”</p> <p>In a concurring opinion, Justice Albie Sachs declared:</p> <p>“Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the community. At a more general and conceptual level, it concerns the nature of the open, democratic and pluralistic society contemplated by the Constitution.”</p>

CASE NAME	<i>Toonen v. Australia</i>
YEAR	1994
COUNTRY	Australia
CITATION	Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)
COURT/BODY	United Nations Human Rights Committee
SCOPE OF AUTHORITY	A body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States parties by examining yearly country reports and individual petitions concerning 112 States parties to the Optional Protocol. Its decisions are not binding on States parties, but they represent authoritative interpretations of the rights in the Covenant.
FACTS AND LAW	<p>Toonen lived in Tasmania, one of the six constitutive states of Australia. Tasmania criminalized same-sex sexual conduct among men under its criminal code; it was the only province in Australia to do so. Toonen brought a communication before the Human Rights Committee, claiming that the Tasmanian law violated articles 2, 17 and 26 of the International Covenant on Civil and Political Rights.</p> <p>Article 2, paragraph 1 of the International Covenant on Civil and Political Rights requires States parties to ensure to all individuals subject to its jurisdiction the rights recognized in the Covenant, without distinction of any kind on grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”</p> <p>Article 17 provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation; and everyone has the right to the protection of the law against such interference or attacks.”</p> <p>Article 26 provides that all persons are equal before the law and declares that the law should prohibit discrimination and positively guarantee freedom from discrimination on grounds of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”</p>
ISSUE(S) AND HOLDING	Is sexual orientation a protected class or status under the International Covenant on Civil and Political Rights? Yes.
DECISION AND REASONING	<p>The United Nations Human Rights Committee (the Committee) held that sexual orientation is included in the definition of “sex” in articles 2 and 26 of the International Covenant on Civil and Political Rights and consensual sexual activity is an activity protected under the definition of privacy in article 17.</p> <p>The Committee thus held that the existence of laws criminalizing sexual conduct, regardless of promises by past or present officials to not enforce them, are violations of the human right of personal privacy. In light of this ruling, the Committee declined to decide the issue as to the violation of equality under article 26.</p> <p>The Committee explained that individuals have a right to a remedy under the International Covenant on Civil and Political Rights. It declared that in this case an “effective remedy would be the repeal” of the challenged laws. However, as it could not order such a repeal, it requested Australia to report back to the Committee on what remedy it provided to Toonen.</p>

CASE NAME	<i>Dudgeon v. United Kingdom</i>
YEAR	1981
COUNTRY	United Kingdom
CITATION	Application no. 7525/76
COURT/BODY	European Court of Human Rights
SCOPE OF AUTHORITY	The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case.
FACTS AND LAW	<p>During a police search of Applicant Dudgeon's home on suspicion of drug activity, personal property, including correspondences and diaries describing same-sex sexual activity, was seized. Dudgeon was subsequently taken to a police station and questioned extensively about his sexual life. The prosecutor considered but eventually declined to prosecute Dudgeon under a statute prohibiting "gross indecency" between males.</p> <p>Dudgeon, a citizen of Northern Ireland, sought a decision from the Court as to whether Northern Ireland's laws criminalizing sexual acts between consenting adult males violated article 8 of the European Convention on Human Rights (the Convention), which recognizes the right to private and family life, and article 14, which provides that enjoyment of the rights and freedoms in the Convention "shall be secured without discrimination on any ground such as sex, race . . . or other status."</p>
ISSUE(S) AND HOLDING	Do statutes criminalizing anal sex and "gross indecency" between consenting adult males violate the European Convention on Human Rights' protections of privacy and equality? Yes.
DECISION AND REASONING	<p>The Court held that the very existence of legislation criminalizing sexual conduct between consenting adult males constitutes an ongoing interference with the Applicant's right to respect for his private life, including his sexual life, in violation of article 8 of the Convention. The Court further held that the Government of the United Kingdom failed to meet its burden of demonstrating that the legislation was necessary to "protect morals" or to protect the rights and freedoms of others. The Court noted that in most European countries it was "no longer considered to be necessary or appropriate to treat homosexual practices . . . as in themselves a matter to which the sanctions of the criminal law should be applied."</p> <p>In light of this ruling, the Court did not reach the issue of discrimination under article 14.</p>

2.4 RIGHTS OF TRANSGENDER PERSONS

CASE NAME	<i>Macy v. Holder</i>
YEAR	2012
COUNTRY	United States
CITATION	Appeal No. 0120120821 (U.S. Equal Employment Opportunity Commission, Apr. 20, 2012)
COURT/BODY	Equal Employment Opportunity Commission
SCOPE OF AUTHORITY	The Commission has the authority to investigate charges of discrimination against employers who are covered by federal anti-discrimination law. If discrimination is found to have occurred, the Commission attempts to settle the charge. If a settlement is not reached, the Commission has the authority to file a civil suit to protect the rights of individuals and the interests of the public.
FACTS AND LAW	<p>The Complainant, a transgender woman, was a police detective. She decided to relocate and was recommended for a position in a crime lab with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (the Bureau). Complainant was qualified for the position and following a phone call during which she presented as a man, the director of the lab informed her that she would be offered the position if no problems arose during her background check. In a subsequent conversation, the director of the lab again assured the Complainant that she would be offered the position upon completion of a background check. The contractor responsible for filling the position contacted the Complainant to begin the necessary paperwork.</p> <p>Two months later, the Complainant informed the contractor that she was in the process of transitioning from male to female and requested that he inform the director of the lab of her new name and gender. Approximately a week later, the Complainant received an email from the contractor stating that, due to federal budget reductions, the position was no longer available. She later learned that another candidate had been chosen for the position.</p> <p>The Complainant filed a complaint with the federal Equal Employment Opportunity Commission (the Commission) claiming she had been discriminated against in employment on the basis of her sex, gender identity and because of sex stereotyping in violation of Title VII of the Civil Rights Act of 1964. She later requested the Commission to consider her complaint on grounds of discriminatory failure to hire based on gender identity, change of sex, and/or transgender status.</p>
ISSUE(S) AND HOLDING	Was Complainant's claim of discrimination based on gender identity, change of sex, and/or transgender status cognizable under Title VII of the Civil Rights Act of 1964? Yes
DECISION AND REASONING	<p>The Commission held that "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex' and such discrimination therefore violates Title VII."</p> <p>The Commission declared that it is "important" that the prohibition on sex discrimination in Title VII proscribes gender discrimination and not just discrimination on the basis of biological sex. If it did not, the only prohibited behaviour would be when an employer prefers a man to a woman, or vice-versa. The Commission stated that the law's "protections sweep far broader than that, in part because the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."</p>

Macy v. Holder (continued)

DECISION AND REASONING
(continued)

The Commission explained that gender discrimination “occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.” It stated that an employer has engaged in gender discrimination when it discriminates against an employee because the individual “has expressed his or her gender in a non-stereotypical fashion,” because the employer is “uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another,” or simply because the employer does not like that the person is identifying as transgender. In each case, the employer is making an impermissible gender-based evaluation.

The Commission cited a number of cases from federal district and federal appellate courts that supported its opinion. In conclusion, it observed that:

“[A] transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.”

CASE NAME	<i>Dr. Khaki v. Rawalpindi</i>
YEAR	2009
COUNTRY	Pakistan
CITATION	Human Rights Cases No. 63 of 2009 and Constitution Petition No. 43 of 2009
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters.
FACTS AND LAW	<p>A petition was filed on behalf of a group of transgender persons after police raided a wedding party they were attending. Police allegedly humiliated the individuals, took money from them and detained them.</p> <p>The petition claimed the rights of transgender persons were habitually infringed upon by society and government. It claimed their right to live with their parents was infringed upon because they were sent by their parents to live in a separate community with “gurus” at birth. It asserted that transgender persons’ right to dignity enshrined in the Quran and in article 14 of the Constitution of Pakistan was violated as they were often laughed at and humiliated in society. The petition claimed their “legal and Islamic” right to property and inheritance was violated because they did not receive inheritance from their parents. It asserted that their right to education was infringed upon because they were not provided education. It claimed transgender persons’ right to respect was violated because they were forced to dance and beg by the “gurus.” It asserted that their right to employment was violated because they were not reserved quotas as a class. Finally, the petition claimed transgender persons’ right to movement was restricted because they were enslaved by the “gurus.”</p>

Dr. Khaki v. Rawalpindi (continued)

ISSUE(S) AND HOLDING	Are the rights of transgender persons protected under the Constitution of Pakistan? Yes.
DECISION AND REASONING	<p>The Court issued several orders addressing the claims in the petition. It first ordered various provincial governments to conduct a census of transgender persons living in each province. It also directed these governments to take account of the “particulars” of any child handed over to the “gurus” in order to determine whether the child was handed over voluntarily or under compulsion and whether any offence had been committed.</p> <p>The Court next held that transgender persons were “citizens” of the country and entitled to protection under article 4 of the Constitution, which guarantees the “inalienable right . . . [t]o enjoy the protection of law and to be treated in accordance with law,” and article 9 of the Constitution, which declares that “[n]o person shall be deprived of life or liberty save in accordance with law.” The Court directed the National Database and Registration Authority to add a third gender column on national identity cards for transgender people. The Court also warned the police not to engage in any “highhandedness” when dealing with transgender persons and required that a mechanism be established to protect transgender people from police harassment.</p> <p>The Court also held that transgender persons’ “social life is to be respected” and that the federal and provincial governments are bound to protect transgender persons under the Constitution. It further ordered the federal and provincial governments to enable transgender persons to “get education and respectable jobs.” The Court directed police departments to provide protection to transgender persons and ensure law enforcement agents did not unnecessarily implicate them in criminal matters for the purpose of confiscating their money.</p> <p>Finally, the Court ordered the federal and provincial governments to ensure protection of transgender persons’ inheritance and voting rights and to provide them with education and employment opportunities. Toward this end, it directed authorities to register transgender people in electoral rolls and to establish a mechanism to assist them with inheritance rights.</p>

CASE NAME	<i>Sunil Babu Pant and Ors. v. Nepal Government and Ors.</i>
YEAR	2008
COUNTRY	Nepal
CITATION	[2008] 2 NJA L.J. 262
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court in the country and final court of appeal for all criminal, civil and constitutional matters.
FACTS AND LAW	The Petitioners were leaders of organizations that represented lesbian, gay, bisexual, transsexual and intersex persons. They claimed that the Government of Nepal violated the rights of sexual minorities, including the rights to equality and freedom from discrimination, which are protected by the Constitution of Nepal and international human rights instruments. The Petitioners requested an order of mandamus allowing, among other things, the official recognition of their gender “on the basis of their gender feelings.”

ISSUE(S) AND HOLDING

1. Did the Petitioners have standing to bring the suit? Yes.
2. Are the rights of sexual minorities, including gay, lesbian and transgender persons, protected under the Constitution of Nepal? Yes.

DECISION AND REASONING

1. The Court held that the Petitioners had standing to bring the suit as a public interest litigation under article 107(2) of the Constitution. It held that transgender persons in Nepal are citizens of the country and must be treated as such. The Court stated that the “issues raised in the writ petition such as gender identity, gender discrimination and obstacles faced due to it as well as the issue of gender recognition etc. are matters concerning social justice and social interest.”
2. The Court noted that the idea that gender identity is a function of both the physical condition and psychological feelings of a person was “being established gradually.” The Court held that it was unlawful to discriminate against individuals on the basis of their sexual orientation, including transgender persons. It held that the term “sex” in article 13 of the Constitution, which prohibits discrimination on a number of enumerated grounds, includes sexual minorities, including gay, lesbian and transgender persons.

The Court held that the right to privacy was a fundamental right and that it included sexual activity. It held that “[n]o one has the right to question how do two adults perform the sexual intercourse and whether this intercourse is natural or unnatural.” An individual’s right to privacy in sexual relations falls within the “ambit of the right to self-determination” and applies equally to individuals who engage in heterosexual sexual activities and same-sex sexual activities.

The Court declared that the Government had not made efforts to protect the rights of sexual minorities. The Court noted that rules concerning citizenship, passports, voter lists and security checks “have not only refused to accept the identity of the people of third gender but also declined to acknowledge their existence.” The Court stated that any existing legal provisions that restrict sexual minorities from enjoying fundamental and other human rights provided by part III of the Constitution and by international conventions “shall be considered arbitrary, unreasonable and discriminatory.” Moreover, state action that enforces such laws “shall also be considered as arbitrary, unreasonable and discriminatory.”

The Court held that it is the responsibility of the State to create an “appropriate environment” and make necessary legal provisions to ensure sexual minorities enjoy their fundamental rights, including the rights to life, dignity, equality and personal liberty. The Court declared that it appeared necessary to add a new provision to the Constitution guaranteeing non-discrimination on the grounds of gender identity and sexual orientation.

Finally, the Court held that it is “an inherent right of an adult to have marital relation with another adult with her/his free consent and according to her/his will.” The Court thus directed the Government to form a committee to “carry out a thorough study and analysis of international instruments relating to the human rights, the values recently developed in the world in this regard, the experience of the countries where same sex marriage has been recognized, and its impact on the society.”

CASE NAME	<i>Hernandez v. Canada (Minister of Citizenship and Immigration)</i>
YEAR	2007
COUNTRY	Canada
CITATION	2007 F.C. 1297 (Can. Fed. Ct.)
COURT/BODY	Federal Court
SCOPE OF AUTHORITY	A national trial court that hears legal disputes arising in the federal domain, including claims against the Government of Canada, civil suits in federally regulated areas and challenges to the decisions of federal tribunals. Decisions may be appealed to the Federal Court of Appeal, then to the Supreme Court of Canada.
FACTS AND LAW	<p>The Applicant was a cross-dressing homosexual man who was violently attacked in his home country of Mexico based on his sexual orientation and transgender status. He fled to Canada and thereafter discovered he was HIV-positive. He sought refugee status in Canada based on his membership in a particular social group, namely homosexual men living in Mexico, cross-dressing men, and people living with HIV.</p> <p>Canada's Immigration and Refugee Protection Act defines a "refugee" as a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality or membership in a particular social group, is unable or by reason of fear unwilling to avail himself of the protection of his home country. A "person in need of protection" is someone whose removal to his or her home country would subject him or her personally to a risk to his or her life or to cruel and unusual treatment.</p> <p>The Immigration and Refugee Board (the Board) found that Mexico offered sufficient protection against homophobia and provided access to HIV treatment services. It also found that the Applicant had not adequately attempted to seek protection from Mexican authorities. The Board thus denied the Applicant's request for asylum. The Applicant sought judicial review of the Board's decision.</p>
ISSUE(S) AND HOLDING	Did the Immigration and Refugee Board adequately consider the ability of Mexico to protect cross-dressers and transgender persons such as the Applicant? No.
DECISION AND REASONING	<p>The Court held that the Immigration and Refugee Board did not reasonably examine the Applicant's claim for refugee status because it only considered Mexico's ability to provide HIV treatment and protect individuals against homophobia. The Court found that there was evidence before the Board to alert them to the fact that the Applicant's identity was not only that of a homosexual man but also a cross-dresser and transgender person.</p> <p>The Court held that the Applicant's identity as a cross-dresser and transgender person must be considered in assessing whether Mexican authorities could offer him adequate protection. The decision of the Board was thus set aside and the matter referred to a different panel of the Board for redetermination.</p>

