

INTRODUCTION

This training guide is expected to raise the level of knowledge and understanding of legal, ethical, human rights and HIV/AIDS among CBOs, NGOs FBOs and PLWHA organizations. The guide introduces the human rights (HR) concept, principles and policies and their relevance to HIV/AIDS interventions. It examines how NGOs, CBOs, FBOs and PLWHAs organizations can integrate and mainstream human rights into HIV/AIDS and development programmes. It is notable that HIV/AIDS is already declared a national disaster in Kenya and has widely been recognized as a developmental problem exacerbating poverty, unemployment and lack of quality and affordable social health services.

The guide is designed for NGOs, CBOs, FBOs and PLWHAs organizations involved in HIV/AIDS, legal and human rights activities. It is intended to provide knowledge and skills needed to implement a rights-based approach to HIV/AIDS work. The training is scheduled to take a minimum of five days but it leaves to discretion of the facilitators to modify the training schedules in accordance with participants level of education and experience in HIV/AIDS. The guide leaves to discretion of the facilitator to incorporate a range of training techniques including plenary discussions, lectures, and group work, question and answer sessions among other participatory activities. The emphasis is however on participation, while keeping formal lectures to a minimum.

Aim

To provide knowledge, skills and understanding of legal, ethical and human rights among NGOs, CBOs, FBOs and PLWHA organizations and encourage them to appreciate and mainstream rights-based approaches in the implementation of HIV/AIDS activities.

Purpose

The purpose of the training guide is to facilitate the training of a team of paralegals to acquire knowledge, skills and understanding of HIV/AIDS legal, ethical and human rights issues, and to demonstrate that HIV/AIDS and human rights are interrelated; the very problem of HIV/AIDS is indicative of existence of human rights violations.

Specific objectives

- Understand legal, ethical and human rights issues in the community.
- Understand HIV/AIDS, legal, ethical and human rights.
- Explore relevance of human rights and how human rights violations impact on HIV/AIDS prevention, care and support.
- Mainstream legal, ethical and human rights activities into core programmes of the target organizations.
- Appreciate importance of greater involvement and participation of PLWHAs in championing their rights and those of the affected.
- Discuss the role of paralegals in promoting HIV/AIDS legal and human rights in the community.

Part One

Outline of Community Paralegal Training Guide

Introduction

- Why paralegals?
- Concept of Para legalism

Unit 1: Paralegal Workers in the Community

Objectives

- Define the term Paralegal workers
- Establish roles and skills of paralegal workers
- Demonstrate the legal and non-legal approaches used in Para legalism

Content

- Who is a paralegal
- Roles of paralegals
- Skills requirement of a paralegal
- Paralegal and the community
- Legal versus non-legal approach

Expected output

- The term Paralegal and concept of Para Legalism understood
- Participants to understand their roles as paralegals
- Entry strategy in the community becomes clearer

Unit 2: Practical Skills Necessary for a Paralegal

Objectives

- Identify basic and general Paralegal Skills
- Explain the Paralegal Skills in details and why they are required
- Explain the alternative dispute resolutions mechanisms that include Negotiation and Arbitration

Content

- General paralegal skills
- Legal and Communication skills
- Interviewing
- Requirements
- Language skills
- Taking a statement
- Advising Client
- Taking Action
- Advise giving and problem solving skills
- Development skills

Expected Output

- Enhancement of knowledge on statement recording, training and counselling skills
- Basic Paralegal skills developed
- Communication and language skills improved

Unit 3: Introduction to Law and Sources of Law

Objectives

- To define law
- To identify sources of law
- Distinguish various branches of law in Kenya

Content

- What is law?
- Sources of Kenyan law
- Branches of law

Expected output

- To list sources of the Kenyan law
- General basic understanding of the meaning of the word law
- To differentiate branches of law in Kenya

Unit 4: HIV/AIDS and Human Rights Violations

Objectives

- Define the term human rights
- Classify human rights into different categories
- Explain key features of human rights
- To review basic human rights concepts and their domestication
- To illustrate the link between HIV/AIDS infection and human rights and related issues in Kenya

Content

- Concept of human rights
- Principles of human rights
- Classification of human rights
- Domestication of human rights
- Derogation from human rights
- Legal and Ethical issues, human rights and HIV/AIDS
- Human Rights issues

Expected Output

- To explain the concept of human rights
- To list the categories of human rights
- To define the meaning of human rights
- To explain the characteristics of human rights

- To link human rights violations with the rights of the infected and the affected with HIV/AIDS
- To describe circumstances of derogation and list rights that cannot be derogated from
- List the concern issues arising in the human rights and HIV/AIDS relations

Unit 5: Family Law

Objectives

- Identify and explain the various family law systems
- Explain the sources of family law
- Describe the different types of marriage law systems
- Explain the legal requirements for a valid customary or statutory marriage
- Explain the circumstances in which a marriage may be presumed by the law
- Explain the grounds of and the consequences for, separation and divorce under customary and statutory marriages
- Describe the principles governing division of matrimonial property

Content

- Family law systems
- Forms of Marriage in Kenya
- Elements of a valid marriage
- Rights and duties of Spouses
- Separation
- Divorce
- Maintenance
- Matrimonial property

Expected Output

- To explain the meaning of a family
- To explain the different marriage laws in Kenya
- To state the requirements of a valid marriage
- To explain how marriage can be dissolved
- To list grounds for divorce

Unit 6: Succession and Inheritance Laws

Objectives

- Understanding the purpose of law of succession
- Explain the difference between testate and intestate succession
- List the sources of Law of Succession
- To understand the Administration of Estates
- Get the difference between inheritance and succession of property

Content

- What is inheritance?
- Sources of Law of Succession

- Succession under customary law
- Succession under the laws of Kenya
- Testate Succession
- What is a Will
- Types of Wills
- Validity of oral Wills
- Intestate Succession
- Letters of administration

Expected Output

- To define succession and inheritance
- To explain how the succession law functions in Kenya
- Explain the distinction between testate and intestate succession
- Describe the process of writing, altering and revoking a will
- Explain the process of obtaining letters of administration

Unit 7: Law of Trusts

Objectives

- Define Trusts
- Formation of Trusts
- Explain reasons for formation of Trusts
- Explain a trust as a legal relationship

Content

- What is a Trust?
- Why create Trusts?
- How to form Trusts
- Control of Trusts
- Beneficiaries

Expected Output

- To define a trust and to understand how it is formed
- To explain why it is necessary to create trusts
- To link Trusts to succession causes

Unit 8: Land Law

Objectives

- Define land
- Understand laws related to land in Kenya
- List the different ways of holding land in Kenya
- Explain different forms of land transactions including registration
- Identify the different problems related to land
- Understand the operations of the Lands tribunal

Contents

- Definition of Land.
- Statutes relating to Land.
- Sources of Land Law in Kenya.
- Systems of Land ownership in Kenya.
- Registered Land Act.
- Land Disputes Tribunal.

