

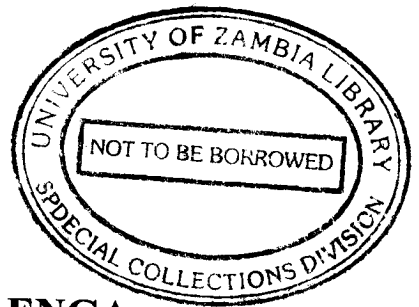
# THE UNIVERSITY OF ZAMBIA

## SCHOOL OF LAW

**THE LAW AND HIV TRANSMISSION:  
COMPULSORY STATE POWERS, PUBLIC HEALTH AND CIVIL LIBERTIES  
A GLOBAL OVERVIEW AND ANALYSIS.**

BY

**PETER MUNKANTA MULENGA**



Being a final year Dissertation submitted to the University of Zambia, School of Law, in partial fulfillment to the conditions for the award of the Degree of Bachelor of Laws (LLB)

UNIVERSITY OF ZAMBIA

DECEMBER 2005

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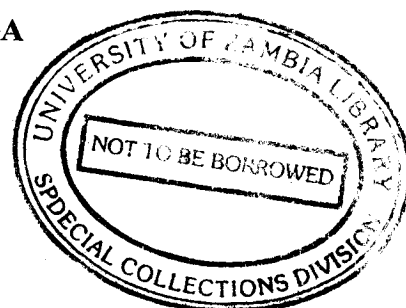
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Date: 9<sup>TH</sup> JANUARY, 2006

Supervisor: *Anne Chewe*

**MS. ANNE CHEWE**

## **DEDICATIONS**

I dedicate this work to my beloved parents, Mr. Steven Mwaba Mulenga and Mrs. Alice Munkanta Mulenga, who though are both deceased, yet their wise counsel and dedication to ensuring that I got a good educational foundation has enabled me to come this far in my education.

## **ACKNOWLEDGMENTS**

I first and foremost acknowledge the Almighty God for the grace he has given me in writing this paper.

I also acknowledge with deep gratitude the invaluable input of my supervisor, Ms. Anne Chewe, who took time to read and guide me as I wrote this paper.

I acknowledge, with a deep sense of indebtedness, the support and encouragement given me during my whole period of studying for this Bachelor of Laws at UNZA by my beloved friend IKC and also my brothers and sisters.

And lastly but not the least, to my lecturers who taught me during my stay in the school of law and my classmates I say, 'a big thank you for making my journey through this course a pleasant one.'

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## CASES

- 1) R v Ssenyonga, Ontario (Chief Medical Officer of Health) v Ssenyonga, [1991] OJ No 544 (QL).
- 2) R v Summer, 1989] AJ No 784 (QL).
- 3) R v Cuerrier [1998] 2 SCR 371 (Supreme Court of Canada).
- 4) Florida Blood Service Inc. vs. Rasmussen, 467 So.2d 798 at 802 (Fla Dist Ct App (1985)).
- 5) United States v Moore, 846 F 2d 1163 (8th Cir 1988).
- 6) The Moore [United States v Moore, 846 F.2d 1163]
- 7) State of Florida v Sherouse, 536 So 2d 1194 (Fla Dist CA, 1989).
- 8) People v Richards, 85-1715-FH (68th Dist Ct, Michigan),

## **STATUTES**

- 1) The National Health Services Act CAP 315 of the laws of Zambia
- 2) The Public Health Act CAP 295 of the laws of Zambia
- 3) The Employment Act CAP 268 of the laws of Zambia
- 4) The Zimbabwe Criminal Law Amendment Bill 1996
- 5) The South Australia Public and Environmental Health Act 1987
- 6) The United States Draft HIV; Prevention Bill 1997

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## ABSTRACT

For many people, the role of the law in the fight against HIV/AIDS is to be punitive. To ban conduct this might spread the virus. To isolate those who are already infected. To limit the travel of groups who might be at risk. To punish those who spread the virus and break the rules. The law has been used from ancient times in an attempt to shape society by controlling the conduct of its members. Anyone involved in the process of legal regulation will know the limited capacity of the law to deliver uniform responses from individuals in society - particularly in matters involving sexual activity and drug use. Yet the peril of HIV/AIDS, and the great risk which it presents to the human population in every part of the world, has prompted a range of legal responses which are frequently quite different from those which most ordinary citizens would see as necessary. *The object of these responses is the same: to prevent the spread of the virus by controlling human behaviour.* The issue presented by the dilemma of legal regulation in the context of HIV/AIDS is to find the strategy which best shapes a future society (and a future world) where the risks of HIV infection are minimised.

This paper will review those legal responses. It will do so against a background of a description of the AIDS epidemic and its rapid spread. As in any area of the law, it is essential to base legal responses - if they are to be effective - upon a good empirical understanding of the target to which it is hoped the law will attach. This paper will examine if there is any place for legal responses to the epidemic. With necessary brevity, it will outline some of the chief laws which have been enacted in various jurisdictions. The process of law enactment is continuing unrelentingly as the daunting size of the

problem and its terrible consequences for individuals, communities and nations are perceived by the public and their representatives.

Hence Chapter one looks at the proscriptive and protective roles of the law.

Chapter two looks at the question of HIV specific laws whether or not they are a necessity or hindrance in the fight to control HIV transmission. In particular, objectives of using criminal law, viz. incapacitation, rehabilitation, retribution and deterrence, Public health law as an alternative to criminalization, Elements of Public laws, Application of criminal law: which approach? Which acts? Will be looked at in some greater detail.

Chapter three looks at the effects of HIV/AIDS laws on HIV positive people and in particular the Infringements of human rights, Reinforcement of HIV/AIDS-related stigma, Risk of selective prosecution and Invasions of privacy.

Chapter four makes some recommendations to the Zambian Government and Concludes.

## CHAPTER ONE

### Introduction

The Human Immune-deficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) have for the past two decades continued to spread across continents killing millions of adults in their prime, disrupting and depriving families, turning millions of children into orphans, weakening the workforce and threatening the social and economic fabric of communities. The total number of people living with the human immunodeficiency virus (HIV) rose in 2005 to reach its highest level ever: an estimated 40.3 million [36.7 million–45.3 million] people are living with the virus. This figure includes the 4.9 million [4.3 million–6.6 million] people who acquired HIV in 2005. The global AIDS epidemic killed 3.1 million [2.8 million–3.6 million] people in the past year.<sup>1</sup>

Sub-Saharan Africa remains by far the worst affected region, with 25.8 million [23.8 million–28.9 million] people living with HIV at the end of 2005, compared to 24.9 million [23.0 million–27.9 million] in 2003. Just under two thirds (64%) of all people living with HIV are in sub-Saharan Africa, as are more than three quarters (77%) of all women living with HIV.<sup>2</sup>

In Zambia whose population now stands at 10.3 million people (Census 2000), about 16% of the adult population aged between 15-49 years is living with HIV.<sup>3</sup> The peak ages for HIV among females are 30 to 34 years (22%) while that for males is 35 to 39 years (29%). Approximately 40% of babies born to HIV positive mothers are infected with the virus.<sup>4</sup>

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<sup>1</sup> AIDS epidemic update from the UNAIDS/WHO 2005 report

<sup>2</sup> Ibid.

<sup>3</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May, 2004

<sup>4</sup> Ibid

Between 2001 and 2002, 8% of rural men population and 12.5% of rural women population and 19% of urban men population and 26.5% of urban women population were living with the HIV virus in Zambia.<sup>5</sup>

Faced with this life threatening problem that has struck the world and has spread like wildfire and whose main modes of transmission are known, we have palliatives that will arrest some of its debilitating manifestations. But we have no cure! The most that the scientists presently hope for is that one day HIV will be like diabetes: controlled but never cured. Always a peril with the infected and to those they may infect. One of the palliatives that has been proposed and used in some jurisdictions to arrest the spread and transmission of the HIV/AIDS is the law.

Law defines the rights and responsibilities of the people who live together in a society. Law also establishes names and categorizes penalties for acts that breach rights or ignore responsibilities. It is made up of statutes (also known as “Acts”) passed by legislatures, regulations made by people to whom the legislature has given the power to do so, and court decisions interpreting and applying statutes and regulations.

Zambia’s current legal system has no single piece of legislation that specifically deals with the problem of HIV/AIDS. Existing pieces of legislation which can possibly be used to

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<sup>5</sup> Zambia Demographic and Health Survey 2001-2002)

address HIV/AIDS like the National Health Services Act<sup>6</sup>, the Public Health Act<sup>7</sup>, and the Employment Act<sup>8</sup> are inadequate and need amendment if they are to effectively deal with this life threatening situation and the issues arising there from like protecting the rights of the HIV positive people. Section 28 of the Employment Act for instance, requires that a qualified medical officer shall medically examine every employee before he/she enters into a contract of service of at least six months' duration. The purpose of the examination is to ascertain the fitness of the employee to undertake the work that he/she is required to do. Although the Act does not require that prospective employees be tested for HIV/AIDS, some employers still request mandatory testing. Prospective employees usually comply, as there is no law to protect them.

