

AIDS IN ZAMBIA - CHALLENGES TO HUMAN RIGHTS

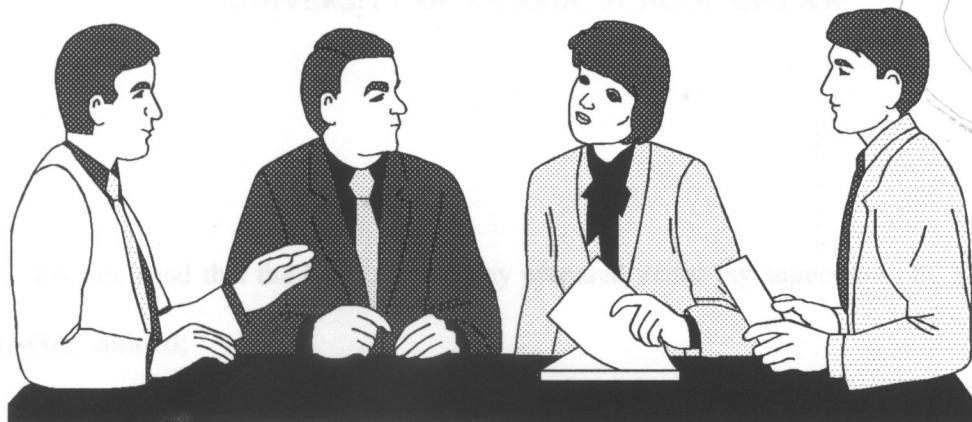
by

KHANDIKILE .P. MVUNGA

Obligatory Essay submitted to the University of Zambia, being a paper in partial fulfillment of the examination for the Degree of Bachelor of Laws of The University of Zambia, November 1994.

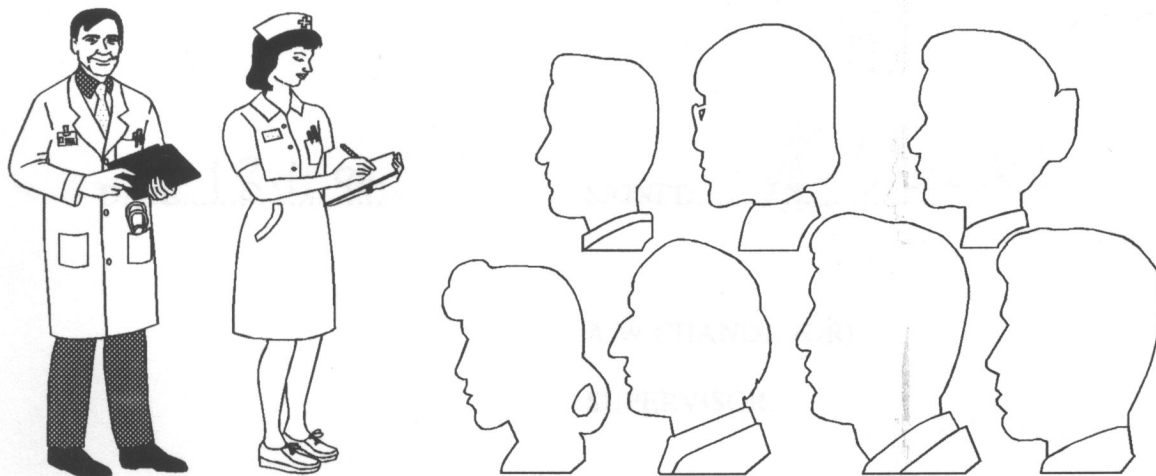
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UNIVERSITY OF ZAMBIA, SCHOOL OF LAW

I recommend that the Obligatory Essay prepared under my supervision by KHANDIKILE P. MVUNGA entitled:

" AIDS IN ZAMBIA - CHALLENGES TO HUMAN RIGHTS"

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills the requirements relating to format as laid down in the regulations governing Obligatory Essays.

DATE...13.11.94

SIGNED.....

A.W CHANDA (DR)

SUPERVISOR.

TABLE OF CONTENTS

	PAGE NUMBER
ACKNOWLEDGEMENTS	(i)
INTRODUCTION	1
CHAPTER ONE: Violations Against AIDS Victims	5
A. Relationship between AIDS and Human Rights	5
B. Discrimination	7
C. Derogation of Fundamental Human Rights on the basis of AIDS	12
CHAPTER TWO: Response To AIDS Violations	18
A. Global Response	18
B. National Response	21
C. AIDS Related Legislation and its Benefits	22
D. Proposed Solutions	27
CHAPTER THREE: Rights Versus Duties	32
A. Behaviour Patterns	32
B. Corresponding Duties of HIV/AIDS Victims	37
C. Criminalising AIDS Transmission	41
CONCLUSION	48
ANNEXURE	53
BIBLIOGRAPHY	55

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INTRODUCTION

AIDS is one of the most serious health problems that has ever faced mankind. AIDS stands for Acquired Immunodeficiency Syndrome. It is a disease caused by the Human Immunodeficiency Virus, HIV - the AIDS virus. The AIDS virus may live in the human body for years before actual symptoms appear.¹ It primarily affects the body by making it unable to fight other diseases. These diseases can cause death. The AIDS virus can be spread by unprotected sexual intercourse (without a condom) with an infected person, sharing drug needles and syringes, and also from mother to baby before or during birth. In addition, some persons with hemophilia and others have been infected by receiving infected blood.

For the purposes of this essay, it is noteworthy that one cannot 'catch' AIDS like a cold or flu because the virus is different. The AIDS virus cannot be transmitted through ordinary casual contact with people around you in school, in the work place, at parties or in stores.²

Between November 1986 and May 1988 the number of African countries reporting cases of AIDS to the World Health Organization (WHO) increased from eight to thirty-eight. As of 31 December 1992 AIDS cases had been reported by all countries of the region.³

Despite knowledge of the various ways in which AIDS can be transmitted, and the fact that a lot of victims of the virus contract it innocently, society has always, unfortunately, associated its victims with promiscuity and loose morals. As a result, all too often, one of the significant factors which stands in the way of a public health approach to AIDS, and which has fuelled the pandemic, is stigmatization of people who are infected, which prevents them from seeking help.⁴

Given the seriousness of the problem posed by the HIV/AIDS pandemic, there is, no doubt, need to wage war against this killer disease. In the words of Javier Perez de Cueller, however, 'the world should make war against AIDS and not against people with AIDS.'⁵

As one member of the Positive and Living Squad (PALS) states, dealing with people infected with the virus or suffering from AIDS is a serious challenge. These are people who may be physically fit but are certainly emotionally 'sick'.⁶ They, therefore, need a lot of compassion and understanding. The last thing they deserve is condemnation and victimization. They are no less human than those that are HIV negative. They, however, frequently face rejection in society, places of work insurance companies and so on.

This piece of work is, therefore, restricted to looking at the challenges that the HIV/AIDS pandemic presents to human rights. I shall start by looking at the relationship between AIDS and human rights. Chapter one deals with the violations of fundamental human rights on the basis of one's HIV/AIDS status. The second chapter proceeds to look at the responses to these violations against AIDS victims, both global and national. The global responses are referred to for comparative purposes. In this regard AIDS-related legislation and its benefits will be examined, by which it is hoped to propose some legislative solutions.

It is felt that an essay of this nature would be incomplete without including the duties of HIV/AIDS persons. Hence, chapter three aims at balancing the rights of HIV/AIDS victims against corresponding duties.

The essay will be concluded with proposals and recommendations on how best to meet the human rights challenges posed by the HIV/AIDS pandemic.

I hope that this essay will be a contribution to the already existing efforts in the struggle for the respect and recognition of human rights for AIDS victims. And further, that it will be an eye opener to the reader to see that practical solutions to the existing violations are not impossible.

FOOTNOTES

- (1) C. Everett Koop, 'Understanding AIDS', (U.S Department of Health and Human Services, HSS Publication No.(CDC) HHS-888-8404, 1992), p. 1.
- (2) Koop supra, p. 2.
- (3) Dr W.S Boayue, (WHO Representative - Zambia), 'WHO Perspective on the HIV/AIDS pandemic' at a workshop on Positive Living Networking in Support of HIV/AIDS for Youth Programmes in Africa. Lusaka, Zambia, 13 to 18 September 1993.
- (4) According to J.A Kalilani (WHO/GPA Medical Officer, Africa Sub Region III, Harare, Zimbabwe). Contained in a report of the deliberations at the workshop in footnote (3).
- (5) United Nations Secretary-General addressing the General Assembly on 20 October 1987.
- (6) Interview with Mr Clement Mfuzi, Chairman of the Positive And Living Squad (PALS), on 5 May, 1994.

CHAPTER ONE: VIOLATIONS AGAINST HIV/AIDS VICTIMS

INTRODUCTION

One may wonder what the connection is, if any, between AIDS and human rights. In this light, the present chapter aims at bringing out the particular relationship between the two. Granted that every individual, by virtue of being a human being, is entitled to certain fundamental rights, the question arises as to whether it is justified to deny HIV/AIDS persons any of these rights. In examining this question, regard will be had to whether doing so really is in the public interest. Specific human rights will be examined with particular reference to the extent to which the same are violated with regard to HIV/AIDS persons.

A. RELATIONSHIP BETWEEN HIV/AIDS AND HUMAN RIGHTS.

It is imperative at the outset to define what are human rights, a task which is not easy. Human rights can be said to be those necessary requirements which must be given to persons simply because they are human beings.¹ These are inborn in human beings and cannot be tampered with by anyone or any authority except, of course, as specifically provided for by law. For instance, every human being has the right to enjoy freedom of movement, but this may be taken away from a person who commits a crime, by lawful jail sentence.

Many nations of the world have recognized the need to secure these basic requirements for human existence and have, therefore, embodied the same in their supreme law - the Constitution. In Zambia, for instance, Part III of the Republican Constitution provides for the 'protection of fundamental rights and freedoms of the individual.' Article 11 recognizes and declares that every individual shall be entitled to these fundamental rights irrespective of race, sex, etc. These include protection of the right to life, protection of the law, and prohibition of degrading or inhuman treatment, etc. It is, however, provided that these rights are to be enjoyed subject to the rights of others, and in-so-far-as enjoyment of the same does not interfere with the public interest.

On the international scene, human rights are protected and enshrined in international instruments such as the Universal Declaration of Human Rights (UDHR), which was adopted by all

member states on December 10, 1948.² There is also the International Covenant on Civil and Political Rights, 1966; the International Covenant on Social Economic and Cultural Rights, 1966. The former has an additional Protocol, and Zambia is a signatory to all these documents. In 1979, African experts met in Dakar, Senegal to prepare an African instrument on human and people's rights. They drafted the African Charter on Human and People's Rights which came into force in October 1986, after ratification by a majority of the member states of the Organization of African Unity (OAU). To date forty African states have ratified the African Charter.³

It should be noted, however, that these international instruments only lay down guidelines, and are not necessarily binding on the member states. This problem is overcome by certain special covenants which bind states that have agreed to be bound by principles in those covenants.⁴ A notable example is The International Covenant on Civil and Political Rights (ICCPR), which becomes binding upon its adoption and ratification.

The scope of human rights is very broad and cannot be exhausted in a text of this nature. We can, however, look at certain elements common to all human rights, which will be relevant for our purposes. Among many characteristics of human rights, the following are listed as illustrative but not exhaustive examples:⁵

- (a) Human rights are inherent;
- (b) Human rights are inalienable;
- (c) Human rights are equal among themselves;
- (d) Human rights advocate equality of all human beings;
- (e) Human rights are against discrimination based on several differentials;
- (f) Human rights are against victimization of any group of people or any individual person;
- (g) Human rights advocate respect for human dignity, freedom and justice.