Expected Output

- To define the term land
- Enhance understanding on the different types of land ownership
- To explain the status of registration under the RLA
- To list the different systems of land holding
- To explain the various dealing in land
- Explain the operations of the Land disputes tribunal

Unit 9: Crimes and Criminal Procedure

Objectives

- Define criminal law
- Describe the criminal procedure process
- List the rights of an accused person and arrested person
- Explain the court trial process

Content

- What is law?
- Powers of Arrest.
- Procedures of effecting arrest
- Rights of an accused person
- Investigation
- Trial process
- Hearing of the case
- Forms of Punishment
- Appeals

Expected Output

- To define criminal law and criminal procedure
- To explain the criminal process
- To narrate steps of a criminal trial
- To recognize the rights of the accused
- To state who has the powers to arrest

Unit 10: Civil Procedure

Objectives

- Explain the Civil Procedure
- To understand the commencement of civil procedure
- Describe steps in civil hearing
- Explain the drafting of pleadings

Content

- Sources of Civil procedure law
- Commencement of Civil proceedings
- Steps in Trial of Civil Action
- Drafting of basic Pleadings
- Interlocutory Proceedings
- Limitation of Actions

Expected Output

- To explain the process of the civil procedure
- To list the steps of civil trial
- The drafting of a plaint
- To explain interlocutory proceedings
- Explain the judicial review and the limitation of actions

Part Two

Paralegal Training Notes

Introduction

In our communities, it is difficult for poor people to get access to justice. Admittedly legal procedures are complicated, take a long time and often needs lawyers who are in most cases very expensive.

The law provides for numerous rights in the constitution and other statutes. However the rights can only be exercised if people have access to the information and the assistance they require.

Community workers have been identified to be a good entry point as people who can act as legal advisors and educators for communities.

Why Paralegals

- Cost of hiring lawyers is high and high levels of poverty are inhibiting
- Shortage of lawyers to work in rural areas
- Communication problems make some areas inaccessible for lawyers

Concept of Para legalism

This concept helps in integration of non-formal legal education in the programs that community is engaged in.

Many organizations can come up with Paralegal workers who can assist the community in different capacities i.e. NGOs and the community based organizations (CBOs) and both formal and informal organizations.

Note: That unlike other countries e.g. South Africa where Paralegalism is regulated by law, Kenya does not have a similar statute.

For clarity purposes, Paralegals should always tell the community who come to them for advice that they are not lawyers. This will protect them from any suit that can arise for wrong advice given.

Unit 1: Paralegal Workers in the Community

The Unit will introduce the community workers. Facilitators will guide in describing who is a paralegal, skills required and roles they play in the community.

Objectives

- Define the term Paralegal workers
- Establish roles and of paralegal workers
- Demonstrate the legal and non-legal approaches used in Para legalism

1.1 Who is a Paralegal?

A Paralegal is a person who works within the community. A paralegal is armed with knowledge of basic law. S/he is trained on relevant skills, which enable him/her to become facilitators in the community. They advice others in the community on how to deal with legal problems and generally educate other members of the community on basic issues of law and how to organize the community on basic issues of community development. Paralegals play an important role in providing access to justice by giving poor rural people access to legal help.

It is hoped that Paralegals will become the link between the people and the legal system to ensure justice. As a community facilitator, it is expected that a Paralegal should be quite familiar with their community of operation.

1.2 What are the roles of Paralegals in the community?

- Giving basic (*legal*) advice to the members of the community, on matters of law
- Educating e.g. the community on their basic human rights
- Educate other members of the community on legal issues
- Provide basic legal advice
- Lobby for social and law reforms
- Assisting in resolving cases of community members at that level
- Help the community to identify their legal needs and how they can be solved
- Assisting the community to identify community development problems and how they can be solved
- Refer people to social and health services and other organizations
- Investigate cases that can be passed to lawyers or referred to the police
- Act as arbitrators in simple community/individual disputes

1.3 Skills Requirement of a Para legal worker

- Armed with basic legal knowledge
- Be in a position to facilitate others
- Must be able to carry out interviews
- Must be a good listener
- Must have good basic counselling skills
- A good understanding of issues of human rights and human rights violations

Note: The 'Non-legal' methods are not methods against the law or illegal.

1.4 Paralegals and the Community

As field officers working with the people in the community, Paralegals will be well placed to empower the people to understand, overcome or deal with legal problems. To do this they can organize education workshops and training programs to pass on skills and knowledge to people in the community. This will make people and communities more enlightened.

Community organization i.e. NGOs and CBOs are also encouraged to have some of their members trained so as to help in the work, by making people aware of their basic rights. Practice elsewhere has shown that paralegal play an important role in doing practical groundwork.

1.5 The 'Legal versus the non-legal' approach

When trying to solve problems there are two different approaches that a paralegal can use, these are formal legal methods and social non-legal methods.

The '**legal**' methods use the law and the court to solve problems. The '**non-legal**' methods use other ways besides the law and the court to solve problems. These include arbitration, advocacy, pressure or organising peaceful demonstration to address community problems.

The Paralegal will be equipped to deal with each particular situation before deciding how to take the issue forward either through legal or non-legal process. They will also consider longer term or shorter-term solutions.

Example

A farmer wants to evict families from his farm without a court order. The community can use the courts to get an urgent injunction to stop the eviction from taking place. But this only provides the families with temporary relief. They can also take the farmer to court to fight for their rights under the law. But they can also lobby local government to provide land for the farm workers, who do not have security of tenure on farms so that they can build their own houses. They can work with the farmer and local government to ensure the interests of all groups - the town, farmer and the farm worker are met.

