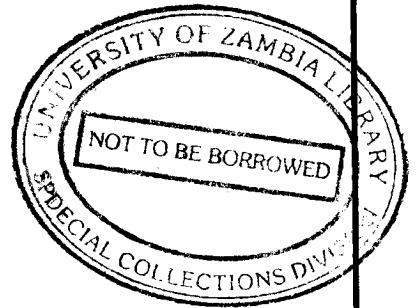


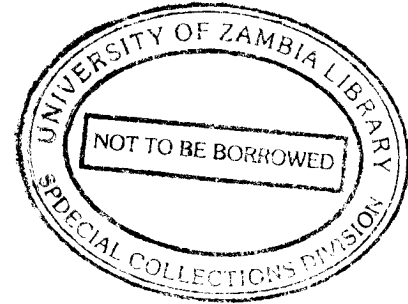
**HIV/AIDS: THE NEED FOR EFFECTIVE LEGAL SANCTIONS
AGAINST PERSONS WHO WILFULLY INFECT OTHERS WITH
HIV/AIDS**

**By
KABWE, MUBANGA**



University of Zambia
Lusaka,
November 2005

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW



I recommend that the obligatory essay prepared under my supervision by

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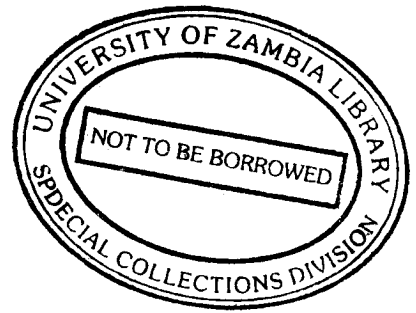
28th Nov. 2005

Date

Obligatory Essay on

**HIV/AIDS: THE NEED FOR EFFECTIVE LEGAL SANCTIONS AGAINST
PERSONS WHO WILFULLY INFECT OTHERS WITH HIV/AIDS**

By



KABWE, MUBANGA

COMPUTER No. 20044879

Submitted to the University of Zambia in partial fulfillment of the requirements of the Bachelor of Laws (LLB) Degree programme.

School of Law

University of Zambia

Lusaka.

DECLARATION

I, Kabwe Mubanga, do hereby declare that this dissertation is my authentic work and that to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other institution for the award of a Bachelor of Laws degree. All other works referred to in this dissertation have been duly acknowledged.

Made this ...28 day of November 2005,

By the said KABWE, MUBANGA



at Lusaka.

DEDICATION

To my entire family; mom and dad, my brother Kasonde, my sisters Mwiche, Musonsa and Mwaka.

PREFACE

This dissertation is divided into four chapters. The first chapter contains a statement of the problem, highlighting the widespread problem of the number of people innocently infected with HIV/AIDS, and in what ways they are infected. The second chapter goes further in that it examines actual existing laws and judicial decisions on HIV/AIDS. The third chapter investigates the possibility of enacting HIV/AIDS legislation in Zambia, and the final chapter summarizes the entire study by way of making recommendations towards the enactment of HIV/AIDS legislation in this country.

It is also noteworthy to understand that the reason this research was embarked on was the realization that there is a segment of society suffering silently, without redress, and the fact that culpable transmission of HIV/AIDS has no legal remedy in Zambia. It is thereby hoped that this paper will prompt further research in this field.

Lusaka, 2005.

K.M

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To the various people and institutions that assisted me to research this dissertation, and yet whose names cannot all be mentioned, I say thank you. However, special thanks goes to Malala Mwondela, a research and training officer at the Zambia Aids Law Research and Advocacy Network (ZARAN), who made herself available not only to listen and advise, but also to provide material that has contributed to the success of this work.

I would also like to thank my sister Mwiche, who has supported me from the beginning, in whatever way possible to facilitate the completion of this dissertation.

I thank my roommates Kayabwe Mulenga and Josephine Mwale, who helped me in the small ways that matter, the small details that would otherwise have been omitted.

Finally, I wish to state that any errors and imperfections that may be in this dissertation are entirely my own.

TABLE OF CONTENTS

	Page
<i>Preface</i>	v
<i>Acknowledgment</i>	vi
 CHAPTER 1- Introduction	 1
 CHAPTER 2- The Law on HIV/AIDS	 9
 CHAPTER 3- HIV/AIDS Law. How possible	 25
 CHAPTER4- Recommendations	 42
Conclusion	50
 BIBLIOGRAPHY	 51

Table of cases

	Page
R.v. Cuerrier (1998) 127 ccc (3d) 1.....	13
R.v. Michel. Unreported. 1994, BC Supreme Court.....	15
R.v. Sinclair 13 Cox Criminal cases 28.....	4
R.v. Summer (1989) AJ no 784 (prov G) (QL), affd 73 CR (3d) 32 (AJZ CA)....	15
R.v. Wentzell. Unreported. 8 December 1989, NS County Court, Filena CR. 10888.....	15
R.v. Williams. 18 September 2003. Supreme Court of Canada decision.....	14
Smallwood v. State of Maryland. 1996 WL 428978.....	18
Virginia v. Webb. Petersburg Cir Ct, No. F- 796-93, 5 November 1994.....	18

Table of Statutes

The Penal Code, Cap. 87

CHAPTER ONE

INTRODUCTION

HIV/AIDS has attracted much debate since it was first diagnosed in the early eighties. HIV itself stands for Human Immunodeficiency Virus, and AIDS stands for Acquired Immune Deficiency Syndrome. The reason this particular disease has attracted so much debate has to do with the fact that up until now, no cure has been found for it.

Although there are many ways in which the virus can be transmitted from one person to another, such as by sharing needles and blades, the most common means is through sexual intercourse. The debate on HIV/AIDS has in the recent years mostly been centered on trying to slow its spread by sensitizing people and also trying to prevent stigmatization of those already infected. However, with the passage of time, these are no longer the only major problems related to HIV/AIDS. In recent years it has become clear that there is a segment of society who are infected with the virus not accidentally with a needle, or willingly due to their own active sexual behavior without precautionary measures, but unwillingly by the malicious act of another person. This shall be termed the deliberate or willful infection of another with HIV/AIDS.

Why is this a problem? It is a problem because there are a growing number of people who are infected with the virus by one who has it and does so deliberately. It is therefore not by one's choice or carelessness that they are infected, but by another's deliberate act. The question is what does one do if they find themselves in this situation? Does it really exist? If so, what shows that it is an existing problem that must be addressed? These are questions that must be answered if society is to curb the spread of HIV/AIDS. This paper aims to answer these questions and more in the best possible manner.

One means by which society tries to address a problem is through the law. Currently in Zambia there is no provision that caters for the punishment of persons who deliberately infect others with HIV/AIDS. In 2001, the then Vice President, Enoch Kavindele is reported to have stated, "I intend to bring a law to the House to make the intentional infection of someone with HIV/AIDS a criminal offence."¹ To date, no such law actually exists. The only way to convince the lawmakers that such a law is needed urgently is to investigate how widespread the problem of willful infection actually is.

In order to know that one has been deliberately infected with the virus, it must be understood how the person was infected in the first place. There are many situations in which a person can deliberately infect another but only three ways will be highlighted here. These are:

¹ BC HIV/AIDS News, by BCPWA Communications, November 2, 2001

- ♦ Child defilement cases
- ♦ Marriage mates to each other
- ♦ Rape cases

Child defilement cases are on the increase. In fact one cannot read a newspaper these days without reading about a child who was sexually molested by her father, her uncle, brother or even the neighbor. For example one heading read: "A 39 year old was arrested in Masaiti for defiling his 1 year old daughter,"² and another read: "School-boy, 18, in court for defiling 10 year old."³ These are not isolated cases. In fact, they have become the order of the day. They occur not only in homes, but also in schools by teachers against their pupils.

