THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

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HIV/AIDS POLICY AND LEGISLATION IN ZAMBIA: WHAT IS THE WAY FORWARD?

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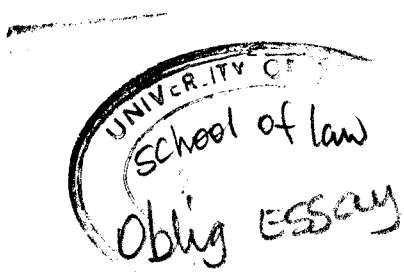

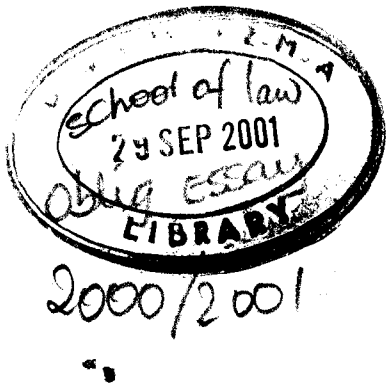

SUBMISSION

HIV/AIDS POLICY AND LEGISLATION IN ZAMBIA: WHAT IS THE WAY FORWARD?

BY

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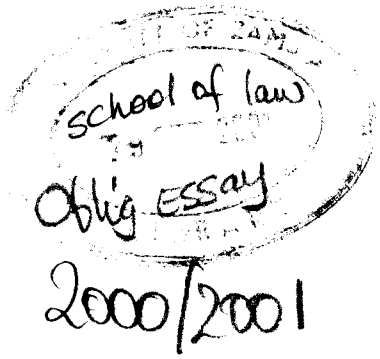
COMPUTER NUMBER : 95221433

An Obligatory Essay submitted to the University of Zambia's Faculty of Law in the partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LLB).

JULY 2001



DEDICATION

To MOM and DAD, MR. and MRS. KATUNASA

You are very wonderful parents and I thank God for your love, care and support that has seen me through my academic stay on campus.

I LOVE YOU

ACKNOWLEDGEMENTS

First, I would like to thank the Lord God Almighty, my creator for giving me the opportunity to come to the University of Zambia to fulfil the desire of my heart i.e. to study Law.

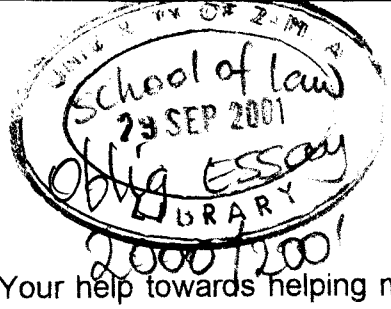
ASK AND YOU WILL RECEIVE; KNOCK AND THE DOOR WILL BE OPENED TO YOU. HOW MUCH MORE THEN, WILL YOUR FATHER IN HEAVEN GIVE GOOD THINGS TO THOSE WHO ASK HIM. **(MATHEW 7:8,11)**

I am also greatly indebted to Mr. Frederick Mudenda, my Faculty Supervisor at the University of Zambia without whose guidance, valuable comments, criticisms, patience, and tolerance, the completion of this work would have been extremely difficult or even impossible. However, I take full responsibility for any mistakes and imperfections that are in this presentation.

Success of this work is also owed to a number of people and institutions whose names I cannot exhaustively mention. Nevertheless appreciations go to Mr. Valentine Kabonga, former Acting Director of the Law Development Commission (1993) from whom the foundation of this paper was laid. Your motivational talks on the enactment of legislation on HIV/AIDS in Zambia greatly inspired me to take up the challenge and write an obligatory essay on the issue.

To my loving sister Chilufya Katunasa, 2nd year Social Work Student, thanks for always being there for me especially when I thought that I would that I would not be able to complete my obligatory essay on time.

To a dear friend, Chi-Alpha Christian Fellowship Chairman, Mr.Gravis Matsika, 4th year student Engineering, thank you for helping me type my work .You are a very busy person but you were always there to help me and made impossibilities turn out to be possibilities.



Thanks to Michael Chishala you are such a pal. Your help towards helping me edit format and print my obligatory essay was so timely. It was not easy pressing those keys for very long hours at the last minute. Anyway what are friends for?