CASE NAME	<i>Jayalakshmi v. State of Tamil Nadu</i>
YEAR	2007
COUNTRY	India
CITATION	W.A. No. 1130 of 2006 and W.P. No. 24160 of 2006
COURT/BODY	High Court of Madras
SCOPE OF AUTHORITY	Highest court and final court of appeal of the state of Tamil Nadu and the Union Territory Puducherry. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	<p>The Petitioner's sibling, Pandian, was a transgender person. Pandian was detained and questioned multiple times by police in connection with an alleged theft. For several days, the police retrieved her from her home at 8 a.m. and detained her at the police station. She returned home at 11 p.m. each day. Pandian claimed she was tortured and sexually assaulted during her detention each day. Her mother inquired about these events at the police station and claimed she was «beaten up» by the police. Petitioner also addressed the police concerning her sister's allegations and claimed she was abused and threatened. Pandian finally immolated herself at the police station. She was treated for severe burns and eventually died as a result of her injuries.</p> <p>The police denied torturing and sexually assaulting Pandian. They claimed that she had admitted to the theft and had only been granted bail on the condition that she appear every day at the police station.</p>
ISSUE(S) AND HOLDING	Did the police torture and sexually assault Pandian, a transgender person, in violation of her fundamental rights? Yes.
DECISION AND REASONING	<p>The Court held that it was «satisfied that excesses have been committed by the [police] and we have no doubt to arrive at the conclusion that the suicide committed by Pandian was only in consequence of the conduct of the [police].» It declared that there was «abundant circumstantial evidence» to prove the Petitioner's claims. The Court further held that there was «abundant evidence» that the police «committed drastic inhuman violence on the body» of Pandian and that it amounted to a violation of her human rights. The Court stated that the police «deserved to be condemned and are liable for suitable action in the interest of maintaining decency, discipline and civilisation» in the police department. It also noted that the police had taken no remedial action in response to the Petitioner's complaints.</p> <p>The Court held that a «constitutional remedy» exists that justifies the «award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers.» The Court thus ordered the Government to pay monetary compensation to the Petitioner. It further ordered the police to initiate disciplinary action against the officers responsible for the torture and abuse of Pandian.</p>

CASE NAME	<i>In re Change of Name and Correction of Family Register</i>
YEAR	2006
COUNTRY	South Korea
CITATION	2004Seu42, June 26, 2006
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	The highest court in the country. Judgments are binding throughout the country.
FACTS AND LAW	The case involved an application of a transgender person to change his sex and name on an official family registry. The Family Register Act did not allow for such a change.
ISSUE(S) AND HOLDING	Is the reassignment of a transgender person's sex and change of name in the family registry legally permissible under the Family Register Act? Yes.
DECISION AND REASONING	<p>The Court declared that biological factors are no longer the only indicator of a person's sex. Instead, an individual's "own awareness of being male or female and the individual's sex role including the socially accepted behaviours, attitudes and characteristics, in other words, the emotional and social factors, have become recognized as . . . factors that determine a person's sex." The Court thus held that there are sufficient reasons for permitting the correction of sex and a change of name in a family registry when an applicant is "obviously a transsexual who can be recognized as a man by widely accepted social norms," and "who had felt that she did not belong to the female sex but to the male sex, has actually lived as a man upon coming of age, [and] has been operated to change [her] sex, . . . given the outer sex organs and the bodily appearance of a man."</p> <p>The Court noted that the Family Register Act (the Act) did not provide a procedure to correct the sex that was recorded at the time of birth. However, it held that there were multiple reasons to allow such a correction. It noted that the principle of the family register was to record the "true personal relation" of the individual. It held that transgender persons have the constitutional "right to enjoy the dignity and value of a human being, to seek happiness and to lead a humane life." The Court declared that if the original, incorrect sex of a transgender person remains on the family register "the person might be treated as a socially abnormal person, deprived of opportunities to work, which eventually might infringe their basic constitutional rights." The Court stated that the Act did not stipulate procedures for transgender persons to correct their sex simply because lawmakers "failed to consider such a possibility and need" when the law was drafted, not because they intended to disallow it. The Court further held that such a change should be allowed via a "simple procedure rather than a court decision."</p> <p>A dissenting opinion argued that the Act only allowed for the correction of a "mistake" in the family register made at the time of birth. Therefore, it argued, if "the recording on the family register was done legitimately, in a way that fit the true personal relation at time of the recording, it shall not be corrected." The dissent contended that the issue should be considered by the National Assembly and, if necessary, addressed through legislation.</p> <p>The majority explained that because of the constitutional issues involved, when the sex of an individual reported at birth does not match the sex that is confirmed by "social conventional wisdom," changing the sex shall be deemed a "correction" and allowed under the Act. It added that while it would be ideal if the legislature addressed the problem, the Court could not allow the "unconstitutional situation to continue" when it was not certain that legislation would be enacted.</p>

CASE NAME	<i>Attorney-General v. Kevin and Jennifer</i> See also, <i>Kevin and Jennifer v. Attorney-General</i> , [2001] FamCA 1074
YEAR	2003
COUNTRY	Australia
CITATION	[2003] FamCA 94
COURT/BODY	Full Court of the Family Court of Australia at Sydney
SCOPE OF AUTHORITY	The Court hears appeals from family law decisions made by federal magistrates (may be heard by a single Family Court judge or by the full Court) and from decisions of single judges in the Family Court. Decisions may be appealed to the High Court with grant of special leave from the High Court.
FACTS AND LAW	The Petitioner, Attorney-General, appealed a decision declaring the marriage valid between Kevin, a post-operative transgender person, and Jennifer. The Petitioner and the Respondents agreed that for a marriage to be valid it must be between a man and a woman. The trial court held that for the purpose of determining the validity of a marriage under Australian law, the question of whether a person is a man or a woman is to be determined at the time of the marriage. It held that the word “man” was to be given its “ordinary current meaning according to Australian usage.” The trial court concluded that Kevin was a man for the purpose of the law at the time of the marriage and thus the marriage between Kevin and Jennifer was valid.
ISSUE(S) AND HOLDING	Was the marriage between Kevin, a post-operative transgender person, and Jennifer valid under the law? Yes.
DECISION AND REASONING	<p>The Court first examined the historical context of marriage in Australian society. The Court declared that marriage is “an important and special social and legal institution, both for the individuals who enter into that commitment, and for the society in which they live.” The Court further held that it would be “potentially highly destructive to the institution of marriage for its definition to be frozen at any point in time.” Concluding its survey, it held that it was “plain that the social and legal institution of marriage . . . has undergone transformations that are referable to the environment and period in which the particular changes occurred.”</p> <p>The term “marriage” was thus to be given its “ordinary contemporary” meaning in the context of the Marriage Act (the Act). The Court held that the interpretation of the term “marriage” in the Constitution was to be understood broadly, given a “wider meaning” than the traditional Christian definition. As such, it was “within the power of Parliament to regulate marriages within Australia that are outside the monogamistic Christian tradition.”</p> <p>The Court agreed with the trial court that the terms “marriage” and “man” were “not technical terms and should be given their ordinary contemporary meaning” in the context of the Act. The Court further agreed with the trial court that the “contemporary, normal and everyday” definition of the term “man” was to include “the humane and practical trend to accept the reality of gender reassignment.” It noted that in all but three Australian states, legislation allows transgender persons to alter their record of birth to reflect their reassigned sex. Moreover, in all but one Australian state, anti-discrimination legislation prohibits discrimination on the basis that a person has a “transsexual history.”</p>

Attorney-General v. Kevin and Jennifer (continued)

DECISION AND REASONING
(continued)

The Court opined that marriage was a “secularised tradition” and it “reject[ed] the argument that one of the principal purposes of marriage is procreation.” The Court thus rejected the contention that because Kevin was unable to procreate, his marriage to Jennifer could not be a valid marriage.

The Court held that there was a “strong argument: first, that a child’s sex cannot be finally determined at birth; and secondly, that any determination at that stage is not and should not be immutable.” The Court agreed with the position that “transsexualism is a medical condition for which treatment is provided in order to afford relief and that the treatment requires a level of commitment and conviction to achieve it.” Accordingly, it concluded that the trial court did not err in finding “as a matter of probability that there was a biological basis for transsexualism.” However, it cautioned that this was “no reason to exclude the psyche as one of the relevant factors in determining sex and gender.” The Court noted that social and cultural factors were “clearly relevant to the issue of the meaning of ‘marriage’ and ‘man’ for the purpose of the marriage law.” As such, the Court held that “society’s perception of [a] person’s sex provides relevant evidence as to the ordinary, everyday meaning of the words ‘man’ and ‘woman.’”

Finally, the Court held that the medical evidence, evidence of social acceptance, weight of international legal developments, widespread statutory recognition of transgender persons for the purposes of social and criminal law, and laws permitting transgender persons to change their sex on their birth certificates all supported the finding that Kevin was a man at the time of his marriage. It added: “A contrary finding would, in our opinion, result in considerable injustice to transsexual people and their children, for no apparent purpose.”

CASE NAME	<i>Bellinger v. Bellinger</i>
YEAR	2003
COUNTRY	United Kingdom
CITATION	[2003] UKHL 21
COURT/BODY	House of Lords
SCOPE OF AUTHORITY	Until 2009, the House of Lords was the court of last resort for most issues of law in the United Kingdom.
FACTS AND LAW	<p>The Petitioner, Mrs. Elizabeth Bellinger, was a post-operative female transgender person who had married a man and sought a declaration that the marriage was valid. The Nullity of Marriage Act 1971, re-enacted in section 11(c) of the Matrimonial Causes Act 1973 (the Act), provided that a marriage was void unless it was between a man and a woman. The Petitioner also sought a declaration that section 11(c) of the Act was incompatible with article 8, the right to respect for private and family life, and article 12, the right to marry and found a family, of the European Convention on Human Rights.</p> <p>The Court established that the Petitioner “felt more inclined to be a female” for as long as she could remember. It noted that individuals experiencing such feelings are often recognized as</p>

Bellinger v. Bellinger (continued)

**FACTS AND LAW
(continued)**

suffering from a psychiatric disorder, known as gender dysphoria or gender identity disorder, which can result in “acute psychological distress.” Petitioner eventually began to dress and live as a woman, underwent hormone treatment and a sex reassignment surgery, and subsequently married a man.

**ISSUE(S) AND
HOLDING**

1. Was the marriage between the Petitioner, a post-operative female transgender person, and a man valid under law? No.
2. Was section 11(c) of the Matrimonial Causes Act 1973, which made no provision for the recognition of gender reassignment, compatible with articles 8 and 12 of the European Convention on Human Rights? No.

**DECISION AND
REASONING**

The Court discussed *Corbett v. Corbett*, 2 All E.R. 33 (P.D.A. 1970), which addressed the issue of how to determine the sex of a transgender person. *Corbett* held that the sex of an individual was fixed at birth and could not “be changed either by the natural development of organs of the opposite sex or by medical or surgical means.” The Court, however, noted that the decision in *Corbett* had received “much criticism, from the medical profession and elsewhere.” It also observed that the decision had not been universally followed internationally and that the international legal trend had instead been contrary to the *Corbett* holding.

The Court next considered the issue in the context of the European Convention on Human Rights (the Convention). The Court examined the European Court of Human Rights’ (the European Court) decision in *Goodwin v. United Kingdom*, Application No. 28957/95, and held that the “United Kingdom’s margin of appreciation no longer extends to declining to give legal recognition to all cases of gender reassignment.” In *Goodwin*, the European Court held that a “test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative” transgender persons. It further held that there was “no justification for barring the transsexual from enjoying the right to marry under any circumstances.”

The Court noted that, in response to the *Goodwin* decision, the United Kingdom had (1) convened an “interdepartmental working group” on transgender persons; (2) announced its intention to enact legislation that would “allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender;” and (3) accepted that parts of English law that “fail to give legal recognition to the acquired gender” of transgender persons are incompatible with articles 8 and 12 of the Convention.

With respect to the issue of whether the Petitioner’s marriage was legally valid, the Court found that recognition of the Petitioner as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would “necessitate giving the expressions ‘male’ and ‘female’ in that Act a novel, extended meaning.” The Court declared that this would represent a “major change in the law” and one that the courts were “ill-suited” to make. It held that questions “of social policy and administrative feasibility,” such as this one, are a matter for Parliament. The Court noted that this was particularly true since the Government had already announced its intention to introduce “comprehensive legislation . . . on this difficult and sensitive subject.”

The Court noted three concerns underpinning its decision: (1) the uncertainty as to which gender reassignment should be recognized for the purpose of marriage, including whether surgical intervention was necessary; (2) the fact that the recognition of gender reassignment for the purposes of marriage was part of a larger issue, which should be addressed as a whole, rather than

Bellinger v. Bellinger (continued)

DECISION AND REASONING
(continued)

in a piecemeal fashion; and (3) the fact that, even in the context of marriage, there were larger concerns, such as the contention that the primary purpose of marriage is procreation.

With respect to the issue of whether the Matrimonial Causes Act 1973 was compatible with the European Convention on Human Rights, the Court held that that section 11(c) of the Act was incompatible with articles 8 and 12 of the Convention. It noted that the Act remained an obstacle to Mr. and Mrs. Bellinger's marriage. The Court rejected the contention that a declaration of incompatibility would not serve a useful purpose. It held that, even though the Government had already announced its intention to propose new legislation, the Court "should formally record that the present state of statute law is incompatible with the Convention."

CASE NAME	<i>Goodwin v. United Kingdom</i>
YEAR	2002
COUNTRY	United Kingdom
CITATION	Application no. 28957/95
COURT/BODY	European Court of Human Rights
SCOPE OF AUTHORITY	The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case.
FACTS AND LAW	<p>The Applicant, Goodwin, was a post-operative male-to-female transgender person who filed a complaint regarding gender-based discrimination in several aspects of her life. The Applicant claimed she had experienced discrimination in the workplace, in relation to contributions to the National Insurance system, and in her ability to marry, as she was prevented from marrying a man because she was still legally male. She also claimed that the State was unwilling to formally recognize her new gender following her sex-reassignment.</p> <p>Article 8 of the European Convention on Human Rights (the Convention) provides that everyone has the right to respect for their private life, and there shall be no State interference with that right except as is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country.</p>
ISSUE(S) AND HOLDING	Did the State fail to meet its obligation to protect the right of the Applicant, a post-operative transgender person, to respect for her private life, in particular through its lack of recognition of her new gender? Yes.
DECISION AND REASONING	<p>The Court held that State respect for gender identity is a human right under the Convention, and such respect includes official State recognition of gender re-assignment.</p> <p>The Court held that the very essence of the Convention is respect for human dignity and human freedom. It stated that the notion of personal autonomy is an important principle underlying the interpretation of the guarantees set forth in article 8 of the Convention. This autonomy includes the right of all people "to establish details of their identity as individual human beings." It further</p>

Goodwin v. United Kingdom (continued)

DECISION AND REASONING
(continued)

declared “In the twenty-first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy.”

The Court held that the United Kingdom had failed to respect Goodwin’s right to respect for her private life, in violation of article 8 of the Convention. It also held that Goodwin’s right to marry under article 12 had been violated.

The Court declined to award damages but directed the United Kingdom to implement such measures it considered appropriate to secure transgender persons’ right to marry and right to respect for private life.

CASE NAME	<i>Powell v. Schriver</i>
YEAR	1999
COUNTRY	United States
CITATION	175 F.3d 107 (2d Cir. 1999)
COURT/BODY	United States Court of Appeals, Second Circuit
SCOPE OF AUTHORITY	The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in the following US states: Connecticut, New York and Vermont. Decisions may be appealed to the Supreme Court of the United States.
FACTS AND LAW	<p>The Plaintiff was a post-operative transgender person living with HIV who was imprisoned in a state correctional facility. A corrections officer told another officer, in the presence of other inmates and prison staff, that the Plaintiff “had had a sex-change operation and that she was HIV-positive.” As a result, the Plaintiff maintains that knowledge of her operation and her HIV status “became known throughout the prison” and she “became the target of harassment by guards and prisoners.”</p> <p>The Plaintiff claimed her constitutional right to privacy had been violated. She claimed deprivation of her constitutional rights to life, liberty, due process of law and equal protection under the Fourteenth Amendment to the Constitution. She also claimed she had been subject to cruel and unusual punishment in violation of the Eighth Amendment. She further alleged violations of statutory rights that prohibited degrading treatment of inmates and conferred the right to confidentiality in one’s HIV status.</p> <p>The trial court dismissed the statutory claims and held that the corrections officer was protected by the doctrine of qualified immunity from liability in the claim of cruel and unusual punishment. The jury awarded the Plaintiff damages for violation of her right to privacy, but the court set aside the verdict.</p>

Powell v. Schriver (continued)

ISSUE(S) AND HOLDING

1. Does the Constitution protect a prisoner’s right to confidentiality in her HIV status and her status as a transgender person? Yes.
2. Was the corrections officer shielded from liability by the doctrine of qualified immunity for the claim that he subjected Plaintiff to cruel and unusual punishment? No.

