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HIV and AIDS Tribunal of Kenya: Assessing its' Effectiveness in Fulfilling Its' Mandate Under the HIV and AIDS Prevention and Control Act, 2006 from the Perspective of St. Thomas Aquinas' Concept of Justice and the Common Good

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144922

Submitted in Partial Fulfilment of the Requirement for the Degree of Masters in Applied Philosophy and Ethics at Strathmore University

School of Humanities and Social Sciences

Strathmore University

Nairobi, Kenya

August, 2026

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Christopher, Wanjala Wafula



Signature **Date: 4-6-2026**

Approval

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Abstract

Laws and institutions established thereunder must effectively achieve their intended original purpose for the common good of the society as articulated by St. Thomas Aquinas. HIV and Aids Prevention and Control Act, 2006 (HAPCA, 2006) is one of such laws. One of its objectives is to extend to PLHIVS and suspected PLHIVS the full protection of their human rights and civil liberties. This objective is to be realized through HIV and Aids Tribunal (HAT). HAT was specifically created to dispense justice to people living with HIV and Aids (PLHIVS). However, existing literature including case analysis (superior court decisions) has showed that HAT's mandate is not clear as original intended. In addition, its' capacity to deliver on its' mandate is also hindered by various other challenges. Therefore, it was necessary to undertake this study to examine deeply the rationale of both HAPCA 2006 and HAT, their mandate, challenges and explore the possible solutions to the challenges. A mixed method was employed to carry out the study. Qualitative method was used to conduct interviews, case analysis and desk review research from secondary sources. Quantitative method employed use of questionnaire to collect data and for presentation of the findings.

The study found and concluded that HAT has not lived up to its' original purpose as planned due to several challenges such as insufficient funding, conflict of some provisions of HAPCA 2006 with the Constitution of Kenya 2010 and other laws, lack of enforcement powers, psychosocial problems and abandoning of cases midway by some advocates. To paraphrase Aquinas, justice is what is due to the other person and institutions such as HAT act as the guarantors of justice to everybody. Therefore, it behoves stakeholders of HAT to put in proper frameworks to enable it to achieve the objectives (HAPCA 2006) and HAT itself to serve the common good as articulated by Aquinas and as originally intended. Hence, the study has recommended several solutions such as amendment of vague provisions of HAPCA 2006 to provide clear mandate, increase in funding, establishing a psychosocial center and further research which are viable solutions to ensure HAT fulfills its' purpose as original planned and for the common good of the Kenyan society.

Table of Contents

Declaration and Approval ii
Abstract iii
List of Tables viii
List of Abbreviations ix
List of Statutes x
List of Cases xi
List of Key Words xii
Acknowledgments xiii
Chapter 1: Introduction 1
1.1. Background 1
1.2. Problem Statement 3
1.3. Research Aim 3
1.4. Research Objectives 4
1.5. Research Questions 4
1.6. Scope of the Study 5
1.7. Significance of the Study 5
1.8. Limitations to the Study 5
1.9. Hypothesis 6
1.10. Chapter Summary 6
Chapter 2: Literature Review 8
2.1. Introduction 8
2.2 Theoretical Framework 8
2.2.1 Natural Law Theory 10
2.2.2 Theory of The Common Good 12
2.3 Literature Review in Accordance with Each Objective 13
2.3.1 How Is the Mandate of HAT To Fulfil Its Purpose and Objectives Under (HAPCA 2006 Limited Due To Conflicts and Inconsistencies Between the Provisions of HAPCA 2006, The Constitution of Kenya, 2010, And Other Existing Laws? 13
2.3.2 What Was the Rationale Behind the Establishment of HAT, And Does It Possess the Capacity to Effectively Enforce Human Rights, Protect Civil Liberties, And Deliver Justice to PLHIVS In Accordance with The Objectives Of HAPCA, 2006? 17

VT OMNES VNVM SINT

2.3.2.1 Hierarchical Structure of Courts and How It Affects HAT's Capacity for Judicial Decision Making 18
2.3.2.2 Insufficient Funding and Limited Public Knowledge and Awareness of HAT 20
2.3.3 What Are the Possible Solutions to Assist and Ensure HAT Fully Realises Its' Purpose and Mandate Under HAPCA, 2006 In Accordance with The Concept of The Common Good? 20
2.3.3.1 Amendment 20
2.3.3.2 Increased Funding for Court Structures and HAT's Publicity 21
2.4. Conceptual Framework 21
2.5 Relationship of this Research Study with Other Existing Research 23
2.6. Chapter Summary 23
Chapter 3: Research Methodology 24
3.1 Introduction 24
3.2 Research Design 24
3.3 Population and Sampling 24
3.4 Data Collection Methods 26
3.4.1 Questionnaire 26
3.4.2 Interviews 26
3.4.3 Where and How Long the Interviews Be Conducted 27
3.4.4 How the Participants Were Approached and Recruited 28
3.4.5 Modalities Put in Place to Safeguard the Litigants Who May Have to Relive Their Cases During the Interviews 29
3.4.6 Data Analysis 29
3.5 Validity and Reliability 29
3.6 Dependability 30
3.7 Ethical Considerations 30
3.8 Chapter Summary 32
Chapter 4: Presentation of Research Findings 33
4.1 Introduction 33
4.2 General Information on participants 33
4.2.1 When Did You Become a member or Representative of HAT/ When Did You First Encounter HAT? 33
4.2.2 When Did You Get To Know About HAT? 34

4.2.3 How Long Have You Been Working with HAT? 35
4.3 Specific Questions on HAT 36
4.3.1 Whether There Are Inconsistencies Between HAPCA 2006 and Other Existing Laws 36
4.3.2 Whether the Conflicts and Inconsistencies Between the Provisions of HAPCA 2006 And Other Existing Laws Have Affected the Mandate of HAT to Deliver and Fulfill Its' Obligations 37
4.3.3 Whether HAT Has the Capacity to Protect Human Rights and Civil Liberties of PLHIVS and Suspected PLHIVS 39
4.4 Whether There Are Other Challenges Facing HAT 40
4.5 What Are the Possible Solutions to The Challenges Facing HAT? 41
4.6 Chapter Summary 42
Chapter 5: Discussion of Findings 43
5.1 Introduction 43
5.2 Whether the Mandate of HAT Is Limited Due To Conflict and Inconsistencies Between the Provisions of HAPCA, 2006, And Existing Laws, Such As the Provisions of The Constitution of Kenya 2010 43
5.3 Whether HAT Can Effectively Enforce Human Rights and Offer Justice to PLHIVS Following the Objectives for the Enactment of HAPCA 2006 47
5.4 Evaluate and Determine Possible Solutions to Ensure the Full Realisation of HAT's Purpose and Mandate Under HAPCA, 2006 50
5.4.1 Amendment 50
5.4.2 Increase Funding 51
5.4.3 Policy Frameworks 52
5.5. Chapter Summary 53
Chapter 6: Conclusions and Recommendations 54
6.1 Introduction 54
6.2 Conclusions 55
6.2.1 Whether the Mandate of HAT is Limited Due To Conflicts and Inconsistencies Between the Provisions Of HAPCA, 2006, and Existing Laws Such as The Provisions of The Constitution of Kenya 2010 55
6.2.2 Whether HAT Can Effectively Enforce Human Rights and Offer Justice to PLHIVS Following the Objectives for The Enactment of HAPCA 2006 55
6.2.3 Evaluate and Determine Possible Solutions to Ensure the Full Realisation of HAT's Purpose and Mandate Under HAPCA, 2006 56

6.3 Recommendations on the Study Based on The Findings and Conclusions 56
6.3.1 Recommendation for Amendment 56
6.3.2 Recommendation for HAT's Enforcement Powers 57
6.3.3 Recommendation for Policy Reforms 57
6.3.4. Recommendation for Further Research 58
6.4. Chapter Summary 59
References 60
Appendices 64
Appendix A: Similarity Report 64
Appendix B: Ethical Clearance Confirmation 66
Appendix C: National Commission for Science, Technology and Innovation (NACOSTI) Research License 68

VT OMNES VNVM SINT

List of Tables

Table 2.1. How Dependent and Independent Variables Relate and Affect Each Other 22

Table 4.1. Information On When Participants First Encountered HAT? 34

Table 4.2. Results of Participants Knowledge of HAT Prior To Engagement with It 35

Table 4.3. Duration Participants Worked with HAT 36

Table 4.4. Results on Whether There Are Inconsistencies Between HAPCA 2006 and Othe Existing Laws 37

Table 4.5. Whether the Conflicts and Inconsistencies Between Provisions of HAPCA 2006 and Other Existing Laws Have Affected Mandate of HAT to Deliver and Fulfill Its' Obligations 38

Table 4.6. Whether HAT Has the Capacity to Protect Human Rights and Civil Liberties of PLHIVS and Suspected PLHIVS 39

Table 4.7. Whether There Are Other Challenges Facing HAT? 41

VT OMNES VNVM SINT

List of Abbreviations

AIDS	Acquired Immunodeficiency Syndrome
ELRC	Employment and Labour Relations Court
HAPCA 2006	HIV and Aids Prevention and Control Act, 2006
HAT	HIV and Aids Tribunal
HIV	Human Immunodeficiency Virus
KLR	Kenya Law Reports
NACOSTI	National Commission for Science Technology and Innovation
NSDC	National Syndemic Diseases Control Council
PLHIVS	People living with HIV and AIDS
SHSS	Strathmore University School of Humanities and Social Sciences
SOA	Sexual Offences Act
SU-ISERC	Strathmore University Institutional Scientific and Ethics Review Committee

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List of Statutes

Constitution of Kenya, 2010

Employment and Labour Relations Act, 2011

HIV and Aids Prevention and Control Act, 2006

Sexual Offences Act

List of Cases

Aids Law Project v Attorney General & 3 others [2015] eKLR

Attorney General & 2 others v PKJ [2025] eKLR

Avery (East Africa) Limited v J M M & another [2018] eKLR

DKS v Ampath Centre (Civil Appeal 161B of 2018) [2023] KEHC 17248 (KLR)

JC v AC [2024] eKLR

MCM v BOO [2019] eKLR

Ontweka & 3 others v Ondieki [2024] eKLR

P.K.N & another v Attorney General & 3 others [2021] eKLR

PRJ v KDF (Tribunal Case 048 of 2022) [2024] eKLR

Royal Media Services Ltd v Attorney General & 6 others [2015] eKLR

Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR)

List of Key Words

HIV and AIDS Prevention and Control Act, 2006 (HAPCA 2006)

HIV and Aids Tribunal (HAT)

Mandate

Psychosocial support

Therapeutic Jurisprudence

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Chapter 1: Introduction

1.1.Background

The efficacy of any promulgated law is significant in a democratic society. Every law enacted by authorities such as parliament should fully achieve its intended purpose. Generally, laws are promulgated in a society to serve different purposes. Some of the significant functions of laws in society are to promote desirable behaviour and prevent undesirable behaviour ones, as well as to provide facilities for private arrangements between individuals (Raz, 2009, p. 169). Essentially, laws aim at the general good of the society.

Various philosophers have also written and stated about the need and importance of laws and institutions in societies. For instance, St. Thomas Aquinas states that the primary function of the law is to serve the common good of the society (Aquinas, 1274, I-II, q.90, a.2). Aquinas defined law simply as an ordinance of reason for the common good made by him who has care of the community and promulgated (Aquinas, 1274, I-II, q.90, a 4,). In this sense, the usefulness of promulgated law is whether it serves the common good or not because it is enacted by reasonable human beings who have legitimate authority.

Usually, common good may refer either to the interests that members have in common or to the facilities that serve common interests, for example, the road system, police protection and public safety, courts and the judicial system, civil liberties such as freedom of speech and freedom of association etc. (Hussain et all, 2018, Par.1). On the other hand, Aquinas views common good as something which can be shared by many or everybody without getting lost or diminished (Thomistic Institute. 2020, 3:11 -3: 27). One of the common goods identified by Aquinas is Justice. He defines justice as a habit whereby a man renders to each one his due by a constant and perpetual will (Aquinas, 1274, II-II, q. 58, a1). Hence, for laws to serve the common good, they must be just and effective, otherwise if they are unjust, they are no law at all.

In Kenya, HIV and Aids Prevention and Control Act, 2006 (HAPCA 2006) is one of the laws promulgated to serve the common good, particularly to provide justice to PLHIVS and suspected PLHIVS. HAPCA 2006 established HAT. It is a special tribunal established under section 25 of HAPCA 2006, and given the mandate under section 26 to handle cases related to HIV and Aids and

those arising out of violation of HAPCA 2006. The Report of the Taskforce on legal issues relating to HIV and Aids (2002) provides that the rationale for the enactment of HAPCA 2006 and subsequent creation and establishing of HAT was to provide a legal framework that would assist in combating HIV and Aids while also ensuring the protection of human rights and legal rights of individuals regardless of the agony occasioned by HIV and Aids (Pg. X).

Despite the above clear rationale for enacting HAPCA 2006 and creation of HAT, desk review research and cases analysis pointed to the fact that HAT faces several challenges that have limited the fulfilment of its' mandate. Desk review through case analysis showed that some of the challenges stem from the law itself such ambiguity in HAT's mandate (Jurisdiction). This can be illustrated by the Kenyan High Court's decision in the case of **Royal Media Services Ltd vs. Attorney General & 6 others (2015)**. In this case, Royal Media Services Limited filed a petition before the High Court to challenge the decision of HAT in which HAT had earlier on ruled that it had the jurisdiction (authority) to hear and determine applications for redress on violation of fundamental rights and freedoms under the Bill of rights as provided for under the 2010 Constitution. However, the High Court disagreed with HAT's decision. It ruled that in the absence of enabling legislation enacted by the parliament and put in place, HAT does not have the power to hear and determine issues relating to infringement of human rights. This limited HAT's mandate. This decision has been applied and followed in several cases before the Tribunal, which has either led to the dismissal of cases or premature termination. For example, in the case of **P.K.N & another v Attorney General & 3 others (2021),** the Petitioners filed a case before HAT and claimed that their fundamental rights and freedoms under the Bill of rights had been violated by prison officers. In that case, the petitioners, who were inmates, claimed in their petition before HAT that prison officers were violating their rights because they were denying them their treatment, they were not being taken to hospital when required and their medical records and HIV status were being handled illegally and negligently, and as a result, they had suffered pain, their health deteriorated, suffered mental anguish as well as stigma and discrimination due to their HIV status. HAT held that access to healthcare services and discrimination are enshrined in the Bill of Rights under Articles 31 and 43 (1) (a) of the Constitution, hence, it did not have the requisite jurisdiction (mandate) to make a determination on whether the Claimants' rights had been violated or not (Par. 39). The question then is, if HAT does not have the mandate to hear and determine issues relating to the infringement of human rights, how can it then enforce issues

related to human rights and civil liberties as envisaged under HAPCA, 2006? It looks, therefore, that HAT has been entrusted with an impossible mission.

