

**A CRITICAL ANALYSIS OF THE CRIMINALISATION
OF THE WILFUL TRANSMISSION OF HIV/AIDS IN
ZAMBIA**

BY

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A dissertation submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

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**A CRITICAL ANALYSIS OF THE CRIMINALISATION OF THE WILFUL
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DECLARATION

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ABSTRACT

In a bid to prevent the HIV/AIDS virus from spreading, many countries across the globe have adopted various measures that are hoped to contain the spread of the deadly disease. One of the mechanisms adopted is the criminalisation of the wilful transmission of HIV/AIDS. Basically, criminalisation of the wilful transmission of HIV/AIDS involves a process by which the government, through the Legislature and the Judiciary, impose criminal sanctions on persons who have been accused of intentionally affecting others with HIV/AIDS.

Criminalisation of the wilful transmission of HIV/AIDS can be done through the use of two mechanisms. The first method entails the prosecution of an accused person through the use of the criminal laws that already exist in a particular jurisdiction such as the laws provided under the Penal Code or the Public Health Act. In the United States of America for example, a number of States such as New York have adopted the already existing criminal laws in order to prosecute persons who have allegedly intentionally transmitted the HIV/AIDS virus.

Another method that has been developed in order to hold persons criminally liable for intentionally transmitting HIV/AIDS is through the enactment of legislation specifically targeted at persons accused of wilfully transmitting HIV/AIDS. This method has recently been adopted by a number of West African countries through the use of the N'Djamena Model Law.

Zambia has, over the years, also experienced increased calls for the criminalisation of the wilful transmission of HIV/AIDS. The current study found that in spite of the advocacy to introduce criminal laws that can prosecute the intentional spread of HIV/AIDS; a number of profound negative consequences may result if Zambia were to actually enact or implement such legislation. The findings of this study suggest that criminalising the wilful transmission of HIV/AIDS could result in human rights violations; discrimination against women and girls; and generally decrease the efficacy of other measures utilised to reduce the spread of HIV/AIDS in Zambia such as VCT and PMCT.

In light of the above negative effects of the consequences that may result from criminalisation of HIV/AIDS, the study found that the Zambian society should neither enact nor implement any legislation that allows for the criminal prosecution of persons who wilfully transmit the HIV/AIDS virus.

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LIST OF ACRONYMS

AIDS	:	Acquired Immuno-defeciency Syndrome
ACHPR	:	African Charter on Human and Peoples Rights
ARV	:	Antiretroviral Drugs
DNA	:	DeoxyriboNucleic Acid
HIV	:	Human Immuno-defeciency Syndrome
PMCT	:	Prevention of Mother to Child Transmission
SADC	:	Southern African Development Community
STI	:	Sexually Transmitted Infection
USA	:	United States of America
VCT	:	Voluntary Counselling and Testing
ZARAN	:	Zambia AIDS Research and Advocacy Network

LIST OF CASES

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Weeks v State of Texas (1992) 834 SW.2d 559 (Tex

State v. Weaver 939 S.W.2d 316, 318 (Ark. Ct. App. 1997).

The People v. Hawkrigg 525 N.Y.S.2d 752 (Suffolk County Ct. 1988)

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Stanely Kingaibe & Charles Chookole v. Attorney General 2007 (unreported) H.C

LIST OF STATUTES

American Statutes

New York Public Health Act, Title 1 § 2307

British Statutes

English Offences Act, No. 23 of 1957

South African Statutes

Draft Offence Act of South Africa, Act No. 23, 1957

Zambian Statutes

The Constitution of Zambia, chapter 1 of the Laws of Zambia

The Marriage Act, Chapter 50 of the Laws of Zambia

The Public Health Act, Chapter 295 of the Laws of Zambia

The Penal Code Act, Chapter 87 of the Laws of Zambia

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CHAPTER ONE

1.0 GENERAL INTRODUCTION

The move to apply criminal law to HIV exposure and transmission is often driven by the wish to respond to serious concerns about the rapid spread of HIV in many countries, coupled by what is perceived to be a failure of existing HIV prevention efforts.¹ Recent years have seen the creation- particularly in parts of Africa, Asia, Latin America, and the Caribbean- of HIV-specific laws that criminalise HIV transmission and exposure.² At the same time, particularly in Europe and North America, existing criminal laws are increasingly being used to prosecute people for transmitting HIV or exposing others to HIV infection.³

Zambia has one of the world's most devastating HIV/AIDS pandemics.⁴ More than 1 in every 7 adults in the country is living with HIV, and the life expectancy at birth has fallen to 39 years. Zambia's first reported AIDS diagnosis was in 1984 and this was followed by a rapid rise in the proportion of people living with HIV.⁵ By the early nineties, it was estimated that as many as many as 1 in 5 adults had been infected with HIV.⁶ In 2004, HIV/AIDS was declared a national emergency.⁷ It is this exponential spread of HIV/AIDS that has resulted in the growing number of emotional responses requiring the development of legislation that can criminalise persons who wilfully infect others with the disease as a mechanism that can help combat this scourge.⁸ It is believed that the criminalisation will punish harmful conduct by imposing criminal penalties, and prevent HIV transmission by deterring or changing risk behaviours.⁹

¹ L. Garbus, *HIV/AIDS in Zambia: Country AIDS Policy Analysis Project*, p22 University of California: California.

² AVERT International, *Criminal Transmission of HIV*, AIDS & HIV information from AVERT, March 2010 at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

³ L. Garbus, *HIV/AIDS in Zambia: Country AIDS Policy Analysis Project*, p22.

⁴ AVERT International, *Criminal Transmission of HIV*, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁵ L. Garbus, *HIV/AIDS in Zambia: Country AIDS Policy Analysis Project*, p22.

⁶ L. Garbus, *HIV/AIDS in Zambia: Country AIDS Policy Analysis Project*, p23.

⁷ L. Garbus, *HIV/AIDS in Zambia: Country AIDS Policy Analysis Project*, p23.

⁸ D. Tyler, *The Case Against Wilful Transmission of HIV Legislation*, Jan – Jun 2006, ZARAN News, Zambian AidsLaw Research and Advocacy Network: Lusaka p. 7.

⁹ United Nations Development Plan, *The Criminalisation of HIV/AIDS*, August 2008, Policy Brief Published by for UNAID p.10-21.

It is against this background that the paper aims to meticulously highlight and consider whether the criminalisation of the wilful or reckless transmission of HIV/ AIDS by the legislature is a necessary and effective response to the rapid spread of HIV/ AIDS in Zambia.

1.1 Problem Statement

HIV/AIDS is a global problem affecting each and every society.¹⁰ The focus in recent years has been centred on trying to slow its spread by sensitizing people and also trying to prevent stigmatization of the already infected.¹¹ However, there is currently also a growing focus on the segment of society that have fallen victim to the virus, not by the accidental infection either through blood donations, utilisation of infected instrument, or consensual sex with persons who do not know they are infected, but rather on innocent victims who have been intentionally infected by another person's malicious acts.¹² This is what is known as the wilful transmission of HIV/ AIDS.¹³

There is thus a great need by the Government to address and remedy the problem of wilful infection of HIV/AIDS by persons in society while at the same time, protecting the rights of those persons who carry the virus.¹⁴

The problem at hand is the requirement to create a balance between the growing requirement to enact specific legislation to criminally prosecute those who transmit the HIV virus to others without disclosing their status or taking appropriate precautions, and the corresponding need to protect the persons living with AIDS (PLWA) from unnecessary criminal sanctions that are very difficult to enforce.¹⁵ The question to be answered is whether the need to criminalise such acts outweighs the obligation to protect persons living with HIV?

¹⁰ L. Gable, Legal Aspects of HIV/ AIDS: A Guide for Policy and Law Reform, The World Bank: Washington DC, 2007 p.98 .

¹¹ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, Obligatory Essay submitted to the School of Law in partial fulfilment of the award of the Bachelor of Laws Degree 2005 pp.15-40.

¹² M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹³ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p7.

¹⁴ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁵ M. Kelly, Zambia: HIV/AIDS Transmission and the Law, September 2006, Challenge Magazine vol. 11 Zambia: Africa files <http://www.africafiles.org/article.aspx?ID=22890>. Accessed July 13,2010.

1.2 Purpose of Study

The goal of the research is to discern whether or not Zambia should make it a criminal offence to wilfully or recklessly infect another person with HIV/AIDS. In order to achieve this goal, the following specific objectives must be addressed:

1.3 Specific Objectives

- I. To determine whether the criminal prosecution of persons wilfully transmitting HIV/AIDS can it be done under existing law.
- II. To establish the possibility of enacting and effectively enforcing laws pertaining to the criminalisation of the wilful transmission of HIV/AIDS.
- III. Consequences of criminalising wilful transmission of HIV/AIDS on various segments of society i.e. women, and men and people living with HIV/AIDS.
- IV. To establish the effects that criminalising the wilful transmission of HIV has on the fundamental rights and freedoms guaranteed by Constitution of Zambia.

1.4 Significance of Study

A study in this area can be useful in determining whether the country's laws affecting HIV/AIDS are in line with the international human rights practices, ethical issues and international policies. Furthermore, the study is significant in assessing whether the existence of laws criminalising the wilful transmission of HIV/ AIDS would positively affect people's behaviour with regards to the virus in that it hopes to answer the question of whether the existence of laws criminalising HIV/AIDS plays a vital role in the reduction of the AIDS prevalence.

Finally, the study is useful in the provision of information for policy creation as well as the creation of legislation that would effectively tackle the problem of HIV/AIDS in society.

1.5 Methodology

a. Secondary Sources

This paper intends to achieve its objectives by referring to a number of authorities on the matter. It will draw information from authors of journals and scholarly articles who have systematically analyzed the issues relating to the criminalisation of the wilful transmission of HIV/AIDS. It will

also evaluate papers prepared by globally recognised organisations on the matter such as the World Health Organisation (WHO) and United Nations Aid (UNAID). The study, in addition will examine other legal systems that have enacted laws criminalising the wilful transmission of HIV/AIDS. Furthermore, the study will refer to a number of decided cases on the matter as well as a plethora of various policies on the subject.