It is enough that an innocent young child be sexually molested. However, the mere fact of the sexual harassment does not end at the physical damage done to a child not ready for sexual activity. It does not end at the emotional turmoil that that child will suffer. It now goes further to add another burden to that once healthy happy child, and that is the burden of having contracted the deadly HIV/AIDS. Yes, those news headlines no longer just talk about the fact that a child has been defiled. They now include an account of how, after being tested, the abused child now has to live with HIV/AIDS.

² Zambia Daily Mail. Thursday, September 2, 2004

³ Times of Zambia – Thursday, September 2, 2004

Much as there is a law that caters for the defilement of children under the age of sixteen, there is no provision that caters for the infecting of that child with HIV/AIDS. This is not just another disease. It is a virus that once contracted, one must live with it until death, which looms somewhat nearer when one has a virus that breaks down their immune system. It is therefore comparable to a death sentence, and for that death sentence the guilty party must be made to pay.

There have been cases where persons have been brought to book for having infected the children they defiled with a sexually transmitted disease (STD). Although the STD's in these cases are not HIV/AIDS, as they occurred before it was ever known, they provide a guideline to show us that defilers can and should be punished not only for the act of defilement, but also for transmitting a dangerous and deadly disease to the victim. One such case is that of **R.V. Sinclair**.⁴ In this case, Sinclair coaxed a 12-year-old girl to have sex with him. Although she neither screamed nor cried, it was later found that she had contracted gonorrhea, which Sinclair was also suffering from. It was argued that the girl was ignorant that a contagious disease was being transmitted to her. Sinclair was found guilty of assault causing grievous bodily harm.

The facts of this case show that the court took into account that besides having had sexual intercourse with a child less than 16 years of age, Sinclair had committed yet another crime of infecting her with gonorrhea. If the court then

⁴ 13 Cox Criminal Cases 28

could consider this factor, how much more so should the courts now take into account the fact that a child has not only been defiled, but has been left with the deadly HIV/AIDS in her system.

One would ask, however, if child defilement rightly falls under the category of deliberate infection of another with HIV/AIDS. Considering that the defiler is a grown adult capable of rationalizing and knowing the possibility of transmitting any virus he may have, whether or not he knows he has such virus should be enough to categorize such adult as a willful infector of an innocent child. After all, an adult woman has the ability to demand that protective measures like a condom is used, but what ability does a one year old have? The presupposition must thus be made that where a child is concerned, the defiler both defiled and infected willfully and deliberately, and must thus be punished for both crimes.

Another category of people who may be deliberately infected with the virus is marriage mates from one to the other: a husband to his wife or a wife to her husband. One party may know their HIV/AIDS positive status and withhold such information from the other party. Do such cases occur in Zambia? Yes! There are in fact so many such cases, as the facts below will show.

Upon a study being conducted at Cara Counseling Center in Lusaka, a counselor revealed that among those who go for counseling include men and women whose mates knew they had the virus but deliberately withheld such information

from their mates, who in turn contracted the virus as a result. Very few of those who discovered the positive status of their mates and thereafter tested their own status have been fortunate enough to test negative. There is an example of a woman who found her husbands positive results stashed away in the house, after he had already demanded unprotected sex with his wife. She was fortunate enough to test negative, but that is not the case with so many other innocent mates. Should such uncaring husbands or wives be left unpunished? It is worth keeping in mind that we are dealing with an incurable disease whose contraction automatically translates into a death sentence upon the one infected. Therefore, wife or husband, such a person who knowingly infects his or her spouse should be punished. Life is irreplaceable.

Another organization that deals with assisting people living with HIV/AIDS is Family Support Project, a non-governmental organization situated in Lusaka's Mandevu compound. It reports similar facts concerning how one spouse deliberately infects the other. One example, among many others, is that of a woman whose husband forcibly had unprotected sex with her, after they had both been tested, he testing positive and she negative. Although she elected to remain his wife, it was agreed that sexual intercourse would only take place with a condom. Her husband's refusal to protect his wife in such a manner shows his deliberate act of infecting her with the virus. The question is must a woman or man be left with no remedy merely because they happen to be married? Such would presuppose that marriage mates have no rights as against each other, and

such a statement would surely cause catastrophe. Therefore, let men and women who deliberately infect their marriage mates be punished.

The third manner in which a person may be deliberately infected with HIV/AIDS is by being raped. Rape is a punishable offence under the laws of Zambia. However, the punishment does not include the fact that the victim now has been infected with an incurable disease. Family Support Project reports of a badly disabled woman in Lusaka's Chipata compound who was raped by her neighbor. She now contends not only with HIV/AIDS, but has an additional burden of a child born with the virus. Another rape victim is an 18-year-old living in Garden Compound in Lusaka, raped by her uncle. She too is now living with the deadly virus.

Although neither of these two rape victims reported the cases to the police, having been threatened by the men who raped them, had the matters been taken to court the offenders would only have been punished for the rape. The additional burden of contracting HIV/AIDS from the rapists would not have been punishable, as there is no law to support it. A rapist must surely fall under the category of ones who deliberately infect others with the virus, much the same way as defilers. The fact that they forcibly have sexual intercourse with ones who do not consent to it presupposes that they knew the possibility of infecting their victims with a sexually transmitted disease, whether or not they knew they actually had it.

These are just a drop in the ocean of the cases that exist of people who have been deliberately infected with HIV/AIDS. It is a growing problem that must be curbed, thus the need for written laws to help deter ones who deliberately infect others. The question is how far has the Zambian nation gone in trying to criminalize the intentional infection of others with HIV/AIDS, since those words of intent were spoken by Enoch Kavindele in 2001? The next chapter will discuss these issues.

CHAPTER TWO

THE LAW ON HIV/AIDS

As it has been noted in chapter one, the problem of the willful transmission of HIV/AIDS from an infected person to an innocent person is quite widespread. There is thus the need to see what is being done in this nation of Zambia to address the problem. This chapter will thereby focus on the current position in Zambia with regard to any measures in place to combat the problem of willful infection. It will also be necessary to examine what positions different jurisdictions have taken in this matter.

Serious steps to combat the problem of HIV/AIDS in Zambia began in 2000, when the government established a National HIV/AIDS, STD and TB Council to deal with and coordinate activities relating to the HIV pandemic.¹ On the 14th of April 2001 a workshop was held at the Mulungushi international Conference Centre to attempt to come up with a National HIV/AIDS policy. Both the institutional arrangements and a legal framework for addressing the problem were laid out in the draft document.

From 2001 to 2005 there existed only a draft policy on HIV/AIDS. Early in 2005, however, the draft became policy. Therefore, there now exists what is termed as

¹ The National HIV/AIDS policy draft document. 14th April 2001. p.10

the HIV/AIDS policy. The relevant section in the policy to this article is section 64 which provides as follows:

64: Many people who are living with HIV/AIDS are usually stigmatized and discriminated. Contraction of HIV/AIDS should, however, be treated like any other diseases and should, therefore, not be targeted for stigma and discrimination. In order to achieve this, the Government shall: -

- ◆ Encourage voluntary counseling and testing for all persons and insist on the maintenance of confidentiality by health care providers and employers;
- ◆ *Legalize* mandatory testing in cases of persons charged with sexual offences that could involve the risk of HIV transmission;
- ◆ Not encourage anonymous (without consent) HIV testing;
- ◆ *Legislate* against individuals who deliberately and knowingly withhold their HIV status from their partners or spouses;
- ◆ *Legislate* against willful transmission of HIV/AIDS;
- ◆ Educate the public about the need to eliminate stigma and discrimination against people living with HIV/AIDS (PLWHA);
- ◆ Encourage the insurance industry to develop and apply policies which take into account the insurance needs of persons with HIV/AIDS;
- ◆ Integrate HIV/AIDS services required by people with different abilities in existing health and social welfare delivery systems; and

- ✦ Promote positive living among people living with HIV and AIDS.²

Another section in the policy that somewhat makes mention of the role of the law in combating the deliberate spread of HIV/AIDS is section 67, which partly states the need to stiffen penalties for child defilers. Therefore, out of the entire policy on HIV/AIDS, only section 64 and to a lesser extent, section 67, mentions the need to criminalize the deliberate transmission of the virus. The rest of the policy centers mainly on the prevention of stigma and discrimination against persons living with HIV/AIDS.