On the basis of the foregoing, it appears the relationship between HIV/AIDS and human rights is clear. As is always the case in human rights, what prompts 'cries' for their reinforcement usually results from a response to violations. It is, therefore, proposed that we move on to look at the issue of discrimination against HIV/AIDS victims.

B. DISCRIMINATION

It is evident that discrimination on the basis of their sero status is the most serious violation that HIV/AIDS victims face. This problem is found mainly in homes, places of employment, health institutions, and insurance companies.

Information on HIV/AIDS-related discrimination is very scanty, which could be attributed to fear of public exposure, leading to further victimization.⁶ Victims of discrimination often refrain from complaining because of their fear of stigmatization. Silence as is well known in human rights, enables discrimination to continue unchallenged.⁷

It is said that once a problem is identified, it becomes half solved. So one may ask, what lies at the root of this discrimination against these persons who are already emotionally afflicted? It is important to note that public opinion surveys often documented a relatively high level of public support for discrimination against HIV/AIDS infected people.⁸ Studies have shown that the widespread view that AIDS is a 'self inflicted disease' further reinforced discriminatory attitudes.⁹

In the first few years after the discovery of HIV/AIDS so much mystery surrounded this new disease. Medical experts seldom understood it and little was known about its nature. It was believed that since transmission was through sexual intercourse with an infected person, then it was a curse from God meant to punish those living in sin. Hence the stigmatization of infected persons.

The end of the first decade of the AIDS pandemic saw the end of these uncertainties. Although no vaccine or cure has been discovered yet, thorough scientific research has dispelled most doubts. For instance, it has, no doubt, been proved that HIV/AIDS cannot be transmitted through ordinary casual and social contact. The principle of non-discrimination is fundamental to the concept of human rights and crucial to the question of AIDS. Non-discrimination is the first principle enshrined in the African Charter:

Article 2: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group...or other status'

This article places an obligation on member states not to discriminate against its citizens, and to legislate laws that protect them from discriminatory practices. One may wonder what constitutes discrimination under this article. Article 61 of the Charter allows the African Commission on Human and People's Rights to take into account legal precedents and doctrines from other jurisdictions in considering the Charter. Therefore, seeking guidance from the United Nations Human Rights Committee and The European Court of Human Rights, the right to non-discrimination demands that any difference in treatment must be based on reasonable and objective criteria.¹⁰ Hence to discriminate against HIV/AIDS patients could be a violation under Article 2 of the Charter. It could be argued, however, that it is reasonable to discriminate against HIV/AIDS persons in the interest of public health. This argument cannot, however, hold any water, in the light of appeals by the World Health Organization (WHO) that the best public health policy relating to HIV/AIDS is one which provides for non-discriminatory practices.¹¹

This raises the question of whether the grounds on which HIV/AIDS victims are discriminated against by insurance companies could be justifiable on the basis of being reasonable and objective. It is essential in this regard to briefly look at the nature of insurance.

A contract of insurance is a contract for the payment of a sum of money, or some corresponding benefit, to become due on the happening of an uncertain event of a character adverse to the interest of the person effecting the insurance.¹²

The person taking out an insurance policy normally gives consideration in the form of periodic payments known as premiums. The underlying principle in insurance is that individuals who 'fear' the consequences of a particular event, put money into a common 'pool'. It is not known when this event shall occur, if at all. In the event that the same occurs, money from the 'pool' is used to, where possible, compensate, and where compensation is impossible, merely to pay an agreed sum to the victim or his beneficiaries. Where, for instance, individuals take out health policies, some may actually get sick, while others may never. Those that do, have the burden of health expenses eased by having the same paid from the 'pool' money.

HIV/AIDS patients are often denied insurance policies. In the United States, for instance, individuals who have been exposed to the virus are denied health insurance, because they incur higher health costs than non-carriers.¹³

On one hand, it ought to be appreciated that insurance companies are not charitable organizations, but profit making ones. It might, therefore, not be in their best interest to compel them to accept to issue insurance policies to HIV/AIDS persons. The chances are, an HIV positive person will eventually develop AIDS, a stage where the patient needs constant medical care for prolonged periods. The insurance companies, therefore, may run the risk of making losses.

On the other hand, it is quite inhuman to deny the social security provided by an insurance policy, to an HIV/AIDS person who so desperately needs the same. Once a person acquires the virus, they can remain healthy for as long as five, ten or even fifteen years. Within this period, the insurance company would have made a lot of profit on the premiums.

Further, it is noteworthy that HIV ~~neg~~ negative status is not permanent. A person wishing to take out an insurance policy could, therefore, test negative, get the policy, and thereafter contract the virus. As one can remain healthy for a long time before developing symptoms of AIDS, they may not know that they have the virus. Even though a contract of insurance is one of utmost good faith, *uberimae fide*, making it essential for one to disclose all relevant facts, a person is not expected to disclose that which he does not know. They therefore, still run the risk of their clients suffering from AIDS, and so the denial of insurance policies to HIV positive persons does not fully solve the problem. On the basis of the foregoing it could be concluded that discriminating against HIV/AIDS persons by refusing to grant them insurance policies cannot be justified as being based on reasonable and objective criteria. What could be justifiable, would be increasing premiums, proportionately to the risk, a discriminatory practice which in insurance, has long been acceptable as reasonable.¹⁴

We can now proceed to look at discrimination against HIV positive persons in places of work. Employers who are reluctant to employ, and anxious to get rid of, employees who are HIV positive have advanced reasons for taking such action. Essentially, employers are interested in employing people who can work. Their worry in employing someone who has tested HIV positive is that there are high chances of that person being unproductive for health reasons. They are also trying to avoid the cost of training, and investing experience and skill in, someone who will probably die in no time.

The writer carried out a random case study of three individuals who have tested HIV positive, and in the hope of living positively have decided to come out in the open. Out of these three, two

lost their jobs on the basis of their sero status. One was concerned about his status in the organization after the test and decided to consult his boss.¹⁵ He was promptly advised to resign 'in the interest of the organization' and avoid the embarrassment of being dismissed. This naturally caused him a lot of emotional distress, but he initially resisted to resign. He was eventually served with a warning letter over very flimsy grounds for making a common mistake. Word of his HIV status leaked, and finding the working environment uncondusive he was forced to resign.

The second case involved an individual who had been employed on merit. He was working on contract basis to be renewed periodically. Upon discovery of his HIV positive status, he decided to be open about the matter in order to assist him take a positive view to life.¹⁶ His employers declined to renew his contract without giving grounds, a practice he found quite unusual. As he was trying to negotiate the matter, a replacement was found, and he dropped the matter and left.

A number of employers in Zambia are notorious for making employment conditional on testing HIV negative. These include Anglo-American Corporation, British Petroleum (B.P), and in the recent past Barclays Bank.¹⁷ Some have been known to dismiss their employees due to their sero status. Can this sort of discrimination be justified as being based on reasonable and objective grounds?

Reference is made to the American case of RAYTHEON COMPANY V FAIR EMPLOYMENT AND HOUSING COMMISSION EX PARTE THE ESTATE OF JOHN CHADBOURNE DECEASED.¹⁸ In that case, the Raytheon Company manufactured electromagnetic systems for the United States Government and hired Chadbourne on permanent terms in 1980. In December 1983, he became ill and was hospitalized. Until this his work performance had been exemplary. He was discharged from hospital in January, 1984, having been diagnosed as suffering from pneumonia and AIDS. Chadbourne made several attempts to return to work and saw numerous medical advisers, some of whom testified, but after much vacillation they decided he was unfit to return to his job. The Industrial Relations Manager, however, continued to vacillate and by July 1984, Chadbourne's condition deteriorated to the point where he was physically unable to continue working. He died in January 1985, due to complications of AIDS.

The respondent commission findings were that the employer's conduct amounted to a refusal to reinstate Chadbourne; that AIDS was a physical handicap and that Raytheon had deprived him of his fundamental civil right not to be discriminated against on the grounds of a physical handicap. It accordingly awarded appropriate relief to his estate.

Raytheon argued that had they reinstated Chadbourne, he would have posed a real risk to his co-workers with the infection of the AIDS disease. However, the medical evidence established that while AIDS could be communicated by, (a) sexual intercourse; (b) invasive contact; (c) pre-natal contact, i.e, by a mother to her child it could, it could not be transmitted through ordinary daily contact in the work place.

This case dealt with an actual AIDS case, while the panel of Chief Justices and Judges passing judgment at the Second Southern African Moot Court Competition in Harare examined the issue of an employee testing HIV positive. They stated as follows:

'That which the Californian Court decided regarding the risk of transmitting AIDS applies a fortiori to the condition of HIV which has not yet developed into AIDS... Indeed, some cases take years to do so, and it would be manifestly unjust, to condemn a man in advance and blight his career because he has, as it were, a pre-AIDS condition... It amounts to unfairness if he is wrongly dismissed, for a condition which would or might eventually develop into one.'¹⁹

This, however, was a judgment in a hypothetical court and, therefore, is not binding. Despite being academic, it is still valuable because the panel of judges which sat to decide the question of the dismissal of HIV/AIDS persons from employment comprised Judges and Chief Justices from Rwanda, Zimbabwe, Zambia, South Africa, Botswana, Swaziland, Uganda, Kenya and Mauritius.

As earlier indicated, HIV negativity is not a permanent status. Employing individuals who have tested HIV negative is, therefore, no guarantee that they shall retain that status. It is for this reason that Barclays Bank dropped its policy on HIV testing, following pressure from Kara Counselling.²⁰

Further, a lot of HIV positive people remain as fit as fiddles for a very long time, in some cases even longer than their HIV negative colleagues. It should also be pointed out that every sexually active individual is at risk of contracting the virus. It would obviously be absurd to discriminate against such a wide class of individuals. It is, therefore, impossible to get rid of all potential carriers of the virus.

It is noteworthy, that human life is finite. There is, therefore, little justification in not employing someone because there is a high risk of them dying. Every human being who uses motor transport, for instance, risks dying. A situation where an individual actually suffering from AIDS is denied employment may, however, be treated exceptionally. He could clearly be said to be unfit on health grounds, if he is in such a condition as not to be capable of performing the duties of the job he is seeking. For someone already in employment, however, this should not be a ground for dismissal.

It can, therefore be concluded that for reasons hereinabove discussed, discriminating against persons in places of employment on the basis of their HIV/AIDS status cannot be said to be reasonable or objective.

Apart from discrimination, this chapter examines derogations of other fundamental human rights on the basis of HIV/AIDS.

C. DEROGATION OF FUNDAMENTAL HUMAN RIGHTS ON THE BASIS OF HIV/AIDS

This section highlights certain other fundamental human rights and the extent to which these are violated in respect of HIV/AIDS.

Right To Dignity:

Article 5 of the African Charter provides: 'Every individual shall have the right to the respect of the dignity inherent in a human being... All forms of exploitation and degradation of man particularly...cruel and inhuman... treatment shall be prohibited.'

A similar provision is contained in Article 15 of the Zambian Constitution. This brings to mind the manner in which AIDS patients are sometimes treated in our University Teaching Hospital

(U.T.H) and other health centres across the country. There is a tendency to treat them as secondary citizens because 'they are going to die anyway'. Those known or suspected to be suffering from HIV/AIDS related infections are placed in a ward like E 21 which is called the 'departure lounge'. This no doubt, causes the patient great humiliation and depression. Broadly speaking, the African Charter prohibits treatment which humiliates or debases the victim.²¹

Right To Privacy:

Article 17 of the International Covenant on Civil and Political Rights provides: 'No one shall be subjected to arbitrary interference with his privacy... (2) Everyone has the right to the protection of the law against such interference.'