Unit 2: Practical Skills Necessary for a Paralegal

Objectives

- Identify basic and general Paralegal Skills
- Explain the Paralegal Skills in details and why they are required
- Explain the alternative dispute resolutions mechanisms that include Negotiation and Arbitration

2.1 General Paralegal skills

- Practical Legal Skills
 - o How to take a statement
 - o Collect evidence of cases
 - o Write letters
- Counselling Skills
 - o How to interview, listen, solve and give advice
 - o Empower a person to know that they have what it takes to solve their own problems
- Knowing some basic principles of law and legal procedures
 - o For example what the law says about arrest and detention, bail, contracts or agreements, what a civil claim is, and how to lay a criminal charge etc
- Training Skills
 - o Learning how to teach others about the law i.e. how to run workshops
- Networking Skills
 - o Developing good networking skills with others and in the community
- Working with a community
 - o How to be transparent and accountable to the community
 - o Ways of discussing problems
 - o How to give simple legal advice to the community
- Monitoring skills
 - o How to monitor what goes on in the community i.e. the police raiding houses and arresting people. Paralegal needs to know how to record this and follow it up
- Advocacy skills
 - o This includes how to convince powerful institutions or people to accommodate the interest of others
 - o To be a lobby nest

2.2 Legal and Communication Skills

It is important for a paralegal to develop communication skills in order to be understood by the persons they are trying to assist

Second, communication skills are necessary because of the many roles that include contacting other people on behalf of the community

Third, the paralegals will be accountable to their organization or the community at large

Communication skills can involve the following

- Interviewing and taking a statement
- Monitoring and evidence gathering skills
- Counselling and listening
- Advice – giving and problem solving
- Referring people to other organizations for assistance
- Writing letters
- Writing reports

2.3 Interviewing

There are certain techniques that you can use when interviewing.

- Always introduce yourself and know the name and address of the person you are dealing with
- Ask the person to explain the kind of assistance they request
- Make up your mind on the assistance you will offer
- Avoid hurrying up the people since they might already be traumatized or embarrassed to talk about the problem
- Lead the person reporting by asking questions that will help them give the answers

2.4 Requirements

- Be a good listener and avoid rushing to conclusion
- Establish what steps have been taken in an attempt to solve the problem
- Discuss with them the necessary steps you will try to take in attempts to sort out the problem
- Once you understand the problem you can refer to the relevant agency or body that is counselling or to FIDA or lawyer Kituo cha Sheria etc

2.5 Language Skills

When you interview people or a person who come for help, it is important to:

- Use simple language that can easily be understood
- Ensure you are communicating
- Probably use clients own language (Mother tongue) and if not possible use Kiswahili unless the individual is comfortable with English
- In case you do not speak the same language, arm yourself with someone to translate

It is necessary that you should use short simple words and sample the difficult legal words avoiding the legal jargon.

It is recommended that one use plain language. You can avoid language problems. For example:

- Using very simple explanations to explain ideas or difficult words
- Never presume that your client knows anything about the law
- Explain the law very simply and use everyday example that relate to the community's experiences of the clients
- Always try to explain how the law affects the client's problem

2.6 Taking a Statement

A statement is necessary because it helps you to keep record. The information taken will help you at every stage.

You need as a paralegal to record the information correctly. The statement should have four parts:

- Personal details i.e. name, age, address etc.
- Description of the problem
- Advice given
- The action that needs to be taken thereafter

2.7 Advising the Client

You must tell the client their rights. Follow by explaining the steps to be taken in solving the problem. Listen to the client to find out what they want.

Guide the client and let them make the decision. It is important to document the details of your advice.

2.8 Taking Action

After discussions with the client, propose what you intend to do. You should be realistic about how much you can do. You will then agree on how you report back to your client and document the steps you take.

You must exercise the rule of confidentiality, not to disclose information that has come to your knowledge in the course of such duties.

2.9 Advise giving and problem solving skills

In most cases, a paralegal will be equipped to give advice and not solve the problems. i.e. somebody unlawfully dismissed, you advice them to go to the labour offices.

As far as possible encourage the people to try and sort out their problems on their own. You have to develop the culture to empower the people to deal with their own problems.

2.10 Development Skills

These are important in paralegal work. These are skills dealing with conflicts and disputes i.e. negotiating mediating and arbitrating. It also includes skills in community education and training. In legal terms they are referred to as Alternative Dispute resolution mechanisms and this include negotiation, mediation and arbitration.

a) Negotiation Skills

The paralegal will be involved daily in negotiating and arbitrating. Negotiation takes place when two or more people or groups who have a conflict try to agree on how best to solve the conflict. Both sides compromise to reach a solution.

The main purpose of being a negotiator is to get the best settlement possible for the persons. It involves:

- Good listening
- Finding out information
- Knowing questions to pose
- Creating a right atmosphere
- Putting up considered proposals
- Controlling attitudes

Example

A union official negotiates with the manager of a farm about the right of workers to join the union. The union official is very emotional because the manager is threatening to dismiss the workers. The union official also believes that the manager is not concerned about the workers, that he is cruel and immoral. The manager is also very emotional. He believes the union official is trying to take over the farm. He is worried about financial losses and believes that as soon as workers join a union they will go on strike. He believes that all workers are lazy and only want money to spend on alcohol. In this example there are many conflicting emotions prejudices and values between the two sides. How can these affect negotiations?

b) Mediation

A paralegal will carry out the role of a mediator. The main job of a mediator is to keep the parties in negotiations communicating with each other. To do this the mediator must encourage both sides to be realistic about what they want. The mediator must keep things going and create confidence in both sides.

The mediator does not make a decision about who is right or wrong. The parties are assisted to come to an agreement themselves. If it fails to work the mediator must withdraw from the process and other means such as going to court or arbitration can be used.

c) Arbitration

The arbitrator is like a judge. The arbitrator chairs hearings at which both parties are present, listens carefully to both sides of the story, listens to witnesses and finally decides who wins the arbitration.

Community issues where mediation or arbitration can be used:

- Purchases: i.e. if one purchases a second hand T.V that breaks down after two-weeks and the company refuses to fix it
- Community or neighbourhood issues. i.e. differences between neighbours, landlord, tenants etc
- Petty criminal offences: Court process can be time consuming and you propose settlement
- Education: To handle teacher/student conflicts
- Family disagreements or divorce: Family mediation can handle family disputes

Unit 3: Introduction to Law and Sources of Law

Objectives

- To define law
- To identify sources of law
- Distinguish various branches of law

3.1 What is law?

The term law is used in a variety of senses. There are laws of physical sciences, laws of social sciences, moral laws and laws of the State.