From a research point of view, thanks go to Mr. Valentine Kabonga for the advice and laying the foundation. Ms.Womba Mayondi thank you for providing me with the materials you obtained when you attended the workshop on the drafting of the National HIV/AIDS Policy Document. My roommate Christabel Musonda, 4th Year School of Education, thanks for helping me with information on HIV/AIDS and cultural practices. I will always remember our stay together. It's been wonderful. Ms. Miyoba Muzumbwe, thanks for the encouragement, support and providing materials to enable me write this essay. Lastly, Dr. Muyinda and Dr. Mulenga of the Blood Transfusion Service at the University Teaching Hospital, thanks for your time and support as well as guidance and provision of materials on blood transfusions and HIV/AIDS. I really learnt a lot from your interview.

ABBREVIATIONS

AIDS	Acquired Immuno-Deficiency Syndrome
HIV	Human Immuno-deficiency Virus
IEC	Information Education Communication
MPI	Medium Term Plan
STD	Sexually Transmitted Disease
TB	Tuberculosis
UNAIDS	Joint United Nations Commission on HIV/AIDS
WHO	World Health Organisation

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INTRODUCTION

The Acquired Immuno-Deficiency Syndrome (hereinafter referred to as AIDS) pandemic poses the most serious health problem in the world today and ever since it was first detected in the United States of America in 1981,[1] to date, a cure and not even a vaccine has been found. A virus known as the Human Immuno-deficiency Virus (hereinafter referred to as HIV) causes AIDS.

STATEMENT OF THE PROBLEM

Given the seriousness of the problem posed by HIV/AIDS, there is need to annihilate this killer disease.

Javier Perez de Cueller, former Secretary General of the United Nations in 1987 during his address to the General Assembly stated,

> *"The world should make war against AIDS and not against people with AIDS."*[2]

It is submitted that what should be put in place is a comprehensive legal framework and policy in order to address the HIV/AIDS problem in the country.

With the AIDS scourge, it is either one is infected or affected by the disease and what has been emphasized on in the past is protection of those who are victims i.e. as regards their basic human rights like the right to life, the right to marry, the right to privacy, the right to employment opportunities.

In recognition of the worsening AIDS situation, there is a need to mobilise other approaches in order to fight the spread of the disease. These approaches basically are:

a) To show that new laws should be enacted to support a comprehensive legal framework to guide the implementation of an effective policy to combat the HIV/AIDS pandemic.

b) To establish how relevant pieces of legislation can be amended and harmonised in order for them to effectively help in combating the spread of the disease. It is submitted that section 200 of the Penal Code Chapter 87 of the laws of Zambia, which covers murder, should be amended in order to pave way for the criminalisation of the act of an infected person intentionally transmitting HIV/AIDS to an uninfected person. It is further submitted that amendments should be made to sexual offences outlined in the Penal Code. The amendments should pertain to situations where a sexual offence is committed and it results in the infection of the complainant.

c) To demonstrate how the national blood transfusion system in Zambia can contribute towards the minimisation of HIV/AIDS infection through blood transfusions, by upgrading and improving HIV testing facilities, training and expansion of voluntary based blood donation system and discouraging donors who may be potential AIDS patients.

d) To promote behavioural change and education and the erosion of certain cultural practices which are a catalyst in the spread of HIV/AIDS.

e) To study the institutional and legal framework that should be put in place to try to combat the spread of the disease.

HIV is transmitted primarily through the following ways; [3]

- By anal intercourse with an infected person.
- By vaginal intercourse with an infected person.
- By use of needles and other skin piercing instruments contaminated with infected blood.
- From an infected mother to her foetus (prenatal transmission) and through breastfeeding.
- By transfusion of infected blood or blood products.
- By tissue, semen, ova, or organ donations from infected donors.