Unfortunately, the Zambian Constitution does not contain a similar provision. Article 17 thereof merely provides for the protection for privacy of home and property. This, no doubt, is a serious omission from the supreme laws of the land.

There have been calls in certain circles, for mandatory HIV testing, either of the population in general, or of designated subgroups.²² But what would this exercise be intended to achieve. Unfortunately, some people tend to think that widespread testing could help identify all those who carry the virus and hence once they are isolated, the uninfected could be protected from infection.²³ Such a view, however, clearly displays ignorance both about AIDS and about testing.

It is submitted that mandatory testing is no solution to containing the spread of AIDS. False negatives would not be detected, and persons still in the latency period when testing was performed also would go undetected.²⁴ Repeat testing would be required to remedy those errors, and in the meantime the carriers in the 'uninfected' population might continue to spread the disease. One danger is that the 'uninfected' population would feel a sense of security, and not pursue any precautions against infection, even though that population could not be entirely secure from infectious persons. Those that hold the above views would argue that even if risk of infection would not be completely eradicated, the same would be greatly reduced, which is better than nothing.

This approach, however, would not be a practical way to handle the AIDS crisis considering the high costs involved. Mandatory testing would entail enormous costs - technical and administrative, an expense which would be more worthwhile spent on HIV/AIDS education.

One practical illustration of infringement of the right to privacy, is the imposition of mandatory HIV testing on marriage license applicants. In Illinois, for instance, a mandatory screening programme was adopted which required compulsory HIV testing of all marriage applicants.²⁵ This programme was designed with the sole purpose of informing the intended spouse of the HIV status of his or her partner.

In 1988, an estimated 159,000 applicants were tested, twenty-three of whom were found to be HIV positive.²⁶ The estimated total cost for the testing was US \$5.6 million, translating to US \$243,000 for each positive result. One wonders why spend so much money on testing to locate so few positive results, which money could be better spent on combatting AIDS. Further, two adults intending to marry who want to jointly submit to testing with an agreement to share test results, should do so voluntarily, and at their own expense.

Right To Marry:

Article 16 of the Universal Declaration of Human Rights provides that men and women of full age, have the right to marry and found a family. Article 18(1) of the African Charter also provides that the family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morale.

One wonders whether these objectives can be best ensured by prohibiting marriage where one (or both) of the intended spouses tested positive. This can be attained by mandatory pre-marital testing, and denying marriage certificates to those testing sero-positive. Such a practice, however, might discourage persons from marrying, and hence encourage fornication.

According to Winston Zulu, a man who tested HIV positive, and went public, and subsequently got married, the right to marry is a sacred one, an institution created by God.²⁷ Marriage, he says, is between two adults who ought to take responsibility for their actions. There is obviously no justification in prohibiting sero-positive persons from marrying as this would in no way

curb the spread of AIDS. After all, those that do not know their sero status are not necessarily HIV negative. To prohibit HIV persons from marrying would inevitably entail compulsory HIV pre-marital testing, a practice which cannot be accepted as earlier discussed. Further, in a country like Zambia where most of the population is rural and therefore, practices customary marriages, which are seldom registered, such a practice would be like cutting a finger off a cancerous hand.

Having seen the violations that HIV /AIDS persons are subjected to, we shall now proceed to look at what the response has been to the same.

FOOTNOTES

- (1) V.A.L Kabonga, Human Rights and Ethical Aspects of Public Health Measures To Support Young People with HIV/AIDS, Occasional Paper, (Lusaka: 1993) p.4.
- (2) United Nations document: A Human Rights ; Compilation of International Instruments (New York: United Nations, 1988). p.413.
- (3) Hassan B. Jallow and Paul Hunt, AIDS And The African Charter, (Occasional Paper No. 3), (Banjul: African Centre For Democracy And Human Rights Studies, 1991) p.3.
- (4) Kabonga, Op.cit p.6.
- (5) Kabonga, supra, p.7.
- (6) According to an interview with Mrs Shetti from Kara Counselling, on 21/4/94
- (7) Katarina Tomasevski, The AIDS Pandemic and Human Rights, Academy of European Law (ed.) Vol.II, Book 2 (The Netherlands: Kluwer Academic Publishers, 1993),p. 121
- (8) Blendon and Donelan, Discrimination Against People with AIDS: The Public's Perspective, The New England Journal of Medicine, (13 October, 1988), p.1022-1026.
- (9) As quoted in Tomasevski, Op.cit. p. 122
- (10) Jallow and Hunt, Op.cit. p.7
- (11) Ministry of Health, Zambia National AIDS/STD/TB and Leprosy Programme, Strategic Plan 1994-1998: A Time To Act, A Time To Care, p.13.
- (12) E.A. Holder, Houseman's Law of Life Assurance, 7th ed., (London: Butterworths, 1970), p.17.

(Genealogy Los Angeles - London: University of California Press 1988)

- (13) E. Fee and D.M. Fox, AIDS: The Burdens of History, (), p.160
- (14) From an interview with Mr M. Lungu, Life Assurance Policy Department at Zambia State Insurance Corporation, on 6 April, 1994.
- (15) This was revealed by the victim, Mr John Lukonde, a member of the Positive And Living Squad (PALS), in an interview at a Workshop on The Networking in Support of HIV/AIDS Programmes for Youth in Zambia, on 3 May, 1994.
- (16) This was revealed by Mr Clement Mfuzi, the Chairman of the Positive And Living Squad, in an interview at the PALS Workshop, on 5 May, 1994.
- (17) From an interview ^{with} Sr. Judith Chimoto, Kara Counselling, on 21 April, 1994.
- (18) California Appeals Division (1989) p.212
- (19) C. Heyns, A. Manase, F. Viljoen, (ed.), From Human Wrongs To Human Rights, (Harare, University of Zimbabwe, 1992), pp. 51.
- (20) According to an interview ^{with} Sr Judith Chimoto from Kara Counselling on 21 April, 1994.
- (21) Hassan and Hunt, Op.cit. p.10
- (22) Martha A. Field, 'Testing for AIDS Uses and Abuses' 16 American Journal of Law and Medicine, 1990, p.54.
- (23) One view which stunned the writer in the course of soliciting views on this subject was that everyone who is HIV positive must be given a permanent stamp on the forehead.
- (24) Field, Op.cit.
- (25) Tomasevski, op.cit. p.
- (26) Tomasevski, supra, p.

CHAPTER TWO: RESPONSE TO HIV VIOLATIONS

INTRODUCTION

The AIDS pandemic has received various reactions worldwide. It is the objective of this chapter to see what the response has been generally, by looking at the response of the international community, and specifically, by looking at how individual countries have responded. It is hoped that by doing so and weighing and comparing the various responses, suggestions can be made on how best to treat the HIV/AIDS problem in Zambia. Further, it is by perusing legislative provisions from various jurisdictions that sound proposals can best be made on probable solutions, and their justifications better understood.

A. GLOBAL RESPONSE

The international community has always emphasized the need to respect human rights in the fight against AIDS. In May 1987, when the global strategy for the prevention and control of AIDS was being elaborated, Dr Jonathan Mann, the then Director of the Global Programme on AIDS, spoke about the need to counter 'the epidemic of social, economic, political and cultural reactions to AIDS and HIV infection.'¹ In his address to the General Assembly on 20 October, 1987, the Secretary-General of the United Nations said that our fight against AIDS 'is also a fight against fear, against prejudice, and against irrational action born of ignorance.'²

The necessity of respecting human rights in responding to HIV/AIDS was first affirmed by the Council of Europe, then by the World Health Assembly, then by the United Nations Commission on the Prevention of Discrimination and Protection of Minorities.³

In its statement on the social aspects of AIDS prevention and control, the WHO's Global Programme on AIDS said that, 'AIDS prevention and control strategies can be implemented effectively and efficiently...in a manner that respects and protects human rights...There is no public health rationale to justify isolation, quarantine, or any discriminatory measures based solely on the fact that a person is suspected or known to be HIV infected...[while] failure to prevent discrimination may endanger public health.'⁴

The foregoing is proof of the importance that the international community has attached to the observance of human rights in the 'war' against AIDS. It is noteworthy, however, that these only provide guidelines; actual implementation of the same depends on the willingness of individual states to incorporate human rights observances in their HIV/AIDS policy.

In South Africa, for instance, the law arms local authorities with the devices of quarantine, and isolation in the fight against AIDS.⁵ AIDS was added to the schedule of 'communicable diseases' under the Health Act.⁶ According to regulation 2(1) thereof, local authorities and health officials have the power to take sweeping steps when 'reasonably satisfied' that the spread of AIDS constitutes 'a real danger to health.' Among them is the power to 'quarantine' persons 'actually suffering or suspected to be suffering' from AIDS or anyone who has been in contact with such persons. A medical officer may also subject a person who in his or her opinion is or could be suffering from AIDS to compulsory medical examination.⁷

Another illustration of individual states failing to conform with the expectations of the international community regarding responding to HIV/AIDS is what is popularly known as the Hans-Verhoef legacy.⁸ On April 2, 1989, a Dutch man named Hans-Verhoef was detained by U.S officials for posing a serious threat to public health in the United States. Verhoef, an educator and AIDS activist, was trying to enter the United States to attend an international meeting. When customs officials discovered AZT in his luggage, Verhoef confirmed that he had AIDS. His detention captured headlines and focused wide public attention on American travel policy towards people with AIDS for the first time.

Before Verhoef's detention, most people were not aware of American regulations restricting entry of people with AIDS and HIV into the country.⁹ International conferences on AIDS were scheduled to be held in Montreal, Canada, in 1989 and San Francisco in 1990, and planning and preparations proceeded although both countries had restrictive regulations or practices regarding the disease to be discussed.

Hans-Paul Verhoef died fifteen months after his confrontation with the U.S government, but his legacy lives on. The Eighth International Conference on AIDS - originally scheduled to be held in Boston in 1992 - was held in Amsterdam as a protest over the regulations that led to Verhoef's

detention. Other conferences on AIDS have been canceled or boycotted because of restrictive AIDS policies, and the attitudes of governments are now a key factor in deciding the future locations of such important meetings.

How have specific countries responded to HIV/AIDS? In India, in December 1989, the Bombay High Court rejected a petition by two mothers to release their HIV-infected sons, detained in Goa under public health law. The Court noted that 'isolation results in social ostracism and encroaches on the individual's liberty,' but added that isolation was necessary because of fear of AIDS amongst the public: 'An error on the safer side may be more agreeable since the dimension of AIDS created a fear psychosis.'¹⁰ Less than two years later the Indian courts overruled the detention of a large number of commercial sex workers, forcibly tested for anti-bodies to HIV, thus signifying a change in the interpretation of Indian law.¹¹

The United States of America, realizing the AIDS was not merely a medical problem by, section 1 of the Executive Order 12601 of 24 June 1987 established the Presidential Commission on HIV and AIDS. This Commission was composed of 7 members who have experience in such relevant disciplines as medicine, epidemiology, virology, law, insurance, education and public health. Section 2 of this Order lays down the following functions of the Commission:

- (a) To advise the President, Secretary of Health and Human Services, and other relevant Cabinet heads on the public health dangers including the medical, legal, ethical, social and economic impact of AIDS.