Laws of physical sciences are those facts, which have been proved correct and do not change over a period of time. Such laws establish the relationship between the cause and effect of related facts. These laws are permanent and universal e.g. the law of motion, law of gravity, laws of games etc.

The laws of social sciences also establish the relationship between the cause and effects of certain facts but these laws are true under certain given conditions only i.e. the laws of Economics, Laws of Sociology e.t.c

On the other hand, moral laws are laws of human conduct as members of a society. These laws guide us on how we should live in the society. Examples of such laws are like "Do not lie" or "Treat your fellow men with courtesy".

Such laws may be incorporated into a country's body of laws and are only effective to the extent to which people are:

- Influenced by their individual consciences;
- Concerned with the social regard of others towards them;
- Influenced by religious beliefs;

The laws of State are those laws, which are made and enforced by the State. It is the duty of the citizens of the State to obey these laws. If they disobey them, they are punished i.e. theft is a crime as provided in the Kenyan Penal code and is punishable by law. Law is part of everyone's life and it is important to know it since ignorance of the law is not a defence.

Therefore law has been defined as a set of rules or principles that govern the conduct of affairs of a given community at a given time. There is provided machineries for an aggrieved party to enforce his rights in case any of the rules or principles is broken.

3.2 Sources of law

The sources of law in Kenya are contained in S.3 of the judicature Act (cap 8) and are as follows:

- The constitution, which is supreme
- African Customary law
- Common law
- Doctrines of Equity
- Statutes of General Application in force in England on 12th August 1897
- Case law or judge- made law
- Islamic law

Looking at Statute laws, these contain the rules of conduct that are enacted by the legislature and enforceable by the courts for the benefit of the general public for the preservation of peace and order.

3.2 Branches of law

With the growth of civilization people's social and economic behaviour has assumed a multi-dimensional character. It is therefore neither desirable nor feasible to control all kinds of people's activities through uniform set of rules and principles. States have provided different kinds/branches of law. These are further classified under: -

1. Public law
2. Private law

Public Law

This governs relations between the citizen and the State and includes:

- Criminal law (e.g., homicide, theft, murder, arson and fraud among others)
- Constitutional law (e.g. Sovereignty of Parliament, Separation of powers and the rule of law)
- Administrative law (e.g. the system and procedures of central and local government bodies)

Private law

This governs the relations between citizens and includes:

- **Contract law**, where an enforceable agreement exists between the parties;
- **Law of tort**, where a duty of care exists or is presumed to exist, between citizens, whether or not there is any formal agreement between the parties concerned;
- **Law of trusts**, governing the relationship between trustees and beneficiaries;
- **Law of property** (real and personal governing the relationship between persons having interests in the land and movable property);
- **Family law**, which includes divorce, judicial separation and other matrimonial disputes, and also adoption and legitimisation;

Unit 4: HIV/AIDS and Human Rights Violations

Objectives

- Define the term human rights
- Classify human rights into different categories
- Explain key features of human rights
- To review basic human rights concepts and their domestication
- To illustrate the link between HIV/AIDS infection and human rights related issues in Kenya

4.1 Concept of Human Rights

Human rights as part of international law are rights that every human being possesses, irrespective of race, religious or political beliefs, legal status, language, colour, national origin, gender, ethnicity etc. In other words human rights are accorded to every human being by virtue of being human.

Human rights are entitlements that are not dependant on the status of any person and their denial results in injustices. Human rights protect human dignity and they are held to be universal, inherent, indivisible, interrelated and inalienable, meaning they cannot be separated.

A fundamental aspect of human rights is that they protect human dignity and integrity. Human rights belong to all and must never be regarded as a favour, gift, or privilege conferred by the State or by any Organization or individual.

Universal Declaration of Human Rights Article 1

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in spirit of brotherhood".

4.2 Principles of Human Rights

Discussion Points

- Human Rights are what make men/women human. They represent individual and
 - o Group demands for the shaping and sharing of power, wealth, enlightenment and
 - o Other values
- Human Rights are entitlements or legal claims that individuals by virtue of being human, have against the State. They deal with the relationship between the State and the individual.
- Human Rights are deemed as State obligations.
- Human rights are characterized as:
 - o Universal
 - o Inherent
 - o Indivisible
 - o Interdependent

Understanding of HR gives NGOs empowerment and participation central to the NGOs work that will enable them to assist other individuals and groups to understand the basic issues of Human rights that are mainly linked to the principles of equity and non-discrimination. It will be up to each NGO to define the aspects of the HR that are important to its work, identify possible violations and set its own priorities and chose the best strategies to achieve its goals.

NGOs working in the area of HIV and AIDS will understand the legal responsibility linked to the notion of entitlement. The NGOs will benefit from using the human rights based approach because it stipulates legally sanctioned guidelines on what individuals and groups are entitled to receive or to be protected from.

4.3 Classification of Human Rights

Human rights are classified into:

First generation- Civil and political rights. These are the rights that West focused on during the period of communism

Second generation -Economic social and cultural rights also referred to as solidarity rights/group rights, which includes right to clean water, environment, and peace among others. These required resources to implement hence not taken seriously by the West

Developmental and Environmental rights- these are mainly group rights

Occasionally rights are described as positive, negative or programmatic. The **Positive** rights require governments to do something i.e. right to vote, right to fair trial etc. The **Negative** rights require the government to stop doing something i.e. right not to be tortured, right to move freely etc. **Programmatic** rights require the government to put in place certain program to help the citizens i.e. the right to clean environment, right to a good house etc.

4.4 Domestication of human rights in Kenya

This is provided for in the:

- Constitution
- Parliamentary Bills (Statutes)
- Case law

Chapter V of the current Kenyan constitution

It provides for fundamental rights and freedoms of the individual and entails protection of right to life, right to personal liberty, protection from slavery and forced labour, inhuman treatment, deprivation from property, arbitrary search or entry, secure protection of law, freedom of conscience, freedom of expression, freedom of assembly and movement, and protection from discrimination on the ground of race, colour etc.