DECISION AND REASONING

1. The Court relied on its decision in *Doe v. City of New York* 15 F.3d 264 (2d Cir.1994), which held that “[i]ndividuals who are infected with the HIV virus clearly possess a constitutional right to privacy regarding their condition.» The decision established that few matters are as personal as the status of one’s health and thus deserving of protection under the constitutional right to confidentiality.

The Court held that an individual who reveals that she is HIV-positive “potentially exposes herself not to understanding or compassion but to discrimination and intolerance . . . necessitating the extension of the right to confidentiality over such information.” The Court reasoned that individuals suffering from gender identity disorder and those who have undergone hormone therapy or sex reassignment surgery face similar discrimination and intolerance. It thus held that “individuals who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.”

The Court next considered whether the right to confidentiality exists in prisons. It held that, generally speaking, prisoners maintain those rights that are “not inconsistent with [their] status as. . . prisoner[s] or with the legitimate penological objectives of the corrections system.» However, it concluded that “the gratuitous disclosure of an inmate’s confidential medical information as humor or gossip—the apparent circumstance of the disclosure in this case—is not reasonably related to a legitimate penological interest, and it therefore violates the inmate’s constitutional right to privacy.” The Court held, however, that because this right was not clearly established at the time of the incident, the corrections officer was entitled to qualified immunity.

Finally, the Court held that it was difficult to imagine circumstances under which the disclosure of a prisoner’s status as a transgender person would serve legitimate penological interests. Moreover, it stated that such disclosure might subject the prisoner to violence at the hands of other inmates, particularly given “the sexually charged atmosphere of most prison settings.”

2. In order to overcome an assertion of qualified immunity, the Plaintiff must demonstrate that “at the time of the violation, the contours of the allegedly violated right were ‘sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.” The Court held that it was clear that a prison official’s failure, as a result of deliberate indifference, to protect an inmate from violence perpetrated by other inmates could constitute a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. It further held that it was “obvious . . . that under certain circumstances the disclosure of an inmate’s HIV-positive status and—perhaps more so—her transsexualism could place that inmate in harm’s way.” The doctrine of qualified immunity thus did not protect the corrections officer from liability for violation of the Plaintiff’s Eighth Amendment right to be free from cruel and unusual punishment as a result of his unnecessary disclosure of her status as an HIV-positive, transgender person.

CASE NAME	<i>M.T. v. J.T.</i>
YEAR	1976
COUNTRY	United States
CITATION	140 N.J. Super. 77 (1976)
COURT/BODY	Superior Court of New Jersey, Appellate Division.
SCOPE OF AUTHORITY	An intermediate state appellate court that hears appeals from state trial courts. Decisions may be appealed to the Supreme Court of New Jersey.
FACTS AND LAW	<p>The Plaintiff in the lower court filing, M.T., was a post-operative transgender female. She filed a complaint for support and maintenance against her husband in Domestic Relations Court. The Defendant, her husband, claimed she was a man and therefore their marriage was void. The trial judge determined that the Plaintiff was a female and ordered the husband to pay support. The husband appealed the decision.</p> <p>The Court summarized testimony from the trial court establishing that the Plaintiff was born a male, but had felt since she was a child that she was a female. She later underwent hormone treatment and sex reassignment surgery, with the cooperation of the Defendant, had her birth certificate changed and married the Defendant. The Defendant later left the Plaintiff and failed to provide her support.</p>
ISSUE(S) AND HOLDING	Was the marriage between the Plaintiff, a post-operative transgender female, and the Defendant, a man, valid under the law? Yes.
DECISION AND REASONING	<p>The Court noted that a lawful marriage “requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female.” This was undisputed by the parties.</p> <p>The Court next considered the English case <i>Corbett v. Corbett</i>, 2 All E.R. 33 (P.D.A. 1970). It noted that <i>Corbett</i> was the only reported decision considering the validity of a marriage involving a post-operative transgender person. The court in <i>Corbett</i> declined to recognize as valid the marriage between a post-operative female and a man. It held that “marriage is a relationship which depends on sex and not on gender” and that only three physiological tests should be used to determine an individual’s sex—the chromosomal, gonadal or genital test.</p> <p>The Court, however, rejected the reasoning in <i>Corbett</i> and held that “there are several criteria or standards which may be relevant in determining the sex of an individual.” It held that “where sex differentiation is required or accepted, such as for public records, service in the branches of the armed forces, participation in certain regulated sports activities, eligibility for types of employment and the like, other tests in addition to genitalia may also be important.” The Court rejected the contention that “sex in its biological sense should be the exclusive standard.” The Court declared that “a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character.” It thus held for “marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person’s gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards.”</p>

**DECISION AND
REASONING**
(continued)

The Court declared that the following rule applies to legal matters involving the sex of transgender persons:

“Where there is disharmony between the psychological sex and the anatomical sex, the social sex or gender of the individual will be determined by the anatomical sex. Where, however, with or without medical intervention, the psychological sex and the anatomical sex are harmonized, then the social sex or gender of the individual should be made to conform to the harmonized status of the individual and, if such conformity requires changes of a statistical nature, then such changes should be made.”

The Court stated that such “recognition will promote the individual’s quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality.”

The Court thus affirmed the lower court’s decision, holding that the marriage between the Plaintiff and the Defendant was lawful and the Defendant was obligated to support the Plaintiff as his wife.

2.5 RIGHTS OF SEX WORKERS

CASE NAME	<i>Canada v. Bedford</i>
YEAR	2012
COUNTRY	Canada
CITATION	2012 O.N.C.A. 186 (Ct. App. Ontario); 109 O.R. 3d 1 (Can. Ont. C.A.)
COURT/BODY	Court of Appeal for Ontario
SCOPE OF AUTHORITY	The Court hears civil and criminal appeals from decisions of Ontario's two trial courts: the Superior Court of Justice and the Ontario Court of Justice. Decisions may be appealed to the Supreme Court of Canada.
FACTS AND LAW	<p>Three women who were currently working or had in the past worked as sex workers, including the executive director of Sex Professionals of Canada, sought a declaration that certain provisions of the Criminal Code of Canada were unconstitutional.</p> <p>Sex work was legal in Canada, but Parliament indirectly restricted the practice by criminalizing certain related activities, including operating “common bawdy-houses,” “living on the avails of prostitution,” and “communicating in public for the purposes of engaging in prostitution or of obtaining the sexual services of a prostitute.”</p> <p>Section 7 of the Canadian Charter of Rights and Freedoms guarantees the right to life, liberty and security of the person, and “the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Section 2(b) protects freedom of expression.</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none"> 1. Do criminal provisions prohibiting the operation of “common bawdy-houses” and “living on the avails of prostitution” violate the right to liberty and security of the person in the Canadian Charter of Rights and Freedoms? Yes. 2. Do criminal provisions prohibiting communication in public for the purposes of “engaging in prostitution or of obtaining the sexual services of a prostitute” violate the right to freedom of expression protected in the Canadian Charter of Rights and Freedoms? No.
DECISION AND REASONING	<ol style="list-style-type: none"> 1. The Court held that the statutory provision criminalizing the operation of bawdy-houses violated the Canadian Charter of Rights and Freedoms (the Charter). The declaration of invalidity was suspended for 12 months to give Parliament an opportunity to draft a provision that complied with the Charter, should it choose to do so. <p>The provision prohibiting “living on the avails of prostitution” was also held to violate the Charter. The Court therefore read in words of limitation to clarify that the prohibition against “living on the avails of prostitution” applied only to those who do so in “circumstances of exploitation.”</p> <p>The bawdy-house provision prohibited a sex worker from doing “in-call” work (engaging in commercial sex) from a fixed indoor location such as a commercial brothel. The prohibition against “living on the avails of prostitution” criminalized exploitive “pimping” but also prevented sex workers from paying bodyguards for protection. The Court held that these provisions increased the risk of physical violence to sex workers and thus infringed their constitutional right to security of the person. It further held that such a deprivation did not accord with “principles of fundamental justice.”</p>

Canada v. Bedford (continued)

DECISION AND REASONING
(continued)

The Court explained that the practical effect of these provisions was that the only way to sell sex in Canada without risking criminal sanction was to engage in “out-call” work, which required sex workers to meet clients at outside locations, such as a hotel room or the client’s home.

2. The Court held that the criminal provision prohibiting communicating in public for purposes of “engaging in prostitution or of obtaining the sexual services of a prostitute” did not violate the right to freedom of expression in the Charter. The Court held that the prohibition was supported by a legitimate legislative objective in that street sex work was “associated with serious criminal conduct including drug possession, drug trafficking, public intoxication and organized crime.”

CASE NAME	<i>Tara v. State</i>
YEAR	2012
COUNTRY	India
CITATION	W.P. (CRL) 296/2012
COURT/BODY	High Court of New Delhi
SCOPE OF AUTHORITY	Highest court and final court of appeal of the Union Territory of Delhi, including the Indian capital New Delhi. Decisions may be appealed to the Supreme Court of India.
FACTS AND LAW	<p>Police from the Indian state of Andhra Pradesh raided a premise in Delhi in order to “rescue” a number of sex workers. Seventy-two women were detained. Minor girls were processed according to the Juvenile Justice (Care and Protection of Children) Act, 2000. Forty-one adult women were released after a hearing before the Metropolitan Magistrate and the police were granted permission, pursuant to the Immoral Traffic (Prevention) Act, 1956, to transport 15 women back to Andhra Pradesh to face a magistrate there. The women opposed the transit order and stated that they wanted to remain in Delhi. The women were subsequently held in temporary detention, against their will, awaiting transport.</p> <p>The women petitioned the Court to quash the transport order. The Court issued an interim order suspending the execution of the order. It later issued notice to the National Commission for Women and the Delhi Commission for Women to “seek their assistance and explore the possibility of rehabilitation of the petitioners.”</p> <p>Counsel for the women argued that the police had “virtually uprooted the petitioners from the places where they lived in Delhi and subjected them to forcible transportation against their consent.” The Court noted that many of the women had children who were in school in Delhi. Counsel contended that this violated their rights under articles 14 (equality before the law) and 21 (protection of life and liberty) of the Constitution of India.</p>
ISSUE(S) AND HOLDING	Was the transit order directing the police to remove the women to Andhra Pradesh and the women’s subsequent detention lawful? No.

Tara v. State (continued)

DECISION AND REASONING

The Court first held that the Magistrate had not acted in accordance with the Immoral Traffic (Prevention) Act of 1956 and thus did not have authority to exercise his power of transit remand.

The Court next held that the “coercive manner” in which the police dealt with the women infringed upon their rights under articles 14 and 21 of the Constitution. In reference to the women’s identity as sex workers, the Court held that the “mandate of these guarantees is constant and unaltered in content without any regard to the general or any of the other traditionally perceived differences that human beings see amongst themselves.” It further held that the “order to the extent it virtually ordered transportation, without consent, of petitioners amounts to treating them as less than human beings and belittling their dignity.”

The Court noted that the Supreme Court was at the same time hearing a case involving the rehabilitation of sex workers. The Court approved of schemes to provide sex workers access to rehabilitation services. However, it held that the continued detention of the women until such services were available was “both unfeasible and unpragmatic.” Ultimately, the Court held that the continued detention of the women was “contrary to law.”

CASE NAME	<i>Karmaskar v. State of West Bengal</i>
YEAR	2011
COUNTRY	India
CITATION	Criminal Appeal No. 135 of 2010
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest judicial forum in the country and final court of appeal for all criminal, civil and constitutional matters.
FACTS AND LAW	In 1999, Budhadev Karmaskar was convicted of murdering a sex worker in Calcutta. In 2011, while dismissing the appeal and affirming the conviction, the Supreme Court <i>suo moto</i> converted the appeal into a public interest litigation to address the rehabilitation of sex workers. It subsequently issued a number of orders addressing sex workers. The litigation is ongoing as of April 2013.
ISSUE(S) AND HOLDING	N/A
DECISION AND REASONING	The Court found that sex workers are “entitled to a life of dignity” under article 21 of the Constitution of India. It declared that women entered sex work because of “abject poverty” and that they would pursue a different livelihood if they received technical or vocational training. In addition, the Court noted that sex workers face increased risks of exposure to sexually transmitted diseases. The Court thus ordered that the central and the state governments, through social welfare boards, “should prepare schemes for rehabilitation [of sex workers] all over the country.”

Karmaskar v. State of West Bengal (continued)

DECISION AND REASONING *(continued)*

The Court convened a panel to examine the practice of sex work and to advise and assist the Court in its adjudication of the issue. It held that the following issues may be examined by the panel: “(1) prevention of trafficking, (2) rehabilitation of sex workers who wish to leave sex work, and (3) conditions conducive for sex workers who wish to continue working as sex workers with dignity.” At the request of the Government, the Court modified the third issue to read: “(3) conditions conducive for sex workers to live with dignity in accordance with the provisions of Article 21 of the Constitution.” The Court directed the secretaries of the social welfare departments of the central government and state governments to meet with the panel to discuss the preparation of rehabilitation schemes.

The Court stated that it wanted to “educate the public and inform them that sex workers are not bad persons.” It asserted that “society should not look down upon . . . sex workers but should have sympathy with them.” The Court emphasized that rehabilitation schemes must “not be coercive in any manner.” It held that they must instead be voluntary.

The Court noted that an existing rehabilitation scheme only provided services for “rescued” or trafficked women, but did not serve sex workers who want to leave the sex trade voluntarily. The Court held that a “proper effective scheme” should be prepared for such women as well. It further noted that the central government scheme had conditioned access to technical training on sex workers staying in a “corrective home.” The Court held that “no such condition should be imposed as many sex workers are reluctant to stay in these corrective homes which they consider as virtual prison.”

In accordance with recommendations from the panel, the Court requested government authorities to ensure that sex workers do not face difficulties in accessing identity documents, such as ration and voter identity cards, and that their children are not discriminated against in admissions to government and government-sponsored schools. The Court also suggested that free legal services be provided to sex workers through the State Legal Services Authorities.

CASE NAME	<i>Kylie v. Commission for Conciliation, Mediation and Arbitration</i>
YEAR	2010
COUNTRY	South Africa
CITATION	2010 (4) SA 383 (LAC)
COURT/BODY	Labour Appeal Court
SCOPE OF AUTHORITY	The Court hears appeals from the Labour Court and has a status similar to that of the Supreme Court of Appeal. Decisions may only be appealed when a constitutional issue is involved to the Supreme Court of Appeal, and then the Constitutional Court.
FACTS AND LAW	Kylie was a sex worker who was employed in a massage parlour. She was terminated from her employment and brought a challenge before the South African Commission for Conciliation, Mediation and Arbitration.

Kylie v. Commission for Conciliation, Mediation and Arbitration (continued)

**FACTS AND LAW
(continued)**

Before the arbitration commenced, a Commissioner held that the Commission did not have jurisdiction to arbitrate Kylie's claim of unfair dismissal because sex work was unlawful in South Africa. Kylie sought judicial review of this ruling in the Labour Court.

The Labour Court held that because sex work was illegal, Kylie's employment contract was void and thus unenforceable. The Court held that although section 23 of the Constitution of South Africa provides that "everyone has the right to fair labour practices," it did not protect a person who engaged in illegal employment. In addition, the Court could not provide the remedy of reinstatement, as that would amount to ordering the employer to perform an illegal act.

Kylie appealed the ruling to the Labour Appeals Court.

**ISSUE(S) AND
HOLDING**

Does section 23 of the Constitution of South Africa, which provides that everyone has the right to fair labour practices, afford protection to sex workers, even though sex work is prohibited by law? Yes.