- (b) Primarily to recommend measures that federal, state and local officials can take to (i) protect the public from contracting HIV; (ii) assist in finding a cure for AIDS, and; (iii) care for those who already have the disease. Having seen how the international community has stressed the observance of human rights in the fight against HIV/AIDS, the question for Zambia is: To what extent have we achieved these guidelines in our national response to HIV/AIDS?

B. NATIONAL (ZAMBIAN) RESPONSE

The initial reaction to the HIV infection and AIDS in Zambia was one of non-acceptance of its existence.¹² The government of the day did not want to acknowledge its existence, a fact which probably contributed to nationals viewing HIV/AIDS as a foreign problem far away from home.

In 1986 the Zambian government finally recognized AIDS as a major public health threat that could disrupt economic and social development.¹³ A National AIDS Surveillance Committee and an Inter-sectoral AIDS Health Education Committee were established to co-ordinate all activities of AIDS prevention and control in Zambia.

In May 1993, a Consensus Workshop was held in Livingstone to chart the new direction in AIDS/STD prevention in Zambia. This Workshop was the starting point for the shift from a purely Ministry of Health activities in health to a multi-sectoral response.¹⁴ Donors, other government ministries and Non-governmental Organizations (NGOs) were invited to participate. Key determinants for the spread of the disease were identified, and possible strategies to deal with the problem were considered.

The policy guidelines for national prevention and control of HIV/AIDS in Zambia has among other things, proposed a review of the legal rights of AIDS patients and HIV positive individuals with a view of developing specific legislation that guarantees such rights.¹⁵ However, what has happened in practice so far is that other than counselling and care for the AIDS patients, stress seems to be more on protecting those not yet infected. The human rights of AIDS victims are not specifically protected.

The authorities have embarked on a strong and, no doubt, effective nation-wide education campaign whose stress is AIDS prevention and control. This, obviously, would be the most appropriate forum for enlightening the masses on the rights of HIV/AIDS victims and the obligation of individuals to observe the same.

The Zambian legislature has so far not enacted any laws specifically dealing with AIDS. The only relevant statute in place is the Public Health Act, Cap 535. Section 22(1) of this statute prohibits wilful exposure of infectious diseases by persons suffering from such disease or persons closely connected to infected people. Section 28(c) specifically talks about 'the measures to be taken for preventing the spread or eradication of ...any infectious disease.' The question is whether HIV/AIDS is in the category of ordinary infectious diseases? The problem is that the methods of infection common to ordinary infectious diseases do not apply to HIV/AIDS. Legally, therefore, before the Public Health Act Cap 535 is amended to expressly include HIV/AIDS there appears to be no basis for applying the provisions of this Act to HIV/AIDS.¹⁶

In the light of the absence of HIV/AIDS legislation in Zambia, it is advisable to look at what other nations have done in this area.

C. AIDS RELATED LEGISLATION AND ITS BENEFITS

As always in human rights, legislation to protect individual rights and freedoms has been a reaction to violations. As earlier mentioned, most international instruments merely lay down guidelines which individual states may incorporate into their national laws. Therefore, in the absence of specific ratification, these international instruments are not binding. A country which is dedicated to respecting the rights of HIV/AIDS victims can best achieve this goal by enacting relevant statutes.

However, as with human rights legislation in any other area, the mere adoption of an anti-discrimination provision does not necessarily signify a commitment to human rights protection. Nor should it be presumed that non-discrimination will automatically be applied and enforced. In human rights work, it is evident that words are not always matched by deeds. That aside, enacting laws prohibiting AIDS-related discrimination is a step in the right direction. Some countries which have taken this exemplary step will be looked at.

The Comores adopted its first AIDS law in November 1988. This piece of legislation gives the National AIDS Control Committee a particular mandate to ensure that citizens' rights are

protected and that the national AIDS programme conforms to the WHO Global AIDS strategy. It is, however, doubtful whether such an ambiguous provision would be of much help, without laying down specific means to be incorporated in achieving this mandate. It is suggested that if such an establishment were to be introduced in Zambia, in order to achieve this mandate, it ought to be granted the status of an administrative tribunal to which aggrieved members of the public could take their complaints. Further, it must be vested with specific powers and privileges.

The AIDS legislation of Argentina (Law on AIDS Number 23 of 16 August 1990) states that no AIDS-related legislation may be adopted if they would infringe on personal dignity or result in discriminatory or marginalizing effects for those affected or likely to be affected. It requires respect of individual dignity, medical confidentiality, and privacy, and prohibits marginalization, degradation, and humiliation of persons affected by HIV/AIDS.

Similarly, the USSR Law on Prevention of AIDS of April 23 1990, states in article 8(4): 'Dismissal from work, refusal of work, refusal of admission to medical and educational establishments, and limitation of the legitimate interests of such individuals solely on the grounds that they are carriers of the virus or are suffering from AIDS, as well as restrictions of the right to accommodation and other rights and legitimate interests of relatives and close associates of an infected person shall be prohibited.'

In 1990, Congress enacted the Americans With Disabilities Act (hereinafter referred to as the 'ADA') which establishes a duty for Health Care Providers (hereinafter referred to as HCPs), private and public, to treat people infected with HIV. The ADA defines disability as 'a physical or mental impairment that substantially limits one or more of the major life activities of such individual...' Although the ADA does not refer explicitly to people infected with HIV, the legislative history states that 'a person with HIV is covered under the... definition of the term 'disability' because of a substantial limitation to procreation and intimate sexual relationships.'¹⁸ This Act, however, places a limitation of this duty to treat HIV persons, where the patient is reasonably suspected of posing a direct threat to the HCP or other patients.

Despite the balance that has to be struck between the rights of HIV/AIDS persons and the healthy public, it is doubtful whether a statute of this nature provides much help. By virtue of the 'direct threat' proviso, it seems to grant a right with one hand and take it away with the other.

To protect the rights of the individual, AIDS legislation in California²⁰ prohibits testing for HIV without the subject's written consent. French law also has a similar provision.²¹ This law further provides that the results of a blood test may not be used in any instance for the determination of insurability and suitability for employment. Under German law,²² any physician or consultant who carries out an HIV test which turns out positive must notify the results to the Central AIDS Infections Registry, without naming the subject of the notification.

Further, the Switzerland Ordinance instituting measures designed to prevent transmission of dangerous infections, despite demanding notification of positive results, takes account of the individual's right to privacy. Hence, by section 24 thereof, any person who receives, processes or transmits notifications through his occupation shall be obliged to preserve confidentiality.

There are certain countries, however, which have enacted laws which have little regard, if at all, for the rights of the HIV positive individual. In Hungary, for instance, persons who test positive shall be placed in a special clinic.²³ The competent state sanitary inspector shall order the sexual partners of patients suffering from AIDS or testing HIV positive, to be placed under clinical surveillance and to undergo HIV tests.

Arab countries are particularly notorious in this area. The Syrian Arab Republic Regulatory Order No. 36/T of 26 October, 1987 of the Ministry of Health, requires mandatory HIV testing of certain groups of persons. Under section 1, the following persons are to be subjected to routine blood test:

- (a) Aliens residing there for purposes of work;
- (b) Students arriving from abroad;
- (c) Students sent on scholarships abroad, upon their return.

In the Libyan Arab Jamaharia, the law²⁴ requires the termination of the services, and residence of any alien proved to be infected with AIDS; any such person is to be deported and banned from re-entry into the country. No employer may offer employment to any such person.

The Danish Government and Ministry of Health have not fundamentally revised the law, despite the fact that Denmark is one of the hardest hit European countries as regards AIDS infected citizens.²⁵ They adhere to the standpoint that the most important aim must be to attain maximum prevention through education and changes in behaviour on the part of members of the public.²⁶ It has been advanced that coercive measures merely push problems underground. Besides, patterns of sexual behaviour can be changed through other means than judicial intervention. It is felt that by showing the optimal amount of respect for human beings, one further achieves optimal control of the disease.

Having seen a variety of legislative provisions from various jurisdictions, one may wonder whether the same are really beneficial. One view is that to tackle the AIDS problem, domestic law will not suffice as the dimension of the problem requires international legislation.²⁷ It is, however, submitted that such a view unduly underestimates the importance of domestic legislation. International legislation is remote from the lives of people. In order to effectively tackle the problem which faces victims in their daily lives, it is essential that the law which regulates their day to day lives be employed. This is the law they are likely to be familiar with and which they can have access to.

In Denmark, as in other countries, the role of the legal system in the fight against AIDS has been discussed.²⁸ Questions have arisen as to whether the legal system can, and ought, to be applied in fighting AIDS and counteracting reactions to it. In evaluating questions of this nature, Harlton L. Danton says we must,

‘remember that just as the law frames society’s response to the AIDS epidemic, the society as a whole shapes the law. Like it or not, we must decide what kind of society we will be; meanspirited, shortsighted and judgmental; or compassionate, clearheaded, and accepting.’²⁹

A good understanding of the role of the law in the quest for human rights for HIV/AIDS persons is found in the Sociological approaches to legal theory. According to such scholars as Inhering,

'Law is but a part of human conduct...Laws are only instruments for serving the needs of society. Their purpose is to further and protect the interest of society.'³⁰

It is submitted that law does not exist in a vacuum but within a particular social context. It is for this reason that it ought to be dynamic in order to meet the changing needs of the society it regulates. In this era of the AIDS pandemic and with full appreciation of the abuses levelled against its victims, the law is, no doubt, an important means of ensuring protection for the abused, and penalties for the abusers. At present in Zambia, given the lack of specific AIDS legislation, to challenge an abuser through the courts can be quite a frustrating process. Probably one reason why victims of abuse seldom litigate is because they have no particular law on which to base a claim.

It is noteworthy, however, that enacting AIDS laws may not necessarily eradicate the problem for various reasons. Firstly, victims may still not litigate due to prohibitive legal costs. Secondly, the high levels of illiteracy and ignorance of the law entail that even when laws are enacted, people may not fully know and appreciate their rights. In addition, people may shun taking abusers to court for fear of exposure and further stigmatization. In developed countries such as the USA AIDS legislation is bound to bear more fruit as the citizens are more aware of their civil rights, unlike their counterparts in developing countries.

However, the aforementioned difficulties are no justification to abandon AIDS legislation. What must be appreciated is that HIV/AIDS is not a purely legal problem and can, therefore, not have a purely legal solution. Hence, in addition to enacting specific HIV/AIDS laws, other aspects of the problem - that is, cultural, economic, religious, etc, ought to be examined.

D. PROPOSED SOLUTIONS

Having identified the violations levelled against HIV/AIDS persons and further looked at varying responses by the world community, it is hoped that solutions to the problems hereinbefore raised can be suggested, which proposals are deemed particularly relevant to the Zambian situation.

It is proposed that the first step in implying the law to control the spread of AIDS whilst protecting the rights of those already infected, is by enacting a particular statute on HIV/AIDS. It is in this statute that the rights of infected persons, as well as the duties of citizens should be contained. Specific penalties for violating the same should be included therein. For instance, a provision imposing a duty on employers not to arbitrarily dismiss those employees who test positive on the basis of their sero status, may be included. However, the statute must go further and provide for specific redress to the abused and a penalty to the perpetrator.

Great legal skill and caution ought to be employed in coming up with a statute of this nature, as it is proposed that it be a codifying one. One may wonder why bother with such a statute which would most likely provide for certain rights already provided under the Constitution. This, it is felt, is necessary considering it is meant not only for lawyers but for a greater majority of lay men. It should, therefore, be a fairly comprehensive statute.