B. Primary Sources

Data will be collected will be by way of interviews. These interviews will be targeted towards persons at various relevant established organisations such as Zambia AidsLaw Research and Advocacy (ZARAN) will be conducted in a bid to acquire the general feelings people have with respect to criminal sanctions against people wilfully transmitting AIDS.

1.6 Outline of Chapters

The study to be undertaken will be covered in a maximum of five comprehensive chapters. Below is a summary of the composition of each chapter

a. Chapter One

Chapter one will for the most part be an introduction to the issue of criminalisation of the wilful infection of HIV/AIDS. The chapter is intended to provide the reader with a proper understanding of what the criminalisation of the disease really entails and how it has become one of the most pressing issues faced in Zambia.¹⁶ It will give the definitions of various key terms that will be used in this paper, a general background of criminalisation laws both in Zambia and in the world; it will provide an understanding of the necessity of undertaking the said research and provide a summary of the problem the paper wishes to address.

b. Chapter Two

The chapter involves a discussion of the current laws affecting the wilful transmission of HIV/AIDS in Zambia. Components of the Penal code¹⁷, Public Health Act¹⁸, and African Charter¹⁹

¹⁶ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁷ Cap 295 of the Laws of Zambia.

¹⁸ Cap 87 of the Laws of Zambia .

¹⁹ The African Charter on Human and Peoples Rights, 1982.

which provide laws that are aimed at addressing the wilful infection of HIV/ AIDS will be discussed. Additionally, chapter will cover the possibility of effectively prosecuting persons under the existing legislation. Thereafter, it will analyse what the new legislation (if any) will provide and then discuss the complexities of prosecution likely to be encountered

c. Chapter Three

The composite of chapter three will be an analysis of how various legal systems across the world have dealt with the problem of the wilful transmission of HIV/AIDS. Particularly, the laws promulgated in the United States, and South Africa will be examined in order to weigh the possible outcome of enacting similar laws in Zambia.

The United States of America has been chosen a country of study because it has over the past decade dealt with the subject of criminalisation the wilful transmission of HIV AIDS.²⁰ The case law in the country is highly developed with about 150 convictions by the Courts against persons accused of the offence.²¹ Additionally, various American landmark decisions will be discussed.

South Africa is of particular relevance to the study because it is one of the jurisdictions that have constantly rejected the criminalisation of the wilful transmission of HIV/ AIDS notwithstanding high levels of advocacy by the general public to have such laws criminalised.²²

d. Chapter Four

This part of the paper will look at the possible outcomes of criminalising the wilful spread of the HIV/AIDS virus within the Zambian legal system. Chapter four in effect will weigh the positive effects against the negative effects of the said criminalization in Zambia. The chapter will thus focus on how criminalization will affect the lives of people living with HIV/AIDS; how criminalization will affect women; how criminalization will affect the general public and the constitutional issues involved in the criminalisation of HIV/ AIDS.

²⁰ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed 13 July, 2010.

²¹ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed 13 July, 2010.

²² AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed 13 July, 2010.

e. Chapter Five

Chapter five will provide the necessary conclusions and recommendations on the issue of criminalization. In this chapter it will be stated whether or not Zambia should criminalise the wilful or reckless transmission of HIV/AIDS within its legal system.

Based on the conclusion arrived at, the chapter will thereupon propose various solutions and recommendations with regards to HIV/AIDS criminalisation. This will be achieved through the consideration of the various suggestions put forward by various scholars in a number of legal systems across the common law countries.

CHAPTER TWO

2.0 LEGISLATION ON THE CRIMINALISATION OF THE WILFUL TRANSMISSION OF HIV/AIDS

2.1 Introduction

Criminal law is seen as the most powerful mechanism a society has for expressing collective disapproval of a person's conduct,²³ this is why many countries have opted for the criminalisation of the wilful transmission of HIV/AIDS as a preventive measure.²⁴ The criminalisation is done either through the enactment of HIV/AIDS specific legislation such as the N'Djamena model law in West Africa; or through the utilisation of already existing laws to hold persons accused of wilfully transmitting the disease criminally liable, for example the use of grievous bodily harm to prosecute "perpetrators".²⁵

2.2 Use of Existing Laws to Prosecute the Wilful Transmission of HIV/AIDS in Zambia

With regards to the utilisation of existing laws, criminal prosecutions are continuously brought under old laws that have only been recently applied to HIV transmission or exposure in that charges are being brought under a variety of laws such as those providing for murder, manslaughter, attempted murder, assault, grievous bodily harm (GBH) or poisoning.²⁶ The possibility of applying the existing laws in Zambia to effectively criminalise the wilful transmission of HIV/AIDS in Zambia is thus worth exploring.

2.3 Prosecution under the Penal Code

The first of the laws proposed to be used as a tool to prosecute the wilful transmission of HIV/AIDS is the Penal Code²⁷. It is argued that the sections that provide for the offences of

²³ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, IPPF: London, 2008 p.76 – 83.

²⁴ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.76 – 83.

²⁵ E. Cameron, M. Clayton and S. Burris, A Tragedy, Not a Crime, August 2008 South Africa: AIDS Rights Alliance for Southern Africa p.45 – 60.

²⁶ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.76 – 83.

²⁷ Section 199 and 200 of the Penal Code Act, Chapter 87 of the Laws of Zambia.

manslaughter and murder could be used as a mechanism which places legal penalties on persons accused of wilfully transmitting HIV/AIDS. .²⁸

Section 199 provides that:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "man-slaughter". 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 or bodily harm.²⁹

Section 200 further provides that:

Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Additionally, under section 229, the Penal Code provides that:

Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for seven years.³⁰

It has been put forward that the aforementioned provisions can be used to prosecute persons who wilfully transmit HIV/AIDS to innocent persons.³¹ In fact, in certain countries such as the England and Wales cases have successfully been prosecuted under Section 20 of the Offences Against the Person Act 1861, with the charge being 'recklessly inflicting grievous bodily harm'.³² Further, in the United States of America, states such as New York have prosecuted persons accused of wilfully transmitting the HIV virus under the criminal laws that already exist.³³

²⁸ Chapter 87 of the Laws of Zambia.

²⁹ Chapter 87 of the Laws of Zambia.

³⁰ Chapter 87 of the Laws of Zambia.

³¹ M. Kelly, Zambia: HIV/AIDS Transmission and the Law, <http://www.africafiles.org/article.asap?ID=22890>. Accessed July 13, 2010.

³² M. Kelly, Zambia: HIV/AIDS Transmission and the Law, at <http://www.africafiles.org/article.asap?ID=22890>. Accessed July 13, 2010.

³³ E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention? Fact Sheet no.57E May 2005, University of California p.43-56.

2.4 Prosecution under the Public Health Act

The Public Health Act³⁴ is also another legislation that could possibly be used to criminalise the wilful transmission of HIV/AIDS. Section 57 of the Act provides that:

Every person who wilfully or by culpable negligence infects any other person with a venereal disease or leprosy, or does or permits or suffers any act likely to lead to the infection of any other person with any such disease, shall be guilty of an offence, and shall be liable to a fine not exceeding six thousand penalty units or to imprisonment for a period not exceeding six months or both.³⁵

However, the Public Health Act³⁶ seems to be restrictive in its nature. It is thus doubtful whether a person who intentionally or recklessly infects another with HIV/AIDS can be prosecuted thereunder. Further, under section 57 the definition of venereal diseases is limited to Syphilis, Gonorrhoeal Ophthalmia, Soft Chancre, Venereal Warts and Venereal Granuloma.³⁷

2.5 Prosecution under the African Charter

International instruments also play a vital role on the imposition liability of people wilfully or recklessly spreading HIV/AIDS.³⁸ Under the ACHPR³⁹ for example, Article 16 (1) provides that:

Every individual shall have the right to enjoy the best attainable state of physical and mental health.⁴⁰

Article 16(2) further states that:

State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.⁴¹

Zambia is a member of the African Union because it is a signatory of the ACHPR.⁴² However, because Zambia is a dualist country,⁴³ the Zambian Parliament must domesticate the Charter into

³⁴ Chapter 295 of the Laws of Zambia.

³⁵ Chapter 295 of the Laws of Zambia.

³⁶ Chapter 295 of the Laws of Zambia.

³⁷ Chapter 295 of the Laws of Zambia.

³⁸ J. Baron, *Modern Introduction to International Law*, Harper Collins: London, 1995. p.45.

³⁹ The African Charter on Human and Peoples Rights, 1982.

⁴⁰ The African Charter on Human and Peoples Rights, 1982.

⁴¹ The African Charter on Human and Peoples Rights, 1982.

local legislation before the provisions of the Charter can be enforced by municipal legislation.⁴⁴ This means that Zambian courts are not bound to apply the provisions under Article 16 to impose criminal sanctions against persons who have been accused of wilfully transmitting HIV/AIDS before they domesticate the laws contained in the ACHPR.

Domestication basically involves the process through international law ratified by a member state to a treaty is made as part of the local laws of the country when the Parliament of the said country enacts legislation to that effect.⁴⁵

Therefore, it can be argued that under the Penal Code⁴⁶ it is possible to prosecute persons who have wilfully transmits HIV/AIDS as is done in the United Kingdom.⁴⁷ On the other hand, it would be very difficult to bring such charges based on the Public Health Act⁴⁸ and the ACHPR.⁴⁹

2.5 HIV/AIDS Specific Legislation

However, despite the possibility of bringing charges under the existing criminal laws, many countries have opted to enact new AIDS specific legislation.⁵⁰ This is true especially for sub-Saharan countries in Africa such as Botswana, Tanzania, and Uganda.⁵¹ As a result, Zambia has seen an increase in the pressure by the public to criminalise the wilful spread of HIV/AIDS under AIDS specific legislation.⁵² As such, it is expected that if Zambia is to criminalise the wilful transmission of HIV/AIDS there is a higher probability that Parliament will enact HIV/AIDS

⁴² C. Martin, The African Charter on Human and Peoples Rights and the African Commission on Human and Peoples Rights, October 2008, An Aide-Memoir for The Commonwealth Human Rights Initiative, at http://www.humanrightsinitiative.org/artres/african_commission_paper.pdf. Accessed on 23 November, 2010 .