**DECISION AND
REASONING**

The Court held that the constitutional right to fair labour practices vests in everyone, even if no formal contract of employment is involved, and even if the work is prohibited by law. The Commission for Conciliation, Mediation and Arbitration thus had jurisdiction to determine Kylie's dispute.

The Court held that previous rulings support a generous approach to the range of beneficiaries protected by section 23. Prior rulings also support the right of sex workers to be treated with dignity, not only by their customers, but also by their employers. The Court noted that the Constitution's commitment to freedom, equality and dignity "reflects the long history of brutal exploitation of the politically weak, economically vulnerable and socially exploited during three hundred years of racist and sexist rule."

The Court further held that while reinstatement may not be an appropriate remedy given the illegality of sex work, Kylie, if she prevails in the Labour Court, could be awarded monetary compensation for a procedurally unfair dismissal as a *solatium* for the loss of her right to a fair procedure.

The Court declared that since sex workers are to be considered employees for the purposes of labour legislation and the Constitution, they could, conceivably, be entitled to form and join trade unions. However, it noted that collective agreements concluded between brothels and sex worker unions that amount to furtherance of the commission of a crime would not be enforceable.

CASE NAME	<i>Decision on the Constitutionality of the Social Order Maintenance Act</i>
YEAR	2009
COUNTRY	Taiwan
CITATION	Judicial Yuan of the Republic of China Interpretation No. 666.
COURT/BODY	Constitutional Court
SCOPE OF AUTHORITY	Highest court for issues of constitutional law in Taiwan, charged with interpreting the Constitution and unifying the interpretation of laws and orders.

Decision on the Constitutionality of the Social Order Maintenance Act (continued)

FACTS AND LAW	Article 80, section 1, subsection 1 of the Social Order Maintenance Act (the Act) provided that any person who engaged in sexual conduct or cohabitation with intent for financial gain was punishable by detention not more than three days or by a fine not more than NT\$ 30,000. The stated legislative purpose of the provision was to maintain and protect public health and social morals. Under the provision, only those with intent to gain financially from sexual conduct, i.e., sex workers, were subject to penalties. Those who provided consideration for sexual conduct, i.e., the clients, were not subject to penalty.
ISSUE(S) AND HOLDING	Is the provision of the Social Order Maintenance Act that stipulates administrative penalties for those who provide sex for financial gain constitutional? No.
DECISION AND REASONING	<p>The Court held that the right to equality in article 7 of the Constitution of Taiwan was not intended only to provide a “mechanical,” formal equality. Rather, article 7 is meant to ensure “substantive equal status under the law.” Therefore when a law that imposes administrative penalties results in differential treatment, it must have a “substantive nexus with the legislative purpose in order not to violate the principle of equality.”</p> <p>The Court held that the “subjective intent for financial gains” requirement resulted in differential treatment under the law. The Court stated that the prohibited sexual transactions occur through the “joint acts” of both the sex worker and her client, and thus the parties to the transaction should be treated equally under the law. Moreover, the Court noted that because most sex workers are women, the law “virtually amounts to a control that only target[s] and punish[es]” women. It added that for many socially and economically disadvantaged women, the law further aggravated their already difficult situations. The Court thus held that the law did not have a substantive nexus with the legislative purpose and violated the constitutional right to equality.</p> <p>The Court further held that in order to realize the legislative purpose of the Act—to maintain citizens’ health as well as public order and morality—the Government “may implement different kinds of management or counselling measures” for sex workers. Such measures could include physical examinations, safe-sex education, job training and/or career counselling.</p> <p>Finally, the Court held that while the Government must provide the “most possible protection and assistance to . . . socio-economically disadvantaged people,” it may also enact “reasonable and precise” regulations to prevent sexual transactions from negatively impacting important public interests.</p>

CASE NAME	<i>BSHER v. Bangladesh</i>
YEAR	2000
COUNTRY	Bangladesh
CITATION	53 D.L.R. 1 (2001)
COURT/BODY	High Court, Special Original Jurisdiction

BSHER v. Bangladesh (continued)

SCOPE OF AUTHORITY	The High Court is a division of the Supreme Court, but it is an independent court with both appellate and original jurisdiction. It hears appeals from orders, decrees and judgments of subordinate courts and tribunals. Its decisions may be appealed to the Supreme Court of Bangladesh, Appellate Division.
FACTS AND LAW	<p>The Petitioners were a group of human rights organizations engaged in protecting sex workers. They contended that the Government of Bangladesh regularly took measures to harass sex workers and their children. Such harassment included evicting women from the peaceful occupation of their homes, physically and verbally abusing them, and placing them into vagrant homes. The Petitioners focused on an incident when police allegedly roused a large number of sex workers from their place of residence and placed them in vagrant homes. The Petitioners asserted that these actions violated the Constitution of Bangladesh and did not conform with statutes on vagrancy.</p> <p>The Constitution of Bangladesh protects the right to life and livelihood, personal liberty, equal treatment and non-discrimination, and the right to freedom of movement. The Constitution further guarantees fundamental human rights and freedoms and respect for the human dignity and worth of the human person.</p> <p>Sex work is not illegal in Bangladesh, but the law criminalizes the keeping of brothels; living on the earnings of a sex worker; importing a female for purposes of commercial sex; and causing, encouraging or abetting the seduction or sale of sexual services by a minor girl.</p> <p>The Vagrancy Act of 1943 provides that a police officer may require any person who is apparently a vagrant to accompany the officer to appear before a magistrate, who will make a determination of vagrancy.</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none">1. Did the police violate the Constitution of Bangladesh in evicting sex workers from their homes, having them declared vagrants and placing them in vagrant homes? Yes.2. Did police act in accordance with the Vagrancy Act of 1943 in evicting sex workers from their homes, having them declared vagrants and placing them in vagrant homes? No.
DECISION AND REASONING	<ol style="list-style-type: none">1. The Court held that the actions of the police violated the sex workers' constitutional rights to life, livelihood, dignity and worth of the human person. The Court ordered that any sex worker remaining in the vagrant home be released.2. The Court held that merely roaming around in an area, without "asking for alms," does not constitute vagrancy under the Vagrancy Act of 1943.

CASE NAME	<i>Public at Large v. State of Maharashtra</i>
YEAR	1996
COUNTRY	India
CITATION	W.P. No. 112 of 1996
COURT/BODY	High Court of Bombay

<i>Public at Large v. State of Maharashtra (continued)</i>	
SCOPE OF AUTHORITY	Highest court and final court of appeal of the states of Maharashtra and Goa and the Union Territories of Daman and Diu, <i>and Dadra and Nagar Haveli</i> . <i>Decisions may be appealed to the Supreme Court of India.</i>
FACTS AND LAW	<p>The Court took notice <i>suo moto</i> of a newspaper article that “disclosed a very shocking and alarming state of affairs regarding sex workers operating in the city of Mumbai.” Among other things, the article indicated that minor girls were unlawfully confined and forced into sex work. Based on this article, the Court passed an order directing the State of Maharashtra, the Commissioner of Police of Mumbai and the Municipal Commissioner for the Municipal Corporation of Greater Bombay to show cause why appropriate actions under sections 366 and 366-A of the Indian Penal Code and sections 5 and 6 of the Suppression of Immoral Traffic in Woman and Girls Act, 1956 were not being taken.</p> <p>The Court noted that rates of HIV infection among groups of sex workers in the city were as high as 70 percent. The Court also discussed the obligation of the Government to provide for the rehabilitation of sex workers, to prevent the illegal trafficking and confinement of women and girls for the purposes of the sex trade, and to address the problem of HIV among sex workers.</p>
ISSUE(S) AND HOLDING	May sex workers be tested for HIV against their will? No.
DECISION AND REASONING	<p>The Court noted existing contentions that the forcible testing of sex workers was against national policy and in violation of the right to life and personal liberty in article 21 of the Constitution. The Court also noted a statement of the Secretary-General of the United Nation declaring that the “[w]orld should make war against AIDS, and not against people with AIDS.»</p> <p>The Court held that mandatory testing of sex workers for HIV was not desirable. Among other things, it directed the state government to “[r]egularly carry out AIDS awareness programme[s] in the areas where sex workers normally operate.”</p>

CASE NAME	<i>R. v. Skinner</i> <i>Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i>
YEAR	1990
COUNTRY	Canada
CITATION	[1990] 1 S.C.R. 1235 and [1990] 1 S.C.R. 1123
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court and final court of appeal in the country. The Court’s decisions are the ultimate expression and application of Canadian law and are binding upon all lower courts of Canada.
FACTS AND LAW	In <i>R. v. Skinner</i> , the Respondent, a prospective client of a sex worker, was charged with “communicating in a public place for the purpose of obtaining the sexual services of a prostitute” under section 195.1(1)(c) of the Criminal Code. The Respondent was convicted at trial, but the Court of

R. v. Skinner (continued)

**FACTS AND LAW
(continued)**

Appeal set the verdict aside. The Court of Appeal held that section 195.1(1)(c) infringed the freedom of expression under section 2(b) and could not be justified under section 1 of the Canadian Charter of Rights and Freedoms (the Charter). It also suggested that the provision infringed the freedom to associate under section 2(d) of the Charter. This appeal followed.

In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, the Lieutenant Governor in Council of Manitoba referred to the Court of Appeal of Manitoba questions as to whether section 193 or section 195.1(1)(c) of the Criminal Code, or a combination of both, violated sections 2(b) or 7 of the Charter. The Court heard the case on appeal. This summary focuses only on the Court's consideration of section 195.1(1)(c).

**ISSUE(S) AND
HOLDING**

1. Does the criminal prohibition on “communicating in a public place for the purpose of obtaining the sexual services of a prostitute” infringe the freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms? No
2. Does the criminal prohibition on “communicating in a public place for the purpose of obtaining the sexual services of a prostitute” infringe the freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms? Yes.
3. Is the infringement upon the freedom of expression justified under section 1 of the Canadian Charter of Rights and Freedoms, which guarantees the rights and freedoms in the Charter “subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”? Yes.
4. Does the criminal prohibition on «communicating in a public place for the purpose of obtaining the sexual services of a prostitute» infringe the right to life, liberty and security of person under section 7 of the Canadian Charter of Rights and Freedoms? No.

**DECISION AND
REASONING**

1. In *R. v. Skinner*, the Court held that section 195.1(1)(c) of the Criminal Code proscribed “expressive activity of a commercial nature,” not conduct of an “associational nature.” It stated that the section did not directly proscribe an agreement between two individuals for the exchange of sex for money or sexual activity between consenting individuals. The fact that the section limited the possibility of commercial activities or agreements did not constitute a prima facie violation of the freedom of association.
2. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, the Court held that “the scope of freedom of expression does extend to the activity of communication for the purpose of engaging in prostitution.” It did not provide any further reasoning.
3. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, the Court stated that the purpose of section 195.1(1)(c) was “to address solicitation in public places and, to that end . . . to eradicate the various forms of social nuisance arising from the public display of the sale of sex.” It stated that the prohibition responded to the “concerns of homeowners, businesses, and the residents of urban neighbourhoods,” as public solicitation of sex work is “closely associated with street congestion and noise, oral harassment of nonparticipants and general detrimental effects on passersby or bystanders, especially children.” The Court rejected a broader interpretation of the section, which contended it was meant “to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution.” Nonetheless, the Court held that the more narrow purpose constituted a “valid legislative aim,” as “the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern.”

**DECISION AND
REASONING**
(continued)

The Court next considered the issue of proportionality; that is, whether section 195.1(1)(c) was “appropriately tailored” to meet its objective. The Court held that the section was appropriately tailored to meet its objective. As to the nature of the expression at issue, the Court stated that it could “hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.” The Court held that the objective of the section was not simply to curb street nuisances; rather it extended to “the general curtailment of visible solicitation for the purposes of prostitution.” The Court also noted that the measure need not be a “perfect scheme,” but only an “appropriately and carefully” tailored one.

4. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, the Court held that to violate section 7 of the Charter, section 195.1(1)(c) must (1) infringe the right to life, liberty and security of person and (2) violate the principles of fundamental justice. As to the first prong, the Court held that there was “a clear infringement of liberty . . . given the possibility of imprisonment.” As to the second, the Court first held that the section was not so vague that its meaning was “impossible to discern.” It further held that Parliament was not precluded “from using the criminal law to express society’s disapprobation of street solicitation” simply because sex work was not a criminal act under Canadian law. The Court thus held that section 195.1(1)(c) was “not so unfair as to violate the principles of justice.”

2.6 RIGHTS OF PEOPLE WHO USE DRUGS

CASE NAME	<i>Canada (Attorney-General) v. PHS Community Services</i>
YEAR	2011
COUNTRY	Canada
CITATION	[2011] 3 S.C.R. 134; [2011] S.C.C. 44
COURT/BODY	Supreme Court
SCOPE OF AUTHORITY	Highest court and final court of appeal in the country. The Court's decisions are the ultimate expression and application of Canadian law and are binding upon all lower courts of Canada.
FACTS AND LAW	<p>Insite was a medical facility that supervised intravenous drug use. It was established in response to increasing intravenous drug use and a rise in HIV and hepatitis C infections among the population of the downtown eastside (DTES) area of Vancouver. In 2003, pursuant to section 56 of the Controlled Drug and Substances Act (CDSA), which allowed the Minister of Health to grant discretionary exemptions for medical or scientific purposes, the Minister granted Insite an exemption from section 4(1) and 5(1) of the CDSA (prohibiting possession and trafficking of controlled substances). Insite's programmes were proven to be effective at reducing the prevalence of HIV and hepatitis C and at saving lives. The programmes were supported by local and provincial governments. Temporary exemptions were again granted in 2006 and 2007. In 2008, the Minister of Health indicated that he would not grant an exemption to Insite.</p> <p>Prior to the expiration of the exemption, two individual Insite clients and PHS (a non-profit organization that supervised Insite's operations) brought an action to maintain Insite's provision of services, arguing that sections 4(1) and 5(1) of the CDSA were constitutionally inapplicable to Insite and that by depriving Insite clients of health services, their application would violate the rights to life and security in section 7 of the Canadian Charter of Rights and Freedoms (<i>the Charter</i>). Additionally, sections 4(1) and 5(1) of the CDSA would violate the section 7 Charter right to liberty of Insite staff, as they would be subject to criminal penalty.</p> <p>The trial judge found addiction to be an illness and that medical supervision reduced mortality and morbidity associated with drug injection. The trial judge further determined that the rights of Insite clients and employees under section 7 of the Charter were limited by the application of sections 4(1) and 5(1) of the CDSA and granted Insite a constitutional exemption from their application. The trial decision was affirmed on appeal. The Attorney-General appealed to the Supreme Court.</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none"> 1. Were sections 4(1) and 5(1) of the Controlled Drug and Substances Act, prohibiting possession and trafficking of controlled substances, constitutionally applicable to Insite? Yes. 2. Did sections 4(1) and 5(1) of the Controlled Drug and Substances Act, prohibiting possession and trafficking of controlled substances, violate the right to life, liberty and security of the person under section 7 of the Canadian Charter of Rights and Freedoms? No. 3. Did the Minister's failure to grant Insite an exemption from section 4(1), which criminalized possession of controlled substances, violate the right to life, liberty and security of the person under section 7 of the Canadian Charter of Rights and Freedoms? Yes.