The HIV/AIDS policy does not adequately provide for the measures that should be taken against persons who willfully infect others with HIV/AIDS. It does not define what constitutes the willful transmission of HIV/AIDS, considering that the provisions are too general for them to be an adequate guideline when the time comes to legislate against willful infectors of HIV/AIDS. It is clear that the priority in the policy is more centered on helping people already living with HIV, rather than trying to prevent its rapid spread. Another problem is the time that it has taken for the HIV/AIDS draft policy to become policy. If it could take four years for this to happen, how many more years shall we count before an actual piece of legislation on HIV/AIDS is produced from the policy currently in existence? There is thus still an urgent need to effectively legislate on HIV/AIDS, and for our present purposes, on sanctions against willful infectors of the virus.

² HIV/AIDS Policy 2005

Is it achievable? One of the best ways to answer that question would be to examine the position that has been taken in other jurisdictions on the issue at hand. In numerous jurisdictions, criminal sanctions have been invoked against HIV – positive people for conduct that transmits, or risks transmitting, the virus.

To date, actual prosecutions for HIV transmission or exposure have been reported primarily in developed countries, and to a lesser extent elsewhere.³ In recent years, however, the issue of criminalization of HIV transmission or exposure has begun to receive increased attentions in a number of developing countries.⁴ We will now proceed with an in-depth discussion of how other jurisdictions have handled the issue of criminalizing HIV transmission. The states that have been selected in this paper for purposes of examining their law on HIV/AIDS are as follows:

- ♦ Canada
- ♦ The United States of America
- ♦ Australia
- ♦ France
- ♦ New Zealand
- ♦ South Africa
- ♦ Finland
- ♦ Zimbabwe

³ Canadian HIV – AIDS Legal Network – Criminal Law and HIV – ADIS strategic Considerations htm.

⁴ Ibid

CANADA

Canada did not wait for specific HIV/AIDS legislation before it began prosecuting cases involving incidents where various persons were accused of having intentionally and willfully transmitted HIV/AIDS to their innocent sexual partners. The courts merely made use of existing offences to prosecute these cases. These already existing offences have thus been used in an attempt to criminalize HIV transmission.⁵ Therefore, if the position on this issue under Canadian law is to be ascertained, there will be need to consider a few of the many cases that have reached the courts in this regard.

One of the cases that have set a precedent under Canadian law is **R.V. Cuerrier**⁶. It was confirmed in that case that not disclosing ones HIV-positive status before unprotected sex amounts to “fraud” which makes a sexual partner’s consent to sex legally invalid. Therefore, the physical sexual contact amounts to an assault. The Supreme Court said that there was a duty to disclose one’s HIV infection before engaging in any activity that posed a “significant risk” of transmitting HIV, although the court did not define which activities would be considered to pose a significant risk.

Furthermore, the court in this case highlighted three things that must be proved to establish fraud. The court stated that:

⁵ Elliot, R. 1997. Criminal Law and HIV/AIDS: Final Report Montreal: Canada HIV/AIDS Legal Network and the Canadian Aids society. P. 6.

⁶ (1998) 127 CCC (3d) 1

- ◆ There must be conduct that the reasonable person would consider “dishonest.”
- ◆ The crown must prove this dishonesty resulted in a ‘significant risk of serious bodily harm’ to the person whose consent is being obtained by means of the dishonesty. The court accepted that infection with HIV is a serious bodily harm, and indicated that unprotected sexual intercourse certainly presents a “significant risk”.
- ◆ The crown must prove beyond reasonable doubt that the person would not have consented to sex if the HIV – positive person had disclosed their status.⁷

Therefore, the court was merely making clear that without disclosure of HIV status, there couldn’t be true consent. The consent cannot simply be to have sexual intercourse. Rather, it must be consent to have intercourse with a partner who is HIV positive. A person with HIV/AIDS may thus be found guilty of the crime of “assault” if they have unprotected sexual intercourse without disclosing their HIV-positive status.

The Cuerrier case was also cited in another case of **R.V. Williams**,⁸ thereby influencing the decision of the court in that case. In the Williams case the question was raised as to whether a person with HIV who has unprotected sex without disclosing their status to a sexual partner who might already themselves have been infected with the virus, can be convicted of either “aggravated assault”

⁷ Ibid

⁸ 18 September 2003. Supreme Court of Canada decision

or simply “attempted aggravated assault”. Furthermore, in this case the court was able to conclude that there had been intent to commit the assault due to the fact that after the accused had learned of his HIV – positive status, he continued engaging in unprotected sex with the complainant, thereby showing his intent to expose her to the lethal consequences of HIV.

Numerous other cases have reached the Canadian courts and the accused persons have been charged and convicted with various offences. For example, in the case of **R.V. Michel**,⁹ the accused was charged with aggravated assault for allegedly having sexually assaulted a woman while knowing he was HIV-positive. He was convicted of simple sexual assault and sentenced to 5 years imprisonment.

In another case of **R.V. Wentzell**,¹⁰ the accused had unprotected sex on roughly 40 occasions with one woman without disclosing his HIV infection. She was later diagnosed HIV-positive. Wentzell pleaded guilty to criminal negligence causing bodily harm. The court agreed that he had shown “wanton and reckless disregard” for the complainant’s life, and sentenced him to three years in prison. In a similar case of **R.V. Summer**,¹¹ the accused had unprotected sex with several partners without disclosing his HIV infection. He pleaded guilty to a charge of common nuisance for having “endangered the lives and health of the public,” and was sentenced to one year in prison and three years probation.

⁹ Unreported. 1994, BC Supreme Court

¹⁰ Unreported. 8 December 1989, NS Country court, Filena CR. 10888

¹¹ (1989) AJ no 784 (Prov G) (QL), affd 73 CR (3d) 32 (AJZ CA)

These are but a few of the cases that have been successfully prosecuted in the Canadian Courts with regards to persons who have been found guilty of intentionally infecting their sexual partners with HIV/AIDS. As can be noted above, the charges have ranged from assault, aggravated assault and criminal negligence, to mention but a few. Existing offences have thus been used in Canada to prosecute HIV transmission cases, and it has proven successful. What Canada has, therefore, is case law that makes it a criminal offence to intentionally infect another with HIV.

THE UNITED STATES OF AMERICA

The United States of America is another state that has taken steps to criminalize the willful and intentional infection of another with HIV/AIDS. In 1988, the presidential Commission on the HIV epidemic concluded that HIV infected persons who knowingly conducted themselves in a manner that posed a significant risk of transmission to others must be held accountable for their actions.¹² The commission then urged state legislatures "to adopt criminal statutes relating specifically to HIV infection that should provide clear notice of socially unacceptable standards of behavior specific to the HIV epidemic, and tailor punishment to the specific crime of HIV transmission."¹³ As a result of this, many states have enacted legislation that criminalizes certain behavior by people with HIV/AIDS.

¹² Elliot, R. 1997. *Criminal Law and HIV/AIDS: Final Report* Montreal: Canadian HIV/AIDS Legal Network and the Canadian Aids Society P. 18.