⁴³ J. Baron, Modern Introduction to International Law, p45.

⁴⁴ J. Baron, Modern Introduction to International Law, p.45.

⁴⁵ M. Shaw, International Law, 6th Edn. Cambridge University Press: New York, 2008 p.166

⁴⁶ Chapter 87 of the Laws of Zambia.

⁴⁷ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁴⁸ Chapter 295 of the Laws of Zambia.

⁴⁹ The African Charter on Human and Peoples Rights, 1982.

⁵⁰ ARASA/OSISA Civil Society, Report on the Consultative Meeting on the Criminalisation of the Wilful Transmission of HIV, 12 June 2007 p.35.

⁵¹ NAM, The 'legislation contagion' of the N'Djamena model law, HIV/AIDS Information from NAM <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>. Accessed on November 20, 2010.

⁵² United Nations Development Plan, The Criminalisation of HIV/AIDS, p. 9 – 16.

specific legislation actually criminalising the wilful transmission of HIV/AIDS.⁵³ Therefore, there is need to discuss briefly the nature of such legislation.

a. Intentional Transmission of HIV/AIDS

The legislation that deals with the criminalisation of the wilful transmission of HIV/AIDS sometimes draws a distinction between intentional, reckless, and even negligent transmission of HIV/AIDS.⁵⁴ Intentional (or deliberate or wilful) transmission is considered the most serious form of criminal transmission. Intentional transmission of HIV/AIDS occurs when one person intentionally transmits the HIV virus to another person.⁵⁵ This may be done through sexual intercourse, or otherwise. In fact some criminal prosecutions have involved individuals (both HIV positive and HIV negative) who have used needles or other implements to intentionally infect others with HIV. Others have been based on HIV positive people who have had sex with the primary intent of transmitting the virus to their partner.⁵⁶

b. Reckless Transmission

Reckless transmission involves a situation where HIV is transmitted through a careless rather than deliberate act.⁵⁷ If for example a person who knows he/she has HIV and has unprotected sex with a negative person, but fails to inform them of the risk involved, this could be classified as reckless transmission in court. "Reckless" here implies that transmission took place as part of the pursuit of sexual gratification rather than because the HIV positive person intended to give their partner HIV (HIV is of course not 'automatically' transmitted every time someone has unprotected sex).⁵⁸ HIV/AIDS specific legislation is therefore used to criminalise both the wilful and reckless transmission of HIV/AIDS in various jurisdictions.⁵⁹ The N'Djamena Model law is

⁵³ M. Kelly, Zambia: HIV/AIDS Transmission and the Law, <http://www.africafiles.org/article.asap?ID=22890>. Accessed July 13, 2010.

⁵⁴ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁵⁵ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁵⁶ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁵⁷ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁵⁸ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁵⁹ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

an example of HIV/AIDS specific legislation used by the West African States to criminalise the wilful or reckless transmission of HIV/AIDS.⁶⁰

2.6 The N'Djamena Model Law

Recently, many African countries that have criminalised the wilful spread of HIV/AIDS have enacted legislation based on a model law developed by the Action for West Africa Region also known as the N'Djamena model law.⁶¹ Under the N'Djamena model law HIV transmission' is defined as infection that can occur through sexual intercourse, blood transfusion or the sharing of intravenous needle[s], skin piercing instruments or through [m]other-to-child transmission.

The model law goes on to state that:

Any person who wilfully transmits HIV by any means will be prosecuted for attempted murder and may be punished according to the provisions of criminal law.⁶²

It must be noted that in 2008, the Southern African Development Community (of which Zambia is a member) met for the purposes of trying to formulate an enactment that has similar provisions to that of the N'Djamena model law, this model law is termed as the SADC model law.⁶³

The nature of the HIV/AIDS specific law (including the SADC model law and N'Djamena model law) is such that criminal charges could be brought against: people with HIV who have practised safer sex; people with HIV who have attempted to disinfect shared needles; and women with HIV whose children acquire the virus via mother-to-child transmission despite their best efforts to prevent this from occurring.⁶⁴ Invariably, this is likely to lead to prosecution of innocent people which is very disadvantageous in a society like Zambia where the efficacy of the criminal justice system is already being put to question.⁶⁵

⁶⁰NAM, The 'legislation contagion' of the N'Djamena model law, <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>. Accessed on November 20, 2010

⁶¹ NAM, The 'legislation contagion' of the N'Djamena model law, <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>. Accessed on November 20, 2010

⁶² NAM, The 'legislation contagion' of the N'Djamena model law, <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>. Accessed on November 20, 2010

⁶³ NAM, The 'legislation contagion' of the N'Djamena model law, <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>, Accessed on November 20, 2010

⁶⁴ NAM, The 'legislation contagion' of the N'Djamena model law, <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>, Accessed on November 20, 2010.

⁶⁵ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

2.7 Disadvantages of Criminal Prosecution under HIV/AIDS Specific Legislation

In light of the above mentioned factors, laws criminalising the wilful transmission of HIV/AIDS are likely to present a great deal of problems with regards to prosecution of the perpetrators.⁶⁶ This is due to a number of reasons; firstly, proving that an individual has transmitted HIV can be exceedingly difficult.⁶⁷ This is because it needs to be proven that the accused was definitely the source of the accuser's HIV.⁶⁸ This would involve a range of evidence including sexual history, testing history and scientific evidence in the form of phylogenetics⁶⁹. This compares the DNA of the virus. If they are completely different then it means that the victim almost certainly did not acquire HIV from the accused and the case would probably be thrown out.⁷⁰ If the strains are very similar however, it is possible, though not conclusive, that accused did in fact infect the victim.⁷¹

Phylogenetics is not reliable because it cannot for certain estimate the direction of transmission.⁷² Furthermore, both the accused and the victim could have been infected by the same third party, or different third parties who shared similar strains of HIV.⁷³

Polygenetics is also a very expensive test that is not usually carried out by all hospitals. This is true especially for developing countries like Zambia.⁷⁴ It must be stressed that Zambia does not yet have the necessary equipment to conduct a phylogenetics report.⁷⁵ Thus, if Zambia enacts the

⁶⁶ ARASA/OSISA Civil Society, Report on the Consultative Meeting on the Criminalisation of the Wilful Transmission of HIV, p.35.

⁶⁷ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, AIDS Rights Alliance South Africa and United Nations Development program: South Africa, 2008.

⁶⁸ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁶⁹ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷⁰ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷¹ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷² AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷³ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷⁴ P. Meagher, Microfinance Regulation in developing Countries: A Comparative Review of Current Practice, October 2002. IRIS Centre University of Maryland p.5.

⁷⁵ P. Meagher, Microfinance Regulation in developing Countries: A Comparative Review of Current Practice, p5

wilful transmission of HIV/AIDS criminal laws, it will inevitably have to acquire costly equipment that is necessary to conduct the polygenetics tests.

Another problem with proof is with respect to cases where intentional transmission needs to be proven. Evidence needs to be found that the accused actively intended and wanted to infect the victim.⁷⁶ Unless there is physical proof of this (e.g. a syringe filled with HIV positive material, a note, or a written confession), it can often just be one person's word against another. With cases of sexual transmission, proving intention can be virtually impossible as the very nature of sexual HIV transmission means there are no witnesses.⁷⁷

There is also the problem of consent and disclosure of the disease.⁷⁸ Consent is an important issue in all criminal prosecutions because if the accused had simply not mentioned that they are HIV positive, then the prosecution would probably argue that they had been reckless by not disclosing their status and not informing their partner of the risks involved in intercourse and a person is likely to be prosecuted for recklessly transmitting the disease rather than being charged for wilfully transmitting the virus. If, on the other hand the accused had actively deceived their partner, and told them they were negative when they were not, the accused is possibly more liable to prosecution.⁷⁹

However, problems arise when where persons will be prosecuted for reckless transmission solely on the basis of non-disclosure because disclosing one's HIV status to an intimate partner can be extremely difficult and⁸⁰ many people have difficulty coming to terms with having HIV and remain in denial of their condition.⁸¹ Further, people are less likely to disclose their HIV status because they fear rejection and the stigma, particularly if they are worried about friends,

⁷⁶ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷⁷ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p7.

⁷⁸ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁷⁹ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁸⁰ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁸¹ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

colleagues or members of their family finding out.⁸² As such, prosecuting a person on the basis of non-disclosure can be potentially problematic.⁸³

In line with this is the issue of having to prove that the accused does in fact have HIV/AIDS.⁸⁴ This would involve in many situations subjecting the accused person to mandatory HIV testing⁸⁵. Mandatory testing involves the process of forcibly subjecting a person to HIV/AIDS testing in order to determine the said person's HIV status.⁸⁶ This form of HIV testing is likely to compromise the confidentiality of VCT record as police would need the results of an HIV test to charge a suspect.⁸⁷ Furthermore, the privacy rights of the accused would most probably be infringed upon as the suspect would be forced to disclose his HIV status.⁸⁸

It must be pointed out that in the Zambian Constitution; the right to privacy is subject to a number of derogations. According to Article 17⁸⁹ of the Constitution it shall not be held to be unlawful to for a law to derogate from the provisions of the said Article where is shown that the law in question is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning; or that the said law is reasonably required for the purpose of protecting the rights or freedoms of other persons.