This lack of appropriate legislation to deal with the HIV/AIDS problem has been acknowledged in the draft *Zambian National HIV/AIDS policy* that clearly states “*HIV/AIDS interventions by the Government and other stakeholders have, however, been undertaken in the absence of a national policy environment. This has resulted in dissipation of scarce health resources and lack of coordination of HIV/AIDS interventions by various stakeholders. The lack of a national policy and, consequently, policy direction, has, on the other hand, made it immensely difficult to effectively mainstream HIV/AIDS prevention and control in national development plans and programs.*”<sup>9</sup> The policy has clearly recognized the need to create a conducive legal framework for addressing the HIV/AIDS pandemic. “*An enabling legal and regulatory framework is an essential element of any effective strategy for*

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<sup>6</sup> CAP 315 of the laws of Zambia

<sup>7</sup> CAP 295 of the laws of Zambia

<sup>8</sup> CAP 268 of the laws of Zambia

*fighting HIV/AIDS. Cognizant of this fact, the Zambian Government shall ensure the effective implementation, monitoring and evaluation of the HIV/AIDS/STI/TB Act and amend and harmonise relevant pieces of legislation such as the National Health Services Act<sup>10</sup>, the Public Health Act<sup>11</sup>, and the Employment Act<sup>12</sup>.”<sup>13</sup>*

To address this lacuna in the law, the National HIV/AIDS/STI/TB Council Act, No.10 of 2002 was passed. This Act established the National HIV/AIDS/STI/TB Council whose function among other things is to “*coordinate and support the development, monitoring and evaluation of the multi-sectoral national response for the prevention and combating of the spread of HIV, AIDS...*”<sup>14</sup> and also to “*support the development and coordination of policies, plans and strategies for the prevention of HIV, AIDS...*”<sup>15</sup> As a result of this, the National HIV/AIDS/STI/TB Council has produced the draft National HIV/AIDS policy<sup>16</sup>. The policy among other things has identified as one of its objectives the need to legislate against individuals who deliberately and knowingly withhold their HIV status from their partners or spouses and also legislate against willful transmission of HIV/AIDS.<sup>17</sup>

From this objective, it is clear that from the perspective of the policy makers, one role that law should play in the fight against HIV/AIDS is to be proscriptive. To ban conduct that might spread the virus. To punish those who spread the virus and break the rules. The law

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<sup>9</sup> Ministry of Health, May, 2004, page 14

<sup>10</sup> CAP 315 of the laws of Zambia

<sup>11</sup> CAP 295 of the laws of Zambia

<sup>12</sup> CAP 268 of the laws of Zambia

<sup>13</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May, 2004, Chapter 8, H.2. 82, page 31

<sup>14</sup> S.(4)(1) of the National HIV/AIDS/STI/TB Council Act, No.10 of 2002

<sup>15</sup> S.(4)(2)(a) of the National HIV/AIDS/STI/TB Council Act, No.10 of 2002

<sup>16</sup> National HIV/AIDS Policy, Ministry of Health, May, 2004

<sup>17</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May, 2004, Chapter 5, E.8. 64, page 20

has been used from ancient times in an attempt to shape society by controlling the conduct of its members. Anyone involved in the process of legal regulation will know the limited capacity of the law to deliver uniform responses from individuals in society - particularly in matters involving sexual activity and drug use. Yet the peril of HIV/AIDS, and the great risk which it presents to the human population in every part of the world, has prompted a range of legal responses, which are frequently quite different from those, which most ordinary citizens would see as necessary. *The object of these responses is the same: to prevent the spread of the virus by controlling human behaviour.*

The issue presented by the dilemma of legal regulation in the context of HIV/AIDS is to find the strategy which best shapes a future society (and a future world) where the risks of HIV infection are minimised. This, from the start, has been the strategy, which the World Health Organisation (WHO) has adopted under the successive Director-Generals who have held office since AIDS became a global concern - Drs Mahler and Nakajima. It is the strategy, which has been implemented from Geneva by the successive Directors of the Global Programme on AIDS - Drs Jonathan Mann and Michael Merson. Virtually every country in the world has now enacted or is in the process of enacting laws designed to either reduce the spread of the virus or to deal with its various social consequences.

The precise definition of this role, however, has not always been given such careful attention and Zambian policy makers must be weary of this. We know that the legal response to HIV epidemic is important, but what should the legal response actually be? Can legislation, HIV-specific or otherwise, assist in strategies for the care and treatment of people with HIV and

help to reduce the spread of HIV? What has been the experience, a decade into the epidemic, in seeking legal remedies for HIV-related discrimination? Are legal sanctions ever helpful in bringing about the changes that will be necessary to respond effectively and appropriately to HIV?

These questions raise the need to recognize and distinguish between the different levels on which the law can operate, and which are seen with all their nuances in the context of HIV and AIDS policy. At one end of the spectrum is the role of the law, which follows an essentially proscriptive model, whereby certain forms of conduct are prohibited and made subject to criminal sanctions. The complex social and ethical dimensions of HIV, however, have called for more creative approaches to how law can contribute to HIV and AIDS policy. This requires an exploration of not only the proscriptive function of the law but also the ways in which the law can be used - or, on occasions, not used - in a constructive way to promote and reinforce the goals of HIV strategies.

In developing policy regarding the use of criminal sanctions or coercive measures under public health legislation, the Zambian Government officials and the judiciary should be cognizant of a number of principles: the best available scientific evidence regarding modes of HIV transmission and levels of risk must be the basis for rationally determining if, and when, conduct should attract criminal liability; preventing the transmission of HIV should be the primary objective and this, rather than any other objective, should guide policy-makers in this area; any legal or policy responses to HIV/AIDS, particularly the coercive use of state power, should not only be pragmatic in the overall pursuit of public health but should also conform to international human rights norms, particularly the principles of non-

discrimination and of due process; state action that infringes on human rights must be adequately justified, such that policy-makers should always undertake an assessment of the impact of law or policy on human rights, and should prefer the 'least intrusive' measures possible to achieve the demonstrably justified objective of preventing disease transmission.

At this point in the epidemic, with the experience of a decade of different legal responses to HIV to reflect upon, it is constructive to analyze the various models by which the law can be incorporated into HIV and AIDS policy. Two main models will be analyzed here. The first is the traditional proscriptive model that penalizes certain forms of conduct. The second model focuses on the protective function of the law and the need to uphold the rights and interests of particular classes of people, notably those infected with HIV or at risk of infection. Both these models have been widely used in responses to HIV epidemic to date.

The distinction between these two different models is not always clear-cut and a particular legal intervention may display elements of more than one model. However, an understanding of the distinctions is important in order to identify clearly what is sought to be achieved by a proposed legal intervention. This analysis can guide any decisions about when we should intervene using the force of law and when, in the interests of certain policy objectives, we should refrain. Unless these different roles are recognized, there is a risk that the full potential of the law to assist HIV and AIDS policy will be overlooked or, worse, that the law may actively obstruct an appropriate response to the HIV epidemic.

## **The proscriptive role of the law**

The impact of the law in its proscriptive mode on HIV and AIDS policy became apparent very early in the epidemic because of the particular epidemiology of HIV infection in developed countries. The two groups most affected by HIV in the West --homosexual men and injecting drug users -- were people whose sexual or drug-using activities constituted (and in some cases still constitute) a criminal offense in many jurisdictions. The existence of these criminal sanctions meant that legal concerns were drawn into the policy debate right from the outset. Our response to the activities that place people at risk of HIV infection have to be formulated in the context of legal prohibitions on these activities.

Since exposure to HIV infection may lead to AIDS which is plainly life threatening, it is a legitimate purpose of the law to endeavour to protect individuals, communities and nations from the spread of the virus. Although the criminal law operates imperfectly, it sometimes has a symbolic value. It can state conduct, which is punishable and hence is not approved of by society. Various theories exist to justify the stigmatisation of conduct by criminal law. According to one theory it is enough that the conduct offends the moral sense of most members of society. This was the traditional basis for laws penalising adult homosexual conduct, even though there was no complaining victim. With the spread of HIV there is the risk of serious actual harm to individuals. This invokes the other goal underpinning criminal law: to protect the individual and the community of individuals from serious harm.

Criminal sanctions are perceived as serving four primary functions. The first is to incapacitate the offender from harming anyone else during the term of his or her imprisonment. The second is to rehabilitate the offender, enabling him/her to change his/her future behaviour so as to avoid harming others. The third is to impose retribution for wrongdoing—to punish for the sake of punishing. The fourth function is to deter the individual offender and others from engaging in the prohibited conduct in the future.

### **The protective role of law**

A second model for the role of law in HIV and AIDS policy focus upon how the law can protect individuals or classes of individuals from harmful and undesirable occurrences. This model has been of central importance in the context of the legal response to HIV because of the proliferation of discrimination against people with HIV<sup>18</sup> and because of the increasing recognition both nationally and internationally, of the interplay between AIDS and human rights<sup>19</sup>. Accordingly, legal instruments such as human rights and anti-discrimination legislation that embody the protective role of the law have been proposed as practical and effective ways in which the law can assist HIV and AIDS policy.

In order to be effective, laws that protect individual rights and interests must incorporate a proscriptive element that imposes certain penalties for non-compliance, but they are not essentially proscriptive in their thrust. Equal opportunity legislation, for example, may

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<sup>18</sup> Tindall et al, 1990; Gostin, 1990; and Somerville et al, 1989

<sup>19</sup> United Nations Centre for Human Rights, 1991; and World Health Assembly, 1988

prohibit certain conduct on the part of employers, landlords and others that is held to amount to unlawful discrimination, but the philosophy underpinning the legislation is that of protecting individuals against discrimination. The objective of the legislation is positive rather than negative: to engender respect for individuals and to promote human rights rather than merely to impose a prohibition on, for example, homosexual activity. It could be conceded that the distinction is one of emphasis rather than degree, but there is nonetheless an important conceptual shift between, on the one hand, regarding the role of the law as that of enforcing legal prohibitions and, on the other hand, viewing it as a mechanism for promoting and protecting individual rights.

The legal response to HIV has drawn on the protective role of the law in many ways, but two protective functions of the law have been dominant, namely protection against discrimination and the protection of confidentiality for people with HIV or suspected HIV infection. This fact has been realized and incorporated in the draft *Zambian National HIV/AIDS policy* that states that “*HIV/AIDS negatively touches and impacts fundamental human rights...indeed, it has now been established that there is correlation between the HIV/AIDS pandemic and the enjoyment of human rights*”.<sup>20</sup> Hence the policy identifies as one of its objectives to ensure that the rights of HIV infected and affected people are protected and stigma and discrimination are eliminated. Judges have been called upon to decide whether pre-existing human rights legislation can or should be given a sufficiently broad interpretation to cover

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<sup>20</sup> Draft *Zambia National HIV/AIDS Policy*, Ministry of Health, May, 2004, Chapter 2, B.6. 43, page 11

new circumstances presented by HIV-related discrimination<sup>21</sup>. Consideration has been given to drawing upon international human rights conventions and declarations embodied in international law to strengthen human rights protection within domestic legal frameworks. The policy has set as one of its objectives to ensure that Zambia complies with international practices in its interventions against the HIV/AIDS pandemic and treatment of infected and affected people.<sup>22</sup> Given the global nature of the HIV/AIDS pandemic, the Government has under taken to ensure that it domestics in its statutes all international agreements, conventions and declarations in respect of HIV/AIDS.<sup>23</sup>

In relation to protection of confidentiality, the law should for example, be invoked to uphold obligations of confidentiality relating to information about HIV status obtained by a hospital and in some cases to justify withholding the identity of an HIV-infected blood donor.