FACTORS THAT PERPETUATE HIV/AIDS

a) **Social cultural norms**: Sexual behaviour is very much influenced by the social cultural norms that are present in any society. For example, a woman is taught never to refuse to give in to her husband's sexual demands even when he is known to be involved in extramarital sexual liaisons or suspected to have HIV or a sexually transmitted disease (hereinafter referred to as an STD). Polygamy, which is the practice of having more than one wife, contributes to women's vulnerability to HIV/AIDS. The man has a number of wives who could be exposed to HIV infection, as they may be involved with other men who are likely to be HIV positive. The retention of a cultural practice like polygamy presents to be an albatross in the fight against cumulative HIV/AIDS infection.

b) **Lack of alternative sources of income**: Owing to the trend of rising levels of poverty, women in particular are unable to cope with this development. As a result they are unable to enter into meaningful and profitable economic activities. Under these circumstances, many are compelled to become commercial sex workers.

c) **Long Distance Trucking**: Long distance truck drivers and their assistants contribute to the spread of HIV/AIDS because they are away from home and their families for extended periods. There are about one thousand five hundred registered commercial trucks operating in Zambia.[4] Reports estimate that each of the approximately three thousand five hundred truck drivers and assistants could have up to sixty sexual partners per month or seven hundred and twenty per year[5]. The majority of women they sleep with are mobile commercial sex workers from outlying low-income communities.

d) **Migrant Work**: In Zambia, men usually migrate from their home villages to work in large agricultural estates as unskilled labourers. This is a source of cheap labour for the agricultural estate owners and a source of income for the villagers. For example, in Mazabuka, sugar-cane cutters employed by the Nakambala Sugar Estate leave their wives or regular sex partners during the nine months cane cutting period from March to November each year[6]. This facilitates extramarital affairs, having multiple sexual partners and having sex with commercial sex

workers. These relationships constitute complex social and sexual networks that result in the widespread transmission of HIV/AIDS.

e) **Cross-border Trading**: Cross-border traders contribute to the spread of HIV because of their high levels of mobility. Female traders engage in sex with truck drivers so as to get a cheap source of transport to neighbouring countries where they go to buy their commodities. Sexual demands from police or customs officials at border posts to women caught crossing the border illegally or who want to avoid paying customs duty aids in spreading HIV/AIDS.

f) **Fishing and Fish Trading**: Many fishermen leave their wives and families at home for several months and enter into marriages of convenience. Their steady cash earnings can also support them to pay for sex favours from commercial sex workers. On the other hand, married female fish traders, due to the high costs of road and water transportation are forced to exchange sexual favours for preferential road and water transportation to and from fishing camps.

g) **Unprotected Sex in Prisons**: In prisons, where inmates are kept for long periods of time due to delayed court procedures, homosexual activities are most likely to take place. Condom distribution in prisons is currently prohibited and prisoners have little or no access to medical care thus delaying the timely diagnosis and treatment of sexually transmitted diseases.

In recent years, policy proposals[7] have discussed the protection of human rights and the dignity of HIV infected persons including persons with AIDS. It is estimated that the majority of HIV infected people are in the economically productive age group and that is why the area that has been tackled most is the implication of HIV/AIDS in the work place environment.[8] Policies on HIV/AIDS have been outlined to provide an opportunity to re-examine work relationships in a way that promotes human rights and dignity, ensures freedom from discrimination and stigmatisation and improve working practices and procedures.[9]

An illustration of a case, which involves discrimination of an employee as regards his HIV status is **RAYTHEON COMPANY v FAIR EMPLOYMENT AND HOUSING**

COMMISSION *exparte* THE ESTATE OF JOHN CHADBOURNE (DECEASED).[10] Raytheon Company, an electromagnetic system manufacturing Company hired Chadbourne on permanent terms. In 1983, Chadbourne became ill and was hospitalised. In January 1984, he was discharged with the diagnosis of AIDS and pneumonia.

Chadbourne tried to return to work but after much vacillation by his employers and medical practitioners, it was decided that he was unfit to return to work. By July 1984, Chadbourne's condition had deteriorated so much such that he was unable to return to work. He died in January 1985 due to AIDS related complications. The Commissions findings were that the respondent company (Raytheon) had breached Chadbourne's basic right to employment on the grounds of his physical handicap. Raytheon argued that, had they reinstated Chadbourne it would have posed a health risk to his co-workers. It was established, however, by medical evidence that the disease is only transmitted by unprotected sex, prenatal contact from mother to child or through the blood transfusion of infected blood.