Other challenges established through desk review included insufficient funding and limited public awareness of HAT's existence and its' scope of work. These challenges were indeed confirmed during collection of information from participants who took part in the study. This means HAT cannot offer justice to Kenyans as originally expected of it. This is a problem that affects access to justice and the common good, as was postulated by St. Thomas Aquinas as shown above. Therefore, there was need to deeply study the rationale for enactment of HAPCA 2006 and creation of HAT from St. Thomas Aquinas perspective of justice and the common good amid the challenges highlighted through desk review and case analysis.

1.2.Problem Statement

Laws are promulgated to serve the common good of society. Any limitation on the law that curtails or makes it impossible to serve the common good causes injustice to people. HAPCA 2006 was enacted to provide the full protection of the human rights and civil liberties to PLHIVS and suspected PLHIVS. Under section 26 (1) of HAPCA 2006, HAT is primarily mandated to provide this protection. However, HAT's mandate has been significantly impaired by the inconsistency between certain provisions of HAPCA 2006 such as sections 3 and 6 and Article 165 (3) (a) and (b) of the 2010 Constitution of Kenya.

Therefore, the problem to study is whether HAT can effectively attain its' mandate under the existing current legal framework in light of the inconsistency of the provisions of HAPCA, 2006, such as sections 3, 25 and 26 of the HAPCA, 2006 with Article 165 (3)(a) & (b) of the Constitution of Kenya considering other challenges such as insufficient funding.

1.3.Research Aim

The overall aim of the study was to examine how challenges facing the HIV and AIDS Tribunal (HAT), such as conflicts and inconsistencies between the provisions of HAPCA, 2006, the Constitution of Kenya, 2010, and other existing laws, as well as insufficient funding and HAT's significant lack of public awareness, affect its mandate. These challenges have contributed to injustice

against PLHIVs, suspected PLHIVs, and members of the public, thereby undermining the common good of society as articulated by St. Thomas Aquinas.

The specific aims of the study were to:

i. Examine the rationale behind the creation and establishment of HAT under HAPCA, 2006.
ii. Analyse HAT's successes, failures, and challenges, together with their respective causes, from its inception to date.
iii. Examine how the concept of the common good can justify the continued existence of HAT and contribute towards improving and strengthening its future performance.

1.4.Research Objectives

i. To examine whether the mandate of HAT is limited due to conflicts and inconsistencies between the provisions of HAPCA 2006, the Constitution of Keya, 2010, and other existing laws.
ii. To assess the rationale for establishment of HAT and examine whether HAT can effectively enforce human rights, civil liberties and offer justice to PLHIVS following the objectives for the enactment of HAPCA, 2006.
iii. To evaluate and ascertain possible solutions to ensure the full realization of HAT's purpose and mandate under HAPCA, 2006 in accordance with the concept of common good.

1.5.Research Questions

i. How is the mandate of HAT to fulfil its purpose and objectives under (HAPCA 2006 limited by conflicts and inconsistencies between the provisions of HAPCA 2006, the Constitution of Kenya, 2010, and other existing laws?
ii. What was the rationale behind the establishment of HAT, and does it possess the capacity to effectively enforce human rights, protect civil liberties, and deliver justice to PLHIVS in accordance with the objectives of HAPCA, 2006?
iii. What are the possible solutions that may ensure the full realisation of HAT's purpose and mandate under HAPCA 2006, in accordance with the concept of the common good?

1.6. Scope of the Study

The scope of this study was limited to matters touching on enforcing and protecting human freedoms rights and civil liberties as provided for under section 3 (a) of HAPCA 2006. This highlighted the limitations on the jurisdiction (mandate) of HAT.

The study's focus was Nairobi. This is because, at the time of this study, there was only one HAT registry that takes and registers all cases referred to it from across the country. However, for better understanding, clarity, and results, the research also referred to other regions in the country where HAT services have been experienced. The study period spanned from March 2025 to May 2026.

1.7. Significance of the Study

The study was significant because it sought to examine and understand the challenges that HAT faces so that it could propose the necessary recommendations to ensure it fully realises its mandate. HAT is a specialised tribunal established solely to offer services to a specialised group of people. As such, it has to live up to its mandate for the common good. However, it has faced challenges that have hindered its ability to fulfil its full mandate and objectives. Therefore, the study was significant because it aimed at understanding these challenges so that it could provide recommendations on how to address them.

Secondly, the study will contribute to knowledge in the areas of HIV/AIDS and access to justice in Kenya. Currently, very little has been written about the HIV-Aids Tribunal in Kenya, and in particular, there is nothing much on HAT and the dispensation of justice. It remains significantly obscure to the public; therefore, this study assists in publicising it.

1.8. Limitations to the Study

There were limited material about HAT, particularly about how it dispenses justice through its' mandate. Most of the materials address the issue of HIV and AIDS in general. There was very little of it that touches on the issue of the mandate of HAT and how it affects its effectiveness.

The study involved a sensitive subject related to PLHIVs. Therefore, finding PLHIVS willing to open up and talk about the subject was a challenge. Therefore, the researcher identified members of the

HAT Registry who dealt with PLHIVS when they brought cases before HAT and who worked alongside them in persuading and, where necessary, counselling them prior to the interviews

The research topic also revolved around a pertinent public issue, and it was therefore imperative that the views of certain people, such as officials at HAT, Advocates, and Lawyers who practice before it, are heard. Unfortunately, some of these members were busy handling other cases, and therefore, finding time for in-depth discussion and examination was a bit challenging. Nevertheless, the researcher was able to persuade them to take a few minutes of their time to fill out the questionnaires he had sent to them.

1.9. Hypothesis

The online Cambridge dictionary defines a hypothesis as an idea or explanation for something that is based on known facts but has not yet been proved.

In this study, the researcher hypothesises that HAT has not been effective in dispensing justice to PLHIVS and suspected PLHIVS due to limitation of its mandate arising out of conflict of laws between HAPCA 2006, the Constitution of Kenya, 2010 and other existing laws, in addition to other challenges such as insufficient funding and the public's limited knowledge and awareness of HAT. This has made HAT's mission ineffective, and the challenges need to be solved for it to be effective.

1.10. Chapter Summary

This chapter introduced the research topic for the study. It is intriguing that, despite being one of a kind, there has been little interest from the public in how effective it is in dispensing justice in accordance with the rationale for its creation and establishment. As a student pursuing a Master's in Applied Philosophy and Ethics, the researcher developed a keen interest in how HAT dispenses justice and therefore wished to study it by assessing the challenges affecting its effectiveness and offering solutions thereto from the perspective of St. Aquinas' concepts of justice and the common good.

To ensure a good structure and coherence in the study, the researcher identified and described the relevant sub-sections, including the title of the topic, background, introduction, the statement of the problem, and stated the overall aim of the research and the objectives of the study. The chapter also stated research questions, outlined the scope of the study, and highlighted significance for the study,

as well as provided limitations that were encountered. The information in this chapter helped to guide the next chapter and subsequent ones.

Chapter 2: Literature Review

2.1.Introduction

In this chapter, the researcher reviews previous works related on the topic of the study to establish knowledge gaps and problems for the study. Snyder, H. (2019) states that literature reviewing is a systematic way of collecting and synthesising previous research to demonstrate evidence and identify areas in which more research is needed, which in itself is a critical component of creating a theoretical framework and building a conceptual model (p. 333). Therefore, this chapter reviews different literature written by previous authors on the topic of study.

In undertaking this chapter, the researcher framed and outlined a theoretical framework within which he synthesised previous works and literature on the topic systematically. In doing so, he explored various theoretical concepts and scholarly material authored by previous researchers on the topic of study, as well as examined several court decisions from cases determined by the Supreme Court of Kenya, the High Court of Kenya, Employment and Labour Relations Court (ELRC) and HAT itself.

Theories relevant to the study, particularly those promulgated by Aquinas and other authors were critically analysed and discussed. Finally, for coherence purposes, the researcher reviewed literature in accordance with the objectives and research questions created in Chapter One and then gave a chapter summary.

2.2 Theoretical Framework

Dickson (2020) states that a theoretical framework is based on an existing theory in a field of inquiry that is related to, and/or reflects the hypothesis of a study (Dickson, 2020, p. 438). It is a blueprint often borrowed by researchers to build their research inquiry (Dickson, 2020, p. 438). The purpose of a theory is to explain a relationship between two or more actions or things using rigorous criteria so that it aligns with logic and empirical evidence (Patten, L.M & Newhart, M, 2018, Pg. 8). The topic of study is the relationship of philosophy of Aquinas concepts of justice and common good in relation to law, particularly, whether HAT as established under HAPCA, 2006, is capable of fulfilling its objectives due to some of the challenges it experiences as stated in the background.

Natural law theory and the common good are the two theories selected for this study. As stated in the abstract, whereas the study seeks to establish the effectiveness of HAT in dispensing justice to

PLHIVS and suspected PLHIVS in accordance with the objectives of HAPCA 2006, it also demonstrates the link between philosophy and the law. Therefore, natural law theory and the common good are connected because natural law provides the basis and reasoning behind the law since it postulates that laws emanate from a superior being through promulgation by those in authority. On the other hand, common good provides the basis for what the law seeks to achieve.

St. Thomas Aquinas's works on natural law theory and common good were further chosen for the study because the common thread running through the study, application and enforcement of human rights is that they are inalienable and belong to everybody. The 2010 Constitution, states that human rights belong to the persons and are not given by the state or anybody else, and therefore cannot be taken away by the whims of anyone (Article 19, 3). This conforms with Aquinas's concept of natural law and natural rights, to which he postulates that they emanate and are given to us by God himself and at the same time we can discover them through reason (Aquinas, 1274, II-II, Q. 90, A. 4). In this context, HAPCA, 2006, is human law made for the common good of the society; that is, HAPCA, 2006, established HAT to serve PLHIVS and suspected PLHIVS for the common good of the Kenyan society.

However, to serve the common good, laws have to be just. He states that laws framed by man are either just or unjust; that is, they are just if they are rooted in human conscience, ordained towards the common good as their end, they do not exceed the power of the lawgiver, and do not burden the subjects or bring about inequality (Aquinas, 1274, Part I-II, Qn. 96, A.4). Hence, for any law to be effective, it has to have these four elements: made or created by reasonable being (human beings), oriented towards the common good, which means its' purpose and teleological end for the whole society is the good, must be made and passed (promulgated) by a legitimate authority, in this case the parliament, and does not burden a section of the society but one that makes life easier and suitable for everyone. The same characteristics are captured in the Summa Theologica under I-II, Q. 95, A. 4, when Aquinas states that, *"*laws are said to be just, both from the end, when they are ordained to the common good; and from their author, when the law does not exceed the power of the lawgiver; and from their form, when burdens are laid upon the subjects according to an equality of proportion and with a view to the common good" (Aquinas, 1274, I-II, Q. 95, A. 4).

HAPCA ’s 2006 objectives and the rationale for the creation of HAT thereunder were all about the common good of the Kenyan society, about challenges facing PLHIVS and suspected PLHIVS due to HIV and AIDS, especially on the twin issues of human rights and civil liberties. This is why the Report of the Taskforce on legal issues relating to HIV and Aids (2002) provides that the rationale for HAPCA 2006 was to establish a legal framework through which human rights and civil liberties of PLHIVS and suspected PLHIVS would be addressed effectively for the betterment of Kenyan society (Pg. X).

Laws such as HAPCA 2006 and institutions established thereunder like HAT are about actions that deal with people and towards people; ensuring that we treat individuals as who they are (individuals) with the respect and dignity they deserve as human beings because they are autonomous human beings regardless of their status. Essentially, this is about enforcing people’s rights and freedoms in the most humane way possible we can think of as provided for under the law and as a matter of our moral obligation by ensuring that our actions are oriented towards what can be considered as a universal law. This is especially for those laws specifically enacted to provide justice to a special or vulnerable group of people such as PLHIVS. Hence, the need to undertake this study.

2.2.1 Natural Law Theory

Aquina's concepts of law and justice are rooted in his theory of natural law. At first, he identifies four types of laws: eternal, natural, human and divine law (Aquinas, 1274, II-II, Q. 90, A. 1-4). Expounding on the same, Harris (2011) writes that Aquinas's legal theory of natural law encompasses four types of laws: Eternal law, which comprises God-given rules governing the creation; Natural Law, which is a segment of the eternal law that is discoverable through reasoning; Divine law, which is law revealed through the scriptures, and Human law which consists of rules, supported by reason but articulated by human authorities for the common good through promulgation (Harris, 2011, P 8). With specific reference to this study, Human law (manmade law) is considered in light of natural law theory because HAT is a creation of manmade law. HAT is established by HAPCA, 2006. The parliament promulgated HAPCA in 2006; hence, both HAT and HAPCA, 2006, can be considered human laws and are therefore relevant to this study because they are artificial laws for the common good.

Harris (2011) further explains the importance of natural law theory. He states that natural law is an important theory because through it, and using the same process of reasoning from nature, authors such as John Locke, who had great interest in human rights such as the right to life, liberty and property, developed the concept of natural rights, of which the infringement of them entitle citizens to revolt (Harris, P. 10). As seen under Articles, 19, 20 and 22 of the Constitution of Kenya, 2010, natural rights and fundamental freedoms under the Bill of rights belong to every individual. Any violation of them gives a person the locus standi to claim infringement before a competent court of law or tribunal. HAPCA 2006 as stated in section 3 (a), was meant to aid human rights for PLHIVS and suspected PLHIVS.

However, this theory has not gone without criticism. Among the critics is John Finnis. Writing about John Finnis's criticism of natural law theory, Himma, E.K writes that according to Finnis, natural law theory and natural law in itself are only concerned with explaining the moral force of law which is the mandatory force of promulgated law, but do not give a conceptual account of legal validity.

Essentially, according to John Finnis, natural law theory is the innate drive (call it moral conscience) of an individual based on the dos and don'ts arising from social facts such as customs, legislation and judicial precedents, and cannot by itself as a theory give validity to a law. Indeed, Finnis himself states that natural law theory is to the effect that the character of law depends upon social facts such as legislation, custom or judicially established precedents, which are fundamental and primary elements in the law's capacity to advance the common good, secure human rights, or to govern with integrity (Finnis, 2024, Par. 6). He further states that a theory of natural law may be primarily undertaken to assist the practical reflections of those concerned to act, whether as Judges, politicians, or citizens, but in either case, the undertaking cannot proceed securely without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities (Finnis, 2011, P.18-19).

Despite this criticism, the researcher maintains that natural law theory remains important for this study because, as Harris (2011) notes, legislated laws derive their legal quality and binding power from natural law. After all, they involve reasoned decisions that are geared towards the common good (Harris, 2011, p. 8). HAPCA, 2006, and the creation of HAT under it were all for the common good of the Kenyan public.