These examples are not intended to suggest that the law has necessarily been exemplary in this context, for indeed many would argue that the law has fallen far short of what is required to protect the interests of people with HIV. Moreover, legal protection in theory may not translate into legal protection in practice if the legal process is too cumbersome, time-consuming or costly to enable people with HIV to exercise their legal rights. Legal remedies that apply in the event of unjustified discrimination or breaches of confidentiality must also be recognized as dealing only with the symptoms of the problem and not with the cause which lies with community prejudice and lack of sensitivity to the rights and needs of people

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<sup>21</sup> Gostin, 1990

<sup>22</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May, 2004, Chapter 5, E.1. Page 17

<sup>23</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May 2004, Chapter 5, E.1. 57, page 17

*with HIV. Even bearing these limitations in mind, however, the examples described above nevertheless demonstrate the extent to which the model of the law as a protective instrument has been incorporated into the response to HIV epidemic.*

It must be recognized that both the proscriptive and the protective model for legal intervention involve fundamental value judgments and, often, value conflicts in relation to what should be protected and what prohibited. As a result, each model operates on two levels, first by defining specific legal rights and obligations, and second by creating or reflecting certain values and rejecting others. These statements of values, which are inherent in the law, can influence and shape other policy responses.

The distinction between the proscriptive and the protective roles of the law is important because it assists in determining whether active legal intervention is an appropriate policy response. While proscriptive and coercive laws may be counterproductive if they discourage the voluntary participation by people at risk of HIV in measures to reduce HIV transmission, protective laws may help to enlist the support and cooperation of these people in prevention strategies. Thus, although decriminalization or the absence of law may be what is sought within the context of the proscriptive legal model, decisive and firm legal intervention may be what is primarily sought to be achieved by a particular legal intervention.

## CHAPTER TWO

### HIV SPECIFIC LAWS: A NECESSITY OR HINDRANCE TO HIV TRANSMISSION

#### Introduction

*"It is trite that law cannot be a panacea for all social ills. Before invoking the rough instrument of the criminal law we must be sure that it will have some impact on the problem at hand. We must also be satisfied that on balance the use of criminal law will not be counter-productive, that it will not "do more harm than good."<sup>24</sup>*

*"Coercive interventions are not ... going to have a significant impact on the epidemiology of the epidemic."<sup>25</sup>*

This chapter examines whether there is a role for criminal law in dealing with situations involving HIV transmission.

The first section (Functions of Criminal Law) analyzes the following question:

- Are the goals the criminal law is said to serve (retribution, denunciation, incapacitation, rehabilitation, and deterrence) appropriate in the HIV/AIDS context?
- If so, will these goals in fact be furthered by imposing criminal sanctions?

The second section analyzes whether public health laws offer an alternative to criminal law in situations involving the risk of spread of HIV (Public Health Law as an Alternative). The section

- first details functions of public health law;
- then asks whether public health law can achieve the goals of criminalization; and finally

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<sup>24</sup> WH Holland. HIV/AIDS and the Criminal Law. *Criminal Law Quarterly* 1994; 36(3): 279 at 316.

<sup>25</sup> Interview with D McKeown, Medical Officer of Health (City of Toronto), 7 February 1996.

- addresses the application of criminal law in terms of approach, acts and state of mind.

The chapter concludes by looking at whether it is necessary to enact HIV-specific legislation or simply apply the already existing criminal law with examples of some countries that have enacted HIV specific legislation and some that have opted to use the already existing criminal and public health laws.

### **Functions of Criminal Law**

In considering whether the criminal law should be invoked as a response to HIV transmission, we must first examine the goals the criminal law is said to serve: are these goals appropriate in the HIV/AIDS context, and if so, will they in fact be furthered by imposing criminal sanctions? This section analyzes these questions, concluding that the retributivist and deterrent functions of criminal law offer the only significant arguments in favour of using the criminal law to address activity that does or may transmit HIV.

### **Retribution**

One justification for criminalizing certain conduct is that it deserves punishment because it is morally blameworthy (e.g., it unjustifiably causes or risks harming others), and therefore society is justified in imposing penalties on those who engage in such conduct.

In Shekter's view,

*“[i]t is difficult to argue against the proposition that one who, maliciously and intentionally, and with full knowledge of his/her seropositive status, attempts to transmit the virus through acts of either sexual intercourse or the sharing of contaminated drug paraphernalia merits criminal prosecution. The intentional infliction of physical injury or disease is something that*

*must be accepted as being universally abhorrent. This writer sees merit in the argument that, despite the potential availability of alternative remedies under public health legislation, the criminal law, in those specific instances, has a definite role to play.”*<sup>26</sup>

This comment reflects the retributivist rationale for criminalisation: conduct that is deserving of punishment, in the sense of being morally blameworthy, should be subject to criminal sanctions.

However, this retributivist argument can only justify criminal sanctions in those cases where the conduct is clearly morally blameworthy and thus deserving of punishment. Therefore, it is necessary to consider the state of the mind of the accused person: it is the "guilty mind" directing the prohibited conduct that is the legitimate subject of punishment. Criminalizing conduct where there is no "guilty mind", and hence no moral culpability, cannot be justified on the basis that punishment is morally deserved. For example, it would be unjustifiable (indeed immoral) to criminally prosecute a person for transmitting HIV when they were unaware of their own infection. At best, the objective of punishment sustains a limited application of the criminal law to conduct that is morally wrong, and even then, not every morally wrong act should also be defined as a crime.

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<sup>26</sup> RH Shekter. The Criminalization of AIDS in Canada. In: Canadian Bar Association - Ontario (Continuing Legal Education). AIDS. Toronto: The Association, proceedings of a workshop held on 24 October 1992.

## **Incapacitation**

One argument for criminalization has been that incarcerating the offender prevents him or her from doing further harm, at least while imprisoned:

*“Protection of society is a well-recognized aim of sentencing. Individuals who are convicted and incarcerated will be effectively quarantined for a period of time. Irresponsible individuals who, despite awareness of being infected, continue to enter into sexual relationships with unsuspecting partners must be controlled.”<sup>27</sup>*

## **Rehabilitation**

Enabling individuals to take measures to reduce the risk of HIV transmission is ultimately the most important goal. But given the nature of sexual activity and drug use – which account for most cases of HIV transmission – the argument that criminalization serves the goal of rehabilitation is highly dubious. It must be questioned whether criminal prosecutions and penalties serve any significant rehabilitative function for any significant portion of offenders.

There is a vast literature in the fields of criminology, psychology, and social sciences on this point, and there are few clear-cut answers to this question. There is little support for the proposition that criminal prosecutions and penalties serve any significant rehabilitative function, although one commentator is of a different view:

*“Ordinarily, the criminal law and punitive sanctions have no place in regulating the sexual activities of the nation. These are primarily a matter for the individual and not for the State. However, an absolutist approach would permit individuals who culpably (intentionally or*

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<sup>27</sup> WH Holland. HIV/AIDS and the Criminal Law. *Criminal Law Quarterly* 1994; 36(3): 279 at 316.

*recklessly) transmitted the virus to escape liability. Criminal sanctions stigmatise, but they also permit rehabilitation.”*<sup>28</sup>

However, in the context of HIV/AIDS the proposition that the criminal law serves a rehabilitative function receives little, if any, acclaim. Rehabilitation is a complicated matter, and it simply cannot be accepted without question that criminalizing risky sex or needle-sharing practices by HIV-positive people will bring about "rehabilitation" in the sense of preventing such behaviour in future. There is widespread agreement that counseling and support are far more effective means of encouraging long-term changes in risk-taking behaviour by someone who has engaged in risky sex or needle-sharing activities.

### **Deterrence**

The most common argument for criminalization is that it will serve to deter people from conduct that transmits, or risks transmitting, HIV. Unlike a retributivist rationale, deterrence is clearly motivated by public health concerns, because it claims that invoking the criminal law will prevent HIV transmission. This rationale for criminalizing risky conduct may hold some attraction on a theoretical level. But its practical significance is questionable. A deterrence rationale could more easily support a lower mens rea threshold because imposing criminal liability would not depend on finding the truly morally blameworthy state of mind that is the hallmark of retribution.

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<sup>28</sup> Crimes (Injuries) Amendment Act 1990, cited by: SH Bronitt. *Spreading Disease and the Criminal Law*. *Criminal Law Review* 1994: 21 at 33.

However, it is questionable whether the criminal law can or will have any significant deterrent effect on the conduct by which HIV is transmitted, and there is a serious concern that allowing criminal liability for negligent conduct (that which is sought to be deterred) may be more susceptible to the impact of assumptions and biases about the guilt of "high-risk group" members than a more stringent standard. This concern is further heightened in light of the objective test for finding negligence that has been established in Canadian criminal law.

*"If the threat of criminal liability elevates the consciousness of those capable of harming others through transmission of the virus, so that they forego dangerous activity, then the law will have achieved its goal."*<sup>29</sup>

"To the extent that criminal law is designed to exact retribution for past behavior, it is inappropriate as a means of protecting public health. But criminal law is also forward-looking; it seeks to deter individuals from engaging in future behavior as well."<sup>30</sup> Indeed, the goal of deterrence is generally recognized as more important than retribution.

### **Public Health Law as an Alternative to Criminalisation**

*"HIV is predominantly a health problem, and should be approached as such."*<sup>31</sup>

*"One reason people tend to accept uncritically criminalization of HIV is that they do not compare it to other possible methods of dealing with the problem."*<sup>32</sup>

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<sup>29</sup> SK Sullivan & MC Feldman. Imposing Criminal Liability on those who knowingly transmit the AIDS Virus: A Recommendation for Legislative Action. *University of Dayton Law Review* 1988; 13: 489 at 508-509.

<sup>30</sup> L Gostin. Traditional Public Health Strategies. In: HL Dalton, S Burris & Yale AIDS Law Project (eds). *AIDS and the Law: A Guide for the Public*. New Haven: Yale University Press, 1987, at 62.