¹³ Ibid 18

A committee of the American bar association identified three general approaches adopted by states in drafting or amending legislation:

1. "To mandate disclosure of HIV status before engaging in certain activities."
2. "To criminalize certain otherwise legal acts if performed by HIV positive people, or by individuals belonging to so called high-risk groups. For example, in South Carolina a bill was introduced to criminalize blood donations by practicing homosexuals or IV drug users. Another bill in Nevada was introduced that allows prosecutors to file attempted murder charges against prostitutes who knowingly transmit HIV.
3. "Some statutes enhance penalties for already illegal acts (most commonly prostitution) when committed by an HIV – positive person."¹⁴

These guidelines have resulted in many states in the United States of America enacting legislation that criminalizes the intentional transmission of HIV/AIDS. Many states impose compulsory, involuntary HIV testing upon those convicted of prostitution, or those charged with a number of sexual offences such as sexual assault. The constitutionality of such measures has been affirmed in several cases, although other courts have concluded that they are unconstitutional. In

¹⁴ Ibid P. 19

some cases, courts have refused to grant mandatory testing orders for procedural or policy reasons.¹⁵

An example of a case that was successfully prosecuted is the case of **Virginia V. Webb**¹⁶, where an HIV –positive man was sentenced to ten years imprisonment after pleading guilty to two charges of attempted murder for having unprotected sex with two teenage girls who were infected. In another case of **Smallwood V. state of Maryland**,¹⁷ a man convicted of sexually assaulting a woman, causing slight penetration without a condom, was convicted of attempted murder, assault with intent to murder, and reckless endangerment. On appeal, the court ruled that his knowledge that he was HIV positive was not, by itself sufficient to sustain the attempted murder conviction, nor did the risk of HIV – transmission in this case rise to the level required to prove a specific intent to kill. Therefore, the convictions for attempted murder and assault with intent to murder had to be reversed. These cases and more illustrate the level attained by lawmakers in the United States of America in their fight against the willful transmitters of HIV.

However, it is not all sections of the American society that have been for the idea of separate legal sanctions that criminalize the deliberate infection of HIV/AIDS. For example, when the American Bar Association adopted a policy on AIDS in 1989, the association questioned the deterrent effect of criminal sanctions and pointed out the variety of harms that may flow from such a response, such as

¹⁵ Ibid

¹⁶ Petersburg Cir Ct, No. F – 796-93, 5 November 1994

¹⁷ 1996 WL 428978

stigmatization and invasion of privacy. It concluded that "because existing criminal and civil remedies are available to prosecute the instances in which specific criminal sanctions might apply, HIV-specific criminal sanctions should play a limited role in combating the HIV epidemic."¹⁸ In addition, the association expressly recommended that criminal justice personnel must be educated about the medical and legal issues arising from the HIV epidemic.

Another association that opposed the criminalization of HIV transmission is the American Civil Liberties Union, which argued that laws already exist that would cover deliberate attempts to infect another. The union argued that creating HIV specific new offences would:

- undermine public health efforts such as education, testing and partner notification;
- not serve as an effective deterrent; and
- threaten privacy rights, particularly for those against whom such laws are likely to be discriminatorily enforced.

In spite of these objections to specific HIV legislation in the United States of America, however, many states have already enacted such legislation as was noted above. The need to enact this necessary legislation thus prevailed over the objections that were raised, thereby emphasizing its importance.

¹⁸ Elliot, R. 1997. Criminal Law and HIV/AIDS: Final Report. Montreal: Canadian HIV/AIDS Legal Network and the Canadian Aids Society.p.21

AUSTRALIA

In Australia, both public health and criminal law vary across states or territories. In some jurisdictions, public health legislation includes provisions specifically relating to HIV transmission, while in others legislation contains broader offences regarding infectious diseases that could be applied to encompass HIV. In some jurisdictions, criminal law is codified, whereas in others, it remains a mixture of statute and common law.¹⁹ The basic elements, however, are common to all jurisdictions.

In one Australian state, Queensland, legislation was enacted imposing a penalty of \$10000 or two years imprisonment or both on any person who knowingly infects any other, unless at the time the infection was transmitted, the infector was the spouse of the person who contracted HIV, the uninfected person knew about the condition of the HIV – positive person, and voluntarily ran the risk of being infected.²⁰ Other states like New South Wales, South Australia and Victoria have legislation criminalizing the transmission of HIV.

FRANCE

For the first time in France, an HIV-positive person was convicted for engaging in sexual intercourse leading to HIV infection, and not disclosing his HIV status. This occurred in a Strasbourg court where a man by the name of Christophe Morat was sentenced to 6 years in prison for “voluntary transmission of a harmful

¹⁹ Ibid

²⁰ Ibid P. 22

substance leading to bodily harm or permanent illness.” Morat was diagnosed HIV-positive in 1998. The two complainants engaged in unprotected sex with Morat and were infected in 1999 and 2000. The court first decided against Morat in May 2004. In sentencing the court took into account the demands of public order and the need to prevent the further spread of the disease. The court decided that 6 years imprisonment constituted a proportionate sentence in the circumstances.²¹ It is thus clear that even in France it has been identified that if the spread of HIV/AIDS is to be controlled, there is need for criminal sanctions to be applied in order to prohibit people from infecting others.

NEWZEALAND

Recently in 2004, a New Zealand court sentenced a man to 6 years imprisonment for having sex with four women without disclosing his HIV-positive status. Hubble J of the Auckland district court sentenced the man to 3 years in jail after he pleaded guilty to four charges of criminal nuisance and three charges of assault. The terms were cumulative, consisting of 6 months on each of the criminal nuisance convictions and 4 months on each of the assault convictions. In sentencing, the judge took into account the number of victims involved and their anguish in waiting for their HIV results, which he said were aggravating factors.²²

²¹ Le Monde, 28 June 2004

²² New Zealand Herald, 31 August 2004

SOUTH AFRICA

In South Africa, the problem of intentional transmission of HIV/AIDS has not gone undetected. In 2001 the South African Law Commission advised against laws to prosecute people who intentionally expose others to HIV, saying that it will be impossible to police or implement. It was said that instead the state should use existing laws to punish HIV- positive people who have unprotected sex without disclosing their status.²³

Judge Edwin Cameron, head of the Law Commission Committee, said he thinks it likely that consensual sex in such circumstances could eventually be regarded as rape by the South African courts. He also stated that existing common laws could very effectively be used against people who fail to disclose their serostatus while having unprotected sex. He said "its probably rape, it might even be attempted murder. If there is infection then there is a whole array of common law crimes. Part of our reasoning is: why create an additional statute that will stigmatize people further but will be ineffective?"²⁴

Therefore, the position that was being taken by the South African Law Commission was that rather than create new and separate legislation on the intentional transmission of HIV, why not use already existing laws to punish offenders. As was earlier noted, this is the same position that was taken by the Canadian courts. Following a Canadian judgment that found the failure of a man

²³ Daily Mail (Johannesburg) September 28, 2001

²⁴ Ibid

to tell his female partner that he was HIV- positive negated her consent to unprotected sex, Judge Cameron said the Canadian judgment is likely to be followed in South Africa. In concurring with the Canadian decision, he said “when you have sexual intercourse with someone and put them at risk of transmitting something without disclosing that risk to them, then it voids their consent.”²⁵

This all goes to show the seriousness with which the South African courts have taken the fight against the willful transmission of HIV/AIDS. The courts have shown a willingness to prosecute offenders based on existing laws.

All these examples show the progress that has been made in developed countries to combat the spread of HIV and AIDS, particularly by those who knowingly and intentionally transmit the virus to others. Other countries have merely modified their existing laws to include crimes specifically related to HIV/AIDS, rather than enacting new and separate legislation. For example, in 1995, the Finnish parliament modified the penal code related to crimes against health.²⁶ Since then, anyone convicted of endangering the health of others, even without violence is guilty of aggravated assault, which usually incurs a lighter sentence than manslaughter.²⁷

²⁵ Ibid

²⁶ Panos London – May 15 1997 – <http://www.aegis.com/news/panos/1997/P5970504.html>.