2.2.2 Theory of The Common Good

Common good is a good that is unitary and capable of being shared without being diminished (Vermeule, 2022, p. 57). It can also be described as the structural political, economic and social conditions that allow communities to live by the precepts of legal justice, combined with the injunction that all official action should be ordered to the community's attainment of those precepts, subject to the understanding that the common good is not the sum of individual goods, but the indivisible good of a community ordered to justice, belonging jointly to all and severally to each (Vermeule, 2022, p. 60). Hence, justice and peace are among the standard constitutional subheadings of the common good (Vermeule, 2022, p. 61). This is in line with Aquinas' advancement of justice as a common good that any promulgated law should aim to achieve. Hence, according to London, to say that a just social order advances the common good is to say that its' basic institutions, including social, political, legal, and health-related institutions, are organised on terms that secure and advance the fundamental interests of that community's members (London, 2022; P. 15 -16). The theory of the common good is important for this study for two reasons. Citing Jacques Maritain, Hussain et all (2024) write that human rights are grounded in natural law but realised through an orientation to the common good (Hussani et all, 2024, Pg. 93). Further, they state that respect for human rights is a requirement of justice and the maintenance of human rights is a fundamental component of the common good (Hussain et all, 2024, Pg. 94). These two elements are at the centre of this study to establish the mandate of HAT.

Common good as a theory has also faced criticism from different scholars. For instance, it has been argued by some scholars such as Jaede Maximilian that common good does not take into account that different communities and individuals have a different version or account of what amounts to shared common good (Jaede, M, Pg.9). After analyzing various concepts from various philosophers, Jaede, M (n.d) writes that it has been argued by scholars such as Charles Taylor that citizens are only prepared to accept the legitimacy of a liberal political order and share the burdens of justice if they have a sense of community based on a shared conception of the common good.

Another criticism is that the concept of the common good has been previously used and can still be used to suppress individual rights. Jaede, M (n.d) writes that many contemporary philosophers acknowledge that the concept has been used in the past to justify social and political inequalities, and

the suppression of parts of the population (P. 10-11). Such critics claim that proponents of the shared good place too much attention and emphasis on individuals who are viewed as having suffered some form of discrimination or historical injustice and forgets about the rest of the community members. Despite these criticisms, the researcher argues that the theory of the common good is a viable framework for this study because it promotes the flourishing of all members of a particular community, regardless of their differing values within a society.

2.3 Literature Review in Accordance with Each Objective

2.3.1 How Is the Mandate of HAT To Fulfil Its Purpose and Objectives Under (HAPCA 2006 Limited Due To Conflicts and Inconsistencies Between the Provisions of HAPCA 2006, The Constitution of Kenya, 2010, And Other Existing Laws?

Online Cambridge Dictionary (n.d) defines mandate as "authority to act in a particular way given to a government or a person". In law, this mandate is also referred to as jurisdiction, authority or power. The Supreme Court emphasised the importance of having a clear mandate in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others (2012). In that case, the Appellant (Samuel Kamau Macharia) filed an application before the Supreme Court seeking leave (permission) of the Supreme Court to appeal against and challenge the decision of the Court of Appeal delivered in 2008 against him for a loan plus interest he had acquired from Kenya Commercial Bank and its affiliates (Respondents) in the case. The Respondents opposed his application for leave by arguing that the Supreme Court of Kenya did not have jurisdiction (authority) to hear and determine application pursuant to Article 163 (4) of the Constitution and because the Court of Appeal decision which the Appellant was seeking to reverse had been delivered prior to the 2010 Constitution when the Court of Appeal of Kenya was the final court in the country. In agreeing with the Respondent's opposition, the Supreme Court held that it did not have jurisdiction (mandate) to hear the application. It stated that a Court's mandate flows from either the Constitution, legislation or both, and a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law (Par. 68).

HAT's mandate is provided for under Section 26 of HAPCA,2006, which provides that the tribunal shall have jurisdiction to hear and determine complaints arising out of any breach of the provisions of the Act, to hear and determine any matter or appeals as may be made to it under the provisions of the Act; and to perform other functions as may be conferred to it by the Act or by any other written

law being in force. This mandate was meant to ensure the objectives and purpose of HAPCA, 2006, are fulfilled.

Commenting on this mandate, Eba (2016) writes that HAT is granted a broad mandate to hear and determine complaints arising out of any breach of the provisions of HAPCA 2006, which could be interpreted to include an extra-judicial mandate that may entail actions such as making recommendations for the effective implementation of HAPCA (Eba, 2016, p. 173). Indeed, Eba, (2016) states that upon their swearing to take over the mandate of HAT, the former Chairperson, Jothan Arwa (now DR. Arwa), stated that what they intended to do was not only to deal with reported cases but wanted to develop the law in the area of HIV and AIDS so that the public health environment is more friendly to the protection of rights of PLHIVS (Pg. 173).

Despite this broad expectation of HAT, its' mandate appears to be greatly impaired making it difficult for it to fulfill its' original purpose and objectives. Desk review and case analysis of decisions of superior courts show that this has been caused by a number of factors including conflict and inconsistencies between some of the provisions of HAPCA 2006 with the Constitution of Kenya 2010, and other existing laws. Yet, there is no substantive research or serious action that has been undertaken to correct the problem so that HAT can fulfill its' mandate as original anticipated. Therefore, there it was necessary to undertake this research to identify where the problems are and find solutions to them. The problems revealed through desk review and case analysis can be outlined as follows:

First, HAT cannot handle cases that are criminal in nature or perceived to be criminal in nature. This jurisdiction constraint is provided for under section 26 (2) of HAPCA, 2006. The section provides that the jurisdiction conferred upon the tribunal under subsection 26 (1) excludes criminal jurisdiction. In the case of M.K.R. vs C.W.R. (2015), the Claimant and the Respondent had been in a sexual relationship from their time at the University. Later on, the Claimant learned that the Respondent had infected him with HIV- Aids. He therefore filed a claim before HAT requesting HAT to declare that the Respondent's conduct and behaviour amounted to a criminal offence under HAPCA, 2006. HAT ruled and held that it did not have jurisdiction to declare the actions of a Respondent therein as amounting to criminal actions because section 26 (2) of HAPCA 2006,

excluded criminal jurisdiction from it (par. 3). Therefore, this shows that HAT has no mandate over matters containing criminal elements in it, even if they are perceived to arise out of HAPCA 2006.

Secondly, the mandate of HAT on some issues is inconsistent with the Constitution due to its unclear and vague nature. This was seen in the case of Aids Law Project v Attorney General & 3 others (2015). The petitioners therein challenged the constitutionality and legality of section 24 of HAPCA 2006, claiming that it did not state what exactly is comprised in sexual contact as used in the section and whether it includes kissing, holding hands, exploratory contact or penetrative intercourse, therefore leaving the issue to the subjective views of the trial court; hence, it was unconstitutional.

The petitioners also argued that any person accused of an offence under section 24(1) of HAPCA, 2006, as read with subsection (3) of HAPCA, 2006, does not have explicit knowledge of the scope of his or her duties of disclosure. This situation was tantamount to facing criminal penalties for an offence which is not adequately clear and precisely defined and therefore violated Article 50 (3) of the Constitution of Kenya, 2010. The High Court agreed with the petitioners and therefore declared section 24 of HAPACA 2006, unconstitutional for being vague, lacking in certainty, and for being overbroad, hence, likely to violate the rights to privacy as enshrined under Article 31 of the Constitution (Par. 91). Section 24 had given HAT the mandate to convict any person who puts another person at risk of contracting HIV and AIDS to a fine of Five Hundred Thousand, or seven-years imprisonment. This declaration took away HAT's mandate because it was no longer recognised as part of the law (HAPCA,2006) and the mandate of HAT. This shows lack of clarity and uncertainty in construing some of the provisions of HAPCA 2006 which merits further examination in thorough study.

The mandate of HAT under section 26 of HAPCA, 2006, has also been challenged as to the extent to which the tribunal can act with that mandate. Two decisions have illustrated this: the High Court and the Employment Court. In the case of DKS v Ampath Centre (2023), the Appellant sued the Respondent for misdiagnosing him, leading to an erroneous conclusion that he had HIV. Appellant claimed that as a result of the misdiagnosis, the Respondent had immediately placed him on septrin treatment, and was instructed to visit the Respondent's facility every 4 months for further check-up and medication, including CD4 count. As a result of the misdiagnosis, the appellant claimed to have taken septrin medication for 11 years. He therefore blamed the Respondent for medical negligence,

as they failed to exhibit the standard of care and skill required of a medical practitioner towards a patient, resulting in a wrong diagnosis. He claimed general damages as compensation for the misdiagnosis and the mental anguish he had gone through.

Ampath objected to the suit being filed in the magistrate's court, claiming that only HAT had the mandate under section 26 of HAPCA, 2006, to hear and determine such cases. The Magistrate's Court agreed with Ampath and dismissed the Appellant's case. The Appellant appealed to the High Court. The High Court reversed the Magistrate's decision and ordered that the Magistrate's Court had jurisdiction to hear cases for medical negligence, such as this one, and ordered the case to be heard and determined before a different magistrate. In reversing the magistrate's decision, the High Court held and stated that neither HAPCA, 2006, nor any other written law confers express jurisdiction on HAT to hear and determine claims for damages for negligence arising from misdiagnosis of HIV AIDS, and such jurisdiction cannot be implied by judicial craft or legal sophistry (Par. 43). The Court went further. It stated that all other medical misdiagnosis and malpractice claims are commonly heard and determined by the ordinary Courts of law. There was no basis for HIV AIDS AIDS-related claims to be excluded and restricted to HAT (DKS v Ampath Centre, Par. 44). The Court concluded that if such exclusion were to be allowed, it would seem to amount to a discriminatory practice outlawed under Article 27(DKS v Ampath Centre, Par. 44). This High Court decision also demonstrated lack of clarity on the provisions of HAPCA 2006 which also requires review to ensure certainty.

On whether HAT can hear cases bordering on employment disputes, the Employment and Labour Relations Court dealt with that situation in the case of Avery (East Africa) Limited v J M M & Another (2018). In that case, JMM sued his employer at HAT and sought severance pay and General damages for termination of his employment for being diagnosed by the Aga Khan to be HIV positive and sharing the results with his employer (AVERY (East Africa) Ltd) without his consent. HAT found in favour of JMM and held that it had jurisdiction (mandate) to hear cases that would ordinarily be dealt with by the Employment Court. However, Avery (East Africa) Limited appealed to the Employment and Labour Relations Court which reversed HAT's decision by stating that there is no provision in HAPCA, 2006, that confers HAT with jurisdiction to hear and determine disputes in employment and labour relations matters as envisaged in section 12 of the Employment and Labour Relations Court

Act as read with Article 162 (2) (a) and 165 (3) and (5) of the Constitution, even if violation arose at the employment place (Pg. 4).

Hence, although it was expected at its inception that HAT would have a broader mandate to dispense justice to PLHIVS and suspected PLHIVS, this mandate has been significantly impaired due to conflicts and inconsistencies between the provisions of HAPCA, 2006 with the Constitution and other laws. The net effect is that HAT's mandate has been greatly impaired and continues to be challenged. Therefore, if superior courts themselves cannot agree on the mandate of HAT, it means there is a problem to be relooked at and rectified. This shows that there is a problem to be addressed to ensure HAT is provided with a clear mandate on matters that it can handle.

2.3.2 What Was the Rationale Behind the Establishment of HAT, And Does It Possess the Capacity to Effectively Enforce Human Rights, Protect Civil Liberties, And Deliver Justice to PLHIVS In Accordance with The Objectives Of HAPCA, 2006?

The rationale for establishing HAT under HAPCA 2006 was to provide a legal framework and institution which would ensure compliance of the provisions of HAPCA 2006 and ensure the realization of the objectives and purpose of HAPCA 2006 through adjudication of cases brought before it. This can be deduced from section 3 of HAPCA 2006 which is to the effect that the primary purpose for the enactment of HAPCA 2006 was two-fold: a) promote public awareness about the causes, modes of transmission, consequences, means of prevention and control of HIV and AIDS; and b) extend to every person suspected or known to be infected with HIV and AIDS full protection of his human rights and civil liberties. These objectives and purpose augurs well with the statement of the Report of the Taskforce on legal issues relating to HIV and Aids (2002) which provides that the rationale for the enactment of HAPCA 2006 and subsequent creation and establishing of HAT was to provide a legal framework that would assist in combating HIV and Aids while also ensuring the protection of human rights and legal rights of individuals regardless of the affliction occasioned by HIV and Aids (Pg. X). This explains why its' mandate is stated as being able to hear and determine complaints arising out of breach of the provisions of HAPCA 2006, hear and determine any matter or appeal as may be made to it pursuant to the provisions of HAPCA 2006, and perform other functions as may be conferred upon it by HAPCA or any other existing law (Section 26 (1) HAPCA 2006). This rationale is important because it demonstrates the essence and ontological importance of establishing HAT which means that it is imperative to study and identify the challenges affecting the

mandate of HAT and address them to enable it fulfil its' original purpose; otherwise, it will lack the capacity to do so. This study sought to do that.

2.3.2.1 Hierarchical Structure of Courts and How It Affects HAT's Capacity for Judicial Decision Making

Capacity can be defined as the ability or power to do or experience something (Garner, 2009, p. 236). HAT is an institution, and in that regard, according to the Institute for Transportation and Development Policy (n.d), Institutional capacity is the capability of an institution to set and achieve its' goals through knowledge, skills, and systems (Institute for Transportation and Development Policy, n.d. Par. 1). Section 3 (a) HAPCA, 2006, is to the effect that one of the objectives of the Act is to protect and enforce human rights and civil liberties of PLHIVS and suspected PLHIVS through HAT. PLHIVS and suspected PLHIVS have and enjoy the same rights and fundamental freedoms and civil liberties like any other person without being discriminated against (Article 27, 2010 Constitution of Kenya). However, due to their status, they require further special attention and protection because of the discriminatory practices they frequently face. HAPCA 2006 has identified such various rights that are paramount and special to the needs of PLHIVS and suspected PLHVIS for legal extra-legal protection. They include prohibition against compulsory testing (section 13 HAPCA 2006), Confidentiality (section 20 HAPCA 2006), prohibition against any form of discriminatory acts and policies (part VIII HAPCA 2006) as well as obtaining consent of PLHIVS and suspected PHIVS before testing and undertaking any form of research with them (Part IX HAPCA 2006). These are in addition to the rights and fundamental freedoms that every other person enjoys as proclaimed in the 2010 Constitution of Kenya and even the Declaration of Human Rights itself. This stresses the philosophical point that despite any human condition, every person remains an autonomous human being with the intellect and will to think and make their own independent choices. This cannot be achieved if human rights and civil liberties for certain individuals such as PLHIVS are violated. To paraphrase the philosopher Immanuel Kant, the whole purpose of protecting human rights and fundamental freedoms is to protect the autonomy and dignity of every human being regardless of their status (Kant, I, Pg. 28).