DECISION AND REASONING

1. On the first question, the Court determined that sections 4(1) and 5(1) were applicable to Insite because they were validly enacted under the federal criminal power, and delivery of health care services was not part of the “protected core of the provincial power over health care.” In the Court’s opinion, the diversity of both criminal and health care activities meant that the Court should narrowly construe areas of exclusive jurisdiction between the federal and state governments, both to avoid creating “legal vacuums” and because of the difficulty of drawing brightline distinctions between criminal and health-related regulation.
2. On the second question, the Court held that sections 4(1) and 5(1) did not in themselves violate the Charter. It determined that section 5(1) of the CDSA, which prohibited trafficking of controlled substances, did not apply to Insite at all, because Insite did not provide its clients with narcotics. Section 4(1), which criminalized possession of controlled substances, did apply to Insite, and thus engaged the rights to life, liberty and security of the person in section 7 of the Charter of both Insite clients and employees, because the prohibition on possession meant that Insite clients could not access potentially life-saving services. The Court also rejected an argument that it was the intravenous drug use by Insite clients and not the CDSA that led to this deprivation. However, the Court found that the deprivation was in accordance with fundamental justice, because the ability of the Minister to grant exemptions from the law prevented it from applying where it would be arbitrary, overbroad or have a grossly disproportionate effect. As such, the laws themselves did not violate the Charter.
3. The Court held that the Minister’s failure to grant Insite *an exemption to section 4(1) violated the Charter because it would prevent clients from accessing health services provided by Insite and could penalize Insite staff.* The right to life, liberty and security of the person under section 7 Charter would thus be limited. The Court further held that this limitation was not in accordance with the principles of fundamental justice because it was arbitrary and grossly disproportionate. In this regard, it noted that Insite’s programmes were known to be effective and to save lives, and its operation furthered rather than undermined the CDSA’s aims of promoting public health. The Minister was fully aware of this, yet still refused the exemption, at great cost to people who inject drugs.

The refusal to grant an exemption could also not be justified under section 1 of the Charter, as necessary to preserve the rule of law, because Insite had been shown to both save lives and not to undermine the legitimate crime prevention efforts of the Government. This finding was the basis for the Court’s holding that the Minister’s refusal violated section 7 of the Charter and did not open the way for others to flout drug laws.

The appeal was dismissed and the Court ordered the Minister to grant Insite an exemption under section 56 of the CDSA.

The Court also rejected a cross-appeal by a co-Respondent, which challenged the application of section 4(1)’s prohibition on possession for all people who use drugs. It held that such a case was clearly distinguishable from Insite’s claim in its factual foundations.

CASE NAME	<i>New Directions Treatment Services v. City of Reading</i>
YEAR	2007
COUNTRY	United States
CITATION	490 F.3d 293 (2007)
COURT/BODY	United States Court of Appeals, Third Circuit
SCOPE OF AUTHORITY	The Court has appellate jurisdiction over decisions of the district courts within its circuit and decisions of federal administrative agencies. Its judgments are binding in the following US states and territory: Delaware, New Jersey, Pennsylvania and the Virgin Islands. Decisions may be appealed to the Supreme Court of the United States.
FACTS AND LAW	<p>New Directions Treatment Services (New Directions, or the Petitioner) was a reputable, long-standing provider of methadone maintenance treatment. It sought to locate a new clinic in the City of Reading (the City). A state zoning statute provided that methadone clinics could not be established or operated within 500 feet of, among other things, an existing school, public playground, public park, residential housing area, child-care facility or church, unless the governing body of the municipality, by majority vote, voted in favour of issuing a permit. The proposed location for the New Directions new clinic fell within the purview of the statute and the City did not vote in favour of issuing the permit.</p> <p>New Directions and individual methadone patients brought suit on constitutional and statutory grounds, raising both facial and as-applied challenges to the law. They alleged that the zoning statute, on its face and as applied, violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act, both of which prohibit discrimination on the basis of a disability, and the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.</p>
ISSUE(S) AND HOLDING	<ol style="list-style-type: none"> 1. Did the zoning statute, which prohibited the establishment and operation of methadone clinics within 500 feet from a list of enumerated premises, violate the Americans with Disabilities Act and the Rehabilitation Act? Yes. 2. Did the City violate the Equal Protection Clause of the Fourteenth Amendment to the US Constitution in voting to deny a permit to the methadone clinic? The Court remanded the issue to the trial court, as it found that the Petitioners could prove a violation.
DECISION AND REASONING	<ol style="list-style-type: none"> 1. The Court held that a law that “singles out methadone clinics, and thereby methadone patients, for different treatment” is facially discriminatory under the ADA and the Rehabilitation Act. The Court cited several decisions from federal appellate courts that addressed the same issue. It notes that “[f]ew aspects of a handicap give rise to the same level of public fear and misapprehension, as the challenges facing recovering drug addicts.» <p>The Court then considered whether New Directions’ clients posed a “significant risk to the health or safety of others,” pursuant to the Rehabilitation Act, also referred to as a “direct threat” under the ADA, which would permit an exception to the prohibition on discrimination under the ADA. The Court held that the “purported risk must be substantial, not speculative or remote” and that “methadone patients, as a class, do not pose a significant risk.” It noted that the record demonstrated “no link between methadone clinics and increased crime” and that “less than six percent of patients enrolled for more than six months” in methadone maintenance treatment tested positive for illegal drugs at an existing New Directions clinic.</p>

New Directions Treatment Services v. City of Reading (continued)

DECISION AND REASONING
(continued)

Finally, the Court quoted the sponsor of the impugned zoning statute from the City Council. The sponsor had stated that the statute was meant to keep methadone clinics “away from people who have kept themselves clean and free of drugs and should not be confronted by this kind of a pollution in their community.” The Court held that this amounted to a “speculative, hypothetical, unsupported” statement at odds with the purpose of the Rehabilitation Act and the ADA, which is to protect disabled individuals «from deprivations based on prejudice, stereotypes, or unfounded fear.”

2. Legal classifications based on individuals with disabilities, including recovering heroin addicts, are reviewed under the rational basis test, which requires the statute to constitute a rational means to serve a legitimate end. The Court observed that the records of the City Council hearings contained “numerous statements by both public participants and council members expressing opposition based on what can only be characterized as generalized prejudice, stereotypes, and fear of [New Directions] clientele.” The Court also noted that the prior occupant of the proposed methadone clinic “treated recovering drug and alcohol addicts as well as mentally ill patients” and the record contained “no evidence of complaints from nearby residents.” The Court thus held that, on remand, the lower court could find that “no reasonably conceivable state of facts . . . could provide a rational basis» for the City’s denial of a permit to New Directions.

CASE NAME	<i>McGlinchey v. United Kingdom</i>
YEAR	2003
COUNTRY	United Kingdom
CITATION	Application No. 50390/99; (2003) 37 EHRR 41; [2003] All ER (D) 359 (Apr)
COURT/BODY	European Court of Human Rights
SCOPE OF AUTHORITY	The Court rules on individual or state applications alleging violations of the rights in the European Convention on Human Rights. Its decisions are binding on parties in each case.
FACTS AND LAW	<p>The Applicants were family members of an individual who used heroin and who died in prison. They alleged that the State violated article 3 (freedom from torture and inhuman or degrading treatment or punishment) and article 13 (right to effective remedy) of the European Convention on Human Rights (the Convention). They claimed the prisoner, Ms. McGlinchey, manifested heroine-withdrawal symptoms, but did not receive adequate medical attention. According to the applicants, this amounted to inhumane and degrading treatment.</p> <p>While in prison, McGlinchey, who had a long history of heroin use, vomited frequently and lost a significant amount of weight as she experienced symptoms associated with heroin withdrawal. She was seen by a doctor on three occasions and was eventually admitted to a hospital where she died.</p> <p>Her family alleged that McGlinchey suffered inhuman and degrading treatment prior to her death in violation of article 3 of the Convention. Her family also claimed to have suffered distress stemming from the knowledge of her inadequate medical treatment and that the United Kingdom had not provided an effective remedy in violation of article 13 of the Convention.</p>

McGlinchey v. United Kingdom (continued)

ISSUE(S) AND HOLDING	Did the United Kingdom violate articles 3 and 13 of the European Convention on Human Rights by failing to provide McGlinchey with adequate medical care while she experienced symptoms associated with heroin withdrawal in prison and by failing to provide an adequate remedy under law? Yes.
DECISION AND REASONING	The Court held that prison authorities failed to comply with their duty to provide McGlinchey with the medical care she required. Authorities improperly monitored McGlinchey's weight loss, which resulted in a gap in the monitoring of her condition and caused her further physical suffering and distress. The United Kingdom's treatment of McGlinchey thus amounted to inhuman and degrading treatment in violation of article 3 of the Convention. Moreover, since there was no compensation available under English law for the deceased's suffering and distress, Applicants had no possibility of obtaining damages, which violated article 13 of the Convention. Accordingly, the United Kingdom was ordered to pay non-pecuniary damages to the Applicants, as well as costs and expenses of the litigation.

CASE NAME	<i>Roe v. City of New York</i>
YEAR	2002
COUNTRY	United States
CITATION	232 F.Supp.2d 240 (2002)
COURT/BODY	United States District Court for the Southern District of New York
SCOPE OF AUTHORITY	The United States district courts are the trial courts of the federal court system. This court has jurisdiction over the counties of New York, Bronx, Westchester, Rockland, Putnam, Orange, Dutchess and Sullivan. Decisions may be appealed to the United States Court of Appeals for the Second Circuit, then to the Supreme Court of the United States.
FACTS AND LAW	<p>The Plaintiffs were injecting drug users and persons living with HIV. They sought declaratory and injunctive relief protecting their "right to legally possess used hypodermic needles or syringes . . . containing a drug residue in the course of participating in a state-authorized needle exchange program." They made factual allegations asserting the link between the use of non-sterile injecting equipment and the spread of HIV and the role of needle exchange programmes in "saving lives by preventing further transmission of disease." The Plaintiffs contended "it could not have been the intent of the Legislature to make needle exchange partially illegal by making the return and receipt of used needles and syringes, the heart of HIV-prevention, subject to criminal prosecution." The Defendants, including the City of New York and several police officers, sought to strike all references to "HIV/AIDS" in the complaint, but were denied because discussion of HIV and AIDS was "deemed central to the case."</p> <p>The Plaintiffs further alleged that the Defendants had a policy of unlawfully harassing, arresting and prosecuting injecting drug users who are registered participants in state-authorized needle exchange programmes. They claimed this violated their constitutional rights and reduced the effectiveness of the life-saving needle exchange programmes.</p>

Roe v. City of New York (continued)

ISSUE(S) AND HOLDING	Is it a criminal offense for an individual to possess a used needle or syringe containing drug residue if he or she is an authorized participant in a needle exchange programme? No.
DECISION AND REASONING	<p>The Court issued a declaratory judgment that “in the course of authorized participation in a needle exchange program . . . there is no criminal liability . . . for possession of a controlled substance based upon the drug residue remaining in a used needle or syringe.”</p> <p>The Court noted that under the New York Public Health Law (the Health Law) the legislature made it unlawful to possess a syringe “unless by prescription, by authorization from the Public Health Commissioner (the Commissioner), or under certain other conditions.” The Health Law also provided that the Commissioner, in consultation with other agencies, “shall develop a number of pilot projects to test the practicality and effectiveness of the distribution of syringes . . . for single use and which are non-reusable.» Pursuant to these provisions, the Commissioner promulgated regulations establishing needle exchange programmes for injecting drug users. In enacting the regulations, the Commissioner noted that such programs “reduce the risk for HIV infection and serve as access points for drug treatment, health and social services, and that research has shown that they do not increase the rate of injection drug use.”</p> <p>The Court also noted that the police department had issued orders directing officers not to arrest an individual in possession of both syringes and a needle exchange programme participation card if the only criminal charge was possession of a hypodermic instrument.</p> <p>The Court held that legislature’s intent was “made clear by its determination that the criminality of drug and needle possession is to be determined in accordance with the . . . Health Law.” It observed that it “would be bizarre to conclude that the Legislative intent was to permit the creation of needle exchange programs in order to remove dirty needles, while at the same time frustrating that goal by making the essential steps of participation criminal.” The Court further declared that the “unrebutted evidence presented indicates that criminalization makes HIV/AIDS reduction far less probable as addicts will simply reuse and share needles for fear of arrest.”</p>

CASE NAME	<i>Doe v. Bridgeport Police Department</i>
YEAR	2001
COUNTRY	United States
CITATION	198 F.R.D. 325
COURT/BODY	United States District Court for the District of Connecticut
SCOPE OF AUTHORITY	The United States district courts are the trial courts of the federal court system. This court has jurisdiction over the counties of Fairfield, Hartford, Litchfield, Middlesex, New Haven, New London, Tolland and Windham in the state of Connecticut. Decisions may be appealed to the Second Circuit Court of Appeals, then to the Supreme Court of the United States.
FACTS AND LAW	The Plaintiffs were injecting drug users and participants in a state-authorized needle exchange programme, and the Connecticut Harm Reduction Coalition, a non-governmental organization “organized to educate, train, and advocate for pragmatic public-health-oriented models of drug

Doe v. Bridgeport Police Department (continued)

FACTS AND LAW (continued)

use prevention, treatment, and policy.” They filed suit for violation of their rights to be free from illegal search and seizures, false arrest and malicious prosecution under the Fourth Amendment to the US Constitution.

Plaintiffs had received a temporary restraining order and then sought a preliminary injunction, which the Court converted into a request for a permanent injunction. The temporary restraining order stated that the police department was:

“[E]njoined and restrained from searching, stopping, arresting, punishing or penalizing in any way, or threatening to search, stop, arrest, punish or penalize in any way, any person who is a participant in the Bridgeport Syringe Exchange Program, based solely upon that person’s possession of up to thirty sets of injection equipment, whether sterile or previously-used and possibly containing a residue of drugs.”

The Connecticut legislature enacted a law that established needle exchange programmes throughout the state. The programmes take “previously-used, potentially-infectious syringes out of circulation and thereby reduce[] the spread of HIV and other blood-borne diseases by increasing the availability of injection equipment and of access to medical services and substance abuse treatment for injecting drug users.” The criminal drug enforcement law was amended to allow people in Connecticut to possess up to 30 syringes or needles.

The Plaintiffs claimed that, in spite of the law, police officers continued to harass, arrest and detain injecting drug users solely on the basis of their possession of hypodermic syringes or needles.

The Court granted the Plaintiff’s motion for class certification and the case was certified as a class action suit for the class of all injecting drug users, present and future, in Bridgeport, Connecticut. They argued that possession “of less than thirty-one hypodermic syringes or needles, whether sterile or previously used and whether empty or containing trace amounts of narcotic substances as residue” was legal under Connecticut law and they sought to permanently enjoin the police from searching, stopping, arresting or punishing any person on this basis.

ISSUE(S) AND HOLDING

Is it lawful for injecting drug users, whether participants in a needle exchange programme or not, to possess not only previously used hypodermic syringes and needles in quantities less than 31, but also trace amounts of narcotic substances contained therein as residue? Yes.

DECISION AND REASONING

The Court first considered whether it was appropriate for the Plaintiffs to seek a permanent injunction. It held that the Plaintiffs had demonstrated the requisite “irreparable harm” and “absence of an adequate remedy at law” because they had “already been detained and charged with possession of narcotics for the alleged residual quantities of drugs contained in previously-used needles” and because “the alleged systemic or ongoing constitutional violations . . . [could] not be remedied with a monetary award.”

The Court then considered the Connecticut needle and syringe exchange programme and relevant criminal drug enforcement statutes. The Court reviewed the legislative history of the law that mandated the establishment and operation of needle exchange programmes in the state. It also reviewed amendments made to the relevant criminal law provisions. The criminal provisions were amended explicitly to allow for the lawful possession of a certain number of hypodermic syringes and needles. The Court held that there was no criminal liability for possession of less than 31 new or previously used hypodermic syringes and needles for any injecting drug user,

Doe v. Bridgeport Police Department (continued)

DECISION AND REASONING
(continued)

regardless of whether the user was a participant in a needle exchange programme. Non-participants were held to be exempt from criminal liability, in part, because of the Court's interpretation of a provision that allowed injecting drug users to purchase sterile needles from pharmacies "without any system in place to require them to participate in the needle and syringe exchange programs."

The Court further held that there was no criminal liability for "possession of trace amounts of narcotic substances contained as residue within less than thirty-one previously-used hypodermic syringes and needles." It held that the law allowing possession of previously used needles "necessarily exempted" participants in exchange programmes from criminal liability for possession of trace amounts of narcotic substances contained as residue in these needles. To decide otherwise would "thwart the intended purpose of the . . . exchange program, i.e., to reduce the incidence and spread of HIV."