Other statutes

Kenya has a variety of Statutes that protect rights i.e. the Children's Act, employment act etc.

The rights protected include and not limited to: -

- The right to life
- The right to dignity
- The right to education

- The right to social security services
- The right to equality (equal protection) before the court of law
- The right to marriage and family life
- The right to health

In conclusion, it is important to observe that the World Conference on Human Rights held in Vienna, Austria in 1993 emphasized that it is the duty of all States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

The private sector has the potential to influence the enjoyment of all the rights both in positive and negative ways. This can be done through advocacy. Under the UN system, NGOs have been active in submitting shadow reports to the various Committees. The international accepted standards and norms set out instruments that should be used in conjunction with existing national laws as a framework of monitoring.

4.5 Derogation from Human Rights

In cases of emergency that threatens the life of the nation, governments are allowed to suspend/derogate from certain human rights. Example is in cases of floods or invasion; freedom of movement can be curtailed. However some human rights cannot be derogated from i.e. the right to life, protection from torture, right to fair and speedy trial, freedom of thought, conscience and religion and protection from slavery.

Rights that can be suspended include as mentioned freedom of movement, interference with privacy and the right to liberty.

4.6 Legal and Ethical Issues

It is important to note that human rights violations in the context of HIV/AIDS take place because of ignorance about the disease and the people most affected by it. The legal Ethical issues below are governed by the UNAIDS international Guidelines on HIV/AIDS and human rights.

Legal and Ethical issues relating to HIV/AIDS are brought about by man's reaction to the epidemic i.e.: -

- Fear and stigmatisation
- Breach of confidentiality
- Unethical research
- Criminalisation of HIV/AIDS infection
- Illegal/mandatory testing
- Abuse of HR i.e. Confinement or isolation
- Right to preserve life or relieve suffering (Euthanasia)
- HIV/AIDS at workplace

4.7 The Issues

1. Testing for HIV/AIDS

- Mandatory or voluntary
- For marriage,
- On children without consent
- For employment
- For insurance purpose
- Indirect testing
- Pre-natal testing

2. Right to Privacy and Confidentiality

- General legal position
- Partner notification
- What of VCT procedure?
- Exceptions?
- Doctor/patient confidentiality
- At workplace, prisons etc.

3. Rights of PLWHA

A PLWHA is human beings like any other and all the provided rights apply to them too and the State is under obligation to maintain those rights.

4. Matrimonial/Family/Women's and Children issues

- Property rights
- Multiple partners
- Marital rape
- Reproductive rights
- Inheritance laws/Writing wills
- Marriage, divorce and separation
- Right to marry and found a family

5. HIV/AIDS and Criminal Law

- Criminal sanctions
- Legal position on euthanasia
- Termination of pregnancy against the right to be born

6. HIV and the Rights of the Child

- Orphans
- Infected children
- Right to health, education etc.
- Punishment for defilement and rape
- Privacy and confidentiality
- Whose consent?

7. HIV/AIDS and Biomedical Research

- Guiding principles to research namely respect beneficiaries and justice
- Maximize benefits and minimize the harms or wrongs
- Equitable distribution of both burdens and benefits to the participants

The UN recommends that states should establish effective national framework for their response to HIV/AIDS, which ensures a coordinated participatory transparent and accountable approach, integrating HIV/AIDS policy and program responsibilities across all branches the government HIV/AIDS international guidelines.

The promotion and protection of human rights constitute an essential component of HIV and reducing the impact of HIV/AIDS.

Adopting a human rights approach ensures that people who are most vulnerable to the infection and the same time disadvantaged have access to the necessary information and services to protect themselves.

These include securing correct information, affordable health care, appropriate social support and protection against violence and discrimination.

The protection and promotion of human rights are necessary both to the protection of the inherent dignity of persons affected by HIV/AIDS and the achievement of the public health goals of reducing vulnerability to HIV infection.

Adopting a human rights approach helps to create the supportive atmosphere that is necessary to encourage people to come forward to help them benefit from HIV/AIDS education and services to enable them change behaviour.

According to the UN guidelines the areas of concern identified are: -

1. Human rights of women
2. Criminal laws and correctional systems
3. Anti-discrimination and protective laws
4. Legal supportive services
5. Right to education
6. Freedom of assembly and association
7. Right to health
8. Right to work
9. The right to freedom from cruel, inhuman or degrading treatment or punishment

Unit 5: Family Law

Family Law

This unit is intended to familiarize the trainee with the law relating to marriage, the rights and duties of spouses, separation, divorce, financial support of the family by the husband, and division of matrimonial property. The family is the primary institution of society. Marriage is both a social and a legal relationship. Family law regulates the legal relationships between the spouses.

Objectives

- Identify and explain the various family law systems
- Explain the sources of family law
- Describe the different types of marriage law systems
- Explain the legal requirements for a valid customary or statutory marriage
- Explain the circumstances in which a marriage may be presumed by the law
- Explain the grounds of and the consequences for, separation and divorce under customary and statutory marriages
- Describe the principles governing division of matrimonial property

5.1 Family Law Systems

What is a family?

In the social sense, a family is a unit created by one man and woman who agree to share a common household with or without children.

Legally, certain requirements have to be complied with for the unit to be formal

- Undergoing a formal marriage ceremony
- Meeting marriage formalities provided by law. In the African customary law, family includes man, wife, children and other relatives

5.2 Forms of Marriages in Kenya

- Statutory
- Islamic
- Customary
- Hindu
- We also have *Solorate* and *Levirate* Unions

By marrying under one of the marriage law systems, a person is presumed to have adopted the personal law system of that marriage law.

5.3 Elements of a valid marriage

- Fulfil age requirements
- Consent
- Capacity
- Dowry payment
- Be single or if polygamy is allowed in accordance with the customs

We have extra legal relationships that take place outside the legally sanctioned marriage and include:

- Concubine

- Prostitution
- Illegitimate children
- Cohabitation

In some cases it leads to Presumption of marriage. This is where a man and woman cohabit without going through formal marriage under any system.

5.4 Rights and Duties of Spouses

Within the marriage, each of the partners has rights and duties. Rights and duties of husband and wife include:

- Duty to provide shelter/matrimonial home
- Conjugal rights and duties
- Duty to provide maintenance for the wife
- Other duties under specific community set-ups

5.5 Separation

Separation is a temporary withdrawal from the marriage contract. This section explains the grounds for seeking separation under customary and statutory marriage systems.