Legislation on HIV/AIDS and the work environment has been enacted in the Union of Soviet Socialist Republic (as it was then), April 23rd, 1990. Article 8(4) of the Law on the prevention of AIDS states,

> *"Dismissal from work, refusal of work, refusal of admission to medical and educational establishments and limitation of the legitimate interest of such individuals solely on the grounds that they are carriers of HIV or are suffering from AIDS shall be prohibited."*

HIV/AIDS legislation has been enacted in certain countries but in Zambia this is not so to date. In July 1983,[11] the United Sates of America passed an amendment to the Public Health Law as regards HIV/AIDS. This spearheaded legislative responses towards the fight against the pandemic. Similarly in 1987,[12] Britain enacted the AIDS (Control) Act.

GOVERNMENT RESPONSE TOWARDS HIV/AIDS IN ZAMBIA

In 1986,[13] the Zambian Government recognised AIDS as a major public health threat that could disrupt economic and social development. A National AIDS Surveillance Committee and an inter-sectoral AIDS Health Educational Committee was established to co-ordinate all activities of AIDS prevention and control programmes[14]. Three national plans were implemented in response to the pandemic. In 1987[15], an emergency short-term plan was developed to ensure safe blood and blood product supplies. The First Medium Term Plan[16] (MMPI: 1988-1992) prioritised eight operational areas: Tuberculosis and Leprosy, information, education and communication, counselling, laboratory support, epidemiological research, clinical care, programme management and home based care.

In 1991, a new government was formed under the Movement for Multiparty Democracy (MMD). It ushered in a novel health policy[17] with a pragmatic approach towards management for quality with a district focus.[18]The policy emphasised a multi-sectoral approach to health problems through the Central Board of Health and an integration of an HIV/AIDS, STD, TB and Leprosy Council. It was on this platform that other national plans were formed in response to the HIV/AIDS pandemic were established. It was acknowledged that initial responses to HIV/AIDS were inadequate to curtail the problem that is more than just medical in nature.

In the year 2000,[19] the government established a National HIV/AIDS, STD and TB Council to appropriately deal with the challenges and co-ordinate activities relating to the pandemic at national level.

Recently, on 14th April, 2001[20] a workshop was held at the Mulungushi International Conference Centre to attempt to come up with a National HIV/AIDS policy. The main aim of the workshop was to create the foundation of mobilising a multi-sectoral approach towards combating the HIV/AIDS pandemic. Institutional arrangements and a legal framework for addressing the problem were laid out in the draft document.

As earlier stated, policy guidelines have embarked on HIV/AIDS patients and their rights but this paper will take a different dimension. It is submitted that to effectively wage a war against AIDS, measures should be tabled to curb the spread of the disease. The paper will be arranged in the following manner:

CHAPTER ONE

The criminalisation of the act of HIV/AIDS transmission by an infected person to an uninfected person intentionally, will be tabled and section 200 of the Penal Code will be examined in relation to this aspect.

Additionally, sexually related offences already outlined under the Penal Code Chapter 87 of the Laws of Zambia will be examined, furthering amendments that should be effected to the already existing penalties to cater for a sexual offence committed resulting in the infection of the complainant.

CHAPTER TWO

Chapter two will attempt to establish if the Blood transfusion service has put in place measures to ensure that safe blood is always administered and there is minimisation of chances of HIV/AIDS infection through blood transfusions.

A comparative study will be made with other countries that have enacted legislation as regards blood transfusions to ascertain if Zambia can implement laws or policies along the same lines as the countries to be studied.

Frequent questions asked are whether liability would arise in an action against a medical practitioner for administering infected blood to a patient under the circumstances that in the doctor's opinion, it was seen that the person on whom the blood transfusion was carried out had less likely chance of surviving unless a blood transfusion was carried out on him and the only blood was available was that which was uncertified (i.e. it is not yet tested). It is not known whether the blood sample is HIV positive or not.

CHAPTER THREE

This Chapter will examine the different cultural practices that we have in society like sexual cleansing, circumcision, encouragement of dry sex, marriage counselling practices which emphasise on the woman being submissive to her husband and never refuse to have sex with her husband. Such marriage counselling practices reinforce the woman's inferior position in African communities and they lead towards the perpetuation of customs and traditions that are retrogressive and detrimental to women's reproductive and human rights. The main question here is should these cultural practices be maintained in the advent of HIV/AIDS?

Basically, this chapter will also try to determine how women can be empowered so as to express their specific needs as a step forward in involving them combat the spread of HIV/AIDS.