The Court further held that non-participants in needle exchange programmes were also exempt from criminal liability for possession of trace amounts of narcotic substances as residue within used needles. This was, in part, due to the provision allowing such users to lawfully purchase sterile needles from pharmacies. The Court also noted the statement of a legislator who established that amendments to the law were meant to "make clean injection equipment readily available to injecting drug users who are not inclined to use the needle and syringe exchange programs and who can afford to buy their own equipment, for the purpose of stopping the spread of HIV."

CASE NAME	<i>Strykiwsky v. Mills (in his capacity as Warden of Stony Mountain Institution)</i>
YEAR	2000
COUNTRY	Canada
CITATION	Court File no. T-389-00
COURT/BODY	Federal Court, Trial Division
SCOPE OF AUTHORITY	A national trial court that hears legal disputes arising in the federal domain, including claims against the Government of Canada, civil suits in federally regulated areas and challenges to the decisions of federal tribunals. Decisions may be appealed to the Federal Court of Appeal, then to the Supreme Court of Canada.
FACTS AND LAW	The Petitioner was a prisoner who was addicted to heroin. The Correctional Service of Canada had introduced the first phase of a methadone maintenance treatment (MMT) programme. The aim of the programme was to minimize "the adverse physical, psychological, social and criminal effects associated with using injectable 'opioids', such as heroin." During Phase I, MMT was only made available to individuals entering federal prisons who were already enrolled in a community MMT programme. Prisoners who did not meet this criterion could only receive treatment under the programme on an exceptional basis, if there was "urgent medical need" for the treatment. The Petitioner did not meet the criterion and applied to receive treatment on an exceptional basis, but was denied access to the programme. During Phase II of the programme, all prisoners were to be eligible to receive MMT, but this phase had not been implemented at the time of the hearing.

Strykiwsky v. Mills (in his capacity as Warden of Stony Mountain Institution) (continued)

FACTS AND LAW
(continued)

The Petitioner claimed the refusal to provide him MMT, and all prisoners medically eligible and wishing to receive the treatment, was in violation of section 86(1)(a) of the Corrections and Conditional Release Act, S.C. 1992, which provides that the Correctional Service of Canada “shall provide every inmate with (a) essential health care.” He also claimed violations of his and other prisoners’ rights under articles 7 (the right to life, liberty and security of the person); 12 (the right not to be subjected to any cruel and unusual treatment or punishment); and 15 (the right to equality) of the Canadian Charter of Rights and Freedoms.

In response to a motion for interim relief, an agreement was reached between the Petitioner and prisons authorities setting aside the original refusal to treat him on an exceptional basis. The Court, however, allowed the case to proceed because “treatment might conceivably be taken away from the [Petitioner] were he no longer in urgent medical need of it.”

ISSUE(S) AND HOLDING

Was the Correctional Service of Canada’s refusal to provide MMT to the Petitioner and other medically eligible prisoners lawful? The Court did not reach a decision because the case was settled out of court.

DECISION AND REASONING

The Correction Service of Canada agreed to expand access to MMT within federal prisons immediately after the Court heard the matter. It eliminated the requirements that prisoners must be enrolled in MMT upon entering prison or demonstrate exceptional circumstances, including dire need for immediate medical intervention.

III. SUPPLEMENTAL JUDGMENTS

3.1 RIGHTS OF PRISONERS AND DETAINEES

CASE NAME	<i>Dudley Lee v. Minister for Correctional Services</i>
YEAR	2012
COUNTRY	South Africa
COURT/BODY	Constitutional Court
CITATION	[2012] ZACC 30
BRIEF SUMMARY	<p>After several years of incarceration, the Petitioner, Lee, was acquitted of the charges against him and released. The Court found that the Department of Correctional Services (the Department) negligently caused Lee to become infected with tuberculosis (TB) while detained in Pollsmoor prison from 1999 to 2004. The lower court held that the Department had violated its own health regulations, failed to perform its constitutional obligations and violated Lee's constitutional rights. It further held that the Department was liable to Lee for the damages suffered as a result of his TB infection. The Supreme Court of Appeal (SCA), however, overturned the decision. The SCA admitted that the State was negligent in responding to TB in Pollsmoor prison, but it claimed that Lee could not prove that this negligence was the cause of his TB infection.</p> <p>The Constitutional Court overruled the SCA decision. It held that the test for causation had been applied too rigidly by the SCA and that Lee had, in fact, sufficiently proven that he contracted TB as a result of the Department's negligence. In reaching this conclusion, the Court stressed the importance of flexibility in determining issues of causation. The Court described the judgment as "of importance, not only to the parties, but also to other inmates and the health sector generally." The Court thus upheld the right to a remedy for prisoners in the position of the Petitioner.</p>

CASE NAME	<i>Yakovenko v. Ukraine</i>
YEAR	2007
COUNTRY	Ukraine
COURT/BODY	European Court of Human Rights
CITATION	Application No. 15825/06
BRIEF SUMMARY	<p>The Applicant was a prisoner living with HIV and TB. The Court held that the failure to provide him with timely and appropriate medical assistance amounted to inhuman and degrading treatment in violation of article 3 of the European Convention on Human Rights.</p>

CASE NAME	<i>Enhorn v. Sweden</i>
YEAR	2005
COUNTRY	Sweden
COURT/BODY	European Court of Human Rights
CITATION	Application No. 56529/0
BRIEF SUMMARY	<p>The Applicant was an HIV-positive gay man who was accused of transmitting HIV to one of his sexual partners. His behaviour was alleged to have constituted a public health risk and he was ordered detained under Sweden’s Infectious Diseases Act. The Applicant challenged the legality of his confinement order under article 5(1) of the European Convention on Human Rights (the Convention).</p> <p>The Court examined “whether the deprivation of the Applicant’s liberty amounted to ‘the lawful detention of a person in order to prevent the spreading of infectious diseases’” within the meaning of article 5(1)(e) of the Convention. Although agreeing that HIV represented a risk to public health, the Court held that the Applicant’s detention was in violation of article 5(1). It held that “the compulsory isolation of the Applicant was not a last resort in order to prevent him from spreading the HIV virus because less severe measures had been considered and found to be insufficient to safeguard the public interest.»</p>

CASE NAME	<i>EN and Ors. v. South Africa</i>
YEAR	2006
COUNTRY	South Africa
COURT/BODY	High Court, Durban and Local Coast Division
CITATION	2006 (6) SA 543 (D); 2007 (1) BCLR 84 (D)
BRIEF SUMMARY	<p>An urgent application was filed on behalf of 15 applicants living with HIV who required antiretroviral treatment while incarcerated at the Westville Correctional Centre (WCC) in KwaZulu-Natal province. The Applicants were acting in their individual capacities and as representatives of the class of prisoners incarcerated at WCC. The sixteenth applicant was the Treatment Action Campaign, which was acting in the public interest for the purposes of securing the effective enforcement of the constitutional rights of the prisoners.</p> <p>The Applicants contended that they, along with the class of prisoners they represented, had a right to adequate medical treatment and that the Respondents bore a corresponding obligation to fulfil the right under articles 27 and 35(2)(e) of the Constitution. The Applicants also argued that the Respondents were in breach of their constitutional obligations by delaying, without good cause, to ensure the Applicants, as well as other prisoners at WCC living with HIV, received adequate medical treatment.</p>

EN and Ors. v. South Africa (continued)

BRIEF SUMMARY
(continued)

The Court held that the Respondents had not met their constitutional and legislative obligations to the Applicants and other similarly placed prisoners living with HIV and AIDS at WCC, as the treatment and medical care provided to both groups was neither adequate nor reasonable. The Court held that the implementation of the laws and policies that pertained to the provision of adequate medical treatment to prisoners living with HIV and AIDS at WCC was unreasonable because it was inflexible and characterized by unjustified and unexplained delays. The Court also stated that some of the steps taken by the Respondents after the institution of the proceedings were irrational.

CASE NAME	<i>Khudobin v. Russia</i>
YEAR	2007
COUNTRY	Russia
COURT/BODY	European Court of Human Rights
CITATION	Application No. 59696/00; (2006) ECHR 898
BRIEF SUMMARY	<p>The Applicant was a prisoner living with HIV. The Court found that he did not receive the requisite medical assistance, even though “he clearly suffered from the physical effects of his medical condition,” including opportunistic infections associated with HIV. The Court held that this constituted a violation of article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment.</p> <p>The Court stated:</p> <p>«What is more, the applicant was HIV-positive and suffered from a serious mental disorder. This increased the risks associated with any illness he suffered during his detention and intensified his fears on that account. In these circumstances the absence of qualified and timely medical assistance, added to the authorities’ refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical sufferings, it amounted to degrading treatment within the meaning of Article 3.»</p>

CASE NAME	<i>Magida v. State</i>
YEAR	2005
COUNTRY	South Africa
COURT/BODY	Supreme Court of Appeal
CITATION	2005 (1) All SA 1 (SCA); [2005] ZASCA 68

Magida v. State (continued)

BRIEF SUMMARY

The Appellant was a woman living with HIV. She was convicted of fraud for using cheques obtained under false pretences. She appealed her sentence on the ground that her HIV status entitled her to a lesser sentence because imprisonment would affect her more harshly than a healthy person and would result in her premature death, as adequate treatment for HIV was not available in prison.

The Court held that in considering an appropriate sentence a court may take into account a convicted person's ill health and how it relates to the effect of a contemplated sentence. Taking into account the Appellant's inability to access treatment in prison, the seriousness of the offence, and the interests of the Appellant and society, the Court held that further imprisonment was unwarranted. The Court also noted its concern that the Appellant "may die soon." It held that the time the Appellant had already spent in prison was an appropriate sentence and that she was not to undergo any further period of imprisonment.

CASE NAME	<i>Odafe and Ors. v. Attorney General and Ors.</i>
YEAR	2004
COUNTRY	Nigeria
COURT/BODY	Federal High Court of Nigeria, Port Harcourt judicial division
CITATION	(2004) AHRLR 205 (NgHC 2004)
BRIEF SUMMARY	<p>The Applicants were prisoners living with HIV. They alleged that their continuous detention, without trial, constituted torture. They further alleged that the State's refusal to provide them access to medical treatment and the discriminatory treatment by prison officials and inmates amounted to unlawful discrimination.</p> <p>The Court held that the "continuous detention without medical treatment" of the Applicants constituted torture. The Court found that the State had "failed to provide medical treatment" to the Applicants. It held that the State had "a duty to provide medical attention" to the Applicants and that failure to do so constituted "non-compliance [with] the provisions of section 8 of the Prison Act and article 16 of the African Charter on Human and Peoples' Rights.»</p>

CASE NAME	<i>Brown v. Johnson</i>
YEAR	2004
COUNTRY	United States
COURT/BODY	United States Court of Appeals, Eleventh Circuit
CITATION	387 F.3d 1344 (2004)

Brown v. Johnson (continued)

BRIEF SUMMARY

The Petitioner was a prisoner living with HIV and hepatitis. He experienced a «[c]omplete withdrawal» of treatment, which resulted in a rapidly worsening condition. The Petitioner was barred from filing a complaint by a provision that prohibited inmates who had filed three or more complaints that were dismissed as frivolous, malicious or for failure to state a claim from filing another complaint.

The Court held that the Petitioner’s condition presented an «imminent danger of serious physical injury,» which constituted an exception to the provision barring the filing of an additional complaint. The Court further held that the withdrawal of treatment amounted to «deliberate indifference to serious medical needs,» and was cruel and unusual punishment prohibited under the Eighth Amendment to the Constitution.

CASE NAME	<i>Montgomery v. Pinchak</i>
YEAR	2002
COUNTRY	United States
COURT/BODY	United States Court of Appeals, Third Circuit
CITATION	294 F.3d 492 (2002)
BRIEF SUMMARY	<p>The Appellant, Montgomery, was an inmate at the East Jersey State Prison (the prison). Montgomery suffered from a heart condition and was HIV-positive. He brought suit against prison administrative officials, the private corporate entity providing medical care to the prison (CMS), and a physician employed by CMS as an independent contractor at the prison. Montgomery claimed that the Respondents were “deliberately indifferent to his serious medical needs” in violation of the right to be free from cruel and unusual punishment under the Eighth Amendment to the Constitution.</p> <p>The Court held that Montgomery’s claim of a violation of the Eight Amendment had “arguable merit in fact and law.” The Court reversed the lower court’s grant of summary judgment to the Respondents and held that Montgomery’s allegations clearly stated a prima facie case of “deliberate indifference to a serious medical need.”</p> <p>The Court stated that the evidence indicated more than an “extremely slim” chance of success, and therefore the case demonstrated merit. The Court held that the uncontested assertion that both Montgomery’s heart condition and his HIV could be life threatening if not properly treated demonstrated the first “objective” component of the applicable legal standard. The Court noted that the Respondents’ loss of Montgomery’s medical records did not rise to the requisite level of deliberate indifference in and of itself, but that the Respondents’ refusal to provide Montgomery with necessary medical treatment in spite of his assertions, and potentially as punishment for them, could have adequately demonstrated the second and final “subjective” component of the applicable legal standard.</p>

CASE NAME	<i>Doe v. Delie</i>
YEAR	2001
COUNTRY	United States
COURT/BODY	United States Court of Appeals, Third Circuit
CITATION	257 F.3d 309 (2001)
BRIEF SUMMARY	<p>The Appellant, Doe, was an HIV-positive former inmate of the State Correctional Institution at Pittsburgh (SCIP). SCIP medical staff informed Doe that his HIV status would be kept confidential. However, because of certain practices permitted by prison officials, Doe's condition was not kept confidential. He brought suit against SCIP officials, alleging that prison practices violated his right to privacy under the Fourteenth Amendment to the Constitution.</p> <p>The Court held that a right to medical privacy clearly existed and that, subject to legitimate penological interests, this right extended to those in prison. The Court held that while inmates did not have a Fourth Amendment right to privacy in their cells, the Fourteenth Amendment right to non-disclosure of one's medical information protected different interests. It explained that while Fourth Amendment privacy rights were "fundamentally inconsistent with incarceration," a prisoner's right to privacy in medical information was not inconsistent with incarceration and could therefore be recognized.</p>

CASE NAME	<i>Van Biljon v. Minister of Correctional Services (also known as B v. Minister of Correctional Services)</i>
YEAR	1997
COUNTRY	South Africa
COURT/BODY	High Court, Cape of Good Hope Provincial Division
CITATION	1997 (4) SA 441 (C); 1997 (6) BCLR 789 (C)
BRIEF SUMMARY	<p>The Appellants were four prisoners living with HIV. They sought an order directing the State to grant them adequate medical treatment at its expense. The facts indicated that at least two of the Applicants' health had deteriorated to a point at which antiretroviral treatment was necessary in order to retard the progress of the infection.</p> <p>The Court stated that the first question, concerning the adequacy of medical treatment provided to the Appellants, was not within its purview; it was purely a medical assessment that the Court was not qualified to make. Notwithstanding this decision, the Court directed the State to supply antiretroviral treatment to the two prisoners, relying on the recommendations of the attending doctors. The Court further held that a lack of funds did not justify the State's failure to respect and realize the prisoners' constitutional right to adequate treatment.</p>

CASE NAME	<i>Bailey v. Director of Public Prosecutions</i>
YEAR	1988
COUNTRY	Australia
COURT/BODY	High Court of Australia at New South Wales
CITATION	(1988) 78 ALR 116
BRIEF SUMMARY	<p>The Appellant was a prisoner living with HIV who sought to appeal his sentence on the ground that imprisonment was a greater burden on him because of his HIV status. The Appellant was HIV-positive at the time of his sentencing, but it was unknown to him and he did not exhibit any symptoms. When it was discovered that he was HIV-positive, he was detained in a special unit in the prison, separate from the general population. This appeared to have an adverse effect on the development of AIDS symptoms.</p> <p>The Court allowed the appeal because the lower court did not consider the relevance and weight to be attached during sentencing to the Applicant's state of health and the effect of imprisonment thereon.</p>