<sup>31</sup> Interview with D McKeown, Medical Officer of Health (City of Toronto), 7 February 1996.

AIDS is undeniably a public health issue, and it is appropriate for the state to endeavour to protect public health by curbing the spread of the disease. While the primary purpose of this paper is to critically examine the use of the criminal law itself vis-à-vis the AIDS epidemic, the coercive power of the state may also appear in the public health context. As Friedman has noted:

*“There are those who would involve the legislature in averting a perceived menace to the public. What many do not realize is that the provincial and federal governments already have a formidable arsenal of weapons to stave off assaults on the general welfare in the form of powers granted under public health legislation.”*<sup>33</sup>

Indeed, some legislative provisions may appropriately be considered quasi-criminal because they invoke the state's police power in pursuit of public health goals.

### **Functions of Public Health**

Public health law, while varying from jurisdiction to jurisdiction, generally performs three primary functions:

- classifying transmissible diseases to which the statutory provisions apply; in Zambia, the Public Health Act provides that, *“infectious disease means any disease (not including any venereal disease except gonorrhoeal ophthalmia) which can be communicated directly or indirectly by any person suffering therefrom to any other person”*<sup>34</sup> and *“the provisions of this Act, unless otherwise expressed, shall, so far as they concern notifiable infectious*

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<sup>32</sup> MA Bobinski, in Closen et al

<sup>33</sup> R Friedman. The Application of Canadian Public Health Law to AIDS. Health Law in Canada 1988-89; 9: 49 at 49.

<sup>34</sup> CAP295 of the Laws of Zambia, s.2

*diseases, apply to anthrax, black water fever, epidemic cerebral-spinal meningitis...and yellow fever.*"<sup>35</sup>

- imposing obligations on certain persons (such as an obligation to seek medical treatment upon suspicion of infection, or an obligation on classes of persons such as health-care workers or teachers to report known or suspected cases of specified diseases); in Zambia, the Public Health Act provides that "*the Minister may, in respect of the notification of infectious disease, by statutory instrument, make regulations as to-(a) the duties of owners or occupiers of land, the owners or managers of mines, employers of labour and all chiefs or headmen or others in regard to reporting the occurrence of any infectious disease...*"<sup>36</sup> and
- granting health authorities wide powers to be exercised for the protection of public health. In Zambia, the Public Health Act provides that, "*A medical officer of health may at any time enter and inspect any premises in which he has reason to believe that any person suffering or who has recently suffered any infectious disease is or has recently suffered from any infectious disease is or has recently been present, or inmate of which has recently been exposed to the infection of the infectious disease, and may medically examine any person in such premises for the purpose of ascertaining whether such person is suffering or has recently suffered from any such disease.*"<sup>37</sup>

Such powers generally include the authority to compel the examination and/or medical treatment of persons suspected of being infected with a transmissible disease<sup>38</sup> and the power

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<sup>35</sup> Ibid, s.9

<sup>36</sup> Ibid, s.12

<sup>37</sup> Ibid, s.15

<sup>38</sup> Ibid, s.15

to order infected persons to conduct themselves so as to avoid infecting others<sup>39</sup>. All jurisdictions grant health authorities powers of detention to prevent the spread of transmissible diseases.<sup>40</sup> The precise powers, and the diseases to which they apply, vary by jurisdiction. The Zambia Public Health Act states that,

*“Where in the opinion of the Medical Officer of Health any person certified by a medical practitioner to be suffering from an infectious disease, or any person suffering from venereal disease in a communicable form, is not accommodated or is not being treated or nursed in such a manner as adequately to guard against the spread of the disease, such person may, on the order of the Medical Officer of Health, be detained in or removed to hospital or any temporary place which in the opinion of the Medical Officer of Health is suitable for the reception of the infectious sick and there detained until such Medical Officer of Health or any medical practitioner duly authorized thereto by the Minister is satisfied that he is free from infection or can be discharged without danger to the public health.”*<sup>41</sup>

**Isolation or Detention**

Isolation, whether disease- or behavior-based, is a uniquely serious form of deprivation of liberty because it can be utilized against a competent and unwilling person without criminal conviction. It fully restricts the personal liberty of a rational adult, not out of concern for that person's welfare, but out of concern for the welfare of others.<sup>42</sup>

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<sup>39</sup> Ibid, s.22

<sup>40</sup> Ibid, s.20

<sup>41</sup> Ibid, s.20

<sup>42</sup> See L Gostin. The Politics of AIDS. Ohio State Law Journal 1989; 49: 1017.

Where public health statutes provide for the detention of an infected person who contravenes orders issued to prevent the transmission of disease, some statutes specify (and it would be ordinary practice) that the individual in question is to be detained in a hospital.<sup>43</sup> The focus is on the promotion of health. Ontario's Chief Medical Officer of Health invoked this in 1990, in support of his controversial request to the Minister of Health that AIDS be classified as a "virulent" disease.<sup>44</sup> He argued that without such power, there is a danger that (AIDS) will become "criminalized." It has already happened in Canada that individuals with HIV infection who have transmitted the disease have become incarcerated. It is more appropriate to detain such individuals in a health-care setting than in prison.<sup>45</sup>

While detention in hospital is certainly preferable to detention in a correctional facility, there is considerable opposition to the designation of HIV as "virulent."<sup>46</sup>

### **Use of Public Health Orders**

In the case of *R v Ssenyonga*,<sup>47</sup> prior to being criminally charged, the accused had been ordered by a medical officer of health not to engage in certain sexual activities. Believing that Ssenyonga had contravened this order, Ontario's Chief Medical Officer of Health applied

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<sup>43</sup> Section 20 of CAP295 of the laws of Zambia.

<sup>44</sup> Such a reclassification would permit a medical officer of health who has issued an order that a person isolate him/herself or "conduct himself or herself in such a manner as not to expose another person to infection" (s 22), to seek a provincial court order that the person who has breached the MOH's order be "taken into custody and detained in a hospital" and "be treated for the disease": s 35(3).

<sup>45</sup> C McLaren. Quarantine urged for AIDS scofflaws by Ontario official. *The Globe and Mail* 8 February 1990.

<sup>46</sup> (1) Ontario Advisory Committee on HIV/AIDS. *Reducing HIV Transmission by People Who Are Unwilling or Unable to Take Appropriate Precautions*. Toronto: AIDS Bureau, September 1995; (2) Ontario Advisory Committee on HIV/AIDS. *Reducing Transmission by People with HIV Who Are Unwilling or Unable to Take Appropriate Precautions*. Toronto: AIDS Bureau, September 1996. For a summary of the 1995 version, see R Elliott. Public Health and "The Unwilling and Unable." *Canadian HIV/AIDS Policy & Law Newsletter* 1996; 2(3): 1, 29-30.

<sup>47</sup> Ontario (Chief Medical Officer of Health) v Ssenyonga, [1991] OJ No 544 (QL).

for, and was granted, a court order restraining Ssenyonga from contravening the original order. Shortly thereafter, Ssenyonga was detained and criminally charged.

In a similar case of *R v Summer*,<sup>48</sup> the provisions of the Alberta statute were used to detain the accused.<sup>49</sup>

### **Can Public Health Law Achieve the Goals of Criminalization?**

*"At least there is some clarity that protection of the public health is the mandate of public health law, whereas it's up for debate whether this is the function of criminal law."*<sup>50</sup>

*'If the ultimate goal is to protect public health, then why use criminal law, which isn't designed for this, when we have public health law as an option?'*<sup>51</sup>

Public health interventions require, of course that public health authorities be aware of the individual and his/her conduct that is risking HIV transmission. Indeed, encouraging access to HIV testing is a principal mechanism for engaging those infected, or at risk of infection, with the public health system; it opens the door to education, counselling, support, partner notification, and if necessary, more serious measures to prevent further transmission. In some cases, however, a course of conduct that has transmitted HIV or exposed others to the risk of infection only comes to the attention of public health authorities after the fact. This does not preclude interventions at that time to prevent further exposures. Nonetheless, it remains the case that conduct that could give rise to a criminal prosecution may have already been

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<sup>48</sup> 1989] AJ No 784 (QL).

<sup>49</sup> C McLaren. Quarantine urged for AIDS scofflaws by Ontario official. The Globe and Mail 8 February 1990.

<sup>50</sup> J Plater, Hemophilia Ontario, interview, 1 February 1996.

<sup>51</sup> Interview with M Battista, Vice-Chair of the Board of Directors, AIDS Committee of Toronto, 9 February 1996.

committed. In such cases, should a complainant, police and/or prosecutors decide to proceed with criminal charges, the mere fact that future conduct could be better addressed by public health interventions does not preclude the possibility of prosecution for conduct that has already occurred.

It should also be acknowledged that public health law might not be able to satisfactorily address all cases of ongoing risky conduct. However, this does not negate the value of a graduated approach that rests upon the principle of "least intrusive, most effective" in the use of state power. The limits of public health law will depend on the extent to which it incorporates the possibility of coercive measures for the most egregious of cases. As has been noted, quasi-criminal measures (such as penalties for breaching public health orders and the power to detain a person who continues to place others at significant risk of infection), are just as effective as a traditional criminal prosecution and sentence of incarceration, while at the same time offering benefits such as greater confidentiality and detention in a more appropriate facility (if available). If such measures are available under public health legislation, only the objective of imposing *retribution* remains (partially) unsatisfied by refraining from criminal prosecutions.

Finally, as a point of particular significance for developing countries, it should be noted that public health interventions of the order described above may not always be a realistic mechanism for responding to conduct that causes or risks HIV transmission. The resources needed to staff and sustain a public health system, and accompanying services to address

issues such as drug addiction, domestic violence, intellectual disability, mental illness, or poverty may simply be unavailable in many developing countries (indeed, they are often stretched in wealthier countries). Furthermore, while it is a virtue of public health interventions that they may be tailored to address individuals' circumstances so as to address conduct that risks infecting others, the cost of doing so may be greater when the underlying reasons are less individualized, and instead represent deeply-entrenched societal norms that are less subject to change by the individual (e.g., subordination of women and denial of their sexual autonomy, women's lack of economic autonomy).