As stated earlier, however, enacting an anti-discrimination law is one thing and having it effectively solving problems on the ground is quite another. Hence it is further proposed that there must be established, in Zambia, a permanent Human Rights Commission in order to achieve this goal. This Commission should operate in a manner similar to the Commissioner for Investigations, or the Ombudsman. In fact it would be more ideal if the office of the Ombudsman was restructured in order to hear matters concerning complaints of human rights abuses. This Commission should be empowered to sit as a quasi judicial tribunal and hear complaints from victims of human rights abuse, not only by public officers, but by ordinary citizens and private institutions. The restructuring of this Commission would have the obvious advantage of reduced legal costs and the absence of stringent legal procedure required in ordinary courts of law. Further, granted the seriousness and importance of the kinds of cases dealt with, provision could be made to ensure disposal of cases within a specified reasonable period.

In addition, it is suggested that all proceedings be held in camera to protect the identity of the applicants and to encourage aggrieved persons to have their cases heard.

Granted the fact that the AIDS pandemic does not only have medical dimensions but also legal, social and others, the composition of the commission should have regard to the relevant fields concerned. Whereas the Chairman should preferably be a lawyer, other members should include medical doctors, psychologists, social workers, and persons from other relevant fields.

Attractive as the idea of such a Commission may be, one major obstacle which can be anticipated is the high cost on the part of government to run such an institution. The office of the Ombudsman, in its present form, is not very successful because it is not widely publicized. There exists in Zambia, at present, a human rights commission of enquiry - popularly known as the Munyama Commission. It is feared that its findings may one day just find themselves accumulating dust on the shelves of some government department. It would be more fruitful if it could be transformed into a human rights tribunal, hearing cases and offering redress where possible.

It is worth noting, however, that the success of the aforementioned proposals lies in the response from the public. This can be achieved by embarking on an education campaign, aimed at enlightening the society on the rights and obligations of HIV/AIDS persons. This could be included in the already existing AIDS education campaigns.

FOOTNOTES

- (1) Quoted from a World Health Organization (WHO) policy document, The Global Strategy for AIDS Prevention and control, (DOC. SPA/INF/87.1, 5 May 1987) paras.2-4.
- (2) Statement by the Secretary General of the United Nations before the General Assembly, Press Release SG/SM/816/GA/334, 20 October, 1987, p.3.
- (3) Katarina Tomasevski, The AIDS Pandemic and Human Rights, Academy of European Law (ed.), Vol. II Book 2 (The Netherlands: Kluwer Academic Publishers, 1993), p.
- (4) World Health Organization policy document: Social Aspects of AIDS Prevention and Control, WHO/SPA/GLO 87.2, (Geneva: 1987).
- (5) Edwin Cameron and Edward Swanson, 'Public Health and Human Rights - The AIDS Crisis in South Africa, South African Journal On Human Rights, Vol. , 1990, p.211.
- (6) Act 63 of 1977, in terms of regulations issued on 30 October, 1987 in terms of section 33: GN R2438 GG11014.
- (7) Regulation 17.
- (8) Katarina Tomasevski, AIDS and Human Rights, (The Netherlands: Kluwer Academic Publishers, 1993) p.558
- (9) Tomasevski, *ibid.*
- (10) Tomasesvski, *supra* p.567
- (11) Tomasesvski, *ibid.*

- (12) Rodger Chongwe, in a seminar paper, 'Legal Implications of HIV Infection', contained in, Proceedings of the SWAAZ/PANOS International Conference on AIDS for Anglophone African Media, compiled by Isle Mwanza, (Lusaka, January, 1993), p.105.
- (13) Ministry of Health policy document: Zambia National AIDS/STD/TB/LEPROSY Programme, Strategic Plan 1994-1998, (Lusaka: Simans Graphics Ltd, 1994), p.4
- (14) Ministry of Health, *ibid.*
- (15) Ministry of Health, *supra*, p.15
- (16) V.A.L. Kabonga, Human Rights and Ethical Aspects of Public Health Measures to Support Young People with HIV/AIDS, Occasional Paper, (Lusaka: 1993), p.40.
- (17) Tomasevski, *supra* p.562.
- (18) Jill Cohen, 'Access To Medical Care for HIV Infected Individuals Under The Americans With Disabilities Act: A Duty To Treat', American Journal of Law and Medicine, Vol.XVIII No.3, 1992, p.239.
- (19) R. Chongwe, *supra* p.106
- (20) Amendment of Division 1 of the Health and Safety Code of 3 April 1985.
- (21) Circular DH/DGS of 28 October 1987 On Screening of hospitalized patients for HIV. (A Circular addressed by the Minister of Social Affairs and Employment to the Regional Department Directorates of Health and Social Affairs.
- (22) Section 2 of the Federal Republic of Germany Ordinance of 9 September, 1987 on Compulsory Notification of positive results.

- (23) Instructions No.10 of 1985 Promulgating Regulations Concerning Notification and recording of communicable diseases, section 13/A(7).
- (24) Decision No. 92 of 1987 of The Secretary for Health Concerning the Termination of Services and Deportations of AIDS cases, sect.1.
- (25) M. Breun and A. Hendriks (ed.), Except from AIDS and Human Rights: An International Perspective, (Copenhagen: Danish Centre for Human Rights, 1988), p.34.
- (26) Breun and Hendriks, supra, p.35.
- (27) Chongwe, op.cit. p.104.
- (28) Breun and Hendriks, ibid.
- (29) Breun and Hendriks, ibid.
- (30) R.W.M. Dias, Jurisprudence 5th ed., (London: Butterworths, 1985), p.424.

CHAPTER THREE: RIGHTS VERSUS DUTIES

INTRODUCTION

The stress so far has been on the rights of individuals, both infected and uninfected; and it is hoped in this chapter to balance things up by highlighting their responsibilities. The fight against AIDS, in manner compatible with human rights, is not only about possessing rights, but also owing duties to others. In this regard, I propose also to look at the issue of criminalising culpable transmission of HIV. There is, on one hand, the right of an infected person not to have his human rights unduly violated; but there is on the other hand the duty of such individual not to deliberately expose others to infection. Given the peculiarities of the modes of transmission, and duration of incubation of the virus, the question of whether to punish deliberate transmission has no easy answer. The first section of this chapter deals with behaviour patterns, while the second proceeds to look at corresponding duties of HIV/AIDS persons. The last one is the one which looks at criminalising deliberate AIDS transmission.

A. BEHAVIOUR PATTERNS.

The figures indicating levels of HIV infection in Zambia are startling: There has been recorded an estimated cumulative number of thirty thousand AIDS cases, in the ratio of one male AIDS case to six female cases.¹ Pregnant mothers attending antenatal clinic are subjected to anonymous blood tests which reveal that 10% to 33.2% of them test HIV positive, indicating that one in every four sexually active individuals are infected with the virus.² It is also projected that nearly eight hundred thousand to one million healthy looking individuals are HIV positive³, keeping in mind that symptoms of AIDS may take very long to show. It is worth noting that the above mentioned statistics are an understatement due to under-reporting. These figures merely reflect cases reported in recognized health institutions such as the University Teaching Hospital (U.T.H). Hence cases dealt with by traditional healers, especially in rural areas, go unchecked. Since the virus is spreading at an alarming rate, and there is no cure in sight as yet, every possible option available ought to be employed to curb the situation. There may be no cure for AIDS as yet, but one consolation is that the disease is preventable. It is common knowledge that prevention is better than cure and hence it is submitted that prevention should lie at the core of any strategy to control the spread of the virus.

When the Global AIDS Strategy was first formulated, the WHO stressed that transmission of HIV is preventable and every individual had the responsibility to prevent contracting or transmitting HIV infection. It appears to be fairly simple reasoning that one who has not contracted the virus should not engage in behaviour which exposes himself to risk of infection; and that one who has already been infected should avoid behaviour which exposes others to risk of infection. One wonders, however, that if this is so, why do individuals continue to engage in high risk behaviour? It is only by identifying the factors which motivate this sort of behaviour that mechanisms can be put in place to try and solve the problem.

In looking at some of these factors, it should be borne in mind that socio-economic and cultural factors play a significant role in the behavioural patterns of people; and that in turn, behavioural patterns play a significant role in the transmission of HIV. Firstly, from the statistics hereinbefore stated, more women than men are infected with the virus. Why is this so? Internationally, HIV prevention programmes focus on disseminating information as a crucial step in ultimately changing the behaviour of individuals, but if people cannot change their behaviour because they lack the means to control their own destinies, information dissemination wastes time and resources.

In most African countries, the tendency to treat women as inferior beings makes them particularly vulnerable to HIV infection.⁴ Zambia has a dual system of law; customary and statutory law⁵, under which statutory law takes precedence over customary law. However, considering the vast levels of illiteracy, and the fact that many people live in rural traditional settings, the law which regulates the lives of a large number of Zambian nationals is customary law. The subordination of women in our traditional society is evident in marriage.

Under customary law, marriage is a union of a man who may or may not be married and a woman who must be unmarried at the time of entering into marriage.⁶ Hence, customary marriages permit polygamy which poses a high risk of infection. In this setting, no matter how faithful a wife may be to her husband, if he takes on an extra wife who is infected with the virus, the first wife is inevitably put at risk. Since society accepts polygamy, a woman has very little control over matters such as her husband's sexuality, which have a direct effect on her life and health.

It may be argued that this does not promote promiscuity of men because a man is restricted to having sexual relations only within the polygamous union. This, however, is not the case because customary is quite indulgent to husbands in this matter. This is illustrated by the case of Kapande v Shanjili⁷ in which the Local Court Justice stated that breach of the husband's right to exclusive sexual relations with his wife gives rise to a customary wrong of adultery, which entitles him to recover damages from the adulterous male. In contrast no similar cause of action rests in the wife.⁸ Similarly, in Uganda, under the Divorce Act,⁹ while a husband can obtain a divorce if his wife has been unfaithful, a wife cannot do the same on the sole ground of her husband's infidelity.

It is, therefore, fruitless to urge women to protect themselves from risk of infection by insisting that their husbands, for instance, should use condoms, especially when they (the women) suspect that the latter have been unfaithful. This is because women are powerless in this sphere. The man makes the decisions regarding sexuality in the home. Another contributing factor to this subordination of women is the fact that traditionally women are taught that a good wife is one who is submissive to her husband. She is told, during marriage instruction by elders, that she is not master of her body, and to protest against what sexually satisfies her husband is considered disrespectful and taboo.

Campaigns on behaviour change should, therefore, target the male populous. These should be educated on the benefits and protection provided by a monogamous marriage, and the dangers of having a plurality of sexual partners.

A variety of other social traditions and customs increase women's susceptibility to HIV infection. In both Uganda and Cote d'Ivoire, for instance, several ethnic groups practice wife inheritance, in which a widow is inherited by a relative of her deceased husband.¹⁰ With such a practice, if a sero negative widow is inherited by a sero positive man, such widow is placed at risk of infection. In some parts of Zambia, this practice is engaged in, in the belief that the deceased man's brother is expected to 'cleanse' his brother's death by engaging in sex with his widow, without necessarily retaining any obligation to marry her.

Another factor which may contribute to failure by women to be assertive over their husbands' behaviour is their economic dependence on their husbands. In a household where the husband (as is often the case) is the sole or major bread winner, the wife is likely to tolerate her husband's promiscuity because of her economic dependence on him and lack of an alternative means of fending for herself.