CHAPTER FOUR

Institutional measures that are in place to curb the spread of HIV/ AIDS will be examined and their effectiveness will be established. The institution to be studied is the National HIV/AIDS, STD and TB Council and the Public Health Act, Chapter 295 of the Laws of Zambia that is the major statute in Zambia that covers issues of health. What will be analysed is whether the Act sufficiently covers the regulation of the spread of AIDS and a study of other Acts relating to health that have been enacted in other countries will be made.

CHAPTER FIVE

Recommendations will be submitted as to what could be an effective legislative proposal as regards the topics outlined in this work.

ENDNOTES

[1]Report on Testing for AIDS, Ontario Law reform Commission, 1992, page 1

[2]Javier Perez de Cueller in his address to the General Assembly o 20th October 1987.

[3]Report on Testing for AIDS, Ontario Law reform Commission, 1992 page 4, 5

[4]The National HIV/AIDS policy draft document 14th April 2001, page3.

[5]Ibid

[6]Ibid

[7]Kabonga Valentine, Human Rights and Ethical Aspects of Public Health Measures to Support Young People Living with HIV/AIDS, Law Development Commission, September 1993, Lusaka.

[8]World Health Organisation, Legislative Responses to AIDS, Martinus Nijhoff Publishers, London, 1989, page 294.

[9]Ibid

[10]1989 California Appeals Division, page 212

[11]World Health Organisation, Legislative Responses to AIDS, Martinus Nijhoff Publishers, London, 1989, page 199

[12]Ibid, page 196

[13]Ministry of Health Policy Document. Zambia National AIDS/STD/TB/LEPROSY CONTROL PROGRAMME STRATEGIC PLAN (1994-1998), Lusaka: Simons Graphics Limited 1994, page 4

[14]Ibid

[15]Ibid

[16]The National HIV/AIDS policy draft document 14th April 2001, page 8

[17]Dr. C Chela. The Development of the Zambia National AIDS Prevention and Control Programme. Excerpt from Proceedings of the Workshop on Positive Living Networking in Support of HIV for Youth Programmes in Africa, Lusaka: Zambia 13-18 September 1993, page 48

[18]Ibid.

[19]The National HIV/AIDS policy draft document 14th April 2001, page10

[20]Ibid.

CHAPTER ONE

It should be borne in mind that society is always in an existing state of motion where there are so many social, cultural, political, and ethical changes. In the advent of HIV/AIDS, it has been observed that there have been many dynamic changes in society and it is submitted that laws should take a reform to this effect. Willies C.J. remarked,

> *"When the nature of things change, the rules of law must change too."*[1]

This is true in that the legislature and within the limits, the courts, should change rules to keep abreast of changes in society.

The Argentinean Law on AIDS No. 23 of 16th August 1990[2] states that

> *"AIDS related legislation should not be adopted if it infringes on personal dignity or results in discriminatory or marginalizing effects on those affected or likely to be affected. It requires respect of individual dignity, medical confidentiality and privacy and prohibits marginalisation degradation and humiliation of persons affected by HIV/AIDS."*

With this legislation in mind, an attempt will be made to determine whether section 200 of the Penal Code Chapter 87 of the Laws of Zambia dealing with murder should be amended and on the other hand, sexually related offences.

Argentinean law is not applicable to Zambia, but for academic purposes, it will be used as a guideline along which AIDS legislation can be enacted as it protects the rights of AIDS victims, which should be seriously taken into consideration. It talks about preventing discrimination of people with AIDS, respecting the individual affected by HIV/AIDS as regards his dignity, keeping his HIV status confidential and prohibits degradation, marginalisation and humiliation of an AIDS victim.

CRIMINALISING THE ACT OF AN INFECTED PERSON INTENTIONALLY TRANSMITTING HIV/AIDS TO AN UNINFECTED PERSON

The position of the law on persons that have been infected with an STD by a person who knew that he/she had the infection has proved to be tentative. The battle to ascertain the position of the parties in this area of law was first illustrated in the case of **R v BENNET**[3] where the prisoner slept with his niece without her consent and communicated to her a syphilitic disorder. Although the girl may have consented to sleep and have connection with her uncle, she did not consent to the aggravated circumstances i.e. to have sex with an infected man. So, it can be said that a fraud was committed on her and the prisoner's act would be an assault by reason of such fraud.