Yet, despite the above importance, desk review and case analysis points to the question as to whether HAT (an institution mandated to ensure protection of human rights and civil liberties to PLHIVS and

suspected PLHIVS) has the capacity to enforce human rights as envisaged under the Act. This problem can further be highlighted using the following examples.

First, the Court structure in Kenya must be appreciated. According to the Constitution of Kenya 2010, courts in Kenya operate at two levels, namely: Superior Courts and Subordinate Courts (The Judiciary). The superior courts are the Supreme Court (Article 163), Court of Appeal (Article 164), the High Court (Article 165) and courts of equal status with the High Court as created under Article 162 (2), which are the Environment and Land Court and the Employment and Labour Relations Court (Constitution of Kenya, 2010). On the other hand, subordinate courts comprise all courts established under Article 169 of the Constitution of Kenya, and they include: Magistrate courts, Kadhis's courts, court martial and any other court or local tribunal established by an Act of parliament (The Judiciary). As a tribunal, HAT falls under local tribunals established by an Act of Parliament.

The hierarchy of courts determines the decisional authority of each court and how they interact and bind one another. Decisions of the Supreme Court bind all other courts and local tribunals, followed by decisions of the Court of Appeal. Then those of the High Court and courts of equal status to the High Court, being the Environment and Land Court and the Employment and Labour Relations Court.

The structure of the court system is important because it reveals how it affects the capacity and mandate of the courts in their decision-making and work delivery, whereby decisions from superior courts bind the lower courts and tribunals. Hence, it can become a bottleneck to their objectives. This can be explained by the sentiments of the Supreme Court of Kenya in the case of Law Society of Kenya v Attorney General & another (2019). In this case, the Supreme Court castigated a High Court Judge for proceeding to hear and issue a Ruling in a case involving issues and the same parties in which one party had gone to challenge the decision of the Court of Appeal in the Supreme Court. The Supreme Court was categorical and emphasised that the High Court Judge ought to have held on, acknowledged and respected the hierarchy of the courts and awaited the outcome of the Supreme Court first before he could proceed to hear and issue a Ruling relating to the same matte that was pending at the High Court (Par. 92).

This is important because it shows that, even though HAPCA, 2006, entrusted HAT to enforce Human rights and civil liberties, its capacity is limited due to Constitutional questions, such as the hierarchy, which also determines the extent to which it can address issues touching on human rights. Under

section 165 of the Constitution, enforcing of Human freedoms and fundamental rights is attributed to the mandate of the High Court. Therefore, this question sought to fill the gap that, as presently established and constituted, HAT faces challenges of capacity to enforce human rights due to issues of mandate.

2.3.2.2 Insufficient Funding and Limited Public Knowledge and Awareness of HAT

Every institution requires sufficient funding to put in place structural and other strategic plans so that it can meet its objectives and targets. In the Judiciary's Budget Report (2024), it is stated that the biggest challenge is insufficient funding and poor court infrastructures, whereby the Judiciary has only been receiving half of its budgetary requirement, which has greatly hindered its structural operations (Judiciary, 2024; P. 51- 52). HAT can only hire more staff and establish additional structures to serve PLHIVs across the country if it receives sufficient funding; otherwise, it will continue to be mainly constrained to Nairobi. Currently, there are suggestions to conduct pilot sessions and public sensitisations in different towns; nevertheless, the same efforts are still hampered by inadequate funding. An increase in funding to the Judiciary in general and a subsequent increase in funding for HAT would enable HAT to establish appropriate structures to meet its objectives. Funding is also needed for facilitation of pro bono lawyers, training among other activities that help HAT fulfill its' obligation under HAPCA 2006.

HAT is recognised as the only tribunal established through legislation to deal with PLHIVS. Nevertheless, very little has been done to sensitise the public about it, or even studies conducted on it for the purpose of informing the public. This has made it significantly obscure to the public. One of the elements of access to justice, as provided for under Article 48 of the Constitution, requires that judicial facilities and institutions, such as HAT, are publicised and made available for the general public to access and utilise. This has not been the case with HAT.

2.3.3 What Are the Possible Solutions to Assist and Ensure HAT Fully Realises Its' Purpose and Mandate Under HAPCA, 2006 In Accordance with The Concept of The Common Good?

2.3.3.1 Amendment

Kenton et all (2023) posits that amendment is a change or addition to the terms of a law, government regulatory filing, contract or other documents (Kenton et all, 2023, Par. 1). Amendments may be

introduced to address circumstances and events that were not foreseen when legislation was initially signed into law (Kenton et all, 2023, Par. 8). Aquinas himself advocated for amendments when he stated that human law is rightly changed, in so far as such change is conducive to the common weal; that is, it is suitable for the common good (Aquinas, 1274, II-II Q. 97, A.2). Both in the Report of the Task Force on Legal Issues Relating to HIV and Aids (2002), and under section 3 (a) HAPCA, it is clear that the rationale and objective of HAPCA, 2006, was to clothe HAT with the mandate to enforce human rights for PLHIVS, suspected PLHIVS as well as others as long the issue touched on HIV and AIDS. In this regard, Albert (2015) writes that in the Lockean tradition of representative government, amendments are significant because they legitimise higher and ordinary law as derived from the direct or mediated consent of the governed. The power of amendment is accordingly an incident of sovereignty because it is supreme within its legal system, even if not omnipotent (Albert, 2015, Par.3).

Therefore, an amendment to HAPCA, 2006, is a possible solution because it will provide a clear mandate to HAT on what it ought to specifically deal with by eliminating conflicts and inconsistencies with the Constitution of Kenya 2010 and other laws.

2.3.3.2 Increased Funding for Court Structures and HAT's Publicity

According to Eba (2016), insufficient funding is one of HAT's most significant challenges (Eba, 2016, p. 173). As stated above, the biggest challenge is insufficient funding and poor court infrastructure, whereby the Judiciary only receives half of its budgetary requirements, which has greatly hindered its structural operations (Judiciary, 2024, pp. 51-52). Hence, increasing funding will ensure HAT meets its obligations and achieve its' original purpose. Sufficient funding also assists in publicising HAT because such publicity requires going out to the public and informing the public about HAT. This requires funding.

2.4. Conceptual Framework

Luft, A. J et all (2022) describe a conceptual framework as a description of the way a researcher understands the variables or factors that are involved in a study and how they relate to one another (P. 7). A conceptual framework aims to explain the concepts under study using relevant literature and to clarify the presumed relationships among those concepts (Luft, A. J et all, Pg. 7). As seen from the description, a conceptual framework is depended on variables; a number, amount, values or situation

that can change and affect something in different ways (online Cambridge dictionary). Variables are either dependent or independent. Dependent variables are values that are influenced by other variables, while independent variables are values that influence other variables (Andrade, C, Pg 178).

In this study, the dependent variable is the effectiveness of HAT to dispense justice to PLHIVS. In contrast, the independent variables are challenges hindering HAT from effectively dispensing justice to PLHIVS, and they include: limitations of HAT's mandate, insufficient funding, and limited public awareness (or obscurity) of HAT and its work to the public. Table 2.1 below shows how the dependent and independent variables relate and affect each other.

Table 2.1: How Dependent and Independent Variables Relate and Affect Each Other

Type Of Variable	**Variable**	**Measure**
Dependent	a. Effectiveness of HAT in Dispensing Justice to PLHIVS	HAT's mandate pursuant to Section 26 (1) of HAPCA, 2006, Number of cases HAT has received and successfully determined without challenge to limitation
Independent Variables	a. Conflict with other existing laws	Article 165 (3) of the Constitution of Kenya, 2010, grants the High Court original and unlimited jurisdiction to hear cases pertaining to civil liberties and exclusive jurisdiction to hear issues pertaining to human rights under the Bill of Rights to the exclusion of subordinate courts and local tribunals; HAPCA, 2006, or Employment and Labour Act No.20 of 2011does not confer HAT mandate to hear cases relating to Employment disputes even if civil liberties and human rights arise thereunder; Section 26 (2) of HAPCA, 2006, completely excludes HAT from hearing criminal cases; HAPCA, 2006, does not confer HAT jurisdiction to hear cases touching on civil liberties such as medical negligence; and Decisions of superior courts bind HAT by virtue of hierarchy of courts.
	b. Insufficient Funding	Insufficient funding. This does not allow HAT to undertake vigorous operational structures to make it more effective such as hiring of more staff and establishing other registries across Kenya.

	c. HAT's Obscurity	Public awareness and knowledge about HAT, its' mandate and work remain limited and unknown to majority of the public. Little sensitization of HAT has been done to ensure it is known and serve people beyond Nairobi

2.5 Relationship of this Research Study with Other Existing Research

As indicated in the limitation of study above, there is currently very little research on this topic of study. The little research that currently exist simply describes HAT as a tribunal, its' composition and what it does. It further hails it as the only existing tribunal in the world specifically established to handle cases relating to HIV and AIDS (Eba, 2016, Pg. 171).

This study is fundamentally different from the current existing research. This is because it undertakes a serious examination of the original purpose of HAPCA 2006 and HAT, its' mandate and challenges that have hindered the fulfilment of its' mandate. Further, this study is also undertaken from a philosophical perspective which gives a deeper understanding of the importance of HAT and therefore why it is important to ensure it fulfils its' purpose for the common good of the Kenyan society. Therefore, this study will add knowledge to the existing research and does so from a deeper understanding of issues which makes it timely.

2.6. Chapter Summary

This chapter has reviewed the literature on this subject by various authors. In reviewing and analysing the literature, the researcher introduced the chapter, discussed the theoretical framework, and analysed the two relevant theories: natural law theory and the theory of common good. He further reviewed the literature in accordance with the research objectives and questions, and finally stated the conceptual framework and concluded the chapter.

Chapter 3: Research Methodology

3.1 Introduction

This chapter is about Research Methodology. These are research approaches; that is, procedures for research that outline the steps from broad assumptions to detailed methods of data collection, analysis and interpretation (Cresswell & Cresswell, 2022, p. 39). It is a plan about which approach should be used to study a topic (Cresswell & Cresswell, 2022, p. 40).

In undertaking this study, the researcher first introduced the topic and stated its purpose. This chapter discusses research design, population and sampling, data collection methods, and data analysis. The researcher also considered research quality and ethical issues and then concluded the chapter.

3.2 Research Design

Research design is defined as the type of inquiry within qualitative, quantitative or mixed methods approaches that provide specific directions for procedures in research (Cresswell & Cresswell, 2022, p. 55). Research designs can be either quantitative, qualitative or mixed methods (Cresswell & Cresswell, 2022, p. 55).

This study used a mixed method approach. Qualitative approach was used to allow interaction between the participants and the researcher. Qualitative research results are presented through words, most commonly by interviewing people or observing settings and analysing information collected by reviewing interview transcripts, filled up questionnaires or field notes (Patten & Newhart, 2018, p. 5). Qualitative method was used to collect information through interviews, case analysis and presentation of findings in word format. On the other hand, Quantitative approach was used to collect data through questionnaires and presentation of findings using numerical numbers such as percentages and use of tables. The integration of qualitative and quantitative approaches enabled a complete analysis and presentation of the findings.

3.3 Population and Sampling

A population is a complete set of people with specialised characteristics, while a sample is a subset of the population (Banerjee, A., et al., Par. 24).

The targeted population for the study was leading HAT players. Sampling was based on the participants' knowledge and experience with HAT as a tribunal, from those who work with it in their official capacity and those who sought justice before it. The study was also limited to this sampled group because it involved technical aspects of the twin questions of limitation of mandate and capacity of HAT to enforce civil liberties and human rights, which mostly require professional knowledge and experience.

The first and foremost population targets were both present and past members of HAT. They were sampled for their experience as adjudicators of HAT and members in their official capacities. They include HAT's secretariat members, which consists of the Chief Executive Officer, Chairperson and six other members, were sampled due to their knowledge, experience and being part of HAT's Administration. Secondly, the PLHIVS, especially those who have appeared and sought justice before HAT, were also sampled for their experience at HAT. Lastly, Advocates and lawyers with over three years of experience practising before HAT or interaction with HAT in their official capacity were also sampled for an interview to discuss their experience, especially in addressing the challenges they face when deciding to file cases before HAT.

The study's sample size was Fifty (50) participants. This number reflected HAT's dimension in terms of its composition, knowledge, experience and the willingness of participants, especially PLHIVS, to appear and participate in the study voluntarily. Given that it employed a qualitative method, the population sample size of fifty participants was adequate to provide sufficient information to arrive at valid conclusions. Initially, the sample of participants to be interviewed included one (1) current Judge of the High Court of Kenya who previously served as chairperson of HAT, one (1) current magistrate who was previously a secretariat member of HAT, one (1) former chairperson, one (1) current chairperson, one (1) current chief executive officer, five (5) current members, five (5) former members, Ten (10) HAT staff members, Twenty (20) Advocates and five (5) litigants (they comprised of both Claimants and Respondents). The Honourable Judge and Magistrate were selected to participate in this study because, at one point, the Judge was the chairperson of HAT while the Magistrate used to offer legal services to HAT on a pro bono basis. In essence, the selected sample was informed by the participants' knowledge and experience about HAT, their availability, likelihood and willingness to participate.

Some of the participants did not respond to the questionnaires and interviews. To ensure the sample of 50 is retained, the researcher reached out to further participants mostly who were advocates who responded on time. The researcher ensured that the participants fell within the category of sampled population; those with experience with HAT. The information they provided was valuable. The researcher was convinced that nothing new would have been provided by those who did not respond.

3.4 Data Collection Methods

Research methods are the tools used to gather data, such as questionnaires and interviews (Dawsons, 2009, p. 14). This study employed a qualitative approach; therefore, the primary data collection tools were questionnaires and interviews.

3.4.1 Questionnaire

Cohen, L et al. state that a questionnaire is a widely used and valid instrument for collecting survey information, providing structured, often numerical data, able to be administered without the presence of the researcher and often comparatively straightforward to analyse (P. 471). Jenn, C.N., writes that a good questionnaire should be valid, reliable, precise, engaging and succinct (Par. 3).

Questionnaires were employed first in this study because they were convenient for most participants who were busy and could not find time for interviews. Some questionnaires were physically delivered to the participants, while others were sent through email and WhatsApp. The researcher used a combination of open-ended questions and closed-ended in the questionnaires to ensure that information is well captured. Open-ended questions were used to allow the participants the freedom to state their views, while closed-ended questions were used to allow for specificity and clarity. Essentially, the questionnaires were designed to elicit the participants' experiences, expectations, any challenges they face/faced, and the solutions they could suggest to improve HAT's effectiveness.

3.4.2 Interviews

The purpose of the research interview is to explore the views, experiences, beliefs and or motivations of individuals on specific matters (Gill, P et all Par. 10). Interviews are most appropriate where little is already known about the study phenomenon or where detailed insights are required from individual participants (Gill, P et all, Par. 10). They are also particularly appropriate for exploring sensitive topics, where participants may not want to talk about such issues in a group environment (Gill, P et

all, Par. 10). Unlike with the questionnaires, in this study, interviews were conducted with members who found time for a face-to-face meeting and interviewing.