²⁷ Ibid

ZIMBABWE

Coming to developing countries closer to Zambia, these are also beginning to see the need to enact legislation that criminalizes certain behavior by people infected with HIV/AIDS. One such country is Zimbabwe. In 1997, Zimbabwe took steps to fight the transmission of HIV, through a criminal amendment bill that was at the time under review by the Ministry of Law. Its two major provisions were as follows: -

- ♦ Anyone who knows they are HIV positive is liable to 15 years in prison for putting others at risk of infection through unprotected sexual intercourse or other means. Exceptions are granted to individuals who inform their partners of their status and whose partners still agree to sex. Also, HIV – positive married people are not liable for putting their partners at risk under any circumstances.
- ♦ Accused rapists would be subjected to mandatory HIV testing. HIV positive defendants would receive stiffer sentences if found guilty of rape.²⁸

The provisions above illustrate the boldness of the measures that Zimbabwe was trying to take in its fight against HIV transmission. These preliminary steps to enacting necessary legislation are recommendable, as they illustrate that the problem has been identified, and therefore that action needs to be taken to rectify the problem.

²⁸ Ibid

In comparison to what other jurisdictions have done to criminalize the willful infection of HIV/AIDS, it is clear that in Zambia, there is still a long way to go. In spite of the fact that the deliberate infection of others with HIV is so widespread, this country can afford to keep on debating the problem without acting. If it has been possible in other countries to legislate against HIV transmission, then there is a possibility of the same being achieved in Zambia, if only this fight can be taken seriously. It is thus of vital importance to investigate the possibility of enacting legislation that criminalizes certain behavior by HIV infected persons, and this will be the focus of the next chapter.

CHAPTER THREE

HIV/AIDS LAW: HOW POSSIBLE

We have seen how widespread the problem of willful infection of others with HIV/AIDS is. We have also seen the lack of specific laws in Zambia to criminalize the act of willful infection. The question thus remains, is it possible to enact HIV/AIDS legislation in Zambia? The possibility must be investigated, and the best place to start would be to ask those that deal with matters related to HIV/AIDS. In Zambia, there are many organizations that deal with HIV/AIDS. What do representatives in these organizations think about criminalizing the deliberate act of infecting another with HIV/AIDS?

Many of the institutions approached in this study expressed the view that although they deal with matters related to HIV/AIDS, their main objectives are to help people already living with HIV/AIDS. Some of these institutions concentrate their efforts on voluntary counseling and testing, while others are trying to fight stigmatization of persons living with HIV/AIDS. Therefore, when asked what they thought about criminalizing the willful infection of others with the deadly virus, it was discovered that it is not an aspect they have given much thought to.

However, a few institutions approached in this study had something to say about criminalizing deliberate infection. One such institution is Cara Counseling

Centre. A counselor was interviewed, and when asked what she thought about the proposed motion, she expressed the view that it would be very desirable to punish persons who knowingly infected others with the HI virus. However, her main concerns were on the difficulties of actually enacting such legislation. She highlighted one difficulty as being that of actually proving that one had been deliberately infected by the other with the virus.

Another institution that expressed an opinion on criminalizing the act of deliberately transmitting HIV is Zambia Aids Law Research and Advocacy Network (ZARAN). Malala Mwendela, a research and training officer at ZARAN expressed the view held by that institution with regards to the proposed motion. She stated that as an institution, ZARAN does not advocate for the criminalization of deliberate HIV infection. She also expressed the view that before criminal laws purporting to make criminal the act of willfully infecting others with HIV can be enacted, many aspects must be considered. For example, the question would have to be asked as to what constitutes willful infection. How would it be proved that the accused person had intention or motive? There would also be problems in knowing who infected who, because people generally enter into relationships without knowing their status.

Mwendela also stated that criminalizing HIV infection would result in more people in the prisons, where there are high infection rates. As a result, the proposed criminal laws would not actually be solving any problems, but just creating more.

On the other hand, when it comes to defilement cases, Mwondela stated that defilement laws should be strengthened to take into account the fact that the defiler is HIV positive, a factor which should increase his criminal liability. In summary, therefore, the position held by ZARAN is that it is difficult to draw the line for willful infection, and that criminalizing it will not deter people. Instead, what is needed is to educate and sensitize people on the dangers of HIV/AIDS.

In 2001, the then president of Young Women Christian Association (YWCA), Bertha Phiri, said there was a need for government to formulate a policy to force rapists into having an HIV test. She said the fight against AIDS could not be effective if such policies were not in place. This motion was seconded by the National Legal Aid Clinic for Women (NLACW). The then director of NLACW Colonel Clement Mudenda said that having people who rape women tested for HIV could in a way discourage rapists from the act.¹ Although neither of these two institutions expressed an opinion during this current study on the possibility of effecting legal sanctions against willful infectors of others with HIV, it is clear that they are not indifferent to the need to protect certain segments of society from unsolicited sexual contact resulting in HIV infection.

Lawyers too have joined the fight against the spread of HIV/AIDS. One such lawyer is K. Sokoni², who has written his views on how to stop the spread of HIV/AIDS. He stated that:

¹ January 17 2001. Times of Zambia: "Yes, Rapists for HIV."

² LL.M. Cornell Law School. Office of the Ithaca City Attorney.

“The fight against AIDS in a manner compatible with human rights is not only about people possessing rights, but also owing duties to society. While persons infected with the virus have the right not to have their human rights unduly violated, they also have the responsibility not to deliberately expose others to infection. While the right to privacy may stop a doctor who has knowledge of his patient's sero status from disclosing that information, who protects this patient's sexual partner?”³

Sokoni therefore recognizes that though a right to privacy is important and must be upheld, it is important also to remember that the one whose right to privacy is being upheld also owes a duty to others, in this case his sexual partner. It is this concern that raises the debate about criminalizing culpable transmission.

Sokoni argues that certain provisions of the penal code may actually be used in criminalizing deliberate HIV transmission. As an example, he cites section 200 of the Penal Code⁴ which states that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. Additionally section 199 provides that any person, who by an unlawful act or omission causes the death of another, is guilty of manslaughter. Sokoni further goes on to say that an unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether such omission is or is not accompanied by an intention to cause death

³ 1998, May, Africa notes: “Women, Aids and the Law in Zambia.”

⁴ Chapter 87 of the Laws of Zambia.

or bodily harm. Arguably, therefore, as the law on homicide stands in Zambia, there is a basis on which to place charges against someone who deliberately transmits the virus for either death or manslaughter. However, one difficulty there is in relying upon the homicide laws in Zambia is that a person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.⁵ It is common knowledge that a person infected with HIV can live a long time before developing full blown AIDS and dying. Therefore, section 200 and 199 of the penal code would not be adequate in criminalizing the deliberate transmission of HIV.

Sokoni identifies yet another difficulty in criminalizing culpable HIV transmission stating that “due to the incubation period of the AIDS virus before death occurs it may often happen that by the time a victim dies the person who knowingly transmitted the virus to him or her may have already died.”⁶ Does this therefore mean that laws criminalizing culpable HIV transmission should be abandoned altogether? On this question, one Zambia Lawyer puts it this:

“Even though the law of murder will not prevent every murder from occurring, we still have a law on the subject in the hope of preventing some, but in any case to state society’s standard and to fix penalties in advance for pre-ordained behavior that is regarded as anti-social. It is upon this basis that specific laws to

⁵ Ibid. Section 209

⁶ 1998, May. Africa Notes: “Women, Aids, and the Law in Zambia”

attach penalty sanctions to the knowing spread of HIV have been justified, whether or not they actually produce change of behavior or a degree of restraint.”⁷

Sokoni concludes his writing by stating that the law must be in place to protect rights, create duties, provide penalties and set standards. In a nutshell, what these two lawyers are saying is that we cannot hide behind the pretext that criminalizing culpable HIV transmission is unworkable and will not deter people. Rather, such legislation should nonetheless be enacted in order to give rights and duties to different segments of society, whether or not these rights and duties are actually respected by those they purport to protect.