An assault is with the rule that fraud vitiates consent. Therefore, if the prisoner knowing that he had a venereal disease induces his niece to sleep with him with the intention of infecting her, and she is ignorant of his medical condition, any consent is vitiated and the prisoner is guilty. This line of thinking was later followed in **R v SINCLAIR**[4] where Sinclair coaxed a girl who was about twelve years of age to have sex with him. The young girl did not scream or cry so as to show resistance to justify a conviction. However, a few days after the sex encounter, the girl had a discharge from her vagina and medical evidence showed that she had contracted gonorrhea and the prisoner was also suffering from the same disease.

The prosecution contended that although the prosecuterix may have consented to the connection, she was ignorant that a contagious disease was being transmitted to her. If this was done by the prisoner, knowing that he had such a disease and that it would be transmitted to the girl and he did not inform her about his medical state, her consent being procured by fraud amounted to there not being any consent so he was guilty of assault occasioning grievous bodily harm.

This may set a dangerous precedence as there are some cases where prostitutes offer sex for financial gains and in the trade, consent is unnecessary as the "rule of the game" is to present oneself to the clientele, get the sexual act done and be paid for it. Nevertheless, there may be times when a prostitute picks up an infection and may accuse any one of her clientele of having infected her. This presents a possibility of the alleged client being prosecuted for assault or rape. This was the danger the court was trying to avoid when it overruled **BENNET** and **SINCLAIR** in **R v CLARENCE**.[5]

In **CLARENCE**, a man had a venereal disease and he slept with his wife without telling her about his medical condition. The wife ended up getting a sexually transmitted infection. The wife claimed that if she had known that he had a venereal disease, she would not have slept with her husband. He was charged with assault and the court found him guilty.

The husband submitted that his wife consented to the intercourse but the court was of the opinion that consent was obtained by fraud i.e. (his silence as to the state of his health) and since fraud vitiates consent, there was the absence of consent on the part of his wife.

It was further stated in **CLARENCE** that the rule that FRAUD VITIATES CONSENT was too general to be applied to all cases where intercourse results in contracting a venereal disease. It was held that it is neither an infliction of grievous bodily harm nor an assault for a man to infect his wife (or any woman) with gonorrhoea by having sex with her even though he was aware of his condition and she was ignorant about it. It is immaterial that she would not have had intercourse with him had she known about his condition.

To quote the words of Stephen J,

> *"The question here is was there an assault? An infection is not an assault. Mere silence though a fraud, the principle that fraud vitiates consent is too general to be applied in this case. If it applied, then many seductions would be rapes and so might acts of prostitution procured by fraud as for instance promises not intended to be fulfilled. These illustrations appear to show clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if they where absolutely true."* [6]

It was thus established by the courts that fraud only vitiates consent as to the nature of the act or the identity of the person with whom the act was done and this remains the position to date.

The above three cases involved STD's and since AIDS is also a sexually transmitted disease, they are used to try and establish the position of the law as regards the criminalisation of the act of an infected person knowingly transmitting HIV to an uninfected person.

The law as regards intentional transmission of sexually transmitted diseases has been harsh since the decision of **CLARENCE** as it takes the nature of the act and the identity of the person into consideration in order for a conviction of guilt to stand or not.

Notwithstanding this, in the advent of HIV/AIDS, which, unlike other sexually transmitted diseases, is incurable and deadly, an urgent need arises to alter the law in this regard.

Under the Penal Code Chapter 87 of the laws of Zambia, the provisions that will be analysed and which are close in aiding the formulation of legislation to criminalize the

intentional transmission of HIV/AIDS from an infected person to an uninfected person are sections183 and 200.

Section 183 of the Penal Code provides

> *"Any person who unlawfully and negligently does any act which is and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life is guilty of a misdemeanour."*

For this charge to stand though is a matter of fact and law. It must be shown that the act of the accused is unlawful and negligent. If one has sexual intercourse with somebody without their consent it can be considered to be an unlawful act and one may be charged under section 183 of the Penal Code. On the other hand, if one has sexual intercourse with somebody else and it results in the communication of an infectious disease he can be said to have acted in such away that he lacked proper care to ensure that the disease is not communicated.

It is submitted that section 183 of the Penal Code should be amended in such a way that it should have a sub-section listing all the diseases dangerous to life, which should include HIV/AIDS infection.