In this respect, prosecution under the said laws is also problematic because it would give authority to the police force to fully investigate an HIV positive person.⁹⁰ In some cases, this will involve actively raiding the home of the person who has been accused for wilfully transmitting the virus for evidence of HIV positive status or demanding medical records from clinics that deal with HIV/AIDS.

In addition, the police have also been known to track down the partner of the person who has been accused of wilfully transmitting the virus and informing them of the HIV status and risk of

⁸² AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁸³ AVERT International, Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁸⁴ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p7.

⁸⁵ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p7.

⁸⁶ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p7.

⁸⁷ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p7.

⁸⁸ L. Sikapizye, Mandatory HIV Testing Unconstitutional – Court Rules. The LRF News. May – June 2010. No125.

⁸⁹ Article 17 (2)(a) and (b) of the Constitution of Zambia, Chapter 1 of the Law of Zambia.

⁹⁰ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

the said accused person. There have also been circumstances where the cops have persuaded the spouse of the accused to testify against his/her partner.⁹¹

2.10 Conclusion

This chapter can thus be concluded by stating that the enactment of criminal specific legislation is likely to lead to a lot of problems within the criminal justice system of Zambia.⁹² This is because there are a number of substantial difficulties that are likely to result from the prosecution of persons accused of wilfully or recklessly transmitting the disease.⁹³ These difficulties include proof, disclosure and police investigations on matters incidental to the crime.⁹⁴ Thus, it can be suggested that in the rare cases where individuals purposely or maliciously transmit HIV with the intent to harm others, existing criminal laws such as the law against causing bodily harm under Penal Code,⁹⁵ can and should be used rather than passing HIV/AIDS specific laws.⁹⁶ Even in these instances, care must be taken to ensure that these laws are not applied too broadly.⁹⁷

⁹¹ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁹² R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.96.

⁹³ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.97.

⁹⁴ AVERT International. Criminal transmission of HIV, at <http://www.avert.org/transmission>. Accessed on July 13, 2010.

⁹⁵ Section 229 of the Penal Code, Chapter 87 of the Laws of Zambia.

⁹⁶ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.98.

⁹⁷ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.98.

CHAPTER THREE

3.0 CRIMINALISATION OF THE WILFUL TRANSMISSION OF HIV/AIDS IN SOUTH AFRICA AND USA

3.1 Introduction

Under chapter three, a case study of two countries will be undertaken in order to examine the various laws and policies that countries have affected regarding the criminalisation of the wilful transmission of HIV/AIDS. The first country that will be studied is the United States of America, a country chosen because of its various laws relating to the criminalisation of HIV⁹⁸. Another country that will be examined is South Africa. In South Africa, the focus will be on the stance that government and parliament has taken with regards criminalisation of HIV, more particularly; the fact that there exists no criminal laws against persons who wilfully transmit HIV/AIDS⁹⁹ despite it being a country with one of the highest HIV prevalence rates.¹⁰⁰

3.2 Criminalisation of the Wilful Transmission of HIV/AIDS in the United States of America

The United States is a federal state comprising of 50 States,¹⁰¹ instead, each State has adopted its own legal framework on how to deal with persons who are accused of wilful transmission of HIV/AIDS.¹⁰²

In terms of prevalence; the USA had a prevalence rate of about 1,106,400 people living with HIV in the year 2006.¹⁰³ In an attempt to reduce this number, many states have opted to enact legislation that will hold persons who intentionally infect others with the disease criminally liable.¹⁰⁴

⁹⁸E. Leslie. Wolf And R. Vezina, Is There a Role for Criminal Law in HIV Prevention. p.43-56.

⁹⁹International HIV & AIDS charity, HIV/AIDS in South Africa, at <http://www.avert.org/aids-hiv-africa.htm>. Accessed 1st January 2010.

¹⁰⁰International HIV & AIDS Charity, HIV/AIDS in South Africa, at <http://www.avert.org/aids-hiv-africa.htm>. Accessed 1st January 2010.

¹⁰¹M. Scheb,., and J. Scheb, An Introduction to the American Legal System, Florence, KY: Delmar, 2002 p. 6.

¹⁰²R. B. Carlson, Ending and Defending Against HIV Criminalization: A Manual For Advocates, vol 1 , 1stEdn, State and Federal Laws and Prosecutions, The Centre for HIV Law and Policy, New York, 2010 p.1.

¹⁰³H. HI, S. Ruiguang, P. Rhodes, Estimation of HIV incidence in the United States. New York: JAMA, 2008 pp.520-529.

¹⁰⁴E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention, p.17.

As earlier stated, there are no federal laws on HIV exposure although USA Congress has provided explicit support for such efforts at the state level. In 1990, the Ryan White CARE Act¹⁰⁵ which provides states funds for AIDS treatment and care required every state to certify that its criminal laws were adequate to prosecute any HIV infected individual who knowingly exposes a person to HIV (The requirement was removed in 2000 after all states had certified that they had such laws).¹⁰⁶

In relation to the States in the USA, three general approaches to making HIV exposure by a person who knows they are HIV positive a crime have been adopted; firstly there are states which have enacted HIV-specific laws¹⁰⁷. Secondly, there are states relying on existing STD laws; and thirdly, there are states using general criminal statutes such as assault or reckless endangerment.¹⁰⁸

By the end of 2005, 24 out of 50 States in the USA had adopted laws that specifically punish HIV exposure as a separate crime; however, there is substantial variation among these laws.¹⁰⁹ Many HIV-specific laws address sexual activity, needle sharing and blood donation. Less often, these laws address other activities such as biting and spitting that have little or no risk of spreading HIV.¹¹⁰ Most of these laws do not require that the HIV positive person actually infect someone else – only that that person engage in a behaviour knowing that it could put someone else at risk for contracting HIV. Penalties for breaking the law range from a minimum of one year to a maximum of life in prison.¹¹¹

In Arkansas for example, HIV /AIDS specific laws have been adopted.¹¹² The said law states that it is a class A felony for a person who knows that he or she has tested positive for HIV to expose another to HIV through the parental transfer of blood or blood products or by engaging in sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's

¹⁰⁵Ryan White Comprehensive AIDS Resources Emergency (CARE) Act, 1990.

¹⁰⁶E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention, p.18.

¹⁰⁷E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention,p.18.

¹⁰⁸ M.M McKinney and K. Marconi, Delivering HIV services to vulnerable populations: A Review of CARE Act funded Research, February 2002, Public Health Reports p.99-113.

¹⁰⁹ E. Leslie, and R. Vezina, Is There a Role for Criminal Law in HIV Prevention, p.18.

¹¹⁰ E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention,p.18.

¹¹¹E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention,p.18.

¹¹²R.B. Carlson, Ending and Defending Against HIV Criminalization: A Manual For Advocates, p.26.

body, without first having informed the other person of the presence of HIV. The emission of semen is not required. For a class 'A' felony the sentence shall not be less than six years but not more than 30 years.

Arkansas has actually prosecuted a number of persons under this law. In *State v. Weaver*¹¹³, for example, an HIV-positive man was sentenced to a 30 year prison sentence for allegedly having sex without disclosing his status, even though he maintained at trial that he did disclose his status to his partner. To rebut the defendant's testimony, the prosecution called a health official to testify that the defendant said he would infect anyone he could if he was HIV-positive. On appeal, the court found that the rebuttal testimony was sufficient as it went to the intent of the defendant to expose others to HIV and therefore to the fact that the defendant probably did not tell the complainant that he was HIV positive.

In terms of general statutes and STI laws, prosecution is based on already enacted laws on matters which are similar to the intentional and reckless transmission of HIV. Six States rely on existing STI laws and seventeen states have neither HIV nor STI laws and instead rely on general criminal laws.¹¹⁴ However, HIV does not always fit easily within the scope of general criminal laws. For example, assault is generally defined in the law as an unwanted touching, and is poorly suited to the consensual nature of the behaviours that can result in exposure to HIV.¹¹⁵

In New York for example, there have been convictions under general laws.¹¹⁶ The New York Public Health Act provides that someone who knows that she/he is infected with an "infectious venereal disease" and has sexual intercourse with another is guilty of a misdemeanour. There is however no indication in New York statutes that HIV infection is considered a "venereal disease."¹¹⁷

In the case of *People v. Hawkrigg*¹¹⁸, the county court denied the defendant's motion to dismiss the indictment of charges for third-degree sodomy, reckless endangerment, and endangering the welfare of a child because there was sufficient evidence to show that the accused had engaged in

¹¹³ 939 S.W.2d 316, 318 (Ark. Ct. App. 1997). Cited in R. Bennett-Carlson, Ending and Defending Against HIV Criminalization: A Manual For Advocates, p. 26.

¹¹⁴ K.M. Sullivan, AIDS and the Coercive Power of the State, p139-197.

¹¹⁵ K.M. Sullivan, AIDS and the Coercive Power of the State, p139-197.

¹¹⁶ New York Public Health Act- Title 1 - § 2307 Venereal Disease; Person Knowing Himself to Be Infected

¹¹⁷ R.B. Carlson, Ending and Defending Against HIV Criminalization: A Manual For Advocates, p.20.

¹¹⁸ 525 N.Y.S.2d 752 (Suffolk County Ct. 1988). cited in p.42.

the acts knowing that he had AIDS and that such conduct could transmit HIV. The court found that this evidence was sufficient to support a reckless endangerment charge because reckless endangerment only requires proof that the defendant consciously disregarded a substantial and unjustifiable risk that his or her conduct would result in the transmission of HIV.