3.2 CRIMINALIZATION OF TRANSMISSION, EXPOSURE AND NON-DISCLOSURE

CASE NAME	<i>R v. Mabior</i>
YEAR	2012
COUNTRY	Canada
COURT/BODY	Supreme Court
CITATION	2012 SCC 47; 2010 MBCA 93
BRIEF SUMMARY	<p>The Court stated that the law in Canada with respect to aggravated sexual assault and the transmission of HIV “attaches criminal liability to the failure to disclose one’s positive HIV status only when there is a significant risk of serious bodily harm.” The Court held that the determination of what constitutes “significant risk of serious bodily harm” must be based on “the scientific and medical evidence adduced in each particular case.”</p> <p>The Court held that in this case “the scientific evidence indicated that either the careful use of a condom or effective antiretroviral therapy which reduced viral loads to an undetectable level could potentially reduce the level of risk to below the legal test of significant risk.”</p>

CASE NAME	<i>R. v. D.C.</i>
YEAR	2012
COUNTRY	Canada
COURT/BODY	Supreme Court
CITATION	2012 SCC 48
BRIEF SUMMARY	<p>The Court considered the standard for criminal sexual assault and aggravated assault for the failure to disclose one's HIV status.</p> <p>The appellate court held that "even without condom use, the requirement of a significant risk of serious bodily harm in the prior jurisprudence was not met, given the absence of any detectable HIV copies in [the accused's] blood." The Court held that this was "contrary to the standard" it proposed in <i>R v. Mabior</i>. It held that, on the facts of the case, "condom use was required to preclude a realistic possibility of HIV transmission." The Court held that to convict the accused "it was necessary to establish beyond a reasonable doubt that [she] failed to disclose her HIV status to the complainant, where there was a significant risk of serious bodily harm." The Court further held that a significant risk of serious bodily harm, in the case of HIV, "is found in the presence of a realistic possibility of transmission and is negated by both low viral load and condom protection." In this case, the accused's viral load was undetectable, so the critical issue was whether a condom was used during sexual intercourse prior to the disclosure of her HIV status.</p>

CASE NAME	<i>People v. Plunkett</i>
YEAR	2012
COUNTRY	United States
COURT/BODY	Court of Appeals of New York
CITATION	19 N.Y.3d 400 (2012); 971 N.E.2d 363; 948 N.Y.S.2d 233; 2012 NY Slip Op 4378
BRIEF SUMMARY	<p>Plunkett was an HIV-positive man who was sentenced to 10 years in prison for aggravated assault after biting a police officer. The lower court held that Plunkett's saliva was a "dangerous instrument" for the purpose of the «aggravated» portion of the charge.</p> <p>The Court vacated Plunkett's conviction and remanded the case for resentencing. The Court held that neither a bodily fluid, such as saliva, nor a body part could constitute a «dangerous instrument» for the purpose of a charge of aggravated assault under New York law.</p>

CASE NAME	<i>State v. Ingram</i>
YEAR	2012
COUNTRY	United States
COURT/BODY	Court of Appeals of New York
CITATION	No. W2011-02595-CCA-R3-CD
BRIEF SUMMARY	<p>The Defendant, Ingram, was convicted by a jury of aggravated burglary, criminal exposure to HIV, evading arrest and resisting arrest. During his arrest, Ingram allegedly spat in the face of a police officer and made threatening statements regarding his HIV status. The officer did not test positive for HIV. Ingram was sentenced to over 32 years in prison.</p> <p>On appeal, Ingram challenged the sufficiency of the evidence in support of his conviction of criminal exposure to HIV. He alleged that the State failed to establish that spitting saliva into an officer's face posed a "significant risk" of transmission. The Court held that in order to establish a significant risk of transmission, the State must present expert medical testimony, as a layperson does not have the requisite medical knowledge to make such a determination. It found that the State failed to establish this element of the offense.</p> <p>The Court thus modified Ingram's conviction of criminal exposure to HIV to "attempt to expose one to HIV." The Court held that Ingram's statement that he was HIV-positive and that he hoped the police dog contracted HIV after biting him demonstrated that he intended to expose the officer to HIV.</p>

CASE NAME	<i>Simon Maregwa Githiru v. Republic</i>
YEAR	2011
COUNTRY	Kenya
COURT/BODY	High Court of Kenya at Embu
CITATION	Misc. Crim. App. No. 24 of 2011, HC Embu
BRIEF SUMMARY	<p>The Court reversed the criminal conviction and sentence of a 54-year-old man living with HIV and tuberculosis. The man was convicted and sentenced to eight months imprisonment for failing to adhere to his medical treatment.</p>

CASE NAME	<i>D.N. and Anor. v. Attorney General</i>
YEAR	2010
COUNTRY	Kenya
COURT/BODY	High Court of Kenya at Eldoret
CITATION	Petition No. 3 of 2010, HC Eldoret
BRIEF SUMMARY	The Court overruled a lower court decision sentencing two individuals living with tuberculosis to eight months imprisonment for allegedly failing to adhere to their treatment regime. The Court held that the sentence was unconstitutional and in violation of the Public Health Act, under which the sentence was delivered. The Court ordered the Petitioners released to their homes to continue treatment under supervision of a District Public Health officer.

CASE NAME	<i>"S" v. Procureur Général</i>
YEAR	2009
COUNTRY	Switzerland
COURT/BODY	Federal Criminal Court, Penal Division
CITATION	Arrêt, 23 février 2009
BRIEF SUMMARY	The Court acquitted a man living with HIV who was convicted of «attempted spread of a human disease» and «attempted serious bodily harm.» The Court found the man not guilty because he was adhering to antiretroviral treatment and had an undetectable viral load at the time he engaged in unprotected sex. In reaching its decision, the Court considered medical testimony from doctors and discussed an article in a medical journal, which stated that «HIV-positive individuals not suffering from any other [sexually transmitted disease] and adhering to effective antiretroviral treatment do not transmit HIV sexually.»

CASE NAME	<i>United States v. Dacus</i>
YEAR	2008
COUNTRY	United States
COURT/BODY	United States Court of Appeals for the Armed Forces
CITATION	No. 07-0612, Crim. App. No. 20050404

United States v. Dacus (continued)

BRIEF SUMMARY

A Staff Sergeant living with HIV was convicted of aggravated assault for «engaging in sexual intercourse with female partners other than his wife without informing them of his medical condition.» The statute under which the Sergeant was convicted required a finding that he used «means or force likely to produce death or grievous bodily harm.» The Court upheld the conviction in spite of testimony from a medical expert, which established that the risk of transmission was “very, very unlikely,” approximately 1 in 50,000.

The concurring opinion challenged the majority’s interpretation of the word «likely.» The concurring judge asserted that “[c]ommon sense seems to dictate that an event is not ‘likely’ for purposes of [the statute], regardless of the harm involved, if there is only a 1 in 50,000 chance of that event occurring.” She further stated that “at a minimum I have grave doubts that the statutory element should be deemed satisfied where the statistical probability of the consequence of an act is so low as to approach being no ‘more than merely a fanciful, speculative, or remote possibility.”

CASE NAME	<i>Police v. Dalley</i>
YEAR	2005
COUNTRY	New Zealand
COURT/BODY	District Court at Wellington
CITATION	(2005) 22 CRNZ 495
BRIEF SUMMARY	<p>The Court dismissed charges of criminal nuisance against an HIV-positive man who had protected vaginal intercourse and unprotected oral sex with a woman to whom he had not disclosed his HIV status. In dismissing the charges, the Court held that New Zealand law imposes a legal duty not to engage in conduct that could foreseeably expose a sexual partner to harm, including the risk of HIV infection. The law also imposes a duty to take reasonable precautions against, and to use reasonable care to avoid, such harm. However, the Court held that the legal duty does not extend to disclosing one’s HIV status.</p> <p>The Court stated:</p> <p>“It seems ... that most people would want to be told that a potential sexual partner was HIV-positive. There may well be a moral duty to disclose that information. There is however a difference between a moral duty and a legal duty, the legal duty in this case being to take reasonable precautions against and use reasonable care to avoid transmitting the HIV virus. I note that the duty at common law is essentially the same – to take reasonable steps.”</p> <p>Therefore the Defendant was under no legal obligation to disclose his HIV status to his sexual partner. He was, however, required not to engage in conduct that could foreseeably expose her to the risk of infection. The Court declared that the duty requires one to take “reasonable precautions and care,” not “failsafe precautions.” It further held that reasonableness is an objective standard and that under the circumstances the Defendant did in fact take “reasonable precautions and care.”</p>

CASE NAME	<i>“AA” Case</i>
YEAR	2005
COUNTRY	Netherlands
COURT/BODY	Supreme Court
CITATION	Criminal Section no. 02659/03 IV/SB
BRIEF SUMMARY	<p>The Court overruled the criminal conviction of an HIV-positive man for wilfully inflicting serious bodily harm through exposure to HIV. The Court did not find the requisite intent to create a substantial possibility of inflicting grievous bodily harm.</p> <p>The Court held that the fact that a person living with HIV may pose a danger if he engages in unprotected sexual contact “does not in itself mean that the sexual acts in question create the kind of possibility of infection with the HIV virus—and thus causing grievous bodily harm—that can be considered substantial in answering the question whether a conditional intent existed.” The Court noted that there could be unusual circumstances that indicate an increased risk of transmission, but the Court of Appeal had not determined anything in this regard.</p> <p>The Court further held that it is “a task for the legislator to evaluate” whether and, if so, to what extent, the criminal law should be used to address the danger posed by an HIV-positive person who engages in unprotected sexual contact.</p>

3.3 DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

CASE NAME	<i>Ang Ladlad LGBT Party v. Commission of Elections</i>
YEAR	2010
COUNTRY	Philippines
COURT/BODY	Supreme Court (En Banc)
CITATION	G.R. No. 190582
BRIEF SUMMARY	<p>The Commission of Elections denied the Ang Ladlad LGBT Party’s (the Petitioner) application for accreditation as a political party. It did so on the grounds that the organization had no substantial membership base, and on grounds of moral condemnation. The Commission also justified its refusal by noting that the LGBT sector was not enumerated in the Constitution and applicable Party-List System Act, and it was not associated with or related to any of the sectors in the enumeration.</p> <p>The Court held that «moral disapproval, without more, is not a sufficient governmental interest to justify exclusion of homosexuals from participation in the party-list system.» The Court, however, declined to define LGBT persons as a class meriting special or differential treatment for purposes of the Equal Protection Clause, as it was not necessary to do so in order to find the Commission’s refusal unlawful.</p>

Ang Ladlad LGBT Party v. Commission of Elections (continued)

BRIEF SUMMARY
(continued)

As to the right to freedom of expression, the Court held that to the extent the Petitioner had been precluded because of the Commission's action «from publicly expressing its views as a political party and participating on an equal basis in the political process with other equally qualified party-list candidates . . . there [had], indeed, been a transgression of petitioner's fundamental rights.»

Finally, the Court discussed the principle of non-discrimination in article 26 of the International Covenant on Civil and Political Rights and held that it «requires that laws of general application relating to elections be applied equally to all persons, regardless of sexual orientation.»

CASE NAME	<i>Dr. Shrinivas Ramchandra Siras v. Aligarh Muslim University</i>
YEAR	2010
COUNTRY	India
COURT/BODY	High Court at Allahabad
CITATION	Civil Misc. Writ Petition No.17549 of 2010
BRIEF SUMMARY	<p>The Petitioner was a professor at Aligarh Muslim University. He was suspended for «gross misconduct» after a local television crew secretly, without his consent, recorded him engaging in sexual relations with another man in his bedroom. The Petitioner was also ordered by the University to vacate his residential quarters. The Petitioner claimed that his constitutional rights to privacy and equality under articles 14, 15 and 21 of the Constitution had been violated. He claimed that he was «entitled to the fundamental rights to his privacy, dignity, equality and non-discrimination of the basis of sexual orientation, and freedom of movement.» The Petitioner requested that the suspension be lifted, that all video of the incident be destroyed and that he receive suitable compensation and damages.</p> <p>The Court held that the right of privacy is a fundamental right that «needs to be protected.» It further held that «unless the conduct of a person, even if he is a teacher, is going to affect and has substantial nexus with his employment, it may not be treated as misconduct.» The Court thus held that the University's allegations of misconduct violated the Petitioner's fundamental rights. The Court directed the University order of suspension to be stayed. It also stayed the order directing the Petitioner to vacate his residential quarter. Finally, the Court held that «pending the writ petition, the media including news channels and the newspapers are restrained from publishing any material, pictures or video clippings or to publish any comments, on the incident, in any manner whatsoever.»</p>

CASE NAME	<i>Zimbabwe Human Rights NGO Forum v. Zimbabwe</i>
YEAR	2006
COUNTRY	Zimbabwe
COURT/BODY	African Court of Human and Peoples' Rights
CITATION	(2006) AHRLR 128
BRIEF SUMMARY	<p>This communication arose out of the alleged action by the Zanu PF party, led by incumbent President Robert Mugabe, against the opposition party following the Constitutional Referendum in Zimbabwe in 2000. The Zimbabwe Human Rights NGO Forum submitted a communication to the African Court on Human and Peoples' Rights, claiming that the alleged actions, including beatings, sexual violence and murder, were not only supported by the Zimbabwean Government but that government agents and supporters participated in the attacks and singled out victims on account of their political beliefs and affiliation.</p> <p>The Court found that the Government of Zimbabwe was responsible for the attacks against Zanu PF's political opponents. It held that the Government's actions violated articles 1 and 7 of the African Charter on Human and Peoples' Rights. The Court called upon the Government of Zimbabwe to establish a commission of inquiry. In the course of the decision, the Court held that "the aim of this principle [of antidiscrimination in Article 2] is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or <i>sexual orientation</i>" [emphasis added].</p>

CASE NAME	<i>Romer v. Evans</i>
YEAR	1995
COUNTRY	United States
COURT/BODY	Supreme Court of the United States
CITATION	517 U.S. 620 (1996)
BRIEF SUMMARY	<p>Various municipalities in Colorado enacted ordinances barring discrimination in housing, employment and other areas on grounds of sexual orientation. Colorado voters thereafter adopted, by referendum, an amendment to the state constitution prohibiting the state or any political subdivision from enacting or enforcing any law granting protected status to persons of homosexual, lesbian or bisexual orientation. The Colorado Supreme Court enjoined enforcement of the amendment, and the state of Colorado and public officials appealed to the US Supreme Court.</p> <p>The Court observed that the immediate effect of the state constitutional amendment was to repeal all existing laws and policies that prohibit discrimination on the basis of sexual orientation and to prohibit enactment of any such protective measures in the future. The amendment thus imposed a broad disability on homosexual and bisexual persons, and no others, barring them from seeking redress for discrimination.</p>

Romer v. Evans (continued)

BRIEF SUMMARY
(continued)

The Court held that the amendment disqualified a class of persons from the right to obtain specific protection from the law and therefore deprived them of equal protection under the law, as guaranteed by the Fourteenth Amendment to the US Constitution. The Court further held that Colorado failed to demonstrate that the classification bore a “rational relationship to a legitimate government purpose” Instead, the Court found that the amendment raised “the inevitable inference” that the disadvantage imposed was “born of animosity toward the class of persons affected.”

The Court thus affirmed the decision of the Colorado Supreme Court, striking down the amendment.