The other issue at hand is whether one who knowingly infects another with HIV should be charged with murder under the Penal Code. Section 200 of the Penal Code provides that any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.

Section 204 of the Penal Code reads as follows:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

a) An intention to cause the death of or to do grievous bodily harm to any person, whether such person is actually killed or not;
b) Knowledge that the act or omission causing death will probably cause the death of or grievous bodily harm to some person, whether such person is the person killed or not although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that may not be caused;
c) An intent to commit a felony; if an infected person sleeps with a person who is presumably uninfected, with the intention of passing the infection to the other person he is said to have the intention to cause death or grievous bodily harm to the other person and this amounts to having malice aforethought which is the mental element of committing the crime of murder.

However, there are four controversial issues that may be raised. Firstly, one has to establish that the accused had the malice. i.e., he had the intention to bring about the harm done or recklessness as to whether it should happen or not as where there is foresight of consequence but the risk is nevertheless taken.[7] Malice would be difficult to establish in the courts of law because one cannot tell that a person knew about his sero-positive status and so went ahead to deliberately spread the infection.

Confidentiality that is attached to HIV tests makes it also extremely difficult for the prosecution to obtain an HIV test certificate in court as medical evidence of the accuser's condition of health. It may be argued that the prosecution may go to a medical hospital and obtain a copy of the HIV test results of the accused on the basis of the holding in **LISWANISO v THE PEOPLE**[8] where illegally obtained evidence is admissible if the evidence is of relevance to the case at hand.

The law should be seen to uphold the confidentiality of an individual's HIV test result so it is submitted that the argument in **LISWANISO** should not be upheld considering that the right to privacy[9] is enshrined in the Constitution of Zambia, which is the supreme law of the land. The right includes privacy of the person and property. Therefore, it is contended that it is a constitutional right of the accused to have his HIV test results kept private and not used as evidence in the court of law to confirm his knowledge of his sero-positive status.

To demonstrate malice, the other point to consider is that the appearance of a person does not confirm that one has the HIV infection. One may not even know that he has the infection because the symptoms sometimes do not appear for ten years or more from the time of infection. Additionally, one may have symptoms that are found in HIV/AIDS patients but can also occur in HIV negative people. One may easily assume that he is not infected at all.

Secondly, the other aspect that has to be proved is that the complainant did not previously have the virus. This brings in the legal aspect of causation. The question asked is that can one say that a certain individual is responsible for transmission without supposing that maybe the complainant had been previously infected by somebody else or by another source i.e. blood transfusion or by using skin piercing instruments that is shared with others who already have the infection?

The case of **R v TOMASI ENYAJU S/O OGURJO and ELASU S/O EJURU**[10] will demonstrate this clearly. During a native dance, Tomasi gave the deceased a violent poke on the head with the sharp end of his heavy stick, piercing the skull and causing the brain to protrude. Almost immediately, while the deceased was alive, Elasu hit him violently on other side of the head, fracturing the skull. Each injury was sufficient to cause death. Tomasi and Elasu were both convicted of murder. Sheridan CJ stated in the Court of Appeal that in assaulting the deceased, the first appellant intended to kill or cause grievous bodily harm and this could have caused death even if there had not been a subsequent assault. Relying on this analogy, it is submitted that if X

infects Y with HIV knowingly, it is no excuse to claim that Y may already have acquired the virus from say Z. Infecting one with the virus will eventually cause the death of the victim in the absence of a previous or subsequent act.

Thirdly, the aspect that is to be examined is section 209 of the Penal Code, which provides for the year and day rule. Section 209, subsection 1 of the Penal Code stipulates that "a person is not deemed to have killed another if the death does not take place within a year and day of the cause of death."

As regards the formulation of HIV/AIDS legislation, the year and rule would be difficult to apply because there is medical evidence that has shown that a person with HIV can live up to ten or fifteen years before getting full blown AIDS and eventually dying. So if X is infected on 1st May 2001 and dies due to AIDS complications on 3rd May 2002 the year and day rule would be difficult to apply. So, as regards AIDS legislation, this should not be included or there should be an exception added to the provision. i.e., lengthening the time period within which intentional transmission of HIV amounts to murder when the complainant dies or the first symptoms are seen.