A number of concerns regarding the wilful criminalization of HIV/AIDS in the USA have been raised.¹¹⁹ To begin, no studies show that criminalizing HIV transmission is an effective HIV prevention approach.¹²⁰ In addition, many people do not know about HIV laws in their state. Unless people are aware of the laws, the statutes will not affect behaviour.¹²¹ Among those people who are aware of such laws, the statutes may create greater stigma against a disease about which much fear and misunderstanding already exists. In addition, the threat of criminal prosecution may discourage people from HIV testing, counselling and treatment. In this way, criminal laws could work against public health efforts, because people who do not know their HIV positive status may be more likely to engage in high-risk behaviours, and, therefore, may increase the spread of HIV.¹²²

Another problem with the criminalization laws in the USA is the stigma and discrimination in sentencing for HIV exposure convictions. Under some of the more extreme criminal HIV exposure laws, as in the *Arkansas State v. Weaver Case*¹²³, sentences can be as long as 10 to 25 years.¹²⁴ Some people prosecuted for exposing others to HIV have received these long sentences, even when the victim was not infected.¹²⁵

Finally, there is the problem with laws that specifically punish someone for failing to disclose his/her HIV status to a partner. There are many instances where HIV positive people may be taking steps to prevent the spread of HIV even if they do not disclose their status and therefore it would be unjust to punish persons who are taking measures to prevent the

¹¹⁹ E. Leslie and R. Vezina, *Is There a Role for Criminal Law in HIV Prevention*, p.19.

¹²⁰ Z. Lazzarini and R. Klitzman, *HIV and the Law: Integrating Law, Policy, and Social Epidemiology*. March, 2002. *Journal of Law and Medical Ethics*; 30:533-547.

¹²¹ Z. Lazzarini and R. Klitzman, *HIV and The Law: Integrating Law*, p.533-547.

¹²² R. B. Carlson, *Ending and Defending Against HIV Criminalization: A Manual For Advocates*, p.43.

¹²³ 939 S.W.2d 316, 318 (Ark. Ct. App. 1997) R. Bennett-Carlson, *Ending and Defending Against HIV Criminalization: A Manual for Advocates*, p. 26.

¹²⁴ R. B. Carlson, *Ending and Defending Against HIV Criminalization: A Manual For Advocates*, p.43.

¹²⁵ R. B. Carlson, *Ending and Defending Against HIV Criminalization: A Manual For Advocates*, p.43.

transmission of HIV/AIDS. Also, many factors may influence a person's ability to disclose his/her HIV positive status in a relationship. One survey conducted in 2009 of HIV positive persons found that 42% of gay men, 19% of heterosexual men, and 17% of women reported having sex without disclosing their HIV. In addition, research shows that the disclosure of one's HIV status is not necessarily associated with using condoms or other risk reduction activities.¹²⁶

It may therefore be stated that the measures taken by the United States of America in order to prevent the spread of the HIV pandemic have proven to be ineffective, and as such, should not be emulated by countries such as Zambia.

3.3 Criminalisation of the Wilful Transmission of the Wilful Transmission of HIV/AIDS in South Africa

South Africa has one of the highest prevalence rates in the world.¹²⁷ By 2009, an estimated 5.6 million people were living with HIV/AIDS in South Africa.¹²⁸ The overall number of annual deaths increased sharply from 1997, when 316,559 people died, to 2006 when 607,184 people died.¹²⁹ With such high prevalence levels, it is expected that South Africa would have opted to criminalize HIV/AIDS as a method of preventing the spread of this disease. This is however not the case.¹³⁰

South Africa has adopted a non-criminalisation approach to the wilful transmission of HIV/AIDS.¹³¹ According to South African Supreme Court Judge, Justice Edwin Cameron:

“Applying criminal law to HIV transmission has a heightened role in stigmatizing HIV, it is ineffective and public health strategies are better used to advance HIV prevention.”¹³²

¹²⁶R. B. Carlson, *Ending and Defending Against HIV Criminalization: A Manual For Advocates*, p.44.

¹²⁷Global Report.UNAIDS Report on the Global AIDS Epidemic
http://www.unaids.org/globalreports/Global_report.htm. Accessed on 29th November, 2010.

¹²⁸Global Report.UNAIDS Report on the Global AIDS Epidemic
http://www.unaids.org/globalreports/Global_report.htm. Accessed on 29th November, 2010.

¹²⁹D. W. Webber, *AIDS and the Law in South Africa: An Overview*, July 1999, Aspen: Aspen Law and Business

¹³⁰NAM, The ‘legislation contagion’ of the N’Djamena model law, at
<http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ej>. Accessed on November 20, 2010.

¹³¹NAM, The ‘legislation contagion’ of the N’Djamena model law, at
<http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ej>. Accessed on November 20, 2010.

¹³²IDASA, *Criminalisation of Wilful Transmission of HIV: Sitting on the Fence*, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

It is argued that because little is known about the impacts of criminalizing HIV transmission, many are concerned that it may have a negative impact on the uptake of HIV testing and access to HIV prevention, treatment and care services.¹³³ Sensational media reports can exacerbate stigma and discrimination, and jeopardize HIV prevention strategies currently in place.¹³⁴

It is worthy to note that due to the increased levels of HIV/AIDS through rape cases¹³⁵ legislation that redefines or expands the definition of existing crime of rape have been enacted.¹³⁶ Section 3(4)(c) of the draft Offences Act¹³⁷ makes it rape for an HIV-infected person to have sexual intercourse without informing his partner of his status.

Instead of criminalisation of the wilful transmission of HIV/AIDS, South Africa has taken a different approach towards the move to prevent the spread of HIV/AIDS:

Firstly, as a preventive measure, South Africa has opted to broaden its AIDS awareness campaigns.¹³⁸ There are a number of large scale communication campaigns related to raising awareness of HIV and AIDS as well as broader health-related issues,¹³⁹ for example the HIV counselling and testing (HCT) campaign launched in April 2010 to scale up awareness of HIV. Further, government aims to bring about general discussion of HIV throughout the country by using the media.¹⁴⁰ For example, the government has adopted strategies which include publicizing the availability of free testing and counselling in health clinics through door-to-door

¹³³ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹³⁴ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹³⁵ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹³⁶ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹³⁷ Act No. 23, 1957.

¹³⁸ NAM, The 'legislation contagion' of the N'Djamena model law, at <http://www.aidsmap.com/law/&wsi=ee474d76044a5e4b&ei>. Accessed on November 20, 2010.

¹³⁹ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹⁴⁰ SANAC, The National HIV Counselling and Testing Campaign, http://www.sanac.org.za/hctportal/index.php?option=com_content&view=Article&id=19. Accessed 29th November, 2010.

campaigning and billboard messages in both rural and urban areas such as Soweto and Johannesburg.¹⁴¹

Advocating the use and distribution of condoms is also another strategy that South Africa has opted for as a measure of prevention.¹⁴² In fact, studies have shown that condom use in South Africa is growing with the percentage of those using a condom during their last sexual encounter increasing from 27 percent in 2002, 35 percent in 2005 to 62 percent in 2008.¹⁴³

Another mode of preventing the increased spread of HIV/AIDS taken by South Africa is by means of sex education.¹⁴⁴ HIV and sex education exists in schools as part of the wider Life Orientation curriculum which was implemented in 2002 and also covers subjects such as nutrition and careers guidance.¹⁴⁵

South Africa has also prioritized HIV testing. Policy makers argue that testing is important in order to access treatment, and knowledge of one's positive status can lead to behaviours that may protect other people from infection.¹⁴⁶ The National Strategic Plan is one of the strategies that South Africa has adopted to reduce the spread of HIV/AIDS by 50% since the year 2011.¹⁴⁷ The Strategic Plan was adopted after a suggestion that giving antiretroviral therapy to all HIV-positive people could effectively eliminate the epidemic.¹⁴⁸

¹⁴¹ SANAC. The National HIV Counselling and Testing Campaign. February, 2010 http://www.sanac.org.za/hctportal/index.php?option=com_content&view=Article&id=19. Accessed 29th November, 2010.

¹⁴² Human Sciences Research Council. South African National HIV Prevalence, Incidence, Behaviour and Communication Survey, A Turning Tide Among Teenagers. August 2009, at <http://www.hsrc.ac.za/SAHA.php>. Accessed 29th November, 2010.

¹⁴³ D. Harrison, An Overview of Health and Health Care in South Africa: 1994-2010: Priorities, Progress and Prospects for New Gains, December 2009 Henry J. Kaiser Family Foundation at <http://www.doh.gov.za/docs/reports-f.html>. Accessed 29th November, 2010.

¹⁴⁴ M. Ahmed, HIV education in South African Schools: The Dilemma and Conflicts of Educators, at 2009 Scandinavian Journal of Public Health, Vol. 37 p.14 http://www.sjp.sagepub.com/cgi/content/short/37/2_suppl/48. Accessed 29th November, 2010.

¹⁴⁵ M. Ahmed, HIV Education in South African Schools: The Dilemma and Conflicts of Educators, at http://www.sjp.sagepub.com/cgi/content/short/37/2_suppl/48. Accessed 29th November, 2010.

¹⁴⁶ Government of South Africa. HIV and AIDS and STI Strategic Plan for South Africa 2007-2011, at <http://www.info.gov.za/otherdocs/2007/aidsplan2007/index.html>, Accessed on 29th November, 2010.

¹⁴⁷ B. Williams, D. Ginsburg, J. Monaner, A. Welte, Achieving South Africa's national Strategic Plan for HIV/AIDS, 14 March 2009, The Lancet, Vol. 373, Issue 9667, pp. 895 – 896.

¹⁴⁸ B. Williams, D. Ginsburg, J. Monaner, A. Welte, Achieving South Africa's national Strategic Plan for HIV/AIDS, pp. 895 – 896.