### **Applying the criminal law: Which approach? Which acts? Which states of mind?**

Given the points noted above, in situations where criminalization is deemed an option, public health measures should be exhausted first before resorting to criminal sanctions. However, any application of the criminal law should be informed by the guiding principles outlined at the outset, namely: preventing HIV transmission is the primary objective; decisions should be based on the best available evidence; respect for human rights; and infringements of human rights require adequate justification.

Guided by these principles, policy-makers must address at least three major questions in determining the parameters of criminalization:

Should HIV-specific legislation be enacted instead of using general offences?

Which acts should be subject to criminal prohibition?

What degree of mental culpability should be required for criminal liability?

## **HIV-specific legislation vs. application of general offences**

Two different approaches to criminalization are possible. The first approach is to apply existing criminal law offences (e.g. assault, criminal negligence causing harm, endangering public health, etc.) to conduct that transmit HIV or risks transmission. Depending on the law in a given jurisdiction, this might be an offence found in a criminal or penal code, or might be found in a separate public health statute. The appropriate offence would depend upon the conduct in question and the provable mental state of the accused. Such an approach means that prosecutorial initiative and judicial interpretation of traditional criminal offences, in response to specific complaints, will shape the contours of the criminal law's application to HIV transmission/exposure.

The second approach is to enact legislation that specifically prohibits and penalizes, as an offence under criminal or public health statutes, certain specified conduct that transmits or may transmit HIV. This approach means that criminalization is at the initiative of legislators (which may or may not be in response to particular cases), and the contours of the law are more directly defined.

Examples of both approaches are found across legal systems and in both developing and industrialized countries. The approach of enacting HIV-specific criminal statutes has been particularly common in various jurisdictions including the United States, following the 1988 report of a presidential commission.

In Zimbabwe, Clause 14 of the Zimbabwe Criminal Law Amendment Bill 1996

"Deliberate Transmission of HIV states the following;

*"14.(1) Any person who, having actual knowledge that he is infected with HIV, intentionally does anything or permits the doing of anything which he knows or ought reasonably to know*

*(a) will infect another person with HIV; or*

*(b) is likely to lead to another person becoming infected with HIV; shall be guilty of an offence and liable to imprisonment for a period not exceeding fifteen years."*

Section 37 of the South Australia Public and Environmental Health Act 1987 states that

*"Persons infected with disease must prevent transmission to others"*

*37.(1) A person infected with a controlled notifiable disease shall take all reasonable measures to prevent transmission of the disease to others. Penalty: Division 3 fine".<sup>52</sup>*

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<sup>52</sup> The Australian position is that "AIDS" and "AIDS-Related Complex" (the severe symptomatic phase of HIV infection) have been designated as controlled notifiable diseases for the purposes of the Act (HIV infection is not of itself notifiable). The penalty for contravening this provision is \$10 000,00. Proceedings in terms of this section cannot be commenced except upon the complaint of an authorised officer; the chief executive officer of a local council; a member of the police force; or a person acting on the written authority of the relevant Minister. This is an example of legislation aimed at harmful HIV-related behaviour which is not HIV-specific. (Note that in South Africa neither AIDS nor HIV is currently notifiable medical conditions.)

Sections 2 and 4 of the United States Draft HIV; Prevention Bill 1997

"Section 2. Findings:

*"2. The Congress finds as follows:...*

*(5) Individuals with HIV disease have an obligation to protect others from being exposed to HIV by avoiding behaviors that place others at risk of becoming infected. The States should have in effect laws providing that intentionally infecting others with HIV is a felony."*

***"Section 4. Sense of Congress regarding intentional transmission of HIV***

*It is the sense of the Congress that the states should have in effect laws providing that, in the case of an individual who knows, that he or she has HIV disease, it is a felony for the individual to infect another with HIV if the individual engages in the behaviours involved with the intent of so infecting the other individual."*<sup>53</sup>

This has not, however, prevented the use of other pre-existing offences as well. In contrast: proposals to amend the Canadian Criminal Code to create HIV-specific offences have been rejected (indeed a previous section prohibiting the transmission of 'venereal disease' was repealed in 1985), and the development of criminal law in relation to HIV transmission/exposure has proceeded through judicial interpretation of traditional offences.<sup>54</sup>

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<sup>53</sup> "Felonies" (serious crimes such as murder and arson) are distinguished from "misdemeanors" (offences generally less heinous than felonies) in American criminal law.

<sup>54</sup> Elliott R, Criminal Law and HIV/AIDS: Final Report. Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997 (via [www.aidslaw.ca](http://www.aidslaw.ca)).

In the United Kingdom, there is no unified penal code, and there is currently no HIV-specific statute; recent proposals for law reform in the area of criminal law, consent, and offences against the person do not appear to single out HIV for specific treatment.<sup>55</sup>

In Australia, there is considerable variance between states: both criminal and public health HIV-specific offences have been enacted in some states; in others, criminal law is only partly codified, with common law offences remaining in effect.

In South Africa, the Law Commission has recommended against creating a specific offence aimed at “AIDS-related behaviour”.<sup>56</sup>

In Sweden, there is no HIV-specific criminal offence; the public health statute provides for coercive measures including compulsory isolation orders, if necessary, after trying to obtain voluntary compliance.<sup>57</sup>

Malawi’s penal code contains an offence relating to negligent conduct likely to spread a disease endangering life.<sup>58</sup>

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<sup>55</sup> Law Commission. Consent in the Criminal Law (Consultation Paper No. 139). London: HMSO, 1995; Law Commission. Violence: Reforming the Offences against the Person Act, 1861 (consultation document). 1998.

<sup>56</sup> South African Law Commission. Fifth Interim Report on Aspects of the Law Relating to AIDS: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour (April 2001) (via: [www.law.wits.ac.za/salc/salc.html](http://www.law.wits.ac.za/salc/salc.html)).

<sup>57</sup> Communicable Diseases Act, SFS 1988: 1472.

<sup>58</sup> Correspondence from MM Katopola, Office of the Law Commission of Malawi, 7 February 2000.

There are two primary arguments in favour of enacting HIV-specific criminal statutes:

There is a potential for defining the prohibited conduct and punishment within the law rather than leaving this task to the courts in their interpretation of whether and how traditional offences apply to HIV transmission/exposure.

A carefully drafted statute could minimize the likelihood of judicial mis-definition of the criminal law, avoiding judicial waywardness resulting in the over-extension and inappropriate application of the law (and the attendant harms).

However, many arguments against the implementation of HIV-specific statutes have been raised.

Firstly, such statutes may be unnecessary. Existing criminal offences may be adequate in addressing conduct that is legitimately criminalized.

Secondly, creating a new offence could compound the problem of criminalization, if prosecutors treat a new criminal charge as an addition to traditional criminal law charges.

The benefit of a carefully and tightly drafted statute in preventing the misuse of the criminal law would be squandered unless such a statute also expressly ousts the applicability of other offences.

Thirdly, an HIV-specific statute would not have any additional deterrent effect over and above the deterrent effect (such as it may be) of criminal prosecution under traditional criminal offences.

Fourthly, and most significantly, the process of enacting such legislation could be damaging and single out people with HIV/AIDS as potential criminals. Contributing to the stigma

associated with HIV/AIDS would (further) deter HIV testing, undermine education efforts, and impede access to counselling and support services that would promote changes in behaviour to reduce the risk of HIV infection.

The United Nations' *International Guidelines on HIV/AIDS and Human Rights* recommend that: "*Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent, causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.*"<sup>59</sup>

### **Defining the prohibited conduct**

There are three important considerations in determining which physical acts may appropriately fall within the purview of the criminal law as it relates to conduct that transmit HIV/AIDS. The guiding principles and the policy considerations noted above suggest the answers to these questions.

#### **(1) Transmission vs. exposure**

Should criminal liability exist only where conduct actually results in HIV transmission, or should it extend to some conduct that risks transmitting HIV even if, in a given case, there is no actual transmission? Since preventing HIV transmission is the primary objective, it makes

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<sup>59</sup> *International Guidelines*, Guideline 4, para 29(a). Policy options Criminal Law, Public Health and HIV Transmission

most sense for the law to target conduct that creates a risk of transmission, rather than imposing criminal penalties only in those cases where the risk actually materializes.

## **(2) Degree of risk**

The degree of the risk of HIV transmission must also be considered in determining the physical acts to which the criminal law may apply. A consideration of the guiding principles, the rationales for criminalization, and the other relevant policy considerations strongly suggest that only conduct that carries a 'significant' risk of HIV transmission is legitimately the target of the criminal law. To extend the criminal law to actions that pose no significant risk of transmission is unwarranted, for a number of reasons:

- it trivializes the seriousness of criminal sanctions—society's harshest response to objectionable conduct;
- assuming the accused had the mental culpability that deserves punishment, it imposes a penalty disproportionate to the offence, harsher than that deserved by the offender;
- it discriminates against the accused person on the basis of his or her HIV status, rather than focusing on his or her conduct;
- it does not advance the primary objective of preventing HIV transmission, since the conduct in question carried no significant risk of transmission;
- it actually undermines the objective of preventing HIV transmission by perpetuating the misperception that the conduct must carry a significant risk of transmission because it has been targeted for criminal prosecution.

In determining what constitutes a ‘significant’ risk of HIV transmission for the purposes of criminal liability, states should be guided by the basic principles. Law and policy must rely on sound data regarding risk levels of various activities. Similarly, the principle of restraint in the use of coercive measures suggests that the criminal law is most appropriately used with regard to those acts that truly carry the highest risk of transmitting HIV, rather than those that carry a low or negligible risk.

### **3) The nature of the conduct: coercive vs. consensual Coercive conduct**

Conduct that risks transmitting HIV may be either coercive (e.g. rape, stabbing with a needle) or may be activity to which the participants are consenting (e.g. consensual sex, sharing injection equipment).