Grounds of separation

- Adultery
- Cruelty
- Desertion
- Sodomy/incest
- Bestiality
- Insanity
- Other grounds – specific community

Procedure for obtaining judicial separation

Either the husband or the wife on any grounds on which a petition for divorce might have been presented may present a petition for judicial separation to the court.

Consequences of separation

Where the court grants a decree of judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

5.6 Divorce

Divorce terminates a marriage contract.

Grounds for Divorce include:

- Adultery
- Cruelty
- Desertion
- Sodomy/incest
- Bestiality
- Insanity
- Presumption of death
- Procedures for obtaining judicial and extra-judicial divorce
- Consequences of divorce

5.7 Maintenance

The law casts on the man the responsibility of providing financial support to the family. If he fails to do so, the law can compel him to discharge his responsibilities. Maintenance can be applied for during the marriage. Look at:

- Circumstances in which maintenance can be claimed
- Principles of determining levels of maintenance
- Variation of maintenance orders
- Enforcement of maintenance orders

5.8 Matrimonial Property

Disputes about who owns what arise when the marriage relationship has failed. This section discusses the principles upon which matrimonial property is shared out, and the process for doing so.

Principles governing division of matrimonial property

- Direct contribution
- Indirect contribution

Procedure for seeking division of matrimonial property

The court may after pronouncing a decree for divorce or nullity of a marriage, depending on application, make order for division of matrimonial property for benefit of the children of the marriage or for either parties as the court deems fit.

Unit: 6 Succession Law and Inheritance Laws

The Unit will deal with the law of succession and inheritance to assist the community to understand the law around this. In a community with many PLWHA, it is important for the trainer to help them to understand the Kenyan succession and inheritance laws.

Objectives:

- Understanding the purpose of law of succession
- Get the difference between Testate and Intestate Succession
- List the sources of Law of Succession
- To understand the Administration of Estates
- Get the difference between inheritance and succession of property

6.1 What is Inheritance?

- Traditionally inheritance was determined by the relationship the deceased person had with the claimant in accordance with the customs of the deceased
- Most African traditions discriminated against women in terms of inheritance
- The 1981 Law of Succession in Kenya made attempts to balance between the African traditions and modern inheritance laws. The Act is the governing statute in terms of distribution of the deceased's property

6.2 The sources of the Law of Succession

- Customary Law
- Statutory Law
- Case Law

6.3 Succession under Customary Law

- This was governed by traditions and customs of the husbands family
- Daughters could not inherit from their fathers
- The Widow(s) could till the land owned by the husband as long as the husband is alive. On dying, the title was passed to the sons and not the widow(s)

6.4 Succession under the Laws of Kenya

The Act provides for both Testate and Intestate Succession. For the purpose of the Act dependants of a male deceased are given as children:

- Both legitimate and illegitimate
- Those born and unborn
Any other children recognized and accepted by the deceased as his own
- Wife or wives or former wives of the deceased whether or not they were being maintained by the deceased before his death

In case of the deceased female, the husband and her children have the right of inheritance.

6.5 Testate Succession

This is where a person dies leaving a will. If a will is properly written, it is respected. Writing wills can minimize disputes over property upon death. However few Kenyans are known to write wills. It is simple to write and vary wills.

In some cases a person may write a will but does not follow the procedures or disinherits some of his/her dependants. In such cases, the Court declares the will invalid and will proceed as if the deceased died intestate.

If one dies when they have made a will, they are said to have died testate.

6.6 What is a Will?

A Will is the record of a deceased person's wishes and intentions on how he wishes his property to be distributed upon his death. In law, a Will only takes effect after the maker dies. The Court will respect a deceased's will to the extent where the dependant(s) do not challenge it.

Advantages of writing Wills:

- To the benefit of the beneficiaries
- Desire of the deceased is respected
- It can provide for how to dispose of the deceased body and a site for burial i.e. by cremation or burial in a specific site for even one can donate his body for use in medical research
- Saves time and avoid long disputes and expenses of distribution of property.
- Intention of the deceased will be respected
- The person making the will called a testator can appoint an executor of his/her choice

6.7 Types of Wills

We have two types

1. Written Will
2. Oral Will

6.8 Legal requirements of making a Will

- Age – Must be an adult over 18 years old
- Sanity – must be of sound mind out of physical illness
- Signature – a Will must be signed
- Witnesses – The will must be witnessed by at least two witnesses known to the maker but not the beneficiaries
- Wilfully – a will has to be made without any influence or duress or coercion nor influence of alcohol
- Provision for all beneficiaries – if not, a will can be contested

Also, the law will look at: -

- Alteration of wills – Alteration has to be signed
- Revocation of wills – Done in writing, by writing another will or marriage of will maker to another spouse
- Challenging wills – Done by a beneficiary in a court of law

6.9 Oral Will is only valid when

- Made before two (2) competent witnesses

- The maker dies three (3) months from date of making it
- If a conflict doesn't arise between the maker and witnesses

6.10 A Written will

It does not have a time frame to be considered for validity. A valid written will should be signed:

1. By maker
2. Before two (2) competent witnesses when additional property is added an annex called a *codicil*, which is added to the will.
3. The will must be clear to bring out the intention of the maker.

Custody

Custody of the wills may be by the Maker, executor, a friend, a lawyer, at the bank or in the High Court registry.

An executor is a person named in the will who will have the responsibility of distributing the property to the persons named. The executor will also put together the deceased's debts and pay out all liabilities from the estate before distribution.

6.11 Intestate Succession

When a person dies without having made a will, he is said to have died intestate. The court while considering a case of intestate will look at:

- The children's rights to inherit both girls and boys
- The polygamous status of the deceased
- The widow's life interest in the property
- The widow's power to apportion property

6.12 Administration of Estates of the Deceased

This is the legal process by which the deceased's property is moved from him to the heirs. The Administrator or the executor is enabled to manage the deceased's property and finally transfer it to the deceased's heirs.

6.13 Letters of Administration

This is a document obtained from court of law that gives the person(s) applying the powers to deal with the deceased's property. The persons applying can be the widow(s) or widower, surviving children, father, mother, brothers and sisters, half brothers and sisters, the public trustee or creditor.