Zambia is a signatory to the International Covenant On Economic, Social and Cultural Rights, the African Charter on Human and People's Rights, and the Covenant on the Elimination of All Forms of Discrimination Against Women. In fulfillment of her obligations under these instruments, laws must be put in force which protect and foster the rights of women in the aforementioned areas. Protection of women's rights should include gender-based anti-discrimination laws, laws criminalising marital violence, and laws expanding women's rights to property, education and employment.¹¹ These enactments, however, are unlikely to bear fruit in the absence of campaigns to sensitise the public on the same. There is no use in creating laws which protect the rights of women, without educating them. Therefore, the Zambian government must encourage and assist efforts by organizations such as the Family Health Trust whose primary concern is education for prevention. Such organizations should, when possible, be given resources to enable them reach women at the grassroots level.

One other aspect which ought to be given due consideration in achieving behavioural change is the economic environment. According to Dr Msiska,¹² the Co-ordinator of HIV/AIDS programmes in the Ministry of Health, change in behaviour is essential in the control of HIV infection, and requires: (i) knowledge; (ii) right attitudes; and (iii) an enabling environment. It is within the powers of the Ministry of Health to provide the required information on HIV/AIDS to the people, in conjunction with the control of the spread of the disease. It is, however, not easy to achieve right attitudes unless the economic environment is conducive.

It has been proven that AIDS is a disease of poverty rather than wealth, - as the PANOS Institute termed it 'a misery seeking missile'.¹³ Certain types of high-risk behaviour such as prostitution are a consequence of rampant poverty. Prostitutes are faced with an option either to lead risk-free lives and die of hunger, or engage in high-risk behaviour and be able to feed themselves and their families. Besides, given the harsh economic environment, for some of them it is a choice

between dying of hunger now, or dying of AIDS at some unknown time in the future. The choice is usually the latter. As Atondoko Negefwa, the President of the Zaire Association for the Defence of Human Rights said,

'It's hard to focus on the AIDS epidemic when you have an empty stomach, no job, and often no place to sleep.'¹⁴

Due to such hardships, people inevitably become dangerously indifferent to the dangers posed by AIDS and do not bother about taking steps to avoid infection. The number of briefly dressed girls who parade along Addis Ababa Drive in Lusaka is self explanatory.

A 22 year old prostitute in Zaire said, 'I've got two children to feed, and I know I have something that men want to pay for, so why not? It doesn't hurt anybody.'¹⁵

The harsh economic realities are now endangering even the lives of the young AIDS-free generation. Young school girls, in their naivety, find it hard to resist succumbing to the sexual demands of older men when these men provide them with financial and material gifts in return. Besides, some men now prefer to go for young school girls whom they presume are AIDS-free. For the school girls, temptation is high considering their parents are unable to provide them with essentials.

Despite how gloomy the picture may appear, however, it would not be accurate to say that no progress has been achieved in the area of behaviour change. It must be noted that there is no definite and fully accurate means of measuring behavioural change. The Family Health Trust, however, has suggested that certain indicators are helpful in this area.¹⁶ One such indicator is the trend in sexually transmitted diseases (STDs). In 1987, 109,000 new STD cases were reported whereas the figure of new cases in 1993 dropped to 37,000.¹⁷ School girl pregnancies have also reduced indicating a possible change in behaviour.¹⁸ This may be a sign of greater HIV/AIDS awareness.

Another positive sign in the area of behaviour change is the involvement of some traditional healers in curbing high-risk practices. The Mwata Kazembe, who is Chief of the Lunda, for instance,

is reported to have called a meeting with his Headmen to spread the message to villagers to stop risky practices such as cleansing and spouse inheritance.¹⁹

Even the Traditional Healers' Association has commenced campaigns, urging their healers and clients to refrain from risky traditional practices such as communal use of razor blades in circumcision and tattooing; and sexual cleansing of widows.²⁰

B. CORRESPONDING DUTIES OF HIV/AIDS VICTIMS

The previous section highlights the importance of behavioral change in achieving control of the spread of HIV infection. The ultimate target of this objective is to ensure that those not yet infected avoid risk of infection; and those already infected do not deliberately or negligently expose others to risk of infection. This study has so far emphasized the need of incorporating human rights in the fight against AIDS.

However, efforts to control the spread of this disease would be wasteful in the absence of a corresponding emphasis on the duties of individuals. The following passage adequately explains this position:

'Responsibilities are the counterpart of individual freedoms. Freedom involves choice and this entails responsibility. Persons who could infect others ought to behave responsibly because there is no such thing as freedom to transmit infection...The importance of balancing individual rights and duties, freedoms and responsibilities, is evidenced by unacceptable results which are achieved by arguing either side of the coin in isolation. Thus arguing about rights only ends up suggesting that 'potential HIV carriers are free not to change their behaviour after identification as carriers.'²⁰

The Council of Europe's recommendation on the common European health policy on AIDS states that health education should emphasize that 'the individual is responsible for the outcome of his behaviour towards himself, others and the society, and that sex education should encourage individuals to assume responsibility for their health by becoming aware of risks and benefits inherent in various lifestyles.'²¹

Take for instance, the right to privacy. This entails that a sero-positive person's HIV test results should be kept confidential by the doctor. Hence, strictly speaking only two people would know the result of the test; the individual and his doctor. The doctor is, therefore, under an obligation not to disclose these results to others. Because of this right, members of the public may not know the individual's sero status. Hence a prospective sexual partner does not have access to this information. However, the person's right to have his sero status kept confidential ought to be balanced up by a corresponding duty on his part to use the result of his test responsibly. He should not take advantage of the fact that others do not have access to information concerning his sero status, and expose them to infection. If, for example, he intended to marry someone, it would only be fair and responsible of him to disclose his sero positivity of which he is fully aware.

This reasoning flows from the traditional principle of equity that he who seeks equity must do so with clean hands.

Similarly, as regards the right to freedom of movement, an HIV positive person has a right not to have this right infringed through quarantine or isolation. However, given this right, he ought not then to go around mercilessly spreading the virus by practicing unprotected sex with a plurality of partners.

At this point, one may consider the question: what may be the cause of irresponsible behaviour by HIV positive individuals? Firstly, this might be attributed to ignorance of their sero-positivity. Some persons continue to spread the disease because they do not know for certain that they are carriers. It is for this reason that every person, especially those that have previously engaged in high-risk behaviour should lead responsible lives. Secondly, some of those that know that they are carriers lead reckless lives due to bitterness for their predicament. They feel that if someone gave them the virus, why should they bother with not passing it on to someone else. These generally just let out their frustrations on innocent individuals and believe it is better not to suffer and die alone; they find consolation in numbers. There are also others who experience a state of non-acceptance. One for instance may know that their spouse or sexual partner died of AIDS but do not accept that they too are infected.

"As an African woman, I was aware of the polygamous nature of African men and, to some extent, I accepted the phenomena even within my own family. My father, though a staunch Catholic and married to only one wife, had a child outside marriage. Before we were legally married, my husband had six children with six different mothers. He succeeded in keeping this a secret, until after five years of marriage, he brought them home one by one... I have never been a prostitute nor a drug user at any time in my life. I believe my husband contracted the virus in the commonest way, by sexual transmission, for he did have multiple sexual partners who were known to me."²²

No matter how much information is disseminated on HIV and AIDS; no matter how much counselling is done; and no matter how many laws are put in place, the behaviour of individuals involves personal responsibility.

It is reported that even after counselling about the risk of perinatal transmission, 16% of Zambian HIV positive women had new pregnancies.²³ The report stated that 17% of women acquired new Sexually Transmitted Diseases (STDs) and that 24% of HIV positive men had new sexual partners.²⁴ It has become evident that men who lost their wives due to AIDS and are infected themselves, marry younger women and infect them too.²⁵ The implication of such behaviour on widespread HIV transmission is disastrous.

In conclusion, the following passage summarizes the seriousness and importance of the duty of HIV positive persons owe to society:

A person may be knowledgeable without being responsible. HIV/AIDS infected people should be responsible persons: that they carry within their blood a most deadly weapon against life, an unstoppable Alien In Death Squad - AIDS. The responsibility of HIV/AIDS victims should be the first to put their house in order. This is not to say that HIV negative people have no reciprocal responsibility.²⁶

victims should be the first to put their house in order. This is not to say that HIV negative people have no reciprocal responsibility.²⁶

C. CRIMINALISING AIDS TRANSMISSION

Having looked, in the previous sections, at behavioral patterns, and the duties of individuals, it is intended in the present section to examine the question of whether culpable transmission of HIV should be criminalised. This is a highly debatable subject with no clear-cut answers. There have been calls that persons who maliciously, or negligently transmit the virus to unknowing persons who maliciously, or negligently transmit the virus to unknowing persons should be charged with murder or manslaughter.²⁷ This, however, raises problems such as how to prove malice, or that the victim did not previously have the virus. There is also the question of what happens in the event of death occurring after 'a year and a day' from the date of transmission, considering that an individual can live for a long time before developing AIDS and dying.

It is imperative at the outset to outline the provisions under the Zambian Penal Code, Chapter 146 of the Laws of Zambia relating to homicide. According to section 200 of the Penal Code:

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

Section 199 of the Penal Code states that, 'Any person, who by an unlawful act or omission causes the death of another person is guilty of the felony termed 'manslaughter.' An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health whether such omission is or is not accompanied by an intention to cause death or bodily harm.'

The law divides manslaughter into two categories:²⁸

- (i) Cases where the defendant intends death or grievous bodily harm, but circumstances of the killing provide a partial excuse, for instance provocation, reducing what would otherwise be murder to manslaughter;
- (ii) Cases where the defendant did not intend or foresee death or grievous bodily harm, but did exhibit a substantial degree of culpability.

The latter is categorised as involuntary manslaughter because the defendant did not want to kill or do grievous bodily harm.²⁹

What amounts to malice aforethought is stipulated in section 204 as including, '(b) knowledge that the act or omission causing death will probably cause the death of or grievous bodily harm to some person...although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.'

The issue which arises is whether under the present homicide law in Zambia, knowingly transmitting HIV infection may amount to murder or manslaughter? In examining this issue the first point for consideration is whether this act amounts to 'an unlawful act.' In the Criminal Law of Zambia, for instance, it is an offence to transmit an infectious disease to another person, which offence is the well-known Assault Occasioning Actual Bodily Harm contrary to section 248 of the Penal Code Cap 146.³⁰ It is, therefore, submitted that knowingly transmitting HIV to another person is such an act, and is, therefore, 'an unlawful act.'

One difficulty which should be pointed out at this point is that the requirement that the person transmitting the virus to another must have done so knowingly, presupposes that the former is aware of his sero-positive status. In cases where the accused's spouse or sexual partner has died of AIDS it is likely to be much easier to prove that the accused had knowledge of his ser-positivity. It is, however, bound to be more difficult in other cases, because not everyone undergoes an HIV test. Besides, how does one disprove an assertion that the accused only came to know about his sero-positivity after engaging in an act which may have transmitted the virus to another. The difficulty with HIV infection, is that an infected person may appear and actually feel perfectly healthy for a long period before AIDS manifests its symptoms.

The next issue to be considered is that of causation. As hereinbefore stated, in both murder and manslaughter, the unlawful act of the accused must cause the death of another. With regard to HIV infection, this raises the question of what if the victim was already infected with the virus from some other source? On this point, reference is made to the East African case of R v Tomasi Enyaju s/o Ogoruto and Elasu s/o Ejuru³¹. In that case, during a native dance, Tomasi gave the deceased a violent poke on the head with the sharper end of his heavy dancing stick, piercing the skull and

causing the brain to protrude. Almost immediately, while the deceased was still alive, Elasu beat him violently on the other side of the head fracturing the skull. Each injury was sufficient to cause death.