Since HIV/AIDS is a worldwide problem, this study would be incomplete without seeking the opinions of various people and organizations outside this jurisdiction. What do they think about criminalizing the deliberate transmission of HIV?

An organization that has widely discussed the criminalization of deliberate HIV transmission is the Aids Committee of Toronto, hereinafter referred to as ACT.⁸ ACT believes that criminal sanctions will not be effective in protecting people from HIV infection. There are a number of arguments that have been advanced

⁷ Ibid

⁸ 1996, June. Aids Committee of Toronto: “Use of Criminal sanctions as a response to the Transmission of HIV.

by this committee, against criminal sanctions with regards to the willful transmission of HIV.⁹

The first argument advanced by ACT is that criminalization of the transmission of HIV is incongruent with the aims of criminal law. Criminal law is traditionally viewed as serving certain purposes, such as rehabilitation, retribution, or deterrence. With regard to HIV, it may be argued that transmission of the virus may be prevented by incarcerating an individual who has in the past or may in the future engage in conduct likely to transmit the virus. It is argued that incarceration prevents prisoners for the term of their imprisonment from harming others. This argument is weak in terms of HIV transmission. Rather than preventing an accused from engaging in further activity that may transmit HIV, incarceration places that person in a setting where evidence indicates high-risk behavior is common and even likely. Furthermore, risk activities within prisons contribute to further transmission outside, since these will be released back into the community.

ACT therefore believes that in formulation of public policy regarding HIV, it is necessary to keep the route of transmission in mind. HIV is not transmitted through casual contact, and in most cases involves the participation of two people, such as sexual intercourse or sharing needles. Such conduct is subject to individual control and a change in behavior of one individual is sufficient to eliminate the risk of transmission. ACT therefore believes that the most effective

⁹ Ibid

method of deterring risky behavior is through public education as well as specific health and social services, such as anonymous voluntary testing and counseling services, which support risk reducing behavior changes. ACT believes that such a response is more effective because it attempts to prevent transmission before it occurs, whereas the criminal process is reactionary and engages only after harm occurs.

It may also be argued that criminal sanctions deter undesirable conduct by sending a message to potential offenders about the consequences of their actions. ACT believes that such an argument is not persuasive when applied to the transmission of HIV. Criminal sanctions are “coercive, externally imposed measures which seem to have little effectiveness in the domain of human sexual activity.”¹⁰ This conclusion has been reached by ACT due to what history has shown when prohibited behaviors like same sex relations, prostitution and public sex have continued regardless. ACT therefore argues that rather than hinder prohibited conduct, criminal sanctions impede public health education and treatment initiatives by stigmatizing people and driving certain conduct underground.

Arguments may also be made that the deliberate transmission of HIV deserves punishment, serving the retributive principle of criminal law. As an organization committed to protecting the rights of, and preventing discrimination against people with HIV, ACT does not support retribution as a legitimate argument for

¹⁰ Ibid

criminalizing the transmission of HIV. ACT believes that arguments based on a desire for punishment provoke unwarranted but substantial anxiety and can unveil deep seated prejudices against people known or believed to have HIV.¹¹

Another argument for criminalizing transmission of HIV is that the offender may somehow be rehabilitated. However, conduct aimed at infecting others with HIV indicates, above all, a need for counseling, which is unlikely to occur or be effective in the penal environment. It is ACT's belief that no rehabilitative purpose is likely to be served by penalizing or incarcerating people with HIV. Under provincial health legislation, an individual can be ordered to undergo mandatory counseling and treatment, and may be incarcerated for violating such an order.¹²

ACT opposes criminalization of HIV infection also from a historical perspective. In the United States of America, until 1985 it had been a criminal offence to knowingly transmit venereal disease to another person. The specific provision prohibited a conviction on the evidence of one witness without corroboration. The offence was repealed in 1985 on recommendation of two federally commissioned reports which found the offence to be ineffective and counter productive. The reports stated that the offence drove underground those who engaged in the activity and made it more difficult to obtain accurate reports of the disease. Both reports stated that a much more effective way of dealing with

¹¹ Ibid

¹² Ibid

transmission of sexually transmitted diseases was through increased education.¹³

Therefore, for similar reasons, ACT opposes the use of criminal sanctions as a response to the transmission of HIV. It is ACT's position that provincial health legislation provides the appropriate arena for society's response to the transmission of HIV, even in extreme cases where such conduct is or seems to be deliberate. ACT believes that such legislation is broad enough to accommodate a variety of responses depending on the nature of the conduct involved and the particular situation of the offender. It is thus clear that the Aids Committee of Toronto is totally opposed to criminalizing deliberate transmission of HIV, believing other methods like education on the virus, to be more effective.

In Canada, there is still disagreement about whether the criminal law should intervene in HIV transmission. Some have argued that the threat posed by HIV is such as to require all reasonable measures of containment to be seriously examined, including the use of the criminal law. One such advocate, Holland,¹⁴ argues that there are compelling reasons why criminalization may be appropriate in some cases. She argues that anyone who knowingly engages in high risk conduct and does not inform the other participant deserves condemnation, and the strongest way to express that condemnation is through the criminal law. According to her, "the consequences of infection are so severe that there is a

¹³ Ibid

¹⁴ Holland, WH. 1994. *Criminal Law Quarterly*: "HIV/AIDS and the Criminal Law. 36(3): 279 - 316

pressing need for such condemnation which will have salutary denunciatory effect.”¹⁵ Holland argues that if the criminal law is not used, there will be public outrage at high-profile cases where individuals have recklessly infected others. Such outrage, she continues, would be aimed indiscriminately at all individuals who are HIV infected. She therefore states the need for an outlet for expression of outrage at such willful or reckless behavior. Holland concludes by saying that “protection of society is a well recognized aim of sentencing” and that “individuals who are convicted and incarcerated will be effectively quarantined for a period of time.”¹⁶

Many other authors, however, oppose the use of the criminal law. The American civil liberties Union even went as far as publishing a position statement containing the “best arguments against criminalization.”¹⁷ Others that have expressed reservations about the use of the criminal law are Gostin and Curran.¹⁸ They have placed little reliance upon the criminal law as a mechanism for impeding the spread of HIV. They conclude that compulsory legal interventions will not provide a fair and effective means of preventing the spread of HIV.

¹⁵ Ibid

¹⁶ Ibid

¹⁷ American Civil Liberties Union Foundation, AIDS and Civil Liberties Project Criminalizing Transmission of the Virus. New York: The Foundation.

¹⁸ Gostin, L and Curran, WJ. 1986. The Limits of Compulsion in controlling AIDS. Hastings Center Report (December): 24-29 at 28 – 29.

Another author Jackson¹⁹ believes that the criminal justice system is an "inappropriate mechanism through which to combat the AIDS crisis." He argues that individual prosecutors "scattered throughout the country, untrained in the medical intricacies of HIV, should not be employing coercive measures... particularly when the public health system has largely ruled out such measures." Dalton concludes that "the case for criminalizing risky behavior is highly dubious." According to her, "a wise nation would consider whether in so doing (prosecuting individuals who, for many reasons, put others at risk of contracting HIV) we advance the public health."²⁰ Sullivan and Field also argue against criminalization, pointing to the many disadvantages of using the criminal law as a tool to contain the spread of HIV. In their view, criminalization would encourage people to avoid testing, threaten the privacy of sexual relationships and encounters, and raise a risk of official harassment and abuse. In short, they conclude that "it would be a mistake to enact... criminal measures... to deal with the problem of transmission of AIDS."²¹

Ralf Jurgens summarizes the view held by many by stating that "the criminal law has only a minor role to play in preventing the spread of HIV... Education will provide the best way to reach HIV carriers, and the soft touch is likely to be more effective than the big stick. Criminalizing HIV endangerment will do little to stop

¹⁹ Jackson, H. 1992. The Criminization of HIV. AIDS Agenda. Emerging issues in Civil Rights. New York: The New Press. 239-270.