Physically assaultive conduct is criminal in itself, regardless of whether it carries any risk of HIV infection. Coerced participation in risky behaviour is not ‘consensual’ and should (where not already the case) be treated as criminal behaviour, not because the offender is HIV-positive, but because their conduct is coercive, violating their partner’s autonomy and physical and mental integrity. It is assaultive conduct, not the HIV status of the offender that is relevant in determining whether or not a crime has been committed. Criminalizing an offender on the basis of their HIV status, and not their conduct, would violate the right to non-discrimination. In some cases, the fact that the offender is HIV-positive may appropriately be considered an ‘aggravating’ factor because the conduct carried an additional risk of harming the victim of the assault by causing HIV infection. But not all assaultive conduct carries any significant risk of HIV transmission, and care must be taken to ensure that the criminal law is not misused in response to assaultive conduct by HIV-positive individuals.

### **Consensual conduct: deceit and non-disclosure**

Applying the criminal law to consensual activity that carries the risks of HIV transmission (e.g. sex, sharing injection equipment) is more problematic. The criminal law's ultimate concern is to prevent a person from harming others. In the absence of such a compelling reason, there is no justification for criminalizing consensual activity, as this infringes upon the right to privacy, to liberty, and to security of the person. Yet even the objective of preventing harm must be weighed against respect for each person's bodily autonomy; the right to liberty includes the right to risk harm to one's own self. Under what circumstances, if any, should the criminal law be applied to consensual conduct that risks transmitting HIV?

The question here is the meaning of "consent." Certainly the individual, who is aware of a partner's HIV infection and, with that knowledge, engages in sexual or needle-sharing activity that risks transmission is consenting to that risk of harm, even if there is a very significant risk. There is no justification for criminalizing the HIV-positive person whose partner consents to running this known risk. While the primary objective of invoking the criminal law must be to prevent HIV transmission, respect for autonomy dictates that the criminal law should have no role to play when individuals knowingly decide to engage in activities that risk their health. To do so would mean that people could not consent to engage in a whole host of other activities (e.g. sporting activities, medical procedures) in which they run a risk of harm. But the more difficult question is whether a person consents to engage in risky behaviour if they are unaware of their partner's HIV infection (and perhaps believe their partner to be HIV-negative). At one end of the spectrum, coercion makes participation in risk activities non-consensual by definition, regardless of whether or not there is

knowledge of HIV infection, and the imposition of criminal penalties is warranted. At the other end of the spectrum, full knowledge of risk makes participation clearly consensual, and there is no justification for criminalization.

At what point along the spectrum is it justified to invoke the criminal law where a person has less than 'full' knowledge? Should it be a criminal offence for a person who knows they are HIV-positive to obtain a partner's 'consent' to conduct that risks transmitting HIV by deceit—that is, actively misrepresenting the fact that he/she is HIV-negative? Should criminal liability extend further, imposing a positive obligation to disclose HIV infection to the other person who is 'consenting' to engage in activity that puts them at risk? It is suggested that criminal sanctions may be applied to cases of deceit, but that mere non-disclosure of HIV-positive status should not amount to a criminal offence.

However, in the absence of deceit, should the law criminalize the HIV-positive person who engages in an apparently consensual risky activity without disclosing his or her status?

In other words, should the criminal law impose a positive obligation to disclose HIV infection? Sexual activity, with any partner, always carries some risk of lesser or greater harm, be it unwanted pregnancy or disease. Unlike the case of coerced sex, which should attract criminal liability, a person engaging in non-coercive sex does not need to know the HIV status of the sexual partner in order to make meaningful choices. He or she may choose not to engage in certain sexual acts so as to avoid the higher degree of risk they pose, may choose to take preventive measures to lower the risk to a level they find acceptable (e.g. condom use), or may choose to engage in unprotected sex, aware that a risk of HIV

transmission may exist. Furthermore, unlike the case of deliberate deceit as to a partner's HIV status, in the case of simple non-disclosure he or she has not been misled into basing choices on willful misinformation.

While promoting respect for autonomy might justify criminal penalties for deliberate deceit, it is a weaker argument for criminalizing mere silence. While the person who does not know his or her partner's HIV status does not, by virtue of this, lose their ability to make autonomous decisions about risky activities, the HIV-positive person may well be inhibited from choosing to disclose their HIV status, particularly if they face the possibility of violence. In a decision directly considering the question of criminal liability for not disclosing HIV infection before unprotected sex, the Supreme Court of Canada has recognized the importance of restricting the application of the criminal law to cases where there was truly a "significant risk" of HIV transmission, and has also suggested that taking precautions such as condom use could be considered to lower the risk sufficiently that no criminal liability should arise for not disclosing HIV infection.<sup>60</sup>

### **Defining mental culpability**

While the criminal law (whether codified or determined by judicial interpretation) must define the conduct that is prohibited, it must also determine when that conduct is culpable and when it is innocent. Culpability is a question of the state of mind of the accused person at the time they engaged in the prohibited conduct.

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<sup>60</sup> R v Cuerrier [1998] 2 SCR 371 (Supreme Court of Canada).

### **(1) Levels of mental culpability**

Where to draw the line for criminal culpability is not always clear, and will partly depend upon the seriousness of the wrongdoing. The criminal law recognizes different degrees of mental culpability, and not all of them will justify criminal prosecution and punishment in all circumstances. In general, the law recognizes three levels of mental culpability:

**Intent:** From a legal perspective, a person *intentionally* commits a crime either when it is his or her *purpose* to commit it, or if he/she *knows* with some certainty that his or her conduct will bring about the prohibited result. The exact characterization of the degree of certainty required may vary across jurisdictions, even within jurisdictions sharing the same basic legal tradition.

**Recklessness:** A person is criminally *reckless* when he or she foresees that his or her conduct may cause the prohibited result but, nevertheless, takes a deliberate and unjustified risk of bringing it about. In other words, in order to be reckless, a person must be aware that their conduct carries a risk of harm, and *unjustifiably* run that risk.

**Negligence:** As a general rule, a person must either intentionally or recklessly commit an offence in order to be found guilty. Ordinarily, conduct that is merely negligent is not subject to criminal sanction (although it may attract civil liability). In a few circumstances, negligent conduct may attract criminal liability. In such cases, the person is deemed blameworthy and deserving of punishment because they failed to be aware of the possible harm from their conduct. However, even in such cases, generally it is *gross* negligence, and more than mere,

ordinary negligence, that must be proved in order for the individual in question to be judged guilty of a crime. In other words, the conduct must markedly deviate from the ordinary care that would have been exercised by a 'reasonable person.'

Cases of *intentional* transmission of HIV are relatively rare; it is not often that someone engages in risky behaviour (e.g. unprotected sex) for the *purpose* of infecting someone else, or with the certain *knowledge* that their conduct will transmit the virus. Such a degree of mental culpability is, however, the most clearly included in the scope of the criminal law.

Whether the criminal law should extend to *reckless* or *negligent* conduct in the context of HIV transmission/exposure is more questionable, and a number of factors must be considered: the degree of risk that should be legally defined as *unjustifiable*, such that running that level of risk could amount to criminal recklessness; when conduct amounts to a *substantial deviation* from the level of careful conduct that is expected of the ordinary, reasonable person, such that it can be considered criminally negligent.

Lowering the threshold for criminal liability below the *intentional* transmission of, or exposure to, HIV raises a concern about the potential for bias and prejudice to enter into the interpretation and application of the criminal law if liability rests on such difficult and loosely defined concepts.

There is, however, a significant risk that bias and arbitrariness will infect the process whenever *recklessness* is the applicable mental element in AIDS cases.... Concepts like *recklessness* and *negligence* assume a common psychology, a common set of concerns, and a common way of viewing the world. However, one of the realities spotlighted by the HIV

epidemic is that we do not always identify successfully with one another, or comprehend the lived experience of people very different from ourselves. Especially when sexual risk-taking is at issue, there is palpable risk that jurors will bring to the evaluative process pre-existing images of and attitudes towards the groups most closely identified with AIDS.... There is a risk that jurors will be predisposed to see HIV-positive defendants as *abnormal*, *deviant* and *reckless*.<sup>61</sup>

Hence the next chapter will proceed to consider the effects of HIV/AIDS laws on HIV positive people and in particular the following:

- Infringements of human rights
- Reinforcement of HIV/AIDS-related stigma
- Risk of selective prosecution
- Invasions of privacy

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<sup>61</sup> Dalton HL, "Criminal Law." In: S Burris et al. *AIDS Law Today: A New Guide for the Public*. New Haven: Yale University Press, 1993, at p. 250.

## CHAPTER THREE

### THE EFFECTS OF HIV/AIDS LAWS ON HIV POSITIVE PEOPLE

#### Introduction

This chapter considers the potential detrimental impact of the coercive use of state powers, particularly through the enactment of HIV-specific legislation, on HIV positive people and in particular the following:

- Infringements of human rights
- Reinforcement of HIV/AIDS-related stigma
- Risk of selective prosecution
- Invasions of privacy.

In Zambia, there is no existing criminal offence dealing with the exposure of others to the risk of infection with venereal disease. Therefore, simply expanding the application of such a law to include HIV has not been an option. In addition, no HIV-specific legislation has been enacted to date to criminalize risky activities. However, the draft Zambia National HIV/AIDS policy has identified as one of its objectives *“to ensure that rights of HIV infected people are protected and stigma and discrimination are eliminated.”*<sup>62</sup> The measures identified to achieve this objective are stated as follows: *“Many people who are living with HIV/AIDS are usually stigmatized and discriminated against. Contraction of HIV/AIDS should, however, be treated like any other diseases and should, therefore, not be target for stigma and discrimination. In order to achieve this, the Government shall: ...*

► *Legalise mandatory testing in cases of persons charged with sexual offences that could involve the risk of HIV transmission;*

► *Legislate against individuals who deliberately and knowingly withhold their HIV status from their partners or spouses;*

► *Legislate against willful transmission of HIV/AIDS...*<sup>63</sup>

Policy-makers must also consider the potential impact of criminalization on public health initiatives. *“A wise nation would consider whether in [prosecuting individuals who put others at risk of contracting HIV] we advance the public health.... If, on the other hand, criminalization serves to undermine our overall public health response to the HIV epidemic, then we must seriously question whether the gains from criminalization are worth it”*<sup>64</sup>.

## **(1) Infringements of Human Rights**

Human rights are universal legal guarantees, as stated in the Universal Declaration of Human Rights, which protect individuals and groups from actions that could compromise their fundamental rights and human dignity. These include freedom from discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ‘Other status’ is interpreted to cover health status, including having HIV/AIDS.