CASE NAME	<i>Egan v. Canada</i>
YEAR	1995
COUNTRY	Canada
COURT/BODY	Supreme Court
CITATION	[1995] 2 S.C.R. 513
BRIEF SUMMARY	<p>Two men lived as partners for over 45 years, creating a relationship which Canada conceded had all the elements of a spousal relationship. One partner became eligible for old age social security benefits, and the other partner applied for spousal benefits. This request was denied because the partners were the same sex, which disqualified them from meeting the definition of “spouse” under the law. The men sued the federal government, alleging that the definition of “spouse” under the law unconstitutionally discriminated on the basis of sexual orientation. After losing in the lower courts, they appeal to the Supreme Court.</p> <p>In a split decision, a majority of five judges held that, while sexual orientation is not explicitly listed in section 15 of the Canadian Charter of Rights and Freedoms (the Charter) as a prohibited ground of discrimination, it was nonetheless protected under the Charter. The Court held that sexual orientation is analogous to the enumerated grounds in section 15 of the Charter, such as race, colour, sex and religion, in that it represents a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs.”</p> <p>The appeal, however, was dismissed, as four judges held that the definition of “spouse” was not discriminatory. Another judge held that the law was discriminatory, but it was justified by a legitimate legislative purpose.</p>

3.4 NON-CONSENSUAL TESTING, CONFIDENTIALITY AND PRIVACY

CASE NAME	<i>C.O.M. v. Standard Group Limited and Anor.</i>
YEAR	2013
COUNTRY	Kenya
COURT/BODY	High Court of Kenya at Nairobi
CITATION	Petition 192 of 2011
BRIEF SUMMARY	<p>The Petitioner was interviewed for an article on “the plight” of people living with HIV. The article was published with a picture of the Petitioner and his name. The Petitioner did not consent to the use of his name and picture in the article, though he did consent to the interview. The Petitioner claimed violations of his constitutional rights to privacy and dignity and requested damages.</p> <p>The Court held that the Petitioner’s rights to privacy and dignity under the Constitution of Kenya had been violated. It further noted that the HIV and AIDS Prevention and Control Act prohibited any person from disclosing any information concerning the HIV status of a person, except, <i>inter alia</i>, with the written consent of that person. The Court declined to grant the Petitioner special, punitive or general damages for pain and suffering. However, it issued an order of «compensation generally.»</p>

See *Georgina Ahamefule v. Imperial Medical Centre* (2012), **Employment Discrimination**

CASE NAME	<i>Kingaipe and Chookole v. Attorney General</i>
YEAR	Zambia
COUNTRY	2010
COURT/BODY	High Court at Livingstone
CITATION	2009/HL/86
BRIEF SUMMARY	<p>Petitioners Kingaipe and Chookole joined the Zambian Air Force in 1989. Between 2001 and 2002, they underwent compulsory medical exams. The Petitioners were not informed they were being tested for HIV. The men tested positive for HIV and were prescribed antiretroviral drugs. According to their testimony, they were neither informed of their HIV-positive status, nor advised about the nature of the prescribed drugs. The Petitioners were ultimately discharged in October 2002.</p> <p>The Court found that the Petitioners were subjected to HIV testing without their informed consent. The Court held that this constituted a violation of their right to privacy and freedom from inhuman and degrading treatment under the Constitution of Zambia. The Petitioners were also entitled to damages for mental anguish and emotional distress.</p>

CASE NAME	<i>Leonel v. American Airlines</i>
YEAR	2005
COUNTRY	United States
COURT/BODY	United States Court of Appeals, Ninth Circuit
CITATION	400 F.3d 702 (2005)
BRIEF SUMMARY	<p>The Appellants, Leonel and others, were persons living with HIV. They applied for flight attendant positions with American Airlines (American). Upon discovery of their HIV status, American rescinded their job offers, citing the Appellants' failure to disclose information during medical examinations. The Appellants were required to give blood samples and disclose their HIV status or related medications through medical history questionnaires.</p> <p>The Appellants claimed that American's medical inquiries and examinations were prohibited by the Americans with Disabilities Act (ADA) and California's Fair Employment and Housing Act (FEHA). The Appellants also contended that conducting complete blood count tests on their blood samples without notifying them or obtaining their consent violated their right to privacy under the Constitution of the state of California.</p> <p>The Court held that American's medical examinations were unlawful under both the ADA and the FEHA. It held that in addition to intentional discrimination, the ADA and FEHA regulate the sequence of employers' hiring processes. The Court explained that the laws prohibit the administration of medical inquiries and examinations until after the employer has made a "real" job offer. The Court also held that the complete blood count tests violated the Appellants' right to privacy under the California Constitution.</p>

CASE NAME	<i>J.A.O. v. Homepark Caterers LTD and Ors.</i>
YEAR	2004
COUNTRY	Kenya
COURT/BODY	High Court of Kenya at Nairobi
CITATION	Civil Case No. 38 of 2003
BRIEF SUMMARY	<p>The Petitioner was a woman living with HIV. She alleged that a doctor and hospital tested her for HIV without her consent, in violation of her right to privacy. The Petitioner further claimed that the doctor disclosed her HIV status to her employer without her knowledge, resulting in the termination of her employment. She claimed this violated her right to confidentiality and constituted a failure on the doctor's part to fulfil a statutory duty. The Defendants (her employer, the doctor and the hospital) requested the court to strike the suit on the ground that it did not present reasonable cause of action</p> <p>The Court held in favour of the Petitioner. It held that her complaint stated a cause of action that was reasonable in light of the facts of the case, the nature of the HIV pandemic, and the development of human rights jurisprudence in the ongoing attempt to harmonize relevant international conventions with domestic law.</p>

CASE NAME	<i>Diau v. Botswana Building Society</i>
YEAR	2003
COUNTRY	Botswana
COURT/BODY	Botswana Industrial Court
CITATION	IC NO 50 OF 2003; 2003 (2) B.L.R. 409 (BwIC)
BRIEF SUMMARY	<p>The Applicant was denied an opportunity to become a permanent employee based on her refusal to undergo an HIV test as a condition for permanent employment. She sought an order declaring that the Respondent’s decision constituted discrimination on the basis of disability in contravention of sections 15(2) and 23 of the Employment Act. She further sought a declaration that the discrimination constituted a denial of equal protection of the law and degrading treatment in violation of the Constitution of Botswana.</p> <p>The Court held that the employer terminated the employment relationship without a valid reason. The Applicant therefore suffered unfairness in violation of the right to equality under article 3(a) and the prohibition of inhuman and/or degrading treatment under article 7(1) of the Constitution. The Court declared that to rule otherwise would run counter to the public’s interest in encouraging citizens to voluntarily seek testing for HIV. It ordered that the Applicant be reinstated to her position and receive compensation for her premature termination. The Court stated:</p> <p style="padding-left: 40px;">«Punishing the applicant for refusing an invasion of her right to privacy and bodily integrity is inconsistent with human dignity. This is particularly so in the context of HIV/AIDS where even the remotest suspicion of being HIV/AIDS can breed intense prejudice, ostracisation and stigmatisation. This is the context within which one must analyse the right to dignity in this case. The symbolic effect of punishing an employee for refusing to undergo an HIV test is to say that all those who refuse to undergo an HIV test are not competent to be employed—they should lose their jobs and by extension be condemned to unemployment—a form of economic death for simply saying, as a human being, I have decided not to test for HIV/AIDS.»</p>

CASE NAME	<i>Doe v. United States Postal Service</i>
YEAR	2003
COUNTRY	United States
COURT/BODY	United States Court of Appeals, District of Columbia Circuit
CITATION	317 F.3d 339 (2003)
BRIEF SUMMARY	<p>The Appellant, Doe, brought an action against his employer, the U.S. Postal Service (the Service), for its disclosure of his HIV status in violation of the Privacy Act, the Rehabilitation Act and the Americans with Disabilities Act (ADA).</p> <p>The Court first examined whether Doe produced sufficient evidence to establish that his medical information had been unlawfully disclosed in violation of the Privacy Act. The Court held that two pieces of evidence were sufficient to indicate that the Service retrieved information about</p>

Doe v. United States Postal Service (continued)

BRIEF SUMMARY
(continued)

Doe's HIV status from protected medical records in violation of the Privacy Act: (1) testimony from Service employees indicating that Doe's management-level supervisor had told co-workers about his HIV status; and (2) circumstantial evidence suggesting that the same supervisor obtained the information from a Family Medical Leave Act form in the normal course of business. The Court thus found that Doe's disclosure was not voluntary.

The Court noted that Doe revealed his medical diagnosis to his employer only after being informed in writing that he would face disciplinary proceedings if he did not. The Court held that if the Service's position was accepted, it "would force employees to choose between waiving their right to avoid being publicly identified as having a disability and exercising their statutory rights." The Court declared that this would be contrary to the statutory intent of the ADA.

CASE NAME	<i>Doe v. SEPTA</i>
YEAR	1995
COUNTRY	United States
COURT/BODY	United States Court of Appeals, Third Circuit
CITATION	72 F.3d 1133 (1995)
BRIEF SUMMARY	<p>The Appellant, Doe, an HIV-positive employee, brought a constitutional challenge after his employer, the Southeastern Pennsylvania Transportation Authority (SEPTA), reviewed his prescription drug records for the purpose of monitoring the company's prescription drug plan. Doe made no claim of personal discrimination or economic deprivation. However, he testified that he felt as though he was treated differently after knowledge of his HIV status was revealed to his co-workers following the review of his prescription drug records. He also claimed that he required antidepressants to treat subsequent depression and that he grew fearful of a particular co-worker who was aware of his status.</p> <p>Doe claimed that SEPTA infringed his constitutional right to privacy under the right to due process in the Fourteenth Amendment to the Constitution.</p> <p>The Court held that individuals have a constitutionally protected right to privacy in their medical records, including prescription drug records, and in their HIV status, but that this right was not absolute.</p>

CASE NAME	<i>Doe v. City of New York</i>
YEAR	1994
COUNTRY	United States
COURT/BODY	United States Court of Appeals, Second Circuit
CITATION	15 F.3d 264 (1994)

Doe v. City of New York (continued)

BRIEF SUMMARY

The Appellant, Doe, an HIV-positive man, brought this suit against the City of New York Commission on Human Rights (the Commission) alleging that it breached his constitutional right to privacy. The Commission issued a press release disclosing the terms of a conciliation agreement between Doe and his employer, despite a confidentiality clause and without the knowledge or consent of Doe or his attorney. Soon after, various New York newspapers published articles based upon the press release describing the nature of the settlement.

The Court held that Doe had a constitutional right to privacy in his HIV status. It held that there was a constitutional right to confidentiality of personal medical information, which was “especially true with regard to those infected with HIV or living with AIDS.” The Court noted that when an individual reveals he is HIV-positive, he is “exposed not to understanding or compassion but to discrimination and intolerance.” The Court declared that there are few matters “quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over.”

CASE NAME	<i>X v. Y</i>
YEAR	1988
COUNTRY	United Kingdom
COURT/BODY	Court of Appeal
CITATION	[1988] 2 All ER 648 UK
BRIEF SUMMARY	<p>A journalist obtained confidential records of two HIV-positive doctors who continued their general practice. The doctors sought a permanent injunction to restrain the publication of the information.</p> <p>The Court granted the injunction. It held:</p> <p>“I keep in the forefront of my mind the very important public interest in freedom of the press. And I accept that there is some public interest in knowing that which the defendants seek to publish. But in my judgement those public interests are substantially outweighed when measured against the public interest in relation to loyalty and confidentiality both generally and with particular reference to AIDS patients’ hospital records.”</p>

IV. RESOURCES AND FURTHER READING

Resources on HIV, Human Rights and the Law

Below is a non-exhaustive list of documents that can help readers deepen their knowledge and strengthening their understanding of the area of HIV, human rights and the law.

Global Commission on HIV and the Law, (2012), *Risks, Rights and Health*, July 2012. Available at: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

Godwin, John, (2010), *Legal Environments, Human Rights and HIV Responses Among Men who have Sex with Men and Transgender People in Asia and the Pacific: An Agenda for Action*, APCOM, UNDP. Available at: http://www.asiapacificforum.net/support/issues/acj/references/sexual-orientation/downloads/Legal_Analysis_of_Asia_Pacific.pdf.

International Commission of Jurists, (2009), *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*. Available at: <http://www.icj.org/sogi-casebook-introduction/>.

Lawyers Collective, (2006), *Legislating an Epidemic, HIV/AIDS in India*, Manual on HIV/AIDS law.

Lines, Rick, (2007), *International Human Rights Jurisprudence on Issues Relating to Drug Use and Harm Reduction*, Open Society Institute. Available at: <http://www.opensocietyfoundations.org/reports/international-human-rights-jurisprudence-issues-relating-drug-use-and-harm-reduction>.

Office of the United Nations High Commissioner for Human Rights, (2006), UNAIDS, *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, Available at: <http://www.ohchr.org/Documents/Issues/HIV/ConsolidatedGuidelinesHIV.pdf>.

Open Society Institute, Equitas, (2009), *Health and Human Rights, A Resource Guide*, Fourth Edition, March 2009. Available at: <http://equalpartners.info/PDFDocuments/EngCompleteResourceGuide.pdf>.

South Asian Association for Regional Co-operation in Law, International Development Law Organization, UNDP, (2013), *Regional Legal Reference Resource, Protective Laws Related to HIV, Men who Have Sex with Men and Transgender People in South Asia, Promoting a Legal Enabling Environment and Strengthening the Legal Response to HIV*. Available at: <http://www.snap-undp.org/elibrary/Publications/HIV-2013-Regional-Legal-Reference.pdf>.

Southern Africa Litigation Centre (SALC), (2012), *Equal Rights For All: Litigating Cases of HIV-related Discrimination*, SALC Litigation Manual Series. Available at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/10/HIV-and-Discrimination-Manual-pdf.pdf>.

SALC, (2012), *Protecting Rights: Litigating Cases of HIV Testing and Confidentiality of Status*, SALC Litigation Manual Series. Available at: <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Litigating-Cases-of-HIV-Testing-and-Confidentiality-of-Status-Final.pdf>.

UNAIDS, United Nations Population Fund, UNDP, (2012), *Sex Work and the Law in Asia and the Pacific*. Available at: <http://www.snap-undp.org/elibrary/Publications/HIV-2012-SexWorkAndLaw.pdf>.

UNAIDS, (2009), *HIV in Africa in the 21st Century, Brief for the Judiciary*, Meeting of Eminent African Jurists on HIV in the 21st Century, 10–12 December 2009, Johannesburg, South Africa. Available at: http://data.unaids.org/pub/manual/2009/jc1803_hiv_and_the_law_en.pdf.

UNAIDS, Canadian HIV/AIDS Legal Network, (2006), *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*, UNAIDS Best Practice Collection. Available at: http://www.unaids.org/en/media/unaids/contentassets/dataimport/pub/report/2006/jc1189-courtingrights_en.pdf.

UNDP, (2004), *Law, Ethics and HIV/AIDS in South Asia, A Study of the Legal and Social Environment of the Epidemic in Bangladesh, India, Nepal and Sri Lanka*. Available at: <http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/law-ethics-and-hiv-aids-south-asia/>.

Relevant Websites

Additional information about the work of UNDP, UNAIDS and ICJ, as well as the legal dimensions of HIV, is available at the websites listed below. This list also includes relevant global, national and regional databases of judgments.

AIDSLEX: www.aidslex.org

Canadian Legal Information Institute: www.canlii.org/canlii-dynamic/en/

European Court of Human Rights: www.echr.coe.int/echr/en/hudoc

Global Commission on HIV and the Law: www.hivlawcommission.org

Global Health and Human Rights Database: www.globalhealthrights.org

Hong Kong Judgment and Legal Reference: www.judiciary.gov.hk/en/legal_ref/judgments.htm

Indian Kanoon: www.indiankanoon.org/about.html

Inter-American Commission on Human Rights: www.oas.org/en/iachr/decisions/cases.asp

International Commission of Jurists: www.icj.org

International Network for Economic, Social and Cultural Rights: www.escr-net.org/

Joint United Nations Programme on HIV/AIDS: www.unaids.org

Kenya Legal and Ethical Issues Network on HIV and AIDS: <http://kelinkenya.org/>

Lawyers Collective: www.lawyerscollective.org/

NAM, AIDSmap: www.aidsmap.com

Section 27: www.section27.org.za/

Southern African Legal Information Institute: www.saflii.org/

The Center for HIV Law and Policy: www.hivlawandpolicy.org/

United Nations Development Programme: www.undp.org



UNITED NATIONS DEVELOPMENT PROGRAMME

Bureau for Development Policy, HIV, Health & Development Group

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