A modelling exercise showed that if everyone in South Africa were tested once per year on average and started on ARV's as soon as they were HIV positive, if other behavioural and social interventions contributed a 40% reduction in transmission, and if full coverage was reached by 2016, it would be possible to eliminate HIV transmission by 2016 and HIV infection by 2050.¹⁴⁹

South Africa further takes the view that there is a positive link between testing levels and several socio-economic growths. Economic indicators suggest that there is an improvement in the general standard of living of persons who know their HIV/AIDS status.¹⁵⁰

Finally, the South African government has included voluntary medical male circumcision as an integral part of its HIV counselling and testing (HCT) campaign.¹⁵¹ Several large studies of male circumcision and HIV have produced firm evidence that the procedure reduces by 60 % the risk of sexual transmission of HIV from women to men.¹⁵² It was estimated that a programme with full coverage of male circumcision could prevent half a million infections and 100,000 deaths within a decade, with these figures rising in the decades to follow.¹⁵³

As can be seen from the above paragraphs, the measures that South Africa has adopted in order to reduce the spread of HIV/AIDS have been effective. Programmes such as the National Strategic Plan have consistently contributed to the decrease in HIV/AIDS transmissions. Therefore, it may be argued that countries such as Zambia must opt to undertake measures that are similar to those measures taken in South Africa in order to reduce the spread of HIV/AIDS.

¹⁴⁹ B. Williams, D. Ginsburg, J. Monaner, A. Welte, Achieving South Africa's national Strategic Plan for HIV/AIDS, pp. 895 – 896.

¹⁵⁰ Government of South Africa, HIV and AIDS and STI Strategic Plan for South Africa, at <http://www.info.gov.za/otherdocs/2007/aidsplan2007/index.htm>. Accessed on 29th November, 2010.

¹⁵¹ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹⁵² IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

¹⁵³ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>. Accessed 30th November, 2010.

3.4 Conclusion

This chapter can thus be concluded by stating that there are various ways in which the law can be used to impose criminal sanctions against persons who wilfully spread HIV/AIDS.¹⁵⁴ However, as can be seen from the case study in the United States of America, these laws have a number of negative effects on individuals and society respectively.¹⁵⁵ On the other hand, an examination of the various policies implemented in South Africa suggests that despite these laws, there are other methods that can be used to prevent the spread of HIV/AIDS effectively.¹⁵⁶

¹⁵⁴ E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention, p.47.

¹⁵⁵ E. Leslie and R. Vezina, Is There a Role for Criminal Law in HIV Prevention, p.47.

¹⁵⁶ IDASA, Criminalisation of Wilful Transmission of HIV: Sitting on the Fence, at <http://www.polity.org.za/article.htm>, Accessed 30th November, 2010.

CHAPTER FOUR

4.0 EFFECTS OF THE CRIMINALISATION OF THE WILFUL TRANSMISSION OF HIV/AIDS IN ZAMBIA

4.1 Introduction

Introducing laws that criminalise the wilful transmission of HIV/AIDS in the Zambian society would have both positive and negative effects on various groups living in Zambia.¹⁵⁷ This chapter is therefore aimed at analysing the possible consequences that may arise from such criminalisation. It will analyse how criminalisation of the wilful transmission of HIV/AIDS would affect people living with HIV/AIDS; women; and the general public. The constitutional issues involved in the criminalisation of the wilful spread of HIV/AIDS will also be discussed.

4.2 Arguments in Favour of Criminalisation of the Wilful Transmission of HIV/AIDS

Proponents of the criminalisation of the wilful transmission of HIV/AIDS argue that the introduction of the said law will play three basic functions. It is argued that the criminalisation of the wilful transmission of HIV/AIDS will act as a deterrent to both HIV positive and negative people.¹⁵⁸ The argument is basically that if such a law is enacted, it will instil fear in people, and as a result, many persons will be afraid to engage in risky sexual behaviours.¹⁵⁹

Another argument in support of the criminalisation of the wilful transmission of HIV/AIDS is that it will act as an instrument for the rehabilitation of people who are HIV positive. This means that people who are incarcerated for intentionally infecting others with HIV will no longer spread HIV/AIDS in society.¹⁶⁰

A final argument in favour of enacting HIV/AIDS criminal legislation is that it will act as a tool of incapacitation against persons who pose a risk to the Zambian society by wilfully spreading HIV/AIDS.¹⁶¹ This argument is based on the premise that people who are infected with

¹⁵⁷ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁵⁸ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁵⁹ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁶⁰ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

¹⁶¹ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

HIV/AIDS and engage in risky sexual activities will be “locked” away hence will no longer endanger the HIV negative people in Zambia.¹⁶²

The above arguments, convincing as they may seem are *per se* not substantial.¹⁶³ A critical analysis of the negative effects of criminalising the intentional or reckless spread of HIV/AIDS in society below will show that these negative consequences outweigh any positive outcome that may result from the proposed criminalisation.

4.3 Arguments Against the Criminalisation of the Wilful Transmission of HIV/AIDS in Zambia

a. It will have a Negative Impact on People Living with HIV/AIDS

The criminalisation of the wilful transmission of HIV/AIDS will invariably affect people living with HIV/AIDS.¹⁶⁴ To begin, applying criminal laws to HIV exposure or transmission is likely to promote fear and stigma against persons who are HIV positive. It reinforces the stereotype that people living with HIV are immoral and dangerous criminals.¹⁶⁵ This is potentially problematic especially in an under developed economy such as Zambia where many persons do not have the necessary resources to prove their innocence. The result of this is an increase in prosecutions against defenceless innocent people.¹⁶⁶

Also, these criminal laws could create a lot of distrust in relationships between HIV positive people and their health care providers in that people may fear that information regarding their HIV status maybe used against them in the criminal justice system.¹⁶⁷ This would impede the provision of quality treatment and care and could also negatively impact the enrolment of HIV-positive people into much-needed research studies.¹⁶⁸

Another problem that is likely to result from the introduction of HIV-specific criminal offences in Zambia is that it is likely that such criminal laws would effectively shift the total burden of HIV prevention onto people living with HIV by relieving HIV negative people of their sexual

¹⁶² M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁶³ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

¹⁶⁴ M. Kabwe, Criminal Sanctions Should be Imposed on Persons Wilfully Transmitting HIV AIDS, pp.15-40.

¹⁶⁵ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁶⁶ D. Tyler, The Case Against Wilful Transmission of HIV Legislation, p.7.

¹⁶⁷ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁶⁸ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

behaviour.¹⁶⁹ This will be an unfortunate outcome seeing as sexual intercourse is a two way activity and requires the consent of both parties.

The above propositions are supported by the Zambia AIDS Law Research and Advocacy Network (ZARAN). According to an interview conducted at with the legal officer at the institution, Mrs Chipo Nkhata, the criminalisation of the wilful transmission of HIV/AIDS will not be beneficial to persons living with HIV/AIDS. According to her, the introduction of such laws in Zambia will result in the victimisation of HIV positive people in that they will be subjected to a lot of public humiliation and prejudice. Worse even is the fact that the HIV positive people are more likely to have their rights to privacy violated in that it will become necessary to expose that person's sexual life and status for them to be prosecuted under the criminalisation laws.¹⁷⁰

b. Negative Effect on Women

With regards to how criminalisation of the wilful spread of HIV/AIDS may affect women, it has been stated that policy law makers and women's rights groups often seek specific legislation as a measure to 'protect women' who are vulnerable to HIV. According to Mrs. Nkhata of ZARAN¹⁷¹, this was the main reason why there has been calls to introduce such laws criminalising the wilful transmission of HIV/AIDS in the first place. However, these laws have proven to be more disadvantageous to women and could lead to greater prosecutions against them. This is due to a number of reasons:

Firstly, women often are the first to find out about their status because they engage with the health system more often (including during pregnancy and child birth), particularly as governments move towards provider-initiated HIV testing and counselling in pre-natal settings.¹⁷²

¹⁶⁹ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

¹⁷⁰ Chipo Nkhata, Legal Officer, Zambia AIDS Law Research and Advocacy Network, 12th February, 2011, Rhodes Park, Lusaka, Zambia.

¹⁷¹ The Legal Officer, Mrs Chipo Nkhata, Zambia AIDS Law Research and Advocacy Network, 12th February, 2011, Rhodes Park, Lusaka, Zambia.

¹⁷² R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

If the said criminal laws are implemented in Zambia, to avoid the risk of being prosecuted for exposing their partner to HIV, women who test HIV-positive would have to disclose their HIV status to their partners, refuse to have sex, or insist on condom use.¹⁷³ However, for many women these actions carry the risk of violence, eviction, disinheritance, loss of their children, and other severe abuses.¹⁷⁴ The combination of more routine forms of testing (particularly during pregnancy) and criminalization of HIV transmission or exposure thus gives women an impossible choice: either to risk violence by trying to protect their partners, or to risk prosecution by failing to do so.¹⁷⁵

Secondly, women are more likely to be blamed by their intimate partners, their partners' families, and their communities for "bringing HIV into the home than men. This will inevitably result in eviction, ostracism, loss of property, and loss of child custody.¹⁷⁶ Mrs. Chipo Nkhata of ZARAN stated that laws criminalizing HIV exposure or transmission would only provide another tool to oppress women.¹⁷⁷ According to her, this effect is greater in a country such as Zambia where apportionment of blame is still an important part of both customary and formal legal systems in matters such as divorce and inheritance.¹⁷⁸

Finally, the application of HIV/AIDS specific criminal laws in to the Zambian legal system could more often than not lead to the prosecution of women for mother to child transmission. Needless to say, the consequences of such prosecutions would be disastrous.¹⁷⁹ This is because such it would mean that for millions of women living with HIV/AIDS—but often denied access to family planning, reproductive health services, or medicines that prevent mother-to-child transmission of HIV— pregnancy, wanted or not, would be a criminal offence.¹⁸⁰

This is unfortunate because there are many more effective ways to prevent mother-to-child transmission of HIV, beginning with supporting the rights of all women to make informed

¹⁷³ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁷⁴ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁷⁵ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁷⁶ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁷⁷ Mrs. Chipo Nkhata, Zambia AIDS Law Research and Advocacy Network, 12th February, 2011, Rhodes Park, Lusaka, Zambia.

¹⁷⁸ The Marriage Act, chapter 50 of the Laws of Zambia.