²⁰ Dalton, HL. 1993. Criminal Law. AIDS Law Today. A New Guide for the Public. New Haven: Yale University Press. 242 -262.

²¹ Field, M. A. and Sullivan, K. M. 1987. AIDS and the Criminal Law. Law, Medicine and Health Care. 15 (1-2): 46-60

the spread of the virus, and worse, it gives the appearance of decisive action while distracting from the solutions that work.²²

We now come to another issue of crucial importance, concerning the possible difficulties that are likely to be encountered in enacting HIV/AIDS legislation. Many authors agree on common difficulties that will likely be encountered should there be criminal laws against deliberate HIV transmission.

Due to the privacy involved in any sexual encounter, one major obstacle with regards to criminalizing HIV transmission is the difficulty there will be in proving that the accused party deliberately infected the other. Risk activities will generally occur in private without third party witnesses. It will thus be difficult to establish a link between an "incidence of transmission and one particularly accused."²³ The question will thus be asked as to how it will be established that the complainant was infected by the accused and not through some other source. The likelihood of having corroborative witnesses will be remote since the most common routes of HIV transmission, such as needle sharing and penetrative sexual intercourse do not usually occur in public areas. Given this scenario, the AIDS Committee of Toronto concluded that "there is a potential that HIV will be used as the basis of criminal sanction against accused individuals whose only incriminating

²² Canadian HIV/AIDS Legal Network. 1996. Canadian HIV/AIDS Policy and Law Newsletter. Volume 2 Number 2: Joint Project on Criminalization of HIV transmission.

²³ 1996, June. Aids Committee of Toronto: "Use of Criminal Sanctions as a response to the Transmission HIV."

characteristics are their HIV status and a past relationship with the complainant.”²⁴

Related to the difficulties of proving ones criminal liability is the fact that it will be difficult to prove that an HIV infected person knew their status, or knew how HIV is transmitted. What degree of mental culpability should be required in order to justify applying the criminal law? It would be unjust to prosecute and imprison the person who did not know they were HIV positive. “Should the prosecution also be required to prove that the person knew their conduct posed a risk of transmission to another if they are to be held criminally liable?... will it be a defense to criminal liability if someone mistakenly believed that their conduct posed no risk, or no appreciable or significant risk, of transmission to the other person?”²⁵

Furthermore, the Aids Committee of Toronto has also raised the question of the meaning of “knowingly” in the context of transmitting HIV. The committee has stated that all forms of intimate sexual behavior involve some degree of risk. That risk is assumed by individuals depending on their degree of comfort and their perception of the emotional bond of trust with their partner. Therefore, if a couple agree to assume a high degree of risk in their behavior and infection occurs, is this a situation whether the virus has “knowingly” been transmitted?²⁶

²⁴ Ibid

²⁵ Elliot, R. 2000. Criminal Law and HIV/AIDS: Strategic considerations. A discussion Paper Durban: Canadian HIV Legal Network.

²⁶ 1996, June. Aids Committee of Toronto: “Use of Criminal Sanctions as a response to the Transmission

Besides the difficulty of proving ones criminal liability, there is also the problem of not increasing stigmatization which already exists against persons infected with the virus. Criminal prosecutions will be accompanied by “inflammatory” and ill informed media coverage. This will contribute to the stigma surrounding HIV disease and people living with HIV/AIDS as “potential criminals”. As one United States court said in 1985, “Aids is the modern day equivalent of leprosy.”²⁷

Criminalizing HIV may also create a sense of false security. People who are HIV negative may feel a false sense of security and therefore encourage risky behavior on their part. Statutes may create a false expectation that the existence of a criminal law has eliminated any danger from engaging in unprotected sex.²⁸ People will therefore fail to take responsibility to protect themselves, instead relying on fear of the law to force partners to admit their serostatus before sex.²⁹

As can be seen therefore, there are mixed feelings concerning whether or not to criminalize deliberate HIV transmission. Whereas there are those who advocate for such laws to be enacted, the vast majority of HIV/AIDS activists are against such legislation. It is also clear that the potential difficulties that may result from enacting such laws are real and not exaggerated.

of HIV.”

²⁷ Elliot, R. 2000. Criminal Law and HIV/AIDS: Strategic “Considerations. A discussion Paper. Durban: Canadian HIV Legal Network.

²⁸ Ibid

²⁹ Daily Mail and Guardian. Johannesburg. September 28 2001: “No New Laws on Deliberate HIV Infection: Existing Laws could be used against people who fail to disclose their HIV positive status while having unprotected sex. By Belinda Beresford.

However, that is not to say that it is impossible to enact HIV/AIDS legislation. It is a possibility, one that has been achieved in other jurisdictions as was discussed in chapter two. It will be noted that it is not the impossibility of enacting such legislation that concerns these organizations, but rather the implementation difficulties and effect that it will have on society, whether it will actually stop the spread of HIV. Therefore it will be of importance to examine ways not only of enacting such legislation, but doing so in such a manner as to overcome any potential difficulties that it may have in its implementation and effect on society. It must be remembered that with regards to enacting any law, individual interests must be balanced against society's interests as a whole. The final chapter will thus make recommendations towards the enactment of laws criminalizing the willful infection of others with HIV/AIDS.

CHAPTER FOUR

RECOMMENDATIONS

The fight against HIV/AIDS is advancing slowly. When it was first detected to be a serious problem, many countries began the fight by sensitizing people to freely talk about the virus. This was not an easy hurdle to get past, primarily because of one of the root modes of its transmission, and that is through sexual intercourse. Anyone suspected of having the virus was thus shunned and stigmatized. Though the stigma attached to HIV/AIDS is still in existence, it has no doubt lessened over the years, as more and more people have come to realize that the only way to totally eradicate it is through open discussions. The efforts that most countries have thus put into sensitizing society about the dangers of HIV/AIDS and how it is transmitted are thus commendable.

However, there is a new turn of events with regard to HIV. This turn of events is that which concerns the deliberate infection of others with the deadly virus. To the extent possible, society has tried to stop stigma against persons living with HIV/AIDS. Now, however, society must think about how to protect persons from being infected deliberately, and if already so infected, to enable them seek justice through the law. If ever the law can be said to have many functions, one of them is to provide a means of seeking justice for a wrong done to a subject of that law. Therefore, whereas others have centered their fight against HIV infection on

public awareness, it is clear that there is a growing need for the law to play its part in this fight.

Earlier on we saw in chapter one the widespread problem of willful infectors of others with HIV/AIDS. Among the victims of this abuse who were earlier discussed are marriage mates as against each other, defilement victims and rape victims. All these are unwilling victims of HIV. Can these categories of people find a remedy in the law to bring to book those that have infected them? Currently in Zambia, the answer is no. There is no remedy in the law. Is the situation hopeless? It was seen earlier that efforts have been made to bring about HIV/AIDS law that criminalizes the deliberate infection of others with HIV. As was noted earlier, there is currently an HIV/AIDS policy, which in section 64 recommends the need to legislate against willful transmission of HIV. The section goes on further to provide that such legislation should include persons who deliberately withhold their HIV status from their partners or spouses.

However, the policy referred to above is just that, mere policy. There is therefore urgent need to act upon that policy and formulate the necessary legislation. The following is therefore recommended:

- ♦ The proposed legislation should specify what is meant by willful infection, as the policy does not define it. The word willful implies the doing of

something deliberately and intentionally³⁰. It therefore conveys the idea of carrying out a premeditated idea. A person charged with willfully infecting another must therefore have been aware that his engaging in unprotected sex with his partner would likely result in that partners contracting the virus.