Similar to the use of questionnaires, interviews were also premised on both open-ended and closed-ended questions. Open-ended questions were used to allow the participants the freedom to state their views, while closed-ended questions were used to allow for specificity and clarity.

Eba (2016) decries that even though HAT is the only statutorily established tribunal in the world to handle human rights specifically related to HIV and Aids, no substantive research has been done on it (Eba, 2016, p. 173). Bearing in mind such sentiments and the fact that HAT is relatively new and obscure to the public, this study primarily relied on primary data obtained from questionnaires and interviews.

The thematic analysis of information collected was done following the five steps of Braun & Clarke, (2006) methodology:

1. Familiarisation (reading and re-reading transcripts).
2. Generating codes (labelling meaningful features of the data).
3. Searching for themes (grouping codes into broader categories).
4. Reviewing themes (checking if they fit the data).
5. Defining and naming themes.
6. Writing up with supporting quotes.

3.4.3 Where and How Long the Interviews Be Conducted

Interviews were conducted in Nairobi. Most of the participants reside and work in Nairobi therefore it was slightly convenient to organize, meet and conduct interviews in Nairobi.

Interviews were conducted for a duration of approximately 30 minutes to 60 minutes (30-1 hour). This ensured participants understood the questions and have enough time to respond to questions posed to them. The researcher factored in the fact that some participants such as PLHIVS may require enough time to pose, compose themselves before they could respond, therefore, the 30-60 minutes duration provide adequate time to ensure they respond without time restrictions or feel tired. For

PLHIVS, interviews were conducted separately and privately in different rooms to ensure their privacy and comfort.

To ensure adequate collection of information from participants, the interviews were conducted from end of December, 2025 to end of February, 2026, as per the researcher's study plan and after ethical clearance from both SU-ISERC and NACOSTI.

3.4.4 How the Participants Were Approached and Recruited

To approach and recruit participants, the researcher first obtained clearance certificates for the study from both SU-ISERC, NACOSTI and an introductory letter from Strathmore University School of Humanities and Social Studies introducing the researcher to participants. This was helpful in ensuring participants that this was indeed a Strathmore university sanctioned and approved study by regulatory bodies.

Upon receiving introduction letter from Strathmore University and clearance certificates from both SU-ISERC and NACOSTI, the researcher wrote letters introducing himself as the researcher (Principal investigator) for the study, stating the aim and purpose of the study and attach letter from Strathmore University and clearance certificates from SU-ISERC and NACOSTI. The researcher then sent emails to various participants especially HAT officials, Advocates, and some litigants requesting and inviting them to participate in the study. The researcher's introductory letter together with ethical clearance certificates were accompanied with set of questions. In addition, the researcher followed up with reminders via emails and where necessary via phone calls to ensure emails were received and if there were any questions the participants could have.

With respect to some PLHIVS (litigants) the investigator requested the assistance of the HAT registry staff both former and current ones for permission and approaching them for the interviews. Upon receiving ethical clearances from both SU-ISERC and NACOSTI, the investigator wrote to the Chairperson explaining the aim and purpose of the study. The researcher received assistance from HAT registry members for a number of litigants.

In the course of approaching participants, the researcher emphasized to them that the study was voluntary, participants were free to terminate their participation any time and they could only

participate after having given informed consent. During the whole process, the researcher remained respectful, trustworthy, empathetic and cooperative with the participants throughout.

3.4.5 Modalities Put in Place to Safeguard the Litigants Who May Have to Relive Their Cases During the Interviews

The researcher was cognizant of the sensitivity of the topic of study especially to PLHIVS participants (litigants). To ensure comfort of litigants, the researcher remained respectful, trustworthy and empathetic to them throughout the whole process.

Secondly, the researcher had earlier on established that HAT has an external counsellor who assists them with counselling of litigants when there is need. Therefore, he reached out to a previous HAT registry staff who assisted in making arrangements for services of a counsellor for participants who may have need counselling during the process at his own costs. Fortunately, none of the participants required such services in the course of collecting information.

Thirdly, there was no discussion or questions asked about merits and demerits of their individual cases filed by litigants. The researcher ensured that the information provided by litigants was about HAT itself and dispensation of justice.

3.4.6 Data Analysis

Data analysis involves changing the collected raw data or information into meaningful facts and ideas that can be understood either qualitatively or quantitatively (Alem, 2020, p. 2).

In this study, it was crucial to scrutinise the information collected from the participants to make inferences and identify the challenges HAT faces, which contribute to its ineffectiveness. Analysis of the collected information was also conducted to determine potential solutions to the issues facing HAT.

When analysing the data or information collected, three key elements were essential to consider. They were as follows:

3.5 Validity and Reliability

Validity and reliability are adopted during the analysis stage to ensure the credibility of the results. The online Cambridge dictionary defines credibility as the fact that someone or something can be

believed or trusted (Par. 1). To ensure credibility, a qualitative method of data analysis that ensures fruitful interaction was employed to understand the participants information and perceptions given through questionnaires and interviews. In this regard, the study focused on the primary information obtained directly from the participants through questionnaires and interviews conducted. Furthermore, where clarification was needed, the researcher followed up with the specific participant(s) for further clarification and additional information. Prior to collection of any information, the researcher sought consent from all participants to ensure that the information provided was voluntary and not obtained through any form of coercion, collusion, or intimidation.

3.6 Dependability

Information was to be collected from verified sources who were familiar with HAT, its purpose and what it ought to achieve for credibility. For instance, most information was collected from HAT's members of the tribunal itself, including the Chairperson, HAT's registry staff, members of HAT, advocates lawyers, as well as litigants who had sought justice before HAT. These were credible sources whose information could be relied upon. Therefore, the information and data gathered from this study can be relied upon by everybody, including future researchers who are likely to arrive at the same findings.

3.7 Ethical Considerations

Moni Wekesa (2025) states that Ethics in Research is necessary to protect the subjects of research or participants (Pg.16). Similarly, Creswell & Creswell (2018) explain that ethics in research ensures that research participants are protected, participants' trust is earned, to ensure integrity, and for researchers to guard against misconduct and impropriety that may affect them as researchers, their institutions and assist in handling new challenges that might arise in the course of the research (Pg. 166). Therefore, the researcher observed high ethical standards while conducting research to protect the research participants and at the same time protect the integrity of the study (work) he undertook and the institution he is affiliated to (Strathmore University).

Researchers need to have their research plans reviewed by the Institutional Review Board (IRB) (Creswell & Creswell, 2018, 166). Such bodies (IRBs) asses any potential risk or any harm to participants such as physical, psychological, social, economic or legal harm (Creswell & Creswell,

2018, 166). Moni Wekesa (2025) further states that everybody who seeks to conduct research in Kenya must seek at least to two types of clearances; Institutional Research and Ethics Committee (IREC) and a research license from the National Council for Science, Technology and Innovation (NACOSTI) (Pg. 16).

Strathmore University has a policy that requires every researcher to obtain research ethics approval from SU-ISERC prior to commencing their research. Hence, the researcher obtained research approval before embarking on collecting information. The research approval was important as it gave assurance to the participants that this was indeed sanctioned research by Strathmore University and also reviewed and approved by SU-ISERC.

Secondly, given that the study also focused on PLHIVS, it was also prudent and ethical to obtain a research permit from NACOSTI. Therefore, the researcher sought an introductory letter from Strathmore University and used it to apply for NACOSTI's approval and license for the purposes of conducting this study.

According to J. Creswell, researchers ought to obtain permission from the authorities or gatekeepers of the communities to get access to the study participants (Creswell J.W, 2009, Pg. 94). Obtaining permission from gatekeepers or area leaders is a form of respecting the research site (Creswell J.W, 2009, Pg. 94). Therefore, for purposes of showing respect to the site of collecting information and give further assurance and confidence to the participants the researcher obtained approval from HAT itself as well.

Thirdly, the researcher recognised and appreciated that ethical issues related to disclosure and consent may arise during the course of the study. Therefore, consent was required from participants sampled for the study. Therefore, the researcher informed the participants that the exercise was voluntary and confidential, and they could opt out at any time during the exercise. Participants voluntarily signed an informed consent form before proceeding with filling questionnaires or undertaking interviews to ensure confidentiality, the information was collected by the researcher directly and safely stored without involvement of any other person. Where a participant wished to withdraw any or all of her information anytime, they were allowed to do so. To ensure the participants' comfort and trust, full consent was obtained purely through persuasion by explaining the purpose of the study, their expected

roles in the study, potential risks, and the need for them to candidly answer questions as accurately and honestly as possible.

Therefore, high ethical standards and obligations were maintained and observed throughout the process to ensure the study's findings met the threshold for ethical considerations.

The similarity Report, Ethical clearance confirmation and NACOSTI License are attached at the end of the references as appendices A-C.

3.8 Chapter Summary

This chapter was about the Research Methodology adopted for the study. In undertaking this chapter, the researcher extensively considered various subtopics, including Research design, population and sampling, data collection methods, Data analysis, Research quality, and Ethical considerations that arose. Detailed information regarding each of the sub-topics, especially their relevance and applicability to the study was provided. Most importantly, qualitative method of data analysis was adopted in collection of information for the study. The information collected and presented in this chapter is beneficial for undertaking the subsequent chapters.

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Chapter 4: Presentation of Research Findings

4.1 Introduction

This chapter analyses and presents information and data that was collected from Respondents (participants) who took part in the study. Information was collected from Fifty (50) participants. Most participants filled questionnaires sent to them. Both the researcher and the participants followed up with clarifications via calls, WhatsApp exchanges, and emails. A sizeable number preferred an interview. The information they provided, coupled with what was obtained from desk review research, was sufficient to make viable conclusions for the study. Nothing much would have been achieved differently with a larger number. The researcher is confident in the findings of the study because most of those who took part were directly involved with HAT in different capacities, while others are still working for HAT or appearing before HAT in their capacity as advocates. Most of the information collected was firsthand, with further clarification where needed; hence, it was reliable and valid.

The analyses and presentation of the results are consistent with the objectives and questions posed for the study. This ensures coherence in the study.

4.2 General Information on participants

4.2.1 When Did You Become a member or Representative of HAT/ When Did You First Encounter HAT?

The question was put to members of HAT (both current and former), Magistrate and lawyers. Its response was important because it elicited and provided the participant's category of participation. It was also important to determine the experience of such participants. The study established that 88.90% of the participants in this category had been with HAT for more than three (3) years. Some advocates had worked with HAT or appeared before it within a period of three (3) to nine (9) years. They had worked with HAT within the period from 2017 to 2026. Current Chief Executive Officer (CEO) has been at HAT since 2018. Table 4.1. below shows the information on when participants first encountered HAT.

Table 4.1: Information on When Participants First Encountered HAT

Item No.	Category of Participants	Year When First Became a Member / Encounter HAT	Year When Stopped Working with HAT	Total Duration Worked with HAT (Years)	% Of Total Duration with HAT
1	Current Chairperson	2023	Ongoing	3	6.5
2	Magistrate	2021	2023	2	4.3
3	Other Current HAT Members	2023	Ongoing	3	6.5
4	Chief Executive Officer	2018	Ongoing	8	6.5
5	Former HAT Members	2017	Between 2019 &2021	3-6	13.0
6	Current Staff Members	Between 2019 & 2022	Ongoing	3-7	15.2
7	Former HAT Staff	2018	Between 2021 & 2023	3-8	17.4
8	Advocates/Lawyers	Between 2017 & 2023	Between 2021 & 2022	2-9	19.5
	Total No. of Years with HAT Adding Up Lowest and Highest			**46**	**88.90**

4.2.2 When Did You Get to Know About HAT?

The question was asked to determine participants' first public awareness of HAT as an institution, before they personally experienced it through work. Some members responded that it was during the period when they were working with the civil society groups providing legal services to PLHIVS. Advocates and lawyers responded that when they were issued instructions by their respective Clients. Others stated that it was during the time they were working with institutions such as FIDA, Red Cross, when they were requested to offer legal services. Others learned about it through the media.

Other participants stated that they learned about it at the time of appointment and deployment. They stated that upon being employed by the judiciary, they were seconded or deployed to HAT registry to assist in the registry. Others applied to become members of HAT, and they were appointed as such. Most litigants, claimants, and respondents were made aware of HAT through paralegals who work with HAT. Generally, about 56% of the participants had an idea about HAT prior to official engagement with it, while 44% did not.

The responses indicated that participants learned about HAT in different ways. The responses to this question also demonstrate public knowledge and awareness of HAT. Table 4.2. shows resultants of participants of their knowledge of HAT prior to their engagements with it.

Table 4.2: Results of Participants Knowledge of HAT Prior To Engagement with It

Item No.	Category of Participants	When Did You Get to Know About HAT	Had You Heard of Hat Prior To Working with It?	
			Yes	No
1	Current Chairperson	2021	1	
2	Magistrate	2021	1	
3	Other Current HAT Members	Between 2016 & 2021	1	1
4	Chief Executive Officer	2011	1	0
5	Former HAT Members	Between 2011 & 2016	1	2
6	Current Staff Members	Between 2019 & 2022	1	2
7	Former HAT Staff	2015 &2018	0	4
8	Advocates/Lawyers	Between 2017 & 2023	22	8
9	Litigants	Between 2017 & 2022	0	5
	Total		**28**	**22**
	Total Percentage Out 100%		**56%**	**44%**

4.2.3 How Long Have You Been Working with HAT?

This question was posed to the participants to determine their duration and experience with HAT. 80% stated that they had either worked or been involved with HAT for more than 3 years. The duration of either working with or being involved with HAT ranged from 3 to 9 years. Litigants had the least duration with HAT of about 6 -12 months, depending on how long their cases took to be concluded.

This coincided with the duration which HAT takes to hear and determine their cases. Table 4.3 shows the duration participants worked with HAT

Table 4.3: Duration Participants Worked with HAT

Item No.	Category of Participants	How Long Have You Worked with HAT		Duration Worked With HAT
		More than 3 Years	Less than 3 Years	
1	Current Chairperson	1	-	3 Years
2	Magistrate		1	2 Years
3	Other Current HAT Members	2	-	3 Years
4	Chief Executive Officer	1	-	8 Years
5	Former HAT Members	3	-	3-6 Years
6	Current Staff Members	3	-	3-5 Years
7	Former HAT Staff	3	1	4-6 Years
8	Advocates/Lawyers	27	3	2-9 Years
9	Litigants		5	6-12 Months
	Total	**40**	**10**	
	Percentage	**80%**	**20%**	

4.3 Specific Questions on HAT

4.3.1 Whether There Are Inconsistencies Between HAPCA 2006 and Other Existing Laws

This question was answered by a magistrate, members of HAT, Advocates, and lawyers. Litigants (claimants and Respondents) were not asked this question due to its legal technicalities. About 80.33% of participants responded affirmatively, while 19% responded negatively. Most Advocates and lawyers responded yes, while members of HAT responded no. Participants who responded in the affirmative cited various provisions of the Constitution, the Sexual Offences Act, and the Employment and Labour Relations Act. Others referred to various court decisions from superior courts, including the High Court, as well as the Employment and Labour Relations Court. Some of the provisions included section 12 of the ELRC Act 2011, Section 3 of SOA, as well as sections 3 and 26 of HAPCA 2006 itself. Those who said no stated that the previous confusion had been clarified by decisions of the superior courts, which they now follow and are guided by. The recent decision in High Court Civil Appeal No. E904 OF 2025: Attorney General & 2 Others vs PKJ (2025) was cited.