Human rights violations in the context of HIV/AIDS are many but many times they go unnoticed as they are neither investigated nor documented. Examples of these include violations of:

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<sup>62</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May 2004, Chapter 5, E.8 page 20

<sup>63</sup> Draft Zambia National HIV/AIDS Policy, Ministry of Health, May 2004, Chapter 5, E.8. 64 page 20

<sup>64</sup> Dalton HL, “Criminal Law,” in: S Burris et al., eds. *AIDS Law Today: A New Guide for the Public*. New Haven: Yale University Press, 1993: at 255.

**The right to non-discrimination** (for example, discrimination based on known or presumed HIV status); International human rights law guarantees the right to equal protection before the law and freedom from discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Discrimination on any of these grounds is not only wrong in itself but also creates and sustains conditions leading to societal vulnerability to infection by HIV, including lack of access to an enabling environment that will promote behavioural change and enable people to cope with HIV/AIDS.

- **The right to life** (for example, violence and killing of persons infected);
- **The right to health** (for example, denial of access to general medical treatment and/or HIV/AIDS therapy);
- **The right to privacy** (for example, breach of confidentiality of HIV status and mandatory testing); Article 17 of the International Covenant on Civil and Political Rights provides that *"No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks"*. The right to privacy encompasses obligations to respect physical privacy, including the obligation to seek informed consent to HIV testing and privacy of information, including the need to respect confidentiality of all information relating to a person's HIV status.
- **The right to work** (for example, dismissal from work and denial of benefits and equal pay on the basis of HIV status); "Everyone has the right to work ... [and] to just and favourable conditions of work"<sup>65</sup>. The right to work entails the right of every person to access to

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<sup>65</sup> Article 23 of the Universal Declaration of Human Rights

employment without any precondition except the necessary occupational qualifications. This right is violated when an applicant or employee is required to undergo mandatory testing for HIV and is refused employment or dismissed or refused access to employee benefits on the grounds of a positive result.

**The right to marry and found a family** (for example, the requirement of mandatory testing as a prerequisite to marriage and mandatory sterilization of HIV+ women); The right to marry and to found a family encompasses the right of "men and women of full age, without any limitation due to race, nationality or religion, ... to marry and found a family"<sup>66</sup>, to be "entitled to equal rights as to marriage, during marriage and at its dissolution" and to protection by society and the State of the family as "the natural and fundamental group unit of society". Therefore, it is clear that the right of people living with HIV/AIDS is infringed by mandatory pre-marital testing and/or the requirement of "AIDS-free certificates" as a precondition for the grant of marriage licenses under State laws. Secondly, measures to ensure the equal rights of women within the family are necessary to enable women to negotiate safe sex with their husbands/partners or be able to leave the relationship if they cannot assert their rights. Finally, the recognition of the family as the fundamental unit of society is undermined by policies that have the effect of denying family unity. In the case of migrants, many States do not allow migrants to be accompanied by family members, and the resulting isolation can increase vulnerability to HIV infection. In the case of refugees, mandatory testing as a precondition of asylum can result in HIV-positive family members being denied asylum while the rest of the family is granted asylum.

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<sup>66</sup> Article 16 of the Universal Declaration of Human Rights

• **The right to freedom of movement** (for example, mandatory HIV testing for returning residents, restriction of movement of national and aliens living with HIV/AIDS, segregation, quarantine or rehabilitation of HIV positive persons and denial of visas or entry permission). The right to liberty of movement encompasses the rights of everyone lawfully within the territory of a State to liberty of movement within that State and the freedom to choose his/her residence, as well as the rights of nationals to enter and leave their own country. Similarly, an alien lawfully within a State can only be expelled by a legal decision with due process protections.

• **The right to education** Article 26 of the Universal Declaration of Human Rights states in part that "*Everyone has the right to education. ... Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship...*"

This right includes two broad components which apply in the context of HIV/AIDS. Firstly, States should ensure that both children and adults living with HIV/AIDS are not discriminatorily denied access to education, including access to schools, universities, scholarships and international education or subject to restrictions because of their HIV status. There is no public health rationale for such measures since there is no risk of transmitting HIV casually in educational settings. Secondly, States should, through education, promote understanding, respect and non-discrimination in relation to persons living with HIV/AIDS.

Hence, what happened in Australia recently where a Zambian national Misheck Kapambwe was denied a student visa because he was infected with HIV is discriminatory. Kapambwe, who hoped to study for his PhD in Australia, was required to undergo quarterly blood tests

for the monitoring of his disease and needed antiretroviral treatment. The cost of his treatment was estimated at \$267.45 four times a year for five years while the antiretroviral treatment was \$1,188 per month. His visa application was denied by Immigration Minister Amanda Vanstone and the Migration Review Tribunal.

A spokesman for Senator Vanstone said the government did not believe taxpayers should foot the bill for foreigners infected with HIV. But human rights group Rights Australia described the ruling as cruel and inhumane. *"Today's Federal Court decision effectively means that it is impossible for short stay visa and student visa applicants with HIV to enter Australia,"* Rights Australia spokesman Greg Barns said. *"This is discriminatory."* *"Rights Australia urges Minister Vanstone to take note of the injustice caused to Mr. Kapambwe and alter the regulations so that the migration authorities have to consider the circumstances of each case."* *"As we know HIV can manifest itself to varying degrees and a blanket ban on people with HIV entering Australia is inhuman."*<sup>67</sup>

## **(2) Reinforcing HIV/AIDS-related stigma**

The introduction of HIV-specific criminal legislation, and/or individual criminal prosecutions against people with HIV for risky conduct, is often accompanied by inflammatory and ill-informed media coverage. This may contribute to misinformation about HIV and its transmission, and contributes to the stigma surrounding HIV infection and people living with HIV/AIDS as 'potential criminals' and as a threat to the 'general public'. As one court stated in 1985, *"AIDS is the modern-day equivalent of leprosy"*<sup>68</sup>. Unfortunately, the stigma

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<sup>67</sup> The Daily Telegraph, September 29, 2005

<sup>68</sup> Florida Blood Service Inc. vs Rasmussen, 467 So.2d 798 at 802 (Fla Dist Ct App 1985).

surrounding HIV/AIDS, and the discrimination that it engenders, remain very real today<sup>69</sup>. Indeed, the intensity of the demand for criminalisation of HIV transmission may itself be a reflection of the prejudices surrounding the HIV epidemic, because no comparable demand has arisen in response to transmission of other sexually transmitted diseases which, although less serious in their medical consequences, are in fact more easily transmitted than HIV and nonetheless result in physical and emotional harm to the person infected.<sup>70</sup>

Such singling out of the HIV disease and people with HIV for criminalization contributes to the stigma still attached to HIV and to the "background noise" of social exclusion and disapproval that is commonly experienced, in myriad ways and on a regular basis, by people with HIV/AIDS.

And though Zambia has not yet passed any HIV/AIDS legislation, it has not been spared by stigma surrounding HIV/AIDS. As a result of this, the Southern African Centre for Conflict Resolutions of Disputes (SACCORD), in partnership with Peace Zambia recently organised a one-day workshop for members of Parliament (MPs) as legislators to see what role they could play in the fight against the scourge.

It is at the same forum that SACCORD executive director, Lee Habasonda, called for more political will from the political leadership in the fight against the HIV/AIDS scourge.

With the workshop's theme, "The role of MPs in reducing stigma and discrimination," Habasonda challenged the lawmakers to formulate laws that would guard against stigma.

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<sup>69</sup> 34GM Herek et al. HIV Related Stigma and Knowledge in the United States: Prevalence and Trends, 1991-1999. *American Journal of Public Health* 2002, 92: 371-377.

<sup>70</sup> AIDS Law Project South Africa (H Axam et al.) Response Paper to the SA Law Commission's Discussion Paper, *supra* at note 72.

He observed that what killed people infected with the HIV/AIDS was not the disease itself alone but the attitude that people cast on such patients.

Lusaka lawyer, Patrick Matibini, who presented a paper on the role of legislators in the fight against HIV/AIDS, said MPs had a mammoth task to advance AIDS and human rights issues locally and internationally. *"As political leaders, they can influence public opinion and increase public knowledge of relevant issues. As legislators they can vote on Acts of Parliament and can ensure that legislation protects human rights and advances effective prevention and care programmes,"* he said.

He said legislators including the State should enact or strengthen anti-discrimination and other protective laws. The laws should protect people living with HIV/AIDS and those with disabilities from discrimination in both the public and private sector.

*"The most effective legal remedy is the enactment of general anti-discrimination legislation which prohibits unfair and irrelevant distinctions being made on specified grounds including disability,"* Matibini said. He said it was preferable for HIV/AIDS to be covered by general legislation so that it could be treated like other analogous diseases and had the benefit of broad based community lobbying...<sup>71</sup>

### **(3) Risk of selective prosecution**

Given the stigma surrounding HIV, there is also concern that criminal sanctions, as is often the case, will be directed disproportionately at those who are socially and/or economically marginalised and are associated in the public mind as the "guilty" people with HIV/AIDS,

such as: the urban poor, prostitutes, injection drug users, gay/bisexual men and other men who have sex with men, immigrants, ethnic or racial minorities in a country, etc...." For example, in South Carolina a bill was introduced to criminalize blood donations by "practicing homosexuals" or IV drug users.<sup>72</sup> Another example is a bill introduced in Nevada that allows prosecutors to file attempted murder charges against prostitutes who knowingly transmit HIV.<sup>73</sup> *"HIV positive sex workers occupy a central place in the discourse on people who pose a risk to the public health. This discourse is constructed through the media and a moralistic language associated with prostitution."*<sup>74</sup>

For example, in a recent article entitled: ***Bourgeault: The Right to Kill?*** Pierre Bourgeault, a well-known regular columnist for the Montréal paper *Le Devoir*, headlined an article calling for prosecutions for unsafe sex: "Le droit de tuer: Et vous, vous coucheriez avec un sidéen?" [The right to kill: And you, would you sleep with an AIDS carrier?]. The article suggested that advocates for persons living with HIV argue that it is a human right of people living with HIV/AIDS to kill others by infecting them.<sup>75</sup>

Such a view however, is an extreme one and only goes to show how serious the problem of HIV stigmatization is. As has already been pointed out in the preceding chapter of this paper, the issue of protecting the rights of HIV positive people arises from the danger of prosecuting them because of their HIV positive status rather than for a criminal conduct of deliberately and willfully infecting other people with the virus. As has already been pointed out, an HIV

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<sup>71</sup> Times of Zambia, August 12, 2005

<sup>72</sup> ACLU AIDS Project. 1995 Docket. New York, 15 September 1995, at 5.