¹⁷⁹ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸⁰ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

decisions about pregnancy and providing them with sexual and reproductive information and services, preventing HIV in women and girls in the first place, preventing unwanted pregnancies among all women, and providing effective medication to prevent mother-to-child transmission of HIV to HIV-positive women who wish to have children.¹⁸¹

Furthermore, evidence shows that criminalisation of HIV exposure or transmission also will not protect women and girls from coercion or violence.¹⁸²

c. Negative Effect on Zambian Society

With respect to how the Zambian society at large will be affected by the criminalisation of the wilful transmission of HIV/AIDS, it has been argued by some policymakers that applying criminal law to HIV exposure or transmission can reduce the spread of HIV by incapacitating or rehabilitating particular offenders, or by deterring others from transmitting HIV.¹⁸³ In fact however, applying these criminal laws to HIV risk behaviour has not been shown to incapacitate, rehabilitate, or deter offenders.¹⁸⁴

With regards to incapacitation, evidence suggests that imprisoning a person with HIV/AIDS does not prevent the transmission of HIV. HIV risk behaviours are prevalent in prisons, and most prison systems continue to reject introduction of evidence-informed prevention measures such as condoms and sterile injecting equipment and fail to undertake measures to reduce the prevalence of rape and other forms of sexual violence.¹⁸⁵ According to a study conducted in Zambian prisons in 2003, HIV infection rates within the prison population were 68.5% higher than that of the general public due to the various high-risk activities that occurred behind prison walls.¹⁸⁶ Given that most prisoners are eventually released from prison, incarceration could contribute to higher rates of infection among the general population.¹⁸⁷

¹⁸¹ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸² R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸³ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

¹⁸⁴ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸⁵ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸⁶ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸⁷ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

In terms of rehabilitation, there is little evidence to suggest that criminal penalties for conduct that transmits or risks transmitting HIV will “rehabilitate” a person such that they avoid future conduct that carries the risk of HIV transmission.¹⁸⁸ Most cases of HIV transmission are related to sexual activity and/or drug use – human behaviours that are complex and very difficult to change through the blunt tool of criminal penalties. Nor do prisons provide rehabilitation programs around behaviour that transmits HIV.¹⁸⁹ Rehabilitation services in Zambian prisons focus on income generation and skill development, not on altering sexual behaviour.¹⁹⁰

As for deterrence, Mrs Nkhata from ZARAN¹⁹¹ stated that there is no scientific data supporting the claim that criminal prosecution or the threat thereof has any appreciable effect in encouraging disclosure to sexual partners by people living with HIV or deterring conduct that poses a risk of transmission. Most people living with or at risk of HIV already believe they have a responsibility to protect others from HIV infection, especially when they have access to good-quality counselling and prevention services such as female and male condoms and interventions to reduce the likelihood of mother-to-child transmission.¹⁹² In any case, during the time when there is the greatest risk of HIV transmission (the first months following infection), most people do not yet know that they are HIV positive, limiting the preventive value that any criminal offence could have.

Another possible outcome of the criminalisation legislation may have on the society is that it has the potential to harm the Zambian society and its fight against HIV. The legislation could limit Zambia’s success in the fight against HIV through voluntary counselling and testing (VCT) in that wilful transmission legislation persons are more likely to avoid knowing their status for fear of being susceptible to prosecution under the said laws.¹⁹³ Additionally, the laws create a barrier to accessing services by the people who know that they are living with HIV. These people who require a comprehensive package of services from their clinics and hospitals will be impeded

¹⁸⁸ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁸⁹ R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁹⁰ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

¹⁹¹ Chiponkhata, Zambia AIDS Law Research and Advocacy Network, 12th February, 2011, Rhodes Park, Lusaka, Zambia.

¹⁹² R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

¹⁹³ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

from accessing the said services by the criminalization laws which would likely creates barriers to regular medical checkups and psycho-social support.¹⁹⁴

Criminalisation of the wilful transmission of HIV also has the potential to create false security among people who are, or think they are HIV-negative and thus, encourage risky behaviour on their part. The statute if enacted may create a false expectation that the existence of a criminal law has eliminated any danger from engaging in unprotected sex.¹⁹⁵ In addition thereto, the over-extension of the criminal law also risks spreading misinformation about how HIV is transmitted. Serious criminal charges have been laid in the US against HIV-positive people for biting and spitting, despite the evidence that the risk of HIV transmission in this fashion is insignificant at most.¹⁹⁶

In *Weeks v State of Texas*,¹⁹⁷ an HIV-positive prisoner in Texas was convicted of attempted murder for spitting at a prison guard. Four different courts of appeal upheld his conviction. Sentenced to 99 years in prison, he subsequently died in jail.

Finally, one of the most compelling effects of the introduction of HIV/AIDS criminal legislation is the potential it has for intrusion into sexual privacy.¹⁹⁸ In addition, the privacy of “confidential” records kept by health professionals or counsellors could also be lost in the search for evidence. Criminal prosecutions are public proceedings, and the HIV-positive status of the accused would become widely reported. Complainants would also need to provide testimony, and the likely loss of confidentiality will also need to be considered in assessing the value of criminal proceedings.¹⁹⁹

¹⁹⁴ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, *HIV: Verdict on a Virus*, p.25.

¹⁹⁵ R. Elliott, *Criminal Law and HIV/AIDS: Strategic Considerations*, Canadian HIV/AIDS Legal Network and the AIDS Law Project: Canada, August 2000 p. 15.

¹⁹⁶ R. Elliott, *Criminal Law and HIV/AIDS: Strategic Consideration*, p. 15.

¹⁹⁷ 834 SW.2d 559 (Tex CA, 1992) Appeals, No 92-1154), Cited in R. Elliott, *Criminal Law and HIV/AIDS: Strategic Consideration*, p. 15.

¹⁹⁸ R. Elliott, *Criminal Law and HIV/AIDS: Strategic Consideration*, p. 15.

¹⁹⁹ R. Elliott, *Criminal Law and HIV/AIDS: Strategic Consideration*, p. 15.

d. Negative Effect on the Rights Guaranteed in the Constitution

It must further be noted that the criminalisation of the wilful transmission of HIV/AIDS will touch upon a number of constitutional law issues, specifically in the realm of the fundamental human rights and freedoms guaranteed under the Constitution of Zambia.²⁰⁰

Under international law, States have the obligation to implement for all within their jurisdiction human rights recognized under customary international law or in treaties ratified by the State.²⁰¹ Implementation of human rights requires States to ensure that human rights are respected, protected and fulfilled for everyone. This includes ensuring that domestic laws, including criminal laws and correctional systems are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups. In Zambia, the Constitution ensures that the people's rights and freedoms are protected.²⁰² In this regard, it is necessary that any enactment by the Zambian legislation is not contrary to the provisions of the Bill of Rights under the Constitution. Invariably therefore, any laws criminalising the wilful transmission of HIV/AIDS must be in line with the Constitution.

Unfortunately however, the proposed criminal legislation is likely to result in human rights violations. The right to the freedom from discrimination is one such right that may likely be violated. According to Article 23 (1)²⁰³:

Subject to clauses (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.

Article 23 (2) stated that:

Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

Section 23 (3) states that:

²⁰⁰ Part 3, Chapter 1 of the Laws of Zambia.

²⁰¹ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.31.

²⁰² The Constitution of Zambia, chapter 1 of the Laws of Zambia.

²⁰³ Article 23 of the Constitution of Zambia, chapter 1 of the Laws of Zambia.

In this Article the expression "discriminatory" means affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Contrary to the above provisions, criminal prosecution relating to HIV seems to favour the rights of people who are not living with HIV over the rights of people who are. The law can be selectively applied and used as an instrument to further marginalize or discriminate. This is particularly true for people whose existence may already be seen as 'illegal' such as undocumented migrants, or sex workers, people who use drugs or men who have sex with men where there are laws criminalizing these behaviours.²⁰⁴

Other rights that the said laws are likely to violate are the right to privacy and the right to protection from inhuman and degrading treatment. Article 17 states that:

Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.²⁰⁵

Further, Article 15 of the Constitution states that:

A person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment.

Criminalization of HIV transmission however does not recognize the sensitivity and obstacles to disclosure. If a person is under investigation for an HIV related crime, their status becomes common information to those conducting the investigation and often more publicly.²⁰⁶ The concept of confidentiality is ignored and even if not prosecuted or convicted, their disclosure is no longer in their own hands.²⁰⁷

²⁰⁴ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.31.

²⁰⁵ Article 17 of the Constitution of Zambia, chapter 1 of the Laws of Zambia.

²⁰⁶ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.31.

²⁰⁷ International Planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.31.

According to a ruling delivered by Justice E. Muyovwe in the Livingstone High Court case of *Stanely Kingaipe & Charles Chookole v. Attorney General*²⁰⁸ where the petitioners were laid off from the Air Force on medical grounds on the basis that they had HIV. The learned trial judge held that the petitioners were entitled to K10 million each in damages as the decision of the Zambian Air Force to subject the petitioners to mandatory testing was unconstitutional and a violation of their right to protection from inhuman and degrading treatment and the right to privacy.

Finally the laws against the wilful transmission of HIV/AIDS are likely to infringe upon the right to equality before the law guaranteed in the Bill of Rights. Article 18:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.²⁰⁹

The right under guaranteed under Article 18 of the Constitution will be violated in the sense that criminalization of HIV transmission or exposure shifts the balance of responsibility onto a person living with HIV yet in all consensual sexual relationships; each partner has equal responsibility to protect their own sexual and reproductive health.²¹⁰

4.7 Conclusion

By way of conclusion, it can be stated that despite the fact that criminalisation of the wilful transmission of HIV/AIDS- at first glance- seems to be a solution to the problem of HIV/AIDS. The real truth however, is that introducing such laws in Zambia would more likely than not be harmful to society as presented in this chapter.

²⁰⁸ 27th May 2007 (unreported) H.C cited in S. Lenganji, Mandatory HIV Testing Unconstitutional – Court Rules, p.7.