Hence, according to them, there is no conflict. Table 4.4 shows the results for the question whether there are inconsistencies between the provisions of HAPCA 2006 and other existing laws.

Table 4.4: Results on Whether There Are Inconsistencies Between HAPCA 2006 and Other Existing Laws

Item No.	Category of Participants	No. of Participants Who Responded to The Question	Whether there are any Inconsistencies Between HAPCA 2006 and Other Existing Laws	
			Yes	No
1	Chairperson	1	-	1
2	Magistrate	1	-	1
3	Current HAT Members	2	1	1
4	Former HAT Members	3	1	2
5	Advocates/Lawyers	30	28	2
	Total	37	29	7
	Total Percentage Out of Total Participants (37)	100%	80.33 %	18.918 (19%)

4.3.2 Whether the Conflicts and Inconsistencies Between the Provisions of HAPCA 2006 And Other Existing Laws Have Affected the Mandate of HAT to Deliver and Fulfill Its' Obligations

This question was put to Advocates and lawyers together with members of HAT tribunal. Litigants and staff members were excluded due to the legal technicalities of the question.

80.33% responded yes; that is, the inconsistencies had affected the mandate of HAT to deliver and fulfil its obligations. 19% responded no.

Overlapping legal issues in cases affects mandate of HAT. Example given is where a claimant's case touches on both employment and HIV and AIDS related issues, or criminal law with HIV and AIDS issues as well and especially when the problem or issue in question stretches and borders on interpretation of law as well. HAT's mandate is greatly limited in such instances.

The 80.33% also cited a lack of quorum to sit and hear cases. Hearing proceedings can only proceed when there is at least the chairperson and 5 other members of the board.

Lack of mandate to enforce its own Judgments, rulings, and decrees and orders ensuing therefrom was also cited by 19% as a reason affecting HAT's mandate. The lack of mandate to enforce its own orders is due to section 29 of HAPCA 2006.

The 19% cited the composition of the Tribunal and stated that, due to its composition, they have the knowledge, expertise, and experience to handle any cases and the corresponding issues that arise therein. They also cited a recent court decision by the High Court, which had provided that HAT has the mandate to hear and determine issues that arise under HAPCA 2006, including to determine whether certain circumstances amount to infringement of human rights and freedoms and enforcement of civil liberties, that is, High Court Civil Appeal No. E904 OF 2025: Attorney General & 2 Others vs PKJ (2025). The High Court in this decision also cited the qualifications and experience of HAT members to claim that it has the mandate to determine violations of rights and fundamental freedoms (Par. 31). Table 4.5 below shows the results for the question whether the conflicts and inconsistencies between the provisions of HAPCA 2006 and other existing laws have affected the mandate of HAT to deliver and fulfill its obligations.

Table 4.5: Whether the Conflicts and Inconsistencies Between Provisions of HAPCA 2006 and Other Existing Laws Have Affected the Mandate of HAT to Deliver and Fulfill Its' Obligations

Item No.	Category of Participants	No. of Participants Who Responded to The Question	Whether The Inconsistencies Have Affected the Mandate of Hat to Deliver and Fulfill Its' Obligations	
			Yes	No
1	Chairperson	1	-	1
2	Magistrate	1	-	1
3	Current HAT Members	2	1	1
4	Former HAT Members	3	1	2
5	Advocates/Lawyers	30	28	2
	Total	37	29	7
	Total Percentage Out of Total Participants (37)	**100%**	**80.33 %**	**18.918 (19%)**

4.3.3 Whether HAT Has the Capacity to Protect Human Rights and Civil Liberties of PLHIVS and Suspected PLHIVS

This question was put to the magistrate, Advocates, lawyers and members of HAT. It was intended to determine whether HAT, as a tribunal, has the capacity to fully enforce and protect the human rights and civil liberties of PLHIVS and suspected PLHIVS, especially by litigants seeking justice before it.

60% responded no, while 40% responded yes. The 60% cited reduced mandate which according to them has greatly interfered with the objective of HAPCA 2006 and HAT's mandate; including ouster clause on criminal jurisdiction (Section 25 HAPCA 2006), lack of clarity of some provisions of HAPCA leading to them being declared unconstitutional (section 24 HAPCA 2006) and due to various pronouncements by superior courts including High Court and Employment Court as highlighted above. The 40% who responded yes again relied on the knowledge, expertise and experience of the composition of HAT's board members, which includes lawyers, doctors and other persons with specialised knowledge on matters of HIV and AIDS. They also referred to decisions of superior courts and stated that those decisions had clarified their mandate on how to enforce human rights and civil liberties of PLHIVS and suspected PLHIVS. Table 4.6 shows the results for the question whether HAT has the Capacity to protect human rights and civil liberties of PLHIVS and suspected PLHIVS.

Table 4.6: Whether HAT Has the Capacity to Protect Human Rights and Civil Liberties of PLHIVS and Suspected PLHIVS

Item No.	Category of Participants	No. of Participants Who Responded to The Question	Whether HAT Has the Capacity to Protect Human Rights and Civil Liberties of PLHIVS and Suspected PLHIVS	
			Yes	No
1	Chairperson	1	1	-
2	Magistrate	1	1	-
3	Current HAT Members	2	1	1
4	Former HAT Members	3	2	1
5	Advocates/Lawyers	30	10	20
	Total	37	15	22
	Total Percentage Out of Total Participants (37)	**100%**	**40%**	**60%**

4.4 Whether There Are Other Challenges Facing HAT

All participants responded to this. The question was to elicit any other challenges HAT faces beyond those identified through desk review and posed by the researcher. All participants responded in the affirmative; that is, 100% affirmed that indeed HAT faces challenges. Among the challenges raised were:

a) Psychosociological support

b) Insufficient funding (Even though this challenge came out through desk review, it was also raised by almost all the participants especially those working with HAT);

c) Lack of enforcement powers;

d) Limited public awareness of HAT (This challenge was also first identified through desk review; however, it also featured predominantly during information collection);

e) Advocates abandoning claimants' cases mid-way during the trial. This forces both staff at HAT and the claimant to look for another lawyer and assign the cases; and

f) Unavailability of claimants to record statements and sign documents to file in court. This occurs when an advocate is assigned a case to handle, but the owner of the case (claimant) is unavailable. Participants pointed out that it mostly happens when claimants relocate to a different town or place, and their contacts, that is, telephone numbers, do not go through.

Table 4.7 below shows results on whether there are other challenges faces HAT

Table 4.7: Whether There Are Other Challenges Facing HAT

Item No.	Category of Participants	No. of Participants Who Responded to The Question	Whether There are Other Challenges Facing HAT	
			Yes	No
1	Chairperson	1	1	-
2	Magistrate	1	1	-
3	Chief Executive Officer (CEO)	1	1	-
4	Current HAT Members	2	2	-
5	Former HAT Members	3	2	-
6	Current Staff Members	3	3	-
7	Former HAT Staff Members	4	4	-
8	Advocates/Lawyers	30	30	-
9	Litigants	5		
	Total	50	50	-
	Total Percentage Out of Total Participants (37)	**100%**	**100%**	**0%**

4.5 What Are the Possible Solutions to The Challenges Facing HAT?

This question was posed to participants to obtain their views on what they considered to be the appropriate solutions to the challenges they had raised in the previous questions. Almost all participants responded affirmatively that HAT indeed faces challenges and needs solutions to operate effectively. Some of the solutions they recommended were as follows:

a) Sufficient funding. These issues were raised by 95% of participants, particularly by members of HAT and lawyers. HAT members claimed that budgetary cuts have made it impossible to expand its court infrastructure to other areas, train more people, pay and facilitate lawyers working with HAT, and publicise the institution.

b) Amendments. These were suggested by mostly lawyers. About 80% stated that amendments were needed to clarify the mandate of HAT. 20% responded "no" because they felt that subsequent superior court decisions had clarified their mandate.

c) Policy reforms. These were suggested by both advocates and HAT members. 60% of the participants were of the view that policy reforms were necessary to ensure the full operationalisation of HAPCA 2006 and HAT, particularly regarding the privacy and

psychological well-being of litigants during trial processes and even afterwards. A Rescue center to take in psychological broken litigants was also suggested and emphasized. Appendix 9 shows summary of the solutions provided by participants

4.6 Chapter Summary

This chapter presented the study's findings obtained from the participants. The findings have been presented as they were obtained through interviews and a questionnaire. Findings have been presented both in word format, use of tables, numbers and percentages. This is in accordance with the mixed method approach used for the study. They have been presented in accordance with the objectives and questions raised in the study to ensure its coherence. The findings are discussed conclusively in the next chapter.

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Chapter 5: Discussion of Findings

5.1 Introduction

This chapter discusses the study's findings, as presented in Chapter 4. The discussion also follows the sequence of how the objectives and questions for the study were framed to ensure coherence.

5.2 Whether the Mandate of HAT Is Limited Due To Conflict and Inconsistencies Between the Provisions of HAPCA, 2006, And Existing Laws, Such As the Provisions of The Constitution of Kenya 2010

The aim of this objective was to identify any legal conflicts and inconsistencies between the provisions of HAPCA 2006 and other laws, including the 2010 Constitution, and to establish how such conflicts and inconsistencies affect the mandate of HAT.

Based on the findings, 80.33% of participants responded yes. These were mostly advocates and lawyers. 19% responded no. These were mostly by members of the tribunal itself, magistrate and a few lawyers.

The large percentage (80.33%) of those who said no clearly confirmed the conflict and inconsistencies between the provisions of HAPCA 2006 and other provisions of existing laws. In addition to the Constitution, the Sexual Offences Act (SOA) and the Employment and Labour Relations Court Act 2011 (ELRC Act 2011) were cited as other examples. Others also cited the Data Protection Act 2019 as likely to conflict with HAPCA 2006.

Among the provisions of HAPCA 2006 cited as in conflict with existing laws are sections 3(b), 24, and 26. These provisions relate to the objective of HAPCA 2006, the prevention of transmission of HIV and AIDS and the HAT's jurisdiction. Section 24 was declared unconstitutional in the case of Aids Law Project vs Attorney General & 3 Others (2015) for being vague and overbroad. Referring to this decision, participants stated that once a provision of HAPCA 2006 is declared unconstitutional, the claimants' claim either dies or their recourse lies with the normal civil course, either at the Magistrates' courts or superior courts, such as the High Court and Employment Court. Indeed, in MCM vs BOO (2019), HAT referred to the Aids Law Project decision and stated that once a provision of the law is declared unconstitutional, it has no business in the law and therefore cannot be followed; hence, it dismissed the claimant's claim. In such circumstances, the claimant is left to seek recourse

in the court with the requisite jurisdiction. This was seen in PRJ vs KDF (HAT case 048 of 2022) (KDF case). In this case, the claimant applied to serve in the Kenya Defence Forces (KDF) in 2021. He went for the interview and also enlisted for KDF medical examination. HIV and AIDS test was one of the tests conducted. He claimed that he was not given pre-test and post-test counselling. Further, his test results were neither provided nor disclosed to him after his testing. Nevertheless, KDF issued him a letter confirming that he had passed the recruitment interview to join KDF as a general duty recruit. Relying on the calling letter, he resigned from his previous work at the National Youth Service (NYS). Upon reporting to KDF's training school in accordance with his calling letter, he was again tested for the second time. Again, both pre-test and post-test counselling were not offered. On 2 January 2022, he was allegedly dismissed on the grounds that he was HIV- positive. He alleged that his dismissal took place in the presence of his fellow recruits, and that he was told to seek treatment. He contended that KDF's disclosure of his HIV status in public caused him humiliation, emotional and psychological torture. He further accused KDF of discrimination on the basis of HIV status. He sought various orders before HAT, including an order that he had suffered a violation and infringement of his rights under HAPCA 2006. Respondents challenged the jurisdiction (mandate) of HAT to hear and determine the case on the grounds that the issue was a labour (Employment) related issue which ought to be heard and determined by the Employment and Labour Relations Court (ELRC) in another case which the claimant had incidentally filed in the ELRC at Eldoret in Eldoret Pet. No. E028 of 2022: PKJ vs AG & 2 Others (2025). HAT held that it had jurisdiction to hear the case on issues touching and relating to HIV and AIDS in line with HAPCA 2006 only (Par. 14). It declined to pronounce itself on issues touching on employment. This led the claimant to pursue the case on employment issues in the Employment and Labour Relations Court (ELRC) in Eldoret Pet. No. E028 of 2022: PKJ vs AG & 3 Others**.** Normal courts subject litigants to normal proceedings, including strict adherence to the rules of evidence, lengthy procedures, and even payment of filing fees, which have been waived at HAT. This prolongs cases, thereby reducing expeditiousness.

Even though HAPCA was enacted in 2006 and got operationalised in 2009 while the Constitution was promulgated in 2010, the Constitution requires that all statutes enacted prior to and after its promulgation must be interpreted and applied in a manner consistent with the Constitution itself; otherwise, any conflict or inconsistency is declared unconstitutional. The Constitution is a living

document which looks into the future as well as in the past. This was explained by the Supreme Court of Kenya in the decision of Law Society of Kenya vs Attorney General & Another (2019), where the supreme court held that pursuant to section 7 (1) of the sixth schedule to the Constitution, all laws that were in existence before the promulgation of the Constitution were not rendered unconstitutional but they must be read, interpreted and applied in a manner that brings conformity into the 2010 Constitution (Par. 60). Similarly, in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others (2012), the Supreme Court stated that the Constitution is not subject to the principle of retroactivity like ordinary statutes. The constitution looks both forward and backwards, horizontally and vertically, because it seeks to reengineer the social order. Therefore, even though HAPCA 2006 was enacted before the 2010 Constitution, it must still be compliant with the Constitution of Kenya 2010 in its interpretation and application.

The findings on this objective can be interpreted and explained in different ways. Firstly, participants who responded yes explained that HAT had always had a problem exercising its mandate when overlapping issues needed to be determined. For instance, where a Claimant's case touches on both employment and HIV and AIDS related issues, or criminal law with HIV and AIDS as well, it stretches and borders on the interpretation of law as well. HAT's mandate is greatly limited in such instances because it cannot interpret the law. This has been shown by the two decisions in MCM vs BOO (2019) as well as in PRJ vs KDF (HAT case 048 of 2022) (KDF case), in which HAT declined to hear issues touching on human rights and employment issues, forcing the claimant to seek redress in the ELCR as shown in Eldoret Pet. No. E028 of 2022: PKJ vs AG & 3 Others.