Tomasi and Elasu were both convicted of murder.

Sheridan C.J stated in the Court of Appeal that: ‘...in assaulting the deceased (the first accused) intended to kill or commit grievous harm, and as was found, this assault would have caused death even had there not been a subsequent assault. In short, since each of the accused persons inflicted on a living man an inevitable fatal injury each must be held equally guilty of his death.’

Relying on this analogy, it is submitted that if A. deliberately transmits the HIV infection to another, it is no excuse to claim that such person may have already got the virus from another person, say B. Infecting someone with the virus, is an assault occasioning actual bodily harm which would eventually cause the death of the victim even in the absence of a previous, or even subsequent similar assault.

On the basis of the foregoing, it is submitted, that as the law on homicide stands in Zambia, there is a basis on which to place charges against someone who deliberately transmits the virus, either for murder under section 200, or manslaughter under section 199 of the Penal Code.

One major obstacle that would stand in the way of securing such conviction is the rule regarding the limitation as to the time within which death must occur. Under section 209 of the Penal Code;

‘A person is not deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.’

The bone of contention about this rule is that criminal responsibility for death disappears if death occurs after a year and a day from the date of affliction of the cause thereof. It is said that this rule should no longer be applicable in the light of death arising from HIV infection.³¹ In this vein, some countries such as New South Wales and Australia have abolished this rule and in other countries as well as the United Kingdom there are proposals to abolish it.³²

Another difficulty is that due to the incubation period of the AIDS virus before death occurs, it may often happen that by the time a victim dies, the person who knowingly transmitted the virus to him or her may already have died. Besides, the latter cannot be tried in advance for causing a death, which death has not yet, but is very likely, to occur.

At this point, one wonders whether criminalising culpable HIV transmission is justified?

In Denmark, the statutory provisions of the Penal Code with regard to murder, manslaughter, assault, threats, etc, can, according to the circumstances, be used against persons with AIDS who infect others.³³ However, it has been generally accepted in Denmark that even though the conduct of those infected, or possibly infected, can be reprehensible and punishable, the legal system must recognize that the use of punishment and coercion will probably entail a decisive weakening of the chances of restricting and fighting the spread of AIDS.³⁴ Regarding the effects of penalisation, it has been stated that one must acknowledge the research results showing that the negative consequences of punishment carry more weight than any potentially positive ones.³⁵

It is submitted, however, that this is no justification to allow culpable transmission of the fatal virus to go unpunished, which view is based on the following grounds advanced by one

Zambian lawyer:

'Even though the law of murder will not prevent every murder from occurring, we still have a law on the subject in the hope of preventing some, but in any case to state society's standard and to fix penalties in advance for pre-ordained behaviour that is regarded as antisocial. It is upon this basis that specific laws to attach penal sanctions to the knowing spread of HIV have been justified, whether or ^{not} they actually produce change of behaviour or a degree of restraint.³⁶

FOOTNOTES

- (1) According to Dr Msiska, speaking on the Z.N.B.C. television programme 'PALAVER' debating the topic: 'The fight against AIDS is wasteful', on 18 October 1994.
- (2) Ibid.
- (3) Ibid.
- (4) Wendy L. Patten and J. Andrew Ward, 'Empowering Women To Stop AIDS In Cote D'Ivoire and Uganda', Havard Human Rights Journal, Vol.6 1993, p.211.
- (5) S.16 Subordinate Courts Act, Cap 45 of The Laws of Zambia.
- (6) Muna Ndulo (ed.), 'The Changing Nature of Customary Marriage in Zambia', Law In Zambia, (Nairobi: East African Publishing House, 1984), p.147.
- (7) Case no. 169 of 1970 Shakumbila Local Court.
- (8) Ndulo, op.cit. p.151.
- (9) Cap 215 of the Laws of Uganda, 1964.
- (10) Patten and Ward, op.cit. p.214.
- (11) Patten and Ward, supra, p.220.
- (12) Speaking during t.v programme in footnote (1).
- (13) K. Tomasevski, The AIDS Pandemic and Human Rights, Academy of European Law (ed.), Vol.II, Book 2, (The Netherlands: Kluwer Academic Publishers, 1993), p.122.

- (14) An extract from a byline by Kenneth B. Noble, New York Times, published in The Houston Chronicle, April 3 1994: An article entitled 'Political Chaos Saps Zaire's Fight Against AIDS', (The Houston Chronicle Publishing House, Section A, p.16.
- (15) K.B. Noble, *ibid*.
- (16) Mrs E. Mataka, speaking on the t.v programme, *supra*, footnote 1.
- (17) *Ibid*.
- (18) *Ibid*.
- (19) Per Dr Vongo, *ibid*.
- (20) K. Tomasevski, *op.cit*. p.125.
- (21) Tomasevski, *supra*, p.124.
- (22) Anne Kaddumukasa, presenting a paper on ' My Personal Experiences with AIDS in the family', Proceedings of the SWAAZ/PANOS International Conference on AIDS For Anglophone African Media, edited by Isle Mwanza, (Lusaka: January 1993), p.54.
- (23) Dr R.M. Sunkutu, presenting a paper on 'AIDS As It Affects Women, *supra*, p.32.
- (24) Sunkutu, *ibid*.
- (25) Sunkutu, *ibid*(24)
- (26) V.A.L. Kabonga, Human Rights and Ethical Aspects of Public Health Measures to Support Young People with HIV/AIDS, Occasional paper, (Lusaka, September 1993, Lusaka), p.40.
- (27) According to an article in the Zambia Daily Mail dated, Thursday, June 23 1994, p.4

- (28) Law Development Commission, Final Report On Homicide Project, (Lusaka: Government Printers, 1992), p.29
- (29) Law Development Commission, *ibid.*
- (30) 12 E.A.C.A 42: Court of Appeal for East Africa, 1945.
- (31) Law Development Commission Report, *op.cit.* p.33.
- (32) Report no. 40, Homicide Law Reform Commission of Victoria, Chapter 6, 'The Substantive Law: Manslaughter' pp.66-121 at pp 66-67.
- (33) M. Breun and A. Hendriks (ed.), except from AIDS and Human Rights: An International Perspective,(Copenhagen: Danish Centre for Human Rights, 1988), p.36.
- (34) Breun and Hendriks (ed.), *ibid.*
- (35) Rodger Chongwe in a seminar paper, 'Legal Implications of HIV Infection', contained in Proceedings of the SWAAZ/PANOS Conference on AIDS, (Compiled by I. Mwanza), (Lusaka: January, 1993), p.108.

CONCLUSION

What emerged at the outset of this discussion is that there is a cordial relationship between HIV/AIDS and human rights. Human rights, though not easy to define, are those basic requirements for human existence. Hence, they accrue to every individual by virtue of being a human being. Due to their fundamental nature, various states have safeguarded them 'jealously'.¹ These are rights such as the right to life, liberty, and privacy, etc.

Further, numerous international instruments have also been created which seek to provide for, and protect the human rights of individuals. Examples of such instruments include the African Charter on Human and People's Rights; the Universal Declaration of Human Rights, etc. These, however, merely lay down guidelines and countries which are dedicated to the protection of these rights for their citizens ought to incorporate them into their respective municipal laws.

Some fundamental human rights, particularly applicable to HIV positive persons which Zambia has specifically enshrined in her Constitution include the following:

- (i) The right to dignity²;
- (ii) The right to protection from degrading and inhuman treatment³;
- (iii) The right not to be discriminated against⁴; etc.

This notwithstanding, Zambia has to make certain improvements in this area. For instance, merely securing the right to privacy of home and property⁵ is inadequate. It is submitted that this right must be phrased in broader terms in order to cover confidentiality. A more appropriate wording would be that contained in the International Covenant on Civil and Political Rights, which states that no-one shall be subjected to arbitrary interference with his privacy. This more adequately takes care of cases where employers arbitrarily demand HIV tests from their employees.

Further the Zambia Bill of Rights does not enshrine the right to marry, as is contained in the African Charter⁶.

It is, however, essential to note that these rights are to be enjoyed subject to the rights of others.⁷ It is the duty of the law to protect these rights, but the difficulty arises in determining in what circumstances the law can come in to lawfully restrict the enjoyment of these rights in order to secure the rights of general public. Interference with the enjoyment, by HIV positive individuals, of their rights can only be justified as being in the interest of the public if it is based on reasonable and objective criteria. However, with an insight into the modes of transmission of the AIDS virus, any compromise of the human rights of HIV positive individuals cannot be justified. The law must, therefore, ensure that these rights are not arbitrarily interfered with.

The response of the Global Community, as outlined in Chapter 2, reveals that in the light of medical research, a successful AIDS control and prevention programme is one which incorporates human rights. Coercive and arbitrary means of controlling the disease tend to worsen the problem by pushing it underground. The Ministry of Health has done a great deal since the identification of the disease in Zambia.⁸ Its strategy revolves around education campaigns. It is suggested that these same education campaigns be employed to acquaint individuals with the rights of HIV/AIDS victims. This is because unless people are educated about the law, mere enactments will serve no purpose. The people for whom laws are made must be familiar with them.

There have been various calls for the enactment of laws, but there is also the question of whether laws are really the solution. Indeed, laws are essential in combatting a problem of this nature because the law must be dynamic to fit the times. This is due to the fact that society as a whole shapes the law, depending on the former's needs. There should, therefore, be specific laws passed ensuring protection for the abused, and penalties against the abusers.

It must be pointed out, however, that merely enacting laws is a fruitless exercise unless the persons for whose benefit the laws exist, can actually benefit therefrom. If they lack the means of claiming their rights then nothing is achieved. This can be because of prohibitive legal costs, illiteracy, and the fear of public exposure resulting in stigmatization.

It is submitted that despite these difficulties, the first step is to have the law in place. Thereafter, mechanisms must be put in place to ensure fruitfulness of the law. These include education and easy access to arbitration. It is proposed that the latter can be attained by restructuring

the office of the Ombudsman to include the jurisdiction to hear matters regarding human rights abuses. This will entail low legal costs, and high levels of confidentiality. The problem with this Commission would be effectiveness. It may not succeed for the very reasons it is failing now; such as funding, and poor response from the public. This, however, can be taken care of by a complete overhaul of the institution. It is proposed that the government should put funds into this venture as the return would be great. Its success would also demand a lot on education of the masses.

Such a Commission should comprise a cross-section of professionals from various disciplines, with quasi-judicial powers. Chapter 2 concludes that it is inevitable to employ the law to safeguard human rights for the HIV/AIDS victims. However, enacting laws alone, cannot solve problem. There must be means place to ensure that these laws are beneficial.

It is pointed out in Chapter 3 that in the fight against AIDS, stress should not only be on victims possessing rights, but also on owing duties to others. A balance must be struck between the right of an infected individual not to have his human rights violated, on one hand, and the duty on the other hand, of an infected person not to expose others to infection.

Behavioural patterns are a crucial factor in the spread of AIDS. Individuals must be educated on the need to refrain from high risk behaviour. Such campaigns, however, are fruitless if circumstances are such that individuals cannot change their behaviour because they lack the means with which to do so.

The tendency to treat women as inferior places them in particularly awkward situation. For instance, the acceptance and promotion of polygamous marriages in Africa denies a woman the means to protect her health by insisting on a 'one man, one woman' relationship.⁹ Therefore, in Zambia women's rights must be protected by enacting laws criminalising marital violence, and laws expanding women's rights to property, education and employment.¹⁰ This will empower women to be assertive over their rights and have the basis to protect themselves.