²⁰⁹ Article 18 of the Constitution of Zambia, chapter 1 of the Laws of Zambia.

²¹⁰ International planned Parenthood Federation, Global Network of People Living with HIV and International Community for Women, HIV: Verdict on a Virus, Public Health, Human Rights and Criminal Law, p.31.

CHAPTER FIVE

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

On the basis of the foregoing chapters, it can be stated that the criminalisation of the wilful transmission of HIV/AIDS is likely to do more harm than good²¹¹ within the Zambian society. The evidence shows that this proposed legislation is destructive because it endangers women; it is often unfairly and selectively enforced; it places blame on one person; increases stigma; assumes the worst about people with HIV, and undermines the more effective means of reducing the spread of the HIV pandemic.²¹²

This being the case, it is proposed that Zambia should not enact laws that criminalise the wilful reckless transmission of HIV/AIDS. Instead, other methods must be adopted in order to prevent the spread of this horrifying scourge. The most effective strategies, especially in poor countries like Zambia are usually those that are relevant to local context and needs. These strategies should take into account matters such as customs, traditions, economic and social environment of the locality in which they are implemented. Bearing this in mind, a number of recommendations can be suggested as alternatives to criminalisation of the wilful transmission of HIV/AIDS.

5.2 Recommendations

- I. To start, it is recommended that the instead of the criminalisation of the wilful transmission of HIV/AIDS, the government of Zambia should increase programmes which have been proven to reduce HIV transmission while protecting the human rights both of people living with HIV and those who are HIV negative in all areas of the Country.²¹³ These methods include voluntary counselling and testing (VCT), prevention of mother to child transmission (PMCT), male circumcision, and

²¹¹ P. Eba, One Size Punishes All: A Critical Appraisal of the Criminalisation of HIV Transmission, AIDS Legal Network, September/November 2008.

²¹² R. Jurgens, Ten Reasons to Oppose Criminalisation of HIV Exposure or Transmission, p.9.

²¹³ D. Tyler, The Case against Wilful Transmission of HIV Legislation, p.7.

distribution of condoms.²¹⁴ Increasing VCT and PMCT as well as HIV awareness programs in all provinces of Zambia especially in the rural areas (where the HIV/AIDS prevalence is extremely high) is more likely to reduce the HIV pandemic²¹⁵ than any form of criminal legislation.

Voluntary counselling and testing has proven to be a very effective way of reducing the spread of HIV/AIDS. It is widely recognised that individuals living with HIV who are aware of their status are less likely to transmit HIV to others and are more likely to access treatment, care and support that can help them to stay healthy for long. In countries such as Malawi, Kenya, and Lesotho for example, VCT campaigns have significantly contributed to the decrease in the HIV pandemic.²¹⁶ VCT as a measure to stop the transmission of HIV is advantageous because is fast, cheap, and easy to conduct.²¹⁷ More importantly, it does not come with any of the negative effects that come with criminalisation of the wilful spread of HIV/AIDS such as discrimination or gender violence.

- II. Increasing advocacy in the use and distribution of condoms all across the country is also another effective way of deterring the spread of HIV/AIDS in Zambia. Condoms play a key role in preventing HIV infection around the world. The distribution of condoms is cheap and effective. Additionally the promotion of HIV/AIDS awareness programs through non-governmental vehicles like Young Women's Christian Association (YWCA), and Zambia AIDS Resource Network (ZARAN), could decrease the spread of HIV/AIDS immensely.²¹⁸

²¹⁴ L. Gable, K. Gamharter and L. Gostine, Legal aspects of HIV /AIDS: A Guide for Policy and Law Reform, p.13

²¹⁵ International HIV/AIDS Charity, HIV and AIDS in Africa, at <http://www.avert.org/hiv-aids-africa.htm>. Accessed on 13th February, 2011.

²¹⁶ International HIV/AIDS Charity, HIV and AIDS in Africa, at <http://www.avert.org/hiv-aids-africa.htm>. Accessed on 13th February, 2011.

²¹⁷ International HIV/AIDS Charity, HIV and AIDS in Africa, at <http://www.avert.org/hiv-aids-africa.htm>. Accessed on 13th February, 2011.

²¹⁸ International HIV/AIDS Charity, HIV and AIDS in Africa, at <http://www.avert.org/hiv-aids-africa.htm>. Accessed on 13th February, 2011.

- III. The provision of PMCT by the local health authorities through the Ministry of Health in Zambia as a means of preventing mother to child transmission of HIV. This basically involves the prevention of HIV infection among prospective parents, avoidance of unwanted pregnancies among HIV positive women and preventing the transmission of HIV from HIV positive mothers to their infants during pregnancy, labour, delivery and breastfeeding.²¹⁹ PMCT as compared to the criminalisation of the wilful transmission of HIV/AIDS is much more preferable because unlike the latter, PMCT does not result in gender violence or discrimination. Further, it is an easier measure to implement and is a very good method of protecting the unborn babies.²²⁰
- IV. Adopting of male circumcision by the government in an effort to control the deadly HIV pandemic. Recent publications have reported an association between the lack of male circumcision and sexual transmission of HIV.²²¹ It has been suggested that following circumcision, the surface epithelium of the glans develops a protective keratin layer, a form of natural condom. Thus, circumcision could reduce the incidence of HIV by directly decreasing the susceptibility of uninfected men. Furthermore, some sexually transmitted diseases may increase men's susceptibility to HIV.²²² If circumcision reduces the transmission of genital infections, either by improving local hygiene or by accelerating the healing of otherwise subpreputial lesions, circumcision may also delay HIV transmission.²²³

²¹⁹ International HIV/AIDS Charity, HIV and AIDS in Africa, at <http://www.avert.org/hiv-aids-africa.htm>. Accessed on 13th February, 2011.

²²⁰ International HIV/AIDS Charity, HIV and AIDS in Africa, at <http://www.avert.org/hiv-aids-africa.htm>. Accessed on 13th February, 2011.

²²¹ I. Vincenzi and T. Mertens, Male Circumcision: A Role in HIV Prevention, The Circumcision Reference Library . February, 2004 at <http://www.cirp.org/library/disease/HIV/vincenzi>. Accessed on 15th February, 2011.

²²² I. Vincenzi and T. Mertens, Male Circumcision: A Role in HIV Prevention, <http://www.cirp.org/library/disease/HIV/vincenzi>. Accessed on 15th February, 2011.

²²³ I. Vincenzi and T. Mertens, Male Circumcision: A Role in HIV Prevention, at <http://www.cirp.org/library/disease/HIV/vincenzi>. Accessed on 15th February, 2011.

It must be understood however, that contrary to popular belief, male circumcision is not an effective means of protecting oneself against the infection of HIV/AIDS.²²⁴ Male circumcision does not necessarily operate as a condom; therefore the use of male condoms is still necessary notwithstanding the fact that an individual has undergone male circumcision.²²⁵

In addition to male circumcision being cost effective and easy to implement, the practice of male circumcision is also a preferable means of reducing the spread of HIV in Zambia because male circumcision has long been embraced as a cultural norm. Tribes such as the Kaonde's and provinces like the North Western practice male circumcision in their initiation ceremonies. Being that as it may, the chances of the Zambian population embracing male circumcision are very high.²²⁶

- V. The government can also adopt an informed and measured approach based on public health and human rights. Criminalisation of the wilful transmission of HIV should be used as a measure of last resort only and should be specifically be applied in cases of intentional transmission. In a country like Zambia where discrimination against people living with HIV is very high, the risk to public health which will result from such criminalisation must outweigh the benefits of retribution in individual cases which is the main objective of the criminal laws in issue.²²⁷
- VI. Governments should strengthen and enforce laws against rape (inside and outside marriage), and other forms of violence against women and children; improve the efficacy of criminal justice systems in investigating and prosecuting sexual offences against women and children, and support women's equality and economic

²²⁴ I. Vincenzi and T. Mertens, Male Circumcision: A Role in HIV Prevention, <http://www.cirp.org/library/disease/HIV/vincenzi>. Accessed on 15th February, 2011.

²²⁵ I. Vincenzi and T. Mertens, Male Circumcision: A Role in HIV Prevention, at <http://www.cirp.org/library/disease/HIV/vincenzi>. Accessed on 15th February, 2011.

²²⁶ D. Bryden, Zambia Moving Fast to Scale up Male Circumcision, <http://sciencesoapeaksblog.org/2010/08/30>. Accessed on 15th February, 2011.

²²⁷ SAFAIDS. Criminalising HIV Transmission in Southern Africa: Fuelling the HIV Endemic? A Policy Brief produced by the SAFAIDS Policy Desk, 2009.

independence, including through concrete legislation, programmes and services.²²⁸ These are the most effective means by which to protect women and girls from HIV infection and should be given the highest priority. Such public health and legislative measures are necessary for States to realize their commitments to achieve universal access to HIV prevention, treatment, care, and support and to halt and begin to reverse the spread of HIV by the year 2015.²²⁹

- VII. If the Zambian government does insist on prosecuting persons who wilfully transmit the virus, it is advised that the current laws under the Penal Code²³⁰ should be used for such purpose. Laws under the penal code²³¹ that provide for the criminal liability for persons who intentionally cause harm to the person of another.²³² However, before utilising the provisions in the penal Code to criminalise the wilful transmission of HIV/AIDS, it is very important that Parliament makes necessary amendments to the provisions in question in order to avoid excessively punishing persons who are accused of wilfully transmitting AIDS.

²²⁸United Nations Development Plan. The Criminalisation of HIV AIDS, p.9-16.

²²⁹United Nations Development Plan. The Criminalisation of HIV AIDS, p.9-16.

²³⁰ Chapter 87 of the Laws of Zambia.

²³¹ Chapter 87 of the Laws of Zambia.

²³² Division IV, chapter 29 of the Penal Code, Cap 87 of the Laws of Zambia.

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