However, as was earlier pointed out by many authors and HIV/AIDS advocates in chapter three, it may be difficult to ascertain the accused person's criminal culpability. Did this person know that he had HIV and that engaging in sex with his partner would result in their infection also?

Clearly, it will not be easy to prove ones guilt. Nonetheless, regardless of the potential difficulties involved in proving that the accused person is guilty, it is proposed that;

- ♦ Criminal legislation with regards to HIV transmission must be put in place. As one prominent lawyer pointed out in chapter three, the mere fact that it will be difficult to legislate against willful infectors does not mean that such legislation should not be enacted. He gave an example of the law on murder, stating that though this law will not prevent murder from occurring, it will still prevent some murders. In the same vein, though the law on HIV/AIDS will be difficult to prove, it must still be put in place so that in the

³⁰ Cowie A.P. (Ed) 1994. Oxford Advanced Learners Dictionary. Oxford: Oxford University Press. P. 1461

event that all the facts are clear in a particular case, the law will be on hand to punish the wrongdoer.

Another problem arises when it comes to child defilers who not only defile a child, but also leave that child suffering with HIV. If it will be difficult to prove that one adult deliberately infected another, it will be even more difficult to prove when the victim is a young child. When child defilement became so rampant in Zambia, there was a belief associated with having sex with a young child, that an HIV infected person would be cured if he did so. Rather than being cured, the only thing that resulted from such actions was the transmission of the virus to an innocent child. Though some of these defilers were caught, they were only charged with child defilement as found under the laws of Zambia in the penal code. The infected child would however be left to suffer the ill effects of the virus, leading to an early death.

In order to provide justice therefore for the pain caused to a baby and young child who have, in the process of their being defiled, contracted HIV, it is proposed that:

- ♦ Proof of ones mental knowledge as to their criminal liability concerning the transmission of HIV to the child should be dispensed with. Therefore, whether or not the defiler knew of his HIV status or that he would likely transmit the virus to the child, a presupposition should be made that he

had such knowledge. The defiler should therefore be subjected to an HIV/AIDS test, and should he be found positive, then the child victim should likewise be tested. If the child is found positive after being tested at the appropriate time when infection is likely to show, the defiler should be presumed to have infected the child and be punished for it. Therefore, as was voiced by ZARAN, YWCA and NLACW, child defilement laws should be strengthened to take into account the fact that the accused is HIV positive, thereby increasing his sentence.

One would perhaps wonder if this is true justice, and the answer would have to be that it is. After all, a child is incapable of making a decision to have sexual contact with an adult, and in the process to accept the risk of contracting HIV. Additionally, the long term effects of living with HIV are seemingly worse in a young child than in an adult. A child's youth will be spent in pain, and the child will likely die even before it grows to adulthood. Is it any wonder then that stiff punishments are proposed for child defilers who, apart from defiling, actually infect a child with the deadly virus?

It is tempting to argue in a similar manner when it comes to rape cases. Though the rape is committed as against an adult, such adult still did not consent to be raped, much less to be infected with HIV in the process. Therefore;

- ♦ A rapist who is HIV positive must be punished not only for the rape, but also for having transmitted the virus to his victim in the process. It may be argued that the rape victim may already have been infected with the virus even before the rape. The onus of proving such a thing should be placed on the rapist. Failure to prove it should result in the presupposition that the rapist is nonetheless guilty of having transmitted the virus to his victim. Harsh this proposition may sound, it must be remembered that a crime like rape touches right to the soul of a woman. If besides dealing with the rape assault this woman is left with an incurable virus, it is only right that she knows her rapist is being punished for both crimes.

It has also been argued by some that since HIV infection involves the participation of two people, such as in the use of common needles when sharing drugs and during sexual intercourse, then it should not be criminalized. The argument is that the two persons have consented not only to share the needles and engage in sexual intercourse, but also to accept whatever risk that comes with such high risk behavior, such as the possibility of contracting HIV. This however is a shallow argument, considering that though two persons are involved, it cannot always be said that they have accepted the risk of contracting HIV. As has been noted above, some victims of HIV are rape and defilement victims. Others are innocent marriage mates who, though they are married to the offender and have consented to sexual intercourse by virtue of their marriage status, cannot be said to have consented to contracting HIV. Therefore, if the law is closed by stating

that all HIV/AIDS victims have consented to high-risk behavior, then innocent victims will not have a remedy in the law. Therefore, it is proposed that:

- ♦ For the sake of these innocent victims, HIV/AIDS criminal law should nonetheless be enacted.

However, various other concerns have been raised concerning the use of criminal sanctions as a means to curb the spread of HIV. One of these concerns as was discussed earlier is that criminalizing culpable HIV transmission will only result in congesting the prisons, and that since prisons have high infection rates, criminal law will hardly be a solution with regards to HIV. However, it will be noted that prisons around the world often place different categories of prisoners in different places. Petty offenders with light prison sentences are situated in a separate part of a prison from hard criminals with longer sentences. Therefore, if the concern is that transmission rates will increase in the prisons with more HIV/AIDS convicts coming in, then this may be solved by:

- ♦ Isolating HIV offenders from other criminals. This is not to say that all HIV infected prisoners should be placed in one area, but rather only those who are in prison by virtue of having deliberately infected one or more persons with the virus.

- ♦ Besides the punishment of a prison sentence, other modes of punishing should also be considered, such as engaging the offender in community work. Since the crime committed is HIV/AIDS related, the community work may include working with other HIV/AIDS patients who are in desperate need of help, such as *individuals whose families have abandoned them as a result of their positive status*. In this way, not only is the offender being punished for his crime, but he is also helping members of the affected society that need a helping hand. Therefore, AIDS advocates must not only consider the punishment of individuals as prison sentences, but must look beyond this to other modes of punishment such as highlighted above.

The issue of stigmatization against those infected with HIV/AIDS is an argument that has been used by some publicists as a justification for not enacting legislation against the deliberate transmission of others with HIV. It is argued that the stigma attached to HIV will increase, and therefore that the best mode of addressing the problem is through health laws. However, you cannot shun a battle you have not yet fought. Rather than being totally closed up to the possibility of having the proposed criminal legislation, why not try to balance public health laws with criminal laws in the fight against HIV/AIDS. As was earlier noted, sensitizing people over the adverse effects of HIV/AIDS has helped people to talk about it openly. Therefore, it is proposed that;

- ♦ This very sensitization process is used to explain to the members of the society the reasons for HIV/AIDS legislation, and the continued need to support those already infected with the virus. If people understand why some members of society have to be punished for transmitting the virus to others, they will be better able to balance the support of persons living with it, as against the punishment of persons deliberately spreading it. Therefore, let not such arguments as the increase in stigmatization prevent the enactment of the necessary legislation.

CONCLUSION

It is not the purpose of the criminal law to be used as a go ahead for engaging in immoral activities that the public shuns. The subject of HIV/AIDS continues to be a sensitive subject for many. It is hoped that with all the work that is being put into the fight against HIV/AIDS, the best means to fight the scourge at all potential problematic angles will be implemented, including the use of the criminal law.

However, it is this writer's opinion that should the law be used in this fight, it should be used to provide a just remedy mainly for use by innocent victims such as marriage mates, rape and defilement victims. This writer does not purport to protect members of society that contracted the virus through out of wedlock

sexual intercourse that was voluntary, or through the use of common needles for illegal drug use. The traditional view that sexual intercourse should be restricted to the marriage bedroom should be upheld even in the application of criminal laws against culpable transmission of HIV/AIDS. It is such traditional views expressed hundreds of years ago by the divine creator that are more likely to be effective in stopping the spread of HIV, than any other mode of prevention that man may come up with, yesterday, today or in the future. (1 Corinthians 6:9, 10)

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