Another crucial factor in achieving behavioural change is uplifting the standard of living of the people. Some individuals engage in risky behaviour such as prostitution as a means of survival. It is only when people have the means of survival that they may concern themselves with human rights issues.

It is believed that a study of this nature would be incomplete without looking at duties of persons already infected with the virus. This entails that HIV infected individuals owe a duty to the public not to spread the infection to innocent persons. This raises the question of whether culpable transmission should be punishable as murder or manslaughter. Under the current homicide laws¹¹ this would be murder or manslaughter provided the resultant death occurs within a year and a day of infliction of the injury causing the death. It is submitted that this rule should not be maintained in view of the period of time which elapses between the time of infection, and resultant death.

It is clear that despite the difficulties which may arise from criminalising deliberate transmission the law should still provide for the same in order to set society's standard.

Finally, it must be appreciated that since the problem of violations of the rights of HIV/AIDS individuals is not a purely legal one, it cannot have a purely legal solution. The law must be in place to protect rights, create duties, provide penalties and set standards. These laws can only bear fruit if the people are educated on the same.

FOOTNOTES

- (1) For example, in Zambia, Part III of the Republican Constitution.
- (2) Ibid, art.15
- (3) Ibid
- (4) Ibid, art.11
- (5) Ibid, art.17
- (6) Ibid
- (7) Ibid, art.18 (1)
- (8) Ministry Of Health Policy document, Zambia National AIDS/STD/TB and Leprosy Programme, Strategic plan 1984 - 1998 p.13
- (9) Muna Ndulo, 'The Changing Nature Of African Customary Marriage'; Law in Zambia, (Nairobi: East African Publishing House, 1984), p.146.
- (10) Wendy L. Patten and J. Andrew Ward, 'Empowering Women To stop AIDS In Cote D'Ivoire and Uganda', Havard Human Rights Journal, Vol.6 1993, p.211.
- (11) Sections 199 and 200 of the Penal Code.

News in Depth

Spreading AIDS knowingly

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wanted to be given another
"wife" from the same family
through traditional
"cleansing."

The man is reported to have
contracted the disease some
time ago but failed to inform
his wife about the problem.
Once in a while, he would fall
ill but later recover until at
one point he went for blood
tests where he was confirmed
HIV positive.

Since he had hidden his
sero-status from his wife he
told one of his closest friends
who lived in the
neighbourhood but pointed
out to him to always keep the

cleansing) in which the wife's
relatives would provide a
woman to sleep with him.
The husband further
demanded to be given another
woman from the same family
to be a wife to take over from
the dead spouse.

While the deceased's family
were discussing the issue, the
man to whom the husband had
confided about his HIV status
approached the family and
warned them about the truth
because he did not want to see
the dreadful situation the
deceased endured to be
repeated to the next relative.

The deceased's family got

As at now results of the
new blood tests have not been
made known but suppose they
are confirmed positive what
will it mean to Zambian
society and its laws. Do they
need a review in terms of
deaths caused through a
similar manner? Should
people who cause such deaths
be charged with manslaughter
or murder?

The latter could be
reserved for some rare cases
but the former could be
appropriate because whilst
persons know that they were
transmitting the virus to their
partners they could be doing

in this case hid his illness
from the wife.

"If he had approached us
before we would have
brought them together for
counseling. Even before the
wife could have contracted
the disease we would have
given the couple the means of
avoiding spreading it to the
other protectively," she said.

She pointed out that her
organisation was well aware
of the problem arising from
husbands and wives
concealing from their partners
once they had been going on
and there was need to tackle it
boldly bringing both partners
together.

Mrs Sheth said as from July
the organisation would launch
couple counseling starting with
Chawama compound and then
to Bauleni.

The programme involves a
couple going for blood testing
once problems of insincerity
became known in the home.

She added that it was
known at Kara Counseling
that some men and women
found it difficult to tell their
partners about their positions
regarding the disease. He
advised such affected people
to contact any of their centres
if they did not know what to
do.

While the relevant organs
are busy trying to tie all loose
ends to come out with a law
to deal with people "causing
death knowingly through the
spread of the HIV virus" it
would benefit the nation if
suggestions to the proposed
law were made public for
discussion before being
enacted.

This would perhaps give
chance to various bodies
including churches and
human rights groups to air
their views.

"If he had approached us before we would have brought them together for counseling. Even before the wife could have contracted the disease we would have given the couple the means of avoiding spreading it to the other protectively."

information secret. As time
went by the disease (virus)
was transmitted to the wife.

The wife was ill for a long
time, she was in and out of
hospital until she reached a
stage medical personnel
described her position to be
terminal and discharged her
from the University Teaching
Hospital (UTH) until she died
recently.

As usual after burial
procedures relatives of the
husband and some of his late
wife took him to a traditional
healer to "wash" him off the
evil spirits that "befell" him
because of the death of his
wife.

When the entourage
returned to the funeral the
misunderstanding started
when the husband started
making demands for
"Kupanya" (traditional

infuriated by the information
they had been told and
charged that the husband had
actually murdered their
daughter and hence they were
demanding compensation and
ruled out the next stage of
"cleansing".

They also ordered that the
husband with his relatives
should go to UTH as soon as
possible to have medical
check-ups since he was
denying that he had infected
his wife with the deadly
virus.

During the exchange of
harsh words at the funeral
house the deceased's relatives
also warned that they would
make sure that the husband
followed his wife in the same
manner because of the new
disclosure.

so especially through sex
because of the difficulty of
desisting from physical
desires.

But experts on AIDS and
AIDS counseling feel the
issue was too complex to be
dealt with like that as it
needed experts from various
disciplines.

Chief counsellor at Kara
Counseling, Mrs Gita Sheth
said in an interview that it
was difficult to say anything
now.

She said the Ministry of
Health in conjunction with a
group of experts drawn from
the legal fraternity were
working out such a law to
deal with the situation.

Asked what was the view of
her institutions on the matter,
Mrs Sheth said it was
unfortunate that the husband

Marginalised groups bear the brunt of the AIDS epidemic

AIDS expert Dr Jonathan Mann, says the global strategy to combat the AIDS epidemic is missing an essential element: the promotion of human rights, and in particular, the empowerment of women.

As the former head of the World Health Organisation's Global Programme on AIDS, or acquired immune deficiency syndrome, Mann was one of the architects of the first international strategy for fighting the disease.

Today he urges that the battle against AIDS is equally a battle against discrimination.

"Take a country, any country. Add AIDS virus. Shake. Wait ten years, and I can tell you where that virus will be," he asserts, contending that in any given society, marginalised groups will bear the brunt of the epidemic.

In the United States the virus began its course in the relatively affluent, white male homosexual population, but the populations hardest hit today are African-Americans and Hispanic-American in the inner city, he points out. Similarly, in Brazil, AIDS has become "a heterosexual epidemic of the favelas."

"To bring the epidemic under control, we have to attack the roots of the problem, and the roots of the problem are social, especially the lack of respect for rights and dignity in society," he told journalists at a recent briefing in Geneva.

In his current position as Harvard University's Francis-Xavier Bagnoud, Professor of Health and Human Rights, Mann travels widely and seizes every available opportunity to reiterate his call for social action.

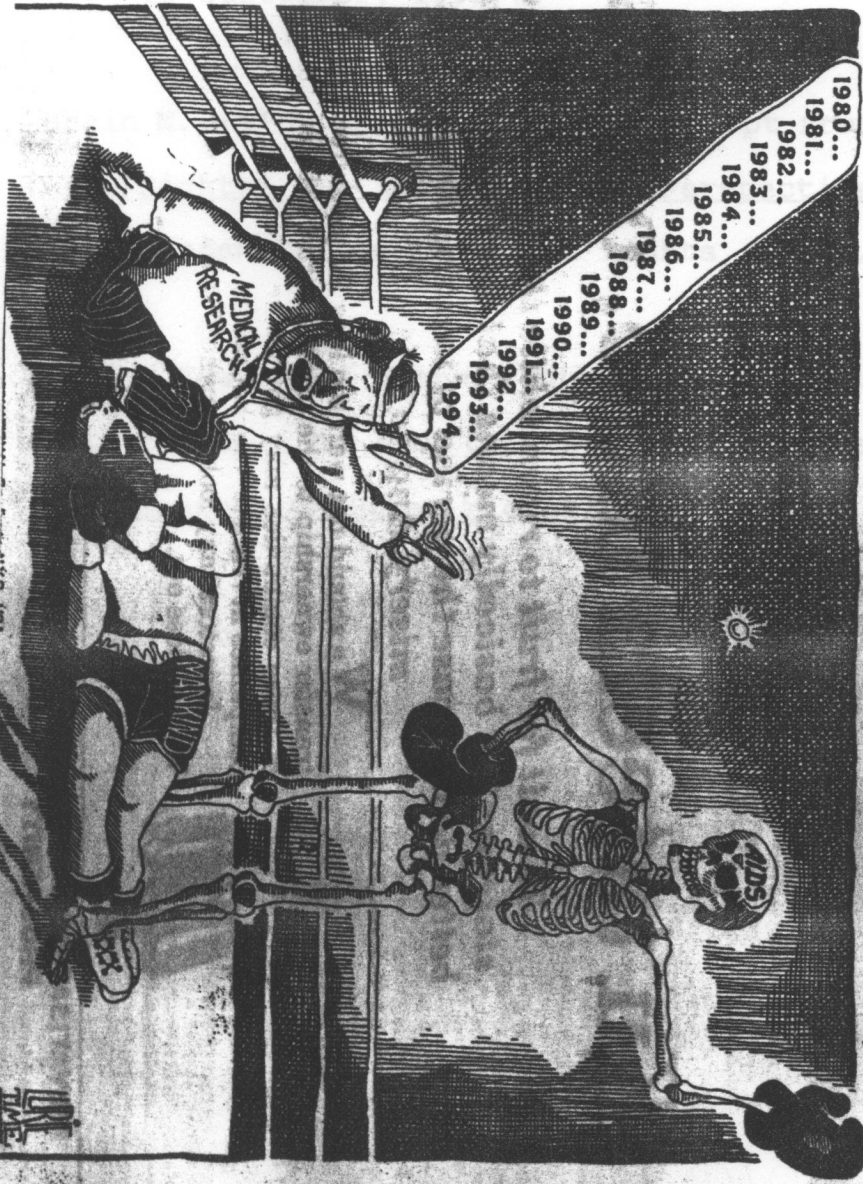
Wherever he goes, Mann carries a copy of the Universal Declaration of Human Rights. "How many of you have read this?" he asks audiences.

"The first part of our mission at the Harvard School of Public Health is to help them see the connections that exist between promoting rights and dignity, and promoting health, he said. Mann believes the global anti-AIDS effort has lapsed into a "period of fragmentation and confusion" about how to deal with the epidemic at the global and community level.

An AIDS vaccine is still "at least five to ten years away," according to Mann. With no effective treatment in sight, he said, prevention will have to remain the focus of the battle against AIDS. But the usual preventive public health responses

LURIE'S WORLD

0/30 Sep 22 '94



condoms and clean syringes - are not sufficient to bring the epidemic under control, Mann said. He is calling for a new comprehensive strategy that would include a targeted effort to protect fundamental human rights and insure non-

In particular, Mann argues that a social strategy for fighting AIDS would have to incorporate programmes aimed at promoting the education of women and elevating their status in society. Washington Line

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