In cases where there is a will, the executor makes the application. The application is by way of prescribed forms obtained from any court. If the value of the property is less than Kshs.100, 000/= the case is filed at the Magistrate's court. If it is more, the matter is filed in the High Court.

Upon filing the forms, the intention of taking out the letters of administration is advertised in the official Kenya Gazette. Those wishing to object are given 30 days to file the objection (in a prescribed form).

If there is no objection, temporary letters of administration are issued pending confirmation after a period of six months. If an objection is filed, the matter is then listed for hearing before the court giving the notice.

After a period of six months, the Administrator of the estate puts together the estate of the deceased and makes necessary sub-divisions. S/He later applies to the court to confirm the shares. The administrator now after confirmation moves to transfer the property.

At the stage when the property has been confirmed, the administrator has the power to even sell some of the property to pay off any debts.

After confirmation, title of ownership passes to the heir(s) and they can deal with their share(s) as they deem fit.

If the deceased dies testate, the will is annexed to the applicant for a grant of probate giving the details of the executors.

Unit 7: Law of Trusts

- To understand the meaning of a trust
- To understand how to create trusts
- Reasons for setting up trusts

7.1 What is a trust?

A trust is the legal relationship created by a person (the settler) when assets are placed under the control of a trustee for the benefit of a beneficiary or for specified purpose. A trust is a separate legal entity that different legal persons own any assets put into the trust. Therefore as assets will no longer be owned the settler, they cannot be taken away from him or her. The trust deed will specify how these assets are to be held, who may have the benefit and the income from them, and who are to be trustees.

7.2 Why create trusts?

There are a number of significant reasons why a person should consider setting up a family trust and transferring assets to that trust. The reasons are as below: -

- Protection from creditors-when a business runs into problems and this will protect you from unexpected liabilities.
- Disputed Wills- It protects against disputes that arise from trusts especially if you foresee one family being disinherited in case of polygamous marriages.
- To put aside property for children with disabilities- It makes funds available at all times for the care of the special needs

7.3 How to form trusts

Each person's personal needs will differ according to circumstances and needs. At the family level couples may create a Mirror trust. A husband can set up one and the beneficiaries are the wife and children. Trustees therefore exercise control over that trust. You then draw a trust deed. Under cap 164 of the laws of Kenya at least one trustee must be independent. Such a person should be a trusted friend, adviser, a friend or relative who is not a beneficiary and who is prepared to take on the role.

7.4 Control of Trustees

The trust deed will normally contain certain powers to enable the settler or the trustees to remove a trustee and appoint new trustees at any given time, without giving reasons. This is to ensure that the settler is always in control.

7.5 Beneficiaries

The trust deed will specify who the beneficiaries are. If there is only one beneficiary, upon their demise, then the property in the trust will form part of your estate.

Unit 8: Land Law

Land is undoubtedly a very important resource in Kenya. As a result, every community has issues relating to land. This unit discusses the laws related to land. This will help the trainees to be in a position to assist the community members who often present them with problems related to land.

Objectives

- Define land
- Understand laws related to land in Kenya
- List the different ways of holding land in Kenya
- Explain different forms of land transactions including registration
- Identify the different problems related to land
- Understand the operations of the Lands tribunal

8.1 Definition of Land

There are different definitions relating to land. Land is seen to connote soil, the earth and the vegetation.

- In the African customary law land is said to be the physical soil and its contents
- According to the registered land Act (RLA) cap 300 of the laws of Kenya, land includes land covered with water and all things growing on it including buildings and other permanent fixtures

Therefore land is property that can be owned, used and disposed.

8.2 Statutes Relating to Land

There are many statutes that deal with interest in land starting with provisions in the **Constitution** that states what Trust land is, vests all the land in the State and protects private property rights. To mention a few other statutes include:

- The registered land Act-deals with all registered land
- The government Land Act Cap 280-comprises of government land
- Registration of Titles Act-Introduced a form of registration of titles and interests in land
- Land adjudication Act- Determines the rights of Trust land view to registration
- Land Disputes Tribunals Act 1990-Limited the jurisdiction of magistrates courts in certain cases related to land and established Land tribunals

8.3 Sources of land law in Kenya

- The constitution
- Statutes
- Common law
- Customary law
- Equity

8.4 Systems of land ownership and interests in land

Part of the confusion with Kenya's land law regime is that there are many land registration systems in place.

The 5 land registration systems and their implications

1. Registration of Documents Act

2. Land titles Act
3. Government Lands Act
4. Registered Lands Act
5. Registration of Titles Act

Land ownership

- Purchases of land (transfer)
- Gifts/presents
- Testamentary and intestate acquisition
- Grant from the state

Extinction of right to land

- Adverse possession
- Termination of lease
- Transfer
- Transmission
- Compulsory acquisition

Interest in land

- Possession
- Lease it out
- Sell the land
- Create easements

Investigation of title

- Rationale
- Personal search
- Official search
- Site visit

Requirements

- Writing
- Execution
- Attestation of signatures
- Verification of execution
- Power of attorney

Stamp duty

This is payment made before transfer is affected.

Consents

- Land Control Board
- Commissioner of Lands
- Kenya Railways Corporation
- Mortgage/charger
- Landlord/head leaser
- Clearance certificates – land rent and rates

Registration

- *Registerable* and *non-Registerable* transactions

- Effect of non registration of *Registerable* transactions
- Effect of registration of *Registerable* transactions
- Indefeasibility of first registration

Restrictions, cautions and caveats

- Rationale
- Right to restrict transaction in land

8.5 The Registered Land Act

This was enacted upon Kenya getting independence with the aim to:

- Create Security of Tenure through Registration
- Reduce fragmentation of land in small pieces through Land Control Act.
- Reduce unnecessary litigations
- Simplified registration process

However this Act has not achieved its goals due to:

- Illiteracy
- Inhibiting costs in transacting
- Corruption in land registries

8.6 Land disputes Tribunal

This is composed of panel of elders from the community who recognize customs of that particular community. Problems with this set up are in:

- Composition, jurisdiction and procedures-gazetted by minister of lands
- Limits on the jurisdiction
- Efficiency of the elders
- Appeal over tribunal decisions time consuming
- Corruption

Unit 9: Crimes and Criminal Procedure

This unit will introduce trainees to the concept crime and various aspects of criminal trial process.