Secondly, the 80% also cited a lack of quorum. HAT can only hold a full hearing if it has at least five members, including the chairperson and at least four other members. This constitutes HAT's quorum (Section 25 (3), HAPCA 2006). Most of the time, there is no quorum to hear the cases, and in the absence of the requisite quorum, HAT lacks the mandate to proceed with its hearing. Those who raised this issue stated that most members of the panel are also engaged in their own private practices, especially the lawyers and doctors who are employed elsewhere. These members are sometimes unavailable due to their other work commitments, functions and other engagements.

Thirdly, the lack of mandate to enforce its own Judgments, rulings, decrees and orders ensuing therefrom was also cited by 80% as affecting the mandate of HAT. HAT has no mandate or capacity

to enforce its own Judgments, rulings, and the ensuing decrees and orders arising therein. They are enforced by the High Court. Section 29 of HAPCA 2006 directs that once HAT grants damages or costs upon delivering a Judgment or a Ruling, it should also issue a certificate stating the amount of costs or damages in whose favour the Judgment was made. The certificate issued is then to be filed in the High Court by the person in whose favour damages or costs were awarded for adoption by the High Court as its own Judgment and decree. This position was reinforced by the High Court in JC v AC (KEHC 3198). The Applicant therein had filed a case at HAT in cause Number 23 of 2019. HAT delivered its' Judgment in her favour and awarded her damages of Kshs. 350, 000.00 and costs. She obtained a certificate and filed an application in the High Court on the grounds that the Judgment of the Tribunal could only be executed if it was adopted as a judgment of the High Court. The High Court agreed with her. Citing section 29 of HAPCA 2006, the High Court was categorical that section 29 of HAPCA 2006 was clear to the extent that HAT's Judgment or Decree was to be adopted by the High Court to facilitate its execution.

As indicated in the findings, 19% of participants, especially members of HAT, stated that there are no conflicts or inconsistencies between the provisions of HAPCA 2006 and other existing laws, such as the 2010 Constitution of Kenya. They stated that HAT has the mandate to fully protect and enforce human rights and civil liberties for PLHIVS and suspected PLHIVS. They cited the composition of the Tribunal as one of the reasons. According to them, HAT's membership consists of Advocates, medical doctors and others with specialised knowledge to handle matters related to HIV and AIDS; they understand the special needs of PLHIVS, suspected PLHIVS and their work in general. Moreover, in addition to their knowledge, expertise, and experience, they also undergo continuous training in handling such matters. Further, they stated that HAPCA 2006 provides sufficient guidelines on the applicable law and on how to handle PLHIVS and suspected PLHIVS

Secondly, they also believe that the Tribunal has a mandate over most matters that are brought before it, which mostly relate to HIV and AIDS disclosure without consent, stigmatisation, testing without informed consent, failure to conduct pre- and post-counselling during testing and discrimination based on their status. Where there are overlapping issues, HAT can pronounce itself on issues that it has a mandate over and decline to pronounce itself or make any findings on issues that it does not

have a mandate over. This was seen in PRJ vs KDF (HAT case 048 of 2022). In that sense, they firmly believe that HAT can effectively offer justice to PLHIVS and suspected PLHIVS.

5.3 Whether HAT Can Effectively Enforce Human Rights and Offer Justice to PLHIVS Following the Objectives for the Enactment of HAPCA 2006

The aim of this objective was to determine whether, in its current state, HAT can effectively enforce human rights and offer justice to PHIVS and suspected PLHIVS in accordance with the objectives of HAPCA 2006. The information and results obtained from participants showed a direct correlation between HAT's mandate and its ability to effectively enforce human rights and offer justice to PLHIVS and suspected PLHIVS.

As indicated in the findings above 60 % responded no, while 40 responded yes. The 80% cited reduced mandate which according to them has greatly reduced the objective of HAPCA 2006; including ouster clause on criminal jurisdiction (Section 25 (3), HAPCA 2006), lack of clarity of some provisions of HAPCA 2006 leading to them being declared unconstitutional (section 24 HAPCA 2006) and due to various pronouncements by superior courts including High Court and Employment Court in decisions such as in Aids Law Project v Attorney General & 3 others (2015) where the High Court declared section 24 of HAPACA 2006 unconstitutional for being vague, lacking in certainty, and for being overbroad, hence, likely to violate the rights to privacy as enshrined under Article 31 of the Constitution (Par. 91), DKS v Ampath Centre (2023) where the High Court held that neither HAPCA, 2006, nor any other written law confers express jurisdiction on HAT to hear and determine claims for damages for negligence arising from misdiagnosis of HIV AIDS, and such jurisdiction cannot be implied by judicial craft or legal sophistry (Par. 43) and in Avery (East Africa) Limited v J M M & Another (2018), where the ELRC held that HAT does not have jurisdiction to hear and determine disputes in employment and labour relations matters as envisaged in section 12 of the Employment and Labour Relations Court Act as read with Article 162(2) (a) and 165(3) and (5) of the Constitution, even if violation arose at the employment place (Pg. 4).

A sizeable number of participants, especially advocates and some members of HAT, strongly agreed that HAT does not have the capacity to fully protect human rights and civil liberties for PLHIVS and suspected PLHIVS. The reason given was a lack of a clearly defined mandate to interpret jurisdiction, a lack of authority to enforce its own Judgments and rulings, as well as Decrees and Orders emanating

therefrom. Further, they claimed that, in the event of an appeal, parties are subjected to the normal court process, which exposes litigants to the public and delays the expeditious disposal of their cases. Where a party goes to enforce Judgments and Orders at the High Court or other superior courts, they are subjected to payment of fees, which are to be borne by the litigant themselves or, if lucky, by their advocate themselves.

The other reason was a lack of quorum. As discussed above, a full hearing of a case can only be conducted when there is a quorum of at least five members, led by the chairperson. However, it was noted that on a good number of occasions, the quorum is not met for various reasons. This reduces the Tribunal's ability to conclude cases expeditiously.

In addition to affecting the mandate of HAT, filing a certificate in the High Court requires a formal application followed by a hearing of that application. Essentially, this requires money. Even though HAT has waived filing fees, it means that for purposes of enforcement through execution at the High Court, a litigant will have to incur some costs. HAT does not provide this, and therefore, it is either the litigants themselves or their advocates, who are mostly pro bono lawyers provided by HAT. If not facilitated, pro bono lawyers end up shelving the case or abandoning it completely, thereby leaving the litigant in limbo without any further recourse.

Lack of enforcement powers to execute its own Judgments, Rulings, and the subsequent decrees and orders arising therefrom reduces expeditiousness in concluding cases, increases costs of litigation, especially to indigent litigants, and at the same time exposes parties to uncertainty and anxiety because they are not sure of whether their pro bono lawyers will continue representing them at the appellate stage or not. Expeditious disposal of cases is a crucial tenet of justice. Similarly, justice ought not to be hindered by the amount of fees. These two affect the institutional output of the Tribunal. If HAT had enforcement powers, it would be easier to bring the whole process to a conclusion and ensure justice is done.

The 40% who responded yes again relied on the knowledge, expertise and experience of the composition of HAT's board members, which includes lawyers, doctors and other persons with specialised knowledge on matters of HIV and AIDS. They also referred to decisions of superior courts and stated that those decisions had clarified their mandate on how to enforce human rights and civil liberties of PLHIVS and suspected PLHIVS. They particularly referred to the KDF case, in which

both the High Court and the Employment Court found that HAT had the requisite mandate to hear and determine matters of infringement and violations of human rights. Upon appeal by the Attorney General to the High Court in Civil Appeal No. E904 OF 2025: Attorney General & 2 Others vs PKJ**,** the High Court held that HAT can determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or even threatened (Par.31). It explained that since members of HAT are public officers, Article 3 of the Constitution obliges them to uphold the Constitution and therefore, HAT must be in a position through the expertise of the chairperson and the other two advocates (who both have a cumulative of 17 years' experience) to be able to determine whether a given set of circumstances reveal denial, violation, infringement or threat to fundamental freedoms or rights (Par. 31-32). To its mind, determining whether a given set of circumstances reveals denial, infringement or threat to fundamental rights and freedom is not the same as interpreting the constitution, which is strictly within the purview of the superior courts. It affirmed HAT's decision and dismissed the appeal. Therefore, according to them, a different composition of members from different professional backgrounds together with those with knowledge and specialised skills to discharge functions of the Tribunal enrich HAT with different knowledge, skills and experience necessary for effective decision-making, bearing in mind the nature of matters and issues the Tribunal is to handle and determine. Emphasis is particularly on legal and medical practitioners, backed up with others who have the requisite skills and knowledge to discharge the functions of a Tribunal. Essentially, there is both professional, skilful, and administrative knowledge to ensure that HAT successfully delivers on its mandate and offers justice to PLHIVS and suspected PLHIVS who seek justice before it. This explains why some participants were affirmative that, due to the composition of the bench, HAT is well-curated and clothed with both the mandate and capacity to handle cases brought before it.

HAT members also stated that the Tribunal could effectively offer justice to PLHIVS and suspected PLHIVS. Their reason was that cases are handled expeditiously, filing fees are waived, cases are handled in camera, and claimants are given free legal representation. Accordingly, most hurdles related to legal fees and costs have been removed, ensuring clear access to justice and representation, which are important tenets of effective justice.

Whereas HAT has the mandate to handle cases brought before it, especially on matters of compulsory testing, disclosure, stigmatisation, discrimination based on HIV and AIDS, lack of pre and post counseling etc, it came out clearly that most of the time it also grapples with cases which it does not have jurisdiction or mandate over.

Those who said no, especially advocates and lawyers, were of the view that when a claimant goes to HAT seeking justice, they expect their case to be fully heard and all issues raised in the matter to be fully settled and not to solve some and decline to solve others. One of the participants, a claimant, was disappointed with the Judgment in her case, in which some issues were fully determined, and one was declined. She felt like she was given half a judgment. In such circumstances, lawyers face the problem of whether to appeal or institute a fresh case before the normal civil courts. This conjures the trial process as was seen in the trilogy of the KDF case in PRJ vs KDF (HAT case 048 of 2022), which was heard in three different courts: HAT, ELRC and High Court, yet it related to the same issues that could be heard and determined simply by one particular court or tribunal.

5.4 Evaluate and Determine Possible Solutions to Ensure the Full Realisation of HAT's Purpose and Mandate Under HAPCA, 2006

5.4.1 Amendment

The majority of participants who responded yes (80.33%) held the firm view that there were conflicts and inconsistencies between the provisions of HAPCA 2006 and other laws, including the Constitution of Kenya 2010 and the Sexual Offences Act (SOA), among others. Indeed, the three Judge bench in Aids Law Project vs Attorney General had warned earlier that there was serious need for the state law office to properly reexamine HAPCA 2006 again and make the necessary changes or reforms with a view to avoiding further litigation it (Par. 90). Nothing has since been done and HAT now finds itself with conflicting decisions from the High Court on the mandate of HAT. These inconsistencies, as outlined in the decisions of superior courts, mean that something must be done to ensure HAT's mandate is clearly defined so that it meets its objective under HAPCA 2006. Amendments to sections 3(b) and 26, which both provide for the objectives and jurisdiction of HAT, were stated to be the best way to resolve the conflict and inconsistencies.

Provisions of HAPCA 2006 should be harmonised with the Constitution and other laws, such as the Sexual Offences Act (SOA), to ensure convergence. In the Royal Media v Attorney General case, the

Attorney General was again directed to provide amendments, but nothing has been done so far. It behoves them to act expeditiously to undertake the requisite amendments. Kenya Law Review Commission was touted by participants as an institution which can assist with harmonisation, especially decisions of superior courts, so that we do not have conflicting or confusing decisions.

Another solution, alongside the amendment, was the formation of an independent committee to look into the legal challenges as well as other challenges facing HAT. The suggestion was that the issue to be forwarded to the Deputy Registrar of Tribunals so that she can forward it to the Hon. Chief Justice to look into it and form a committee to be led by either a Judge of the High Court or another qualified professional to work closely with HAT's leadership and other stakeholders to come with solutions to resolve the challenges so that HAT can align with its' original purpose. Similar committees have previously been formed by the Chief Justice, for instance, the one formed to look into the issues affecting the small claims court, including legal issues on mandate and jurisdiction (Judiciary, X post).

5.4.2 Increase Funding

95% of participants advocated for an increase in funding. This was especially by members of HAT, advocates and lawyers. Their responses were consistent with desk review research, whereby Eba (2016) claimed that insufficient funding is one of HAT's most significant challenges (Eba 2016, p. 173). They stated that an increase in funding was necessary to expand HAT's infrastructure services and registry facilities across the country.

The research also established that HAT has waived filing fees and other costs. Participants stated that an increase in funding will sustain this waiver together with other services that require payment, thereby ensuring more access to justice for the indigent litigants.

Increase in funding will also assist in payment for pro bono lawyers who form the backbone of legal representation for claimants as well as paralegals on the ground who identify aggrieved claimants and direct them to HAT to report their case for legal assistance. Facilitating Pro bono lawyers and paralegals ensures that they are not only compensated, facilitated or paid for the work and time they invest in assisting litigants but also acts as motivation to continue with the good work they are doing.

5.4.3 Policy Frameworks

A number of participants advocated for HAT to include policy reforms to protect PLHIVs while conducting their cases during the trial at the tribunal and even post-judgment. Other reforms touted included ensuring compliance with some of the provisions of HAPCA 2006. Some legal assistants at HAT, members, advocates, and even some litigants cited a lack of reforms in counselling before a claimant is subjected to the gruesome process of examination, especially cross-examination. About two participants recounted a time where litigants cried during examination because they remembered the horrific accounts of how they came to be infected, how their status was publicly exposed, and the stigma and ostracisation they encountered afterwards. One participant recounted a horrific incident where a litigant threatened to commit suicide at HAT offices by jumping down from the 12th floor of the building housing the offices. Some staff members also recounted incidences whereby litigants came to the offices while so broken because they had been chased from their rented homes or their children forcefully taken away from them because of their HIV status. These observations align with the findings of Nyongesa, K.M, Nasambu, C et all (2022) who wrote that PLHIVS express various challenges, among which include psychological challenges alongside emotional and socioeconomic systems (Pg. 16). These challenges are not limited to economic and social levels alone but they extend to trial process as well.