<sup>73</sup> DR Smith. Medicine and Law: AIDS, Constitutional Challenges to Tort Reform and Medical Malpractice. *Tort and Insurance Law Journal* 1987-88; 23: 317 at 381, citing *American Medical News* 8 May 1987.

<sup>74</sup> S Gibson. 'Knowingly and recklessly': The policy and practice of managing people who place others at risk of HIVinfection. *HIV/AIDS Legal Link* 1997; 8(3): 6-9 at 7.

positive person must not be criminalized or accused of killing others by infecting them if the other people, knowing of the HIV positive status of the accused, willfully and voluntarily engage in sexual activity or any other high risk conduct with the HIV positive person.

In several cases HIV-positive accused have not only been charged with, but also convicted of, attempted murder or serious assault charges, in some cases for conduct that carries no or negligible risk of transmitting the virus. In many instances, the extremity of criminal sanctions - for behaviour carrying no risk of HIV transmission - is worrisome.

- In one of the earliest cases, a prisoner with AIDS was convicted on criminal charges for assaulting corrections officers by biting, scratching, and spitting at them.<sup>76</sup>
- In another case, an HIV-positive inmate of a federal medical centre bit two correctional officers and was convicted of "assault with a deadly or dangerous weapon." On appeal, a federal circuit Court of Appeals upheld the conviction,<sup>77</sup> in a widely criticized decision.<sup>78</sup>
- In one case, a prostitute was charged with "attempted criminal transmission of HIV" for soliciting an undercover police officer, knowing she was living with HIV.<sup>79</sup>

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<sup>75</sup> Le Devoir 5 October 1996, at A15.

<sup>76</sup> *United States v Kazenbach*, 824 F 2d 649 (8th Cir 1987).

<sup>77</sup> *United States v Moore*, 846 F 2d 1163 (8th Cir 1988).

<sup>78</sup> Note. *Deadly and Dangerous Weapons and AIDS: The Moore* [*United States v Moore*, 846 F.2d 1163] Analysis is Likely to Be Dangerous. *Iowa Law Review* 1989; 74: 951-967.

<sup>79</sup> See DW Wanamaker. *From Mother to Child... A Criminal Pregnancy: Should Criminalization of the Prenatal Transfer of AIDS/HIV be the Next Step in the Battle Against this Deadly Epidemic?* *Dickinson Law Review* 1993; 97: 383-409 at note 70.

- In another, a prostitute who had tested HIV-positive was charged with attempted manslaughter for engaging in unprotected sex with two different men without disclosing her serostatus.<sup>80</sup>
- Charges of attempted murder and assault were laid in a case in which an HIV-positive person spat at four police officers.<sup>81</sup>

### **Invasions of privacy**

Finally, states should also consider the potential for intrusion into personal privacy. As already noted, the privacy of 'confidential' records kept by health professionals or counselors could be lost in the search for evidence. In addition, criminal prosecutions are public proceedings, and the HIV-positive status of the accused would become widely reported. As Holland has put it, "one of the most compelling reasons for caution is the potential intrusion into sexual privacy."<sup>82</sup>

Having examined the role of the use of coercive state powers in the prevention of the spread of HIV/AIDS and its possible effects on people living with HIV, the next chapter looks at the conclusion and recommendations to the Zambia Government.

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<sup>80</sup> State of Florida v Sherouse, 536 So 2d 1194 (Fla Dist CA, 1989).

<sup>81</sup> People v Richards, 85-1715-FH (68th Dist Ct, Michigan), cited in L Gostin & WJ Curran. *The Limits of Compulsion in Controlling AIDS*. Hastings Center Report, December 1986, 24 at 28 n11

<sup>82</sup> W Holland. HIV/AIDS and the Criminal Law. *Criminal Law Quarterly* 1994; 36(3): 279 at 316.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

In the preceding chapters, this paper has outlined some principles and numerous policy considerations that Zambian policy-makers should bear in mind when considering the issue of criminalizing HIV transmission. It has also identified a possible alternative to the use of the criminal law, that is, the use of the public health law, and identified some key questions to be addressed in examining this question. The recommendations that follow are put forward to inform the development of sound public policy as the Zambian Government has identified as one of its objectives the need to legislate against individuals who deliberately and knowingly withhold their HIV status from their partners or spouses and also legislate against willful transmission of HIV/AIDS.<sup>83</sup>

#### **Prohibited conduct and excluding liability**

The criminal law may appropriately be extended to conduct that not only results in actual transmission of HIV, but also that exposes others to a significant risk of infection. Criminal actions should not apply to acts that pose no significant risk of transmitting HIV. Criminal charges applicable to coercive conduct should be appropriately applied to cases where the accused is HIV-positive. More serious charges or harsher penalties against an HIV-positive accused must be justified on the basis of the best available scientific evidence regarding the risk of transmission posed by the assault and also the deliberate non-disclosure of one's HIV-positive status, rather than simply the HIV infection of the accused.

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<sup>83</sup> The Draft Zambia National HIV/AIDS Policy, Ministry of Health, May, 2004, Chapter 5, E.8. 64, page

Criminal charges should not apply to an HIV-positive person for conduct that poses a risk of transmission if the partner at risk is aware of the other individual's HIV-positive status, regardless of the degree of risk involved. Criminal sanctions may be appropriate in the case where consent to engage in risky activity is obtained by deliberate deceit regarding HIV status. Whether by statute or by judicial determination, the law should expressly recognize that there is no criminal liability for HIV transmission or exposure when the conduct in and of itself carries no significant risk of transmitting HIV, regardless of whether the conduct is assaultive or consensual; there has been disclosure of HIV infection to another person exposed to the risk of infection and the person consents to engage in the conduct carrying the risk, regardless of the degree of risk involved.

### **Ensure safeguards against misuse of public health laws and powers**

The Zambian Government should enact laws and develop policies and protocols that prevent the misuse of public health laws and powers, ensuring that: people are not subjected to coercive measures solely on the basis of their HIV status; that protections for due process exist where the liberty of people living with HIV is infringed, such as objective criteria for assessing the risk of harm the person poses to others, the right to legal representation, the right to subject the coercive exercise of public health powers to appeal or judicial review, and fixed rather than indeterminate periods of orders.

### **Establish prosecutorial guidelines to avoid misuse of criminal law**

Zambian Government should establish guidelines for prosecutors to prevent inappropriate criminal prosecutions and to guide prosecutorial conduct during proceedings,

so as to avoid publicity that may prejudice a trial, breach the confidentiality of the accused's HIV status, expose the accused to stigma and discrimination before having been convicted of any offence, and undermine public health efforts by contributing to widespread misconceptions about how HIV may be transmitted.

**(4) Protect the confidentiality of medical/counselling information**

So as to minimize the potentially detrimental impact on access to counselling and support services which assist in avoiding risky behaviour, details of the accused person's communications to a health-care professional, spiritual adviser or other counsellor should be legally inadmissible in a prosecution for a criminal or public health offence.

**5) Protect against discrimination and protect privacy**

The Zambian Government should enact or strengthen laws that protect people living with HIV/AIDS, as well as other vulnerable groups, from discrimination, as well as laws that protect privacy and confidentiality.

**6) Ensure access to HIV testing, counselling, and support for risk reduction**

The Zambian Government should ensure access to HIV testing, accompanied by pre- and post-test counselling, to enable people to determine their HIV status, a critical component of preventing further transmission. The Zambian Government should also ensure access to understandable information about how to prevent HIV transmission, accompanied by the economic, social and personal supports necessary to avoid conduct that risks HIV transmission.

## **(7) Ensure access to anti-HIV treatment following exposure**

The Zambian Government should ensure that at least those persons exposed to possible HIV infection through assault or occupational injury should have free, rapid access to anti-HIV post-exposure prophylaxis, as well as counselling and support.

### **Conclusion**

For the reasons set out in the preceding chapter, the use of criminal law in the control of HIV/AIDS transmission must be carefully drafted to avoid unjustifiably infringing on human rights. People living with HIV/AIDS have a right to non-discrimination and to equality before the law. Similarly, policy-makers must avoid basing laws on stereotypes or prejudices about groups commonly associated in the public mind with HIV/AIDS, such as sex workers, gay men, injecting drug users, or immigrants (in some contexts), who also have the human right to non-discrimination and to equality.

Policy-makers should also consider the negative effect that criminal legislation may have on the human right to privacy (by opening the door to wide-ranging investigation into many people's private sexual conduct) or on the right to bodily integrity (by authorizing compulsory HIV testing)—rights that are recognized in international law as human rights. An ill-conceived resort to the criminal law may also result in other injustices, such as imposing the burden of criminal sanctions upon those people living with HIV/AIDS whose ability to disclose their status or avoid risky behaviours is circumscribed. What is required is a 'human rights impact assessment' of any proposed criminal law to determine, through careful consideration, whether the proposal may do more harm than good to basic human rights.

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- 14) UNAIDS. *Handbook for Legislators on HIV/AIDS , Law and Human Rights*. UNAIDS/IPU. Geneva: 1999.

### **Newsletters & Journals**

- 1) *Canadian HIV/AIDS Policy & Law Newsletter*
- 2) *AIDS Law Project Policy Review and Update AIDS Legal Quarterly.*
- 3) *HIV/AIDS Legal Link.*

### **Websites with information on HIV/AIDS and criminal law**

- 1) [www.aidslaw.ca](http://www.aidslaw.ca)
- 2) [www.hri.ca/partners/alp](http://www.hri.ca/partners/alp)
- 3) [www.law.wits.ac.za/salc/salc.html](http://www.law.wits.ac.za/salc/salc.html)
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