Objectives

- Define criminal law
- Describe the criminal procedure process
- List the rights of an accused person and arrested person
- Explain the court trial process

9.1 What is Criminal Law?

The law is a set of rules that are geared towards regulating social behaviour. Criminal law is the law that defines and deals with crime, including describing forms of punishment to be meted on offenders as well as to regulate crime. Two statutes are used: -

- The Penal code
- Criminal procedure code

Crime is an anti- social behaviour as stipulated in the penal code and the police are under a duty to protect the members of public by effecting arrests of the offenders who in Kenyan law are suspects and remain innocent until proved guilty. Therefore the purpose of criminal law is to punish those who commit crimes. The presumption is that everyone knows the law and that ignorance is no defence. However, this is often misconceived, especially where the majority of people lack basic knowledge of their rights.

9.2 Powers to arrest

These are given to the following:

- Citizens
- Police officers
- Administration i.e. chiefs
- Magistrate

However, due to structures in the community, police officers effect/execute most arrests.

9.3 Procedures of effecting arrest

- Complaint made to the police
- Suspect arrested on commission and handed over to the police
- Mob justice arrest-Illegal to take law in own hands
- Arresting officer has to identify himself
- Some offences in the penal code require warrant of arrest which must be produced
- Unless in cases where suspects turn violent and the police officer has grounds to believe life is in danger and suspects have to be restrained, use of force during arrest is not allowed
- When person is arrested but other authorized persons, they have to be handed over to the police within reasonable time
- Arrested suspect placed in cells and investigation commences

9.4 Rights of an accused person

- Search conducted upon arrest

- Person property surrendered and documented and signed for
- The suspects name is entered in the Occurrence book-OB
- Men and women should be confined in different cells
- A woman should be searched by female officer
- Finger prints or photograph of suspect taken
- The law allows 24 hours confinement before production in court. However, for serious offences like murder, treason or robbery a maximum 14 days is allowed
- While in custody the suspect has right to contact lawyer, family and friends, to receive visitors and access medical attention including seeing a personal doctor

9.5 Investigations

Police must investigate a case before a charge is preferred. A suspect can be released on bail pending investigation if the offence is *bailable*. The bail terms will indicate when h/she is to report to the police station.

Investigations include the following:

- Record of Statement from the complainant and their witnesses
- Record statement from the suspect that include:
 - i. Statement under inquiry
 - ii. Statement under charge

9.6 Trial Process

Plea Taking

- i. Plea of guilty
- ii. Plea of not guilty
- iii. Refusal to plead or silence
- iv. Challenge to the charge- already acquitted of similar offence, does not disclose offence etc.
- v. Application for bail

9.7 Hearing of the case

- Mentions
- Prosecution case
- Examination in chief
- Cross examination
- Re-examination
- Ruling of case to answer
- Defence case; Sworn or *unsworn* statement or silence
- Submission if advocate on record
- Judgment
- Mitigation
- Sentence-Concurrent and consecutive

9.8 Forms of Punishment

- i. Death penalty
- ii. Imprisonment

- iii. Remission
- iv. Suspended sentence
- v. Corporal punishment
- vi. Fines and forfeiture
- vii. Compensation
- viii. Probation Community Service Order

9.9 Appeals

- i. Right of Appeal 14 days
- ii. Filing and appeal
- iii. Bail pending appeal



Unit 10: Civil Procedure

Civil procedure rules deal with how legal proceedings concerning civil actions are commenced and prosecuted to completion. Unlike the criminal procedures, the police are not involved. The purpose of civil procedure rules is to guide litigants and make uniform the trial of civil disputes. Parties can bring up the cases on their own or through a lawyer.

Objectives

- Explain the Civil Procedure
- To understand the commencement of civil procedure
- Describe steps in civil hearing

10.1 Sources of civil procedure rules

- Civil Procedure Act
- Civil Procedure Rules
- Other statutes
- Case Law
- Rules of practice
- Inherent jurisdiction of the court

10.2 Commencement of Civil Proceedings

Civil proceedings can commence in different ways as provided in the civil procedure Act. This can be through filing a plaint, petition, or originating motions and originating summons. Where the law lays down a specific procedure, the proceedings will be struck out if that procedure is not followed.

10.3 Steps in the Trial of Civil Actions

Civil procedure rules lay down the various steps to be followed in the trial of civil actions. Each step builds on the previous one. We have the following: -

- Primary pleadings
- Time limits filing different pleadings
- Presentation of the claimants' evidence
 - i. Evidence in chief
 - ii. Cross examination
 - iii. Re-examination
- Presentation of the defendants' evidence
 - i. Evidence in chief
 - ii. Cross examination
 - iii. Re-examination
- Rules of evidence
- Burden of proof on a balance of probabilities
- Standard of proof
- Judgement
- Enforcement of judgement
 - i. Role of auctioneer
 - ii. Role of broker
- Review of judgement
- Right of appeal

10.4 Drafting of Basic Pleadings

A Paralegal Worker should be able to draft basic pleadings when necessary. Basic pleadings include plaint, memorandum of appearance, defence, and hearing notice.

Steps in drafting pleadings

- i. Plaint
- ii. Memorandum of appearance
- iii. Statement of defence and counter-claim
- iv. Hearing notice
- v. Originating summons
- vi. Affidavit
- vii. Replying affidavit
- viii. Petition
- ix. Reply to petition
- x. Chamber of summons

10.5 Interlocutory Proceedings

It is possible to initiate one or more minor cases pending the hearing and final determination of the main case. The applicant in these minor cases within the main case usually seeks temporary remedies, for example, a temporary injunction.

Purpose and features of the main types of interlocutory applications

- Amendments of pleadings
- Summary judgement
- Temporary injunctions
- Security for costs

Application of main types of interlocutory proceedings

- Amendment of pleadings
- Summary judgement
- Temporary injunctions
- Security for costs

10.6 Limitation of Actions

Limitation of actions, applies only in civil cases. There is a limited period of time for taking action to protect one's rights. After the time has expired, the claimant's rights are extinguished.

Period of limitation is stipulated in various Acts regulating a particular right.

- Land
- Contract
- Tort

The consequence on expiry is that one cannot proceed without seeking courts indulgence to file the matter out of time by extending the period.

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