Superior courts nowadays require courts to observe the psychological and mental well-being of litigants who appear before it in cases that are sensitive and emotive in nature under a philosophy referred to as therapeutic jurisprudence. These courts appreciate and recognize that legal rules, legal procedures and the roles of legal actors constitute social forces that impact on the psychological well-being of those involved in the court process especially litigants. This can be attributed to PLHIVS and suspected PLHIVS as well. Courts and Tribunals such as HAT are encouraged to consider employing therapeutic jurisprudence in dealing with cases that involve vulnerable people such as PLHIVS and at the same time can cause psychological harm. This was seen in the case of Ontweka & 3 others v Ondieki where the Court of Appeal stated that some disputes could be emotive, and whatever outcome, some would be left crestfallen and therefore, the words and phrases employed in the resolution of the dispute should be sensitive to the mental, psychological and physical health of the parties involved in the dispute (KECA, 2024, 11-12). The law and institutions such as HAT should first value humanness as a crucial element in the justice process and therefore it ought to be factored

in the trial process and judgment making. Although the Court of Appeal in Ontweka & 3 others v Ondieki was dealing with a burial dispute, the principle of therapeutic jurisprudence remains the same and applies to all cases that involve vulnerable people, such as PLHIVS and suspected PLHIVS. Therefore, it was the participants' plea that reforms should be undertaken to put in place counselling measures for litigants who are PLHIVS and those suspected to be PLHIVS before they are subjected to the trial process until conclusion.

Flowing along this, HAT itself in MCM vs BOO (2019) decried the absence of privacy guidelines as required under section 20 of HAPCA 2006. According to HAT, such guidelines were necessary to facilitate and make easier the collection, recording, transmission, and storage of records and other necessary information of HIV results so that there is compliance with sections 18 and 20 HAPCA 2006. HAT recommended that the cabinet secretary in charge of health to move expeditiously and hasten the development of such guidelines (Par. 78). No such privacy guidelines have seen been developed more than six years since that pronouncement. In the meantime, it will be prudent if pro bono lawyers are also be trained on how to draft and frame prayers in claims that that they file before HAT. The kind of prayers requested and granted are likely to expose HIV and AIDS status of litigants. Even though most of the time HAT declines to grant such prayers that might jeopardise litigants by exposing their identity or status, still, there remains the possibility of exposing them to the public.

5.5. Chapter Summary

This chapter has discussed the findings presented in chapter four. In doing so the chapter has elaborated, explained and given meaning to the findings. The discussion has been done in accordance with the objectives of the study. The discussion of the findings will inform the conclusions and recommendations in the next chapter.

Chapter 6: Conclusions and Recommendations

6.1 Introduction

This study set out to determine the effectiveness of HAT in dispensing justice to both PLHIVs and those suspected of being PLHIVs. As a specialised (sui generis) Tribunal, HAT is meant to offer justice to PLHIVS and suspected PLHIVS full protection of their human rights and civil liberties in accordance with the objectives of HAPCA 2006. HAT has to live up to its' expectations and fulfil this role.

A number of philosophers have written about law and justice, and their writings are relevant for discussion in this study. As discussed above, Aquinas held that laws ought to be just and to serve the common good of a society. Essentially, laws must serve the interests of all people in a society, especially vulnerable groups, without hindering their fundamental rights and freedoms.

On the other hand, Immanuel Kant viewed justice as the enforcement of a person's individual freedoms and rights. According to him, promulgated laws such as HAPCA 2006 are enablers for the protection of such rights and freedoms, which ideally ensure justice. Accordingly, where there are any obstacles that hinder or limit the rights and freedoms of an individual, then every possible measure should be taken to eliminate such obstacles. This includes problems of quorums, mandate, insufficient funding etc. as discussed above.

The study established that most of the time, HAT grapples with cases over which it does not have jurisdiction or mandate. It then follows that if it does not have a clear mandate to enforce issues to do with the interpretation of the law regarding freedoms, human rights and civil liberties, which it ought to enforce, then its effectiveness in meeting the objectives as provided for under section 3 (b) of HAPCA 2006 and original purpose is greatly hindered. This curtails its effectiveness to dispense justice as was originally intended. Effective justice can only be attained through an effective justice system. Rawls, J (1971) stated that justice was the first virtue of social institutions as truth is of systems of thought (Pg.3). Being a sui generis institution, it is not enough to create HAT, but its' jurisdiction, powers, mechanisms and measures given to it and put in place must be those that lead to dispensation of effective justice. The rationale for the establishment of HAT was to create a specialised tribunal that was alive to the plight of PLHIVS, suspected PLHIVS and those afflicted by

HIV and AIDS. There was a particular need for such a special tribunal due to the prevailing HIV and AIDS circumstances at the time. Current circumstances call for a more effective one. HAT must be well-equipped, structured, and funded to ensure it fully performs its obligations in compliance with the objectives of HAPCA 2006 and its original purpose.

Therefore, after gathering information from the participants and discussing it above in chapter 5, this chapter now makes conclusions on the findings and provides the necessary recommendations with the hope that they will facilitate the improvement of HAT as an institution so that it can dispense justice as originally envisioned.

6.2 Conclusions

6.2.1 Whether the Mandate of HAT is Limited Due To Conflicts and Inconsistencies Between the Provisions Of HAPCA, 2006, and Existing Laws Such as The Provisions of The Constitution of Kenya 2010

The study established through information gathered from participants and desk review that HAT's mandate has been greatly limited due to conflicts and inconsistencies of the provisions of HAPCA 2006 and other laws, including the 2010 Constitution. However, there was also divergence of opinion among some participants, especially members of HAT and advocates, on whether HAT has the capacity to effectively handle human rights and civil liberties due to the limits of its mandate. Whereas most believe that it is greatly limited, others, especially members of the Tribunal, hold a firm belief that it does. Members of HAT believe that its' composition equips it with the necessary skills and knowledge as well as based on their professional experience they have the ability and capacity to offer justice to PLHIVS and suspected PLHIVS. Advocates believe that based on various superior court pronouncements from the High Court and Employment Courts, HAT's capacity has either been taken away or greatly reduced to the extent that mandate has also been drastically reduced.

6.2.2 Whether HAT Can Effectively Enforce Human Rights and Offer Justice to PLHIVS Following the Objectives for The Enactment of HAPCA 2006

The study established that HAT's mandate to effectively enforce human rights and offer justice to PLHIVS and suspected PLHIVS is greatly impeded. This is caused by the reduced mandate on the type of cases it can hear and determine, conflicting and confusing court decisions, lack of enforcement powers to enforce its own Judgments, decrees, rulings, or orders. Further, other factors, such as a lack

of quorum and insufficient funding, have also impeded HAT's original purpose. Such factors reduce expeditious disposition of cases, reducing public confidence in HAT as there are no funds to assist with the expansion and publicity of the Tribunal.

Lack of guidelines and policy frameworks to operationalise provisions of HAPCA 2006, such as section 20, with regard to privacy and records, and the psychological well-being of litigants, particularly the vulnerable, such as PLHIVS and suspected PLHIVS, has also affected the effectiveness of HAT. Both desk review research and collected information enabled the study to conclude that even though HAT is still capable of rendering justice to those who seek justice before it, it is effectiveness is greatly hindered due to the factors and reasons discussed above.

6.2.3 Evaluate and Determine Possible Solutions to Ensure the Full Realisation of HAT's Purpose and Mandate Under HAPCA, 2006

The study established that HAT's original purpose and rationale have not been fully and effectively achieved due to several issues. The issues include a reduced mandate, which limits cases that HAT can decide, insufficient funding and a lack of policy frameworks to enable effective justice dispensation as originally planned and public obscurity.

To ensure HAT fulfils its original purpose as envisioned under HAPCA 2006, a number of solutions were established during the study. They included undertaking amendments, policy reforms, increase funding and undertaking further research on the topic of study. These solutions are highlighted and discussed in the recommendations below.

6.3 Recommendations on the Study Based on The Findings and Conclusions

6.3.1 Recommendation for Amendment

Amendments normally address circumstances and events that were not foreseen when legislation was initially enacted (Kenton et all, 2023, Par. 8). The study established that the original purpose cannot be fully accomplished due to limit of the mandate as a result of the conflict and inconsistences of the provisions of HAPCA and other existing laws such as 2010 Constitution and SOA. This came out clearly through the pronouncements of HAT itself and those of the superior courts in various cases. Without running in the danger of repetition, pursuant to section 26 (2) of HAPCA 2006, HAT ruled in M.K.R. vs C.W.R. (2015) that it does not have jurisdiction over criminal matters. In Aids Law

Project v Attorney General & 3 others, the High Court declared section 24 of HAPACA, 2006, unconstitutional for being vague and lacking in certainty (Par. 91). In DKS v Ampath Centre (2023), the High Court held that neither HAPCA, 2006, nor any other written law confers express jurisdiction on HAT to hear and determine claims for damages for negligence arising from misdiagnosis of HIV AIDS (Par. 43). In Avery (East Africa) Limited v J M M & Another (2018), the Employment and Labour Relations Court (ELRC) held that HAT does not have jurisdiction to hear and determine disputes in employment and labour relations matters as envisaged in section 12 of the ELRC Act 2011(Pg. 4).

The information gathered during the study and the above decisions both from HAT itself and superior courts demonstrate the need to undertake amendment to HAPCA to clear confusion and bestow HAT with clearer mandate to meet its' objectives and original purpose for its' establishment. Therefore, amendments are recommended for purposes providing HAT with a clear mandate to fulfill its' statutory role under HAPCA 2006.

6.3.2 Recommendation for HAT's Enforcement Powers

The study also established that HAT does not have the power or authority to enforce its own Judgments. Such Judgments or orders have to be adopted by the High Court and enforced like its own Judgments or Orders. One of the recommendations with amendments should be to grant HAT the mandate to enforce its own judgments, rulings, and decrees as well. This will ensure the expeditious disposal of suits and reduce the costs of enforcing HAT's orders in the High Court.

6.3.3 Recommendation for Policy Reforms

The findings established that the mental well-being of litigants, especially vulnerable ones like PLHIVS, had not been given prominence at the institution. However, the study also established that a good number of participants in the study were alive to the fact that litigants face psychological and mental stress during the trial process, especially when subjected to gruelling cross-examination. This also extends to the instances when advocates abandon litigants' cases during the trial, thereby leaving them in a limbo. Staff members also suffer from psychological issues as a result of handling psychosocially affected litigants. Incidences of litigants threatening to commit suicide such the one who threatened to throw himself from the roof of the HAT offices affects the mental wellbeing of HAT staff members.

Therefore, in accordance with the guidance of the Court of Appeal in **Ontweka & 3 others v Ondieki**, policy reforms should be introduced to assist with the counselling of the litigants during the entire case and even experts in psychology and who understand PLHIVS mental issues should be sitting throughout the trial process. In fact, a Rescue center for psychosocial support of litigants and staff members was highly recommended by participants. This will ensure mental wellbeing of the vulnerable litigants.

6.3.4. Recommendation for Further Research

Both desk review research and information gathered from participants in the study, particularly advocates and members of the Tribunal, demonstrated a case whereby there is no consensus on the effect of decisions of the superior court on the mandate of HAT and the ability to hear and determine certain cases. For instance, the decision of the High Court in Royal Media Services Ltd vs. Attorney General & 6 others, ruled that in the absence of enabling legislation being promulgated by the parliament and put in place, HAT does not have the power to hear and determine issues relating to infringement of human rights. On the contrary, another High Court decision in Attorney General and 2 Others v PKJ ruled that HAT has jurisdiction to hear and determine denial, violation, infringement and threatening of human rights and fundamental freedoms (Par. 32). This confusion has given leeway for members of HAT to quote and rely on this decision while advocates rely on the Royal Media Services Ltd vs Attorney General & 6 others, or argue depending on what favours the circumstances. It causes confusion and great concern. E, Z, Ongoya (2020) writes that when superior courts deliver divergent decisions on same issue or legal provisions, conflict arises among advocates, lower courts and ends up making a mockery of the justice system (Pg.179). Divergent decisions from superior courts is a serious matter which ought to be addressed with the seriousness it deserves. This is because such conflicting decisions portrays such courts as being unserious with interpretation and clarification of law, hence exposing it to public disrepute, makes it difficult for teachers of law to teach with certain on current issues in law and makes it difficult for advocates and lawyers to advise their clients authoritatively (E.Z, Ongoya,2020, 171). He suggests further research in such instances to raise areas of concern and get a clear way forward (E.Z Ongoya, 2020, 174).

The information gathered during the study, as well as desk review research, showed that there is an issue of conflict of decisions from superior courts on the mandate of HAT, and the relevant players

are left to choose between which suits particular instances. Hence, further research, probably a commission on study of full scope of conflicting decisions on legal issues affecting and limiting both HAT's mandate ought to be undertaken further and findings used in policy frameworks to make the necessary changes required HAT works effectively.

6.4. Chapter Summary

This chapter presents conclusions and recommendations based on the findings. The study has concluded that even though HAT is still capable of offering justice to PLHIVS and suspected PLHIVS, it nevertheless faces a lot of issues which have hindered its' full potential and original plan. Therefore, a number of measures such as amendments, increase in funding and policy reforms have to be undertaken to ensure it effectively offers justice.

VT OMNES VNVM SINT

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Appendices

Appendix A: Similarity Report

Wanjala Christopher Wafula

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Appendix B: Ethical Clearance Confirmation

20th November 2025

Mr Wafula Christopher,
wanjala.wafula@strathmore.edu

Dear Mr Wafula,

RE: HIV and AIDS Tribunal Effectiveness

This is to inform you that SU-ISERC has reviewed and **approved** your above **SU-masters** research proposal. Your application reference number is **SU-ISERC3070/25.** The approval period is from **20th November 2025 to 19th November 2026.**

This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, and MTA) will be used
ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-ISERC.
iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-ISERC within 72 hours of notification
iv. Any changes, anticipated or otherwise, that may increase the risks or affect the safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-ISERC within 72 hours
v. Clearance for the export of biological specimens must be obtained from relevant institutions.
vi. Submission of a request for renewal of approval at least 60 days prior to the expiry of the approval period. Attach a comprehensive progress report to support the renewal.
vii. Submission of an executive summary report within 90 days of completion of the study to SU-ISERC.

Before commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) https://research-portal.nacosti.go.ke/ and obtain other clearances needed.

Yours sincerely,

Mr Ambrose Rachier,
Chairperson; SU-ISERC

REPUBLIC OF KENYA

NATIONAL COMMISSION FOR SCIENCE,TECHNOLOGY & INNOVATION

Appendix C: National Commission For Science, Technology and Innovation Research License

Ref No: **383269**

Date of Issue: **17/December/2025**

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This is to Certify that Mr.. Christopher Wanjala Wanjala of Strathmore University, has been licensed to conduct research as per the provision of the Science, Technology and Innovation Act, 2013 (Rev.2014) in Nairobi on the topic: HIV AND AIDS TRIBUNAL EFFECTIVENESS for the period ending : 17/December/2026.

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15. Relevant Institutional Scientific and Ethical Review Committee shall monitor and evaluate the research periodically, and make a report of its findings to the Commission for necessary action.

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