In Denmark, the statutory provisions of the Penal Code with regards to murder, manslaughter, assault threats, etc. can, according to the circumstances, be used against persons with AIDS who infect others.[11]

It is submitted that the emotional status of the accused has to be taken into consideration when he/she is told about their HIV status. If the HIV test is positive, most people suffer from shock, disbelief, anger, fear and denial. Their mental state may drive them into sleeping around and infecting others for the fear of dying alone. Should the law, therefore, be lenient on the accused because of his mental state of mind when he/she is informed of their HIV status? It is rather difficult to establish that the person is still in a state of shock when they decide to start infecting others. In as much as one may be shocked at the instance he is declared HIV positive, he may recover or may not. All the more the reason medical practitioners encourage

counselling before and after the HIV test in order for the person to prepare for the outcome of his HIV test results and learn how to live positively, look after oneself and others whether found negative or positive.

The main aim of legislation should be to curb the transmission of HIV/AIDS to an uninfected person negligently, so it has to be harsh and firm on this ground.

Article 1 clause 2 of the Constitution of Zambia Chapter 1 of the Laws of Zambia, states that

> *"The Constitution of Zambia is the Supreme Law of Zambia and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."*

The Constitution has a Bill of Rights under Part 3, Article 12 clause1 provides that

> *"No person shall be deprived of his life intentionally except through execution of the sentence of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted."*

This provision is contained in the Constitution, which is the supreme law of the land, and if any AIDS related legislation is to be formulated, leniency exercised on the person knowingly infecting others on the basis of the presumption that one was in an unstable emotional state will be a contravention of the objectives of the Article 12(1) of the Bill of Rights. (i.e., preservation of the inalienable right to life)

It is submitted that the act of knowingly infecting an uninfected person with HIV should be criminalized and amendments should be made to sections 183 and 200 of the Penal Code and this will be illustrated in the recommendation part of this work.

SEXUALLY RELATED OFFENCES

The National HIV/AIDS Policy Draft Paper of 14th April, 2001 outlines in its objectives that it is to provide legal provisions of keeping confidential the status of people with HIV/AIDS, STD's and tuberculosis except people charged with sexual offences that could involve the risk of HIV/AIDS, STD and TB transmission. This statement provides as a stepping-stone in the direction of enacting legislation for HIV/AIDS transmission in relation to sexually related offences.

According to section 132 of the Penal Code,

> *"Any person who has unlawful carnal knowledge of a woman or girl, without her consent or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm or by means of false pretences as to the nature of the act, or, in the case of a married woman by personalising her husband is guilty of the felony termed 'rape' ".*

It must be noted that for the charge of rape to stand, there must be actual penetration of the male sexual organ into the female organ. It is not just enough for one to say that she found a man sleeping on top of her or beside her[12]

Rape consists in a man having sexual intercourse without a woman's consent. However in the case of a married woman, Hawkins J in **R v MILLER**[13] was of the view that a husband could not be convicted of rape of his wife. Martial privilege is equivalent to consent given once and for all at the time of marriage. It follows that the mere act of sexual communion is lawful, but there is a wide difference between a simple act of communion which is combined with infections contagion endangering health and causing harm which is unlawful. It may be said that assuming a man to be diseased, still he cannot have communication with his wife without consent; the communication of the disease is the result of a lawful act and therefore, cannot be criminal.

It can be argued that a person having a privilege of which he may avail himself or not at his will and pleasure cannot exercise it while at the time doing something not included in this privilege and which is unlawful and dangerous. He must either forego his privilege or take the consequences of his unlawful conduct.

This judgment sought to show that a woman may consent to the act of sexual intercourse but not when it endangers her health, and so she is entitled to refuse in such an instance. It is submitted that the law should be harsh in cases where a woman or girl is raped and it is found that the victim is infected with an STD or even with HIV/AIDS.

According to section 138 of the Zambia Penal Code,

> *"Any person who unlawfully or carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment for life."*

For the defence under the provision to succeed, an accused must satisfy the court that he had reasonable cause to believe that the girl was of or above the age of sixteen years and must satisfy the court that he did in fact believe this.

In case of **NSOFU v THE PEOPLE**[14], the judge stated that no reasonable person could have thought that the girls who had been defiled were over sixteen years of age.

According to the Convention on the Rights of the Child, which Zambia has ratified, Article 34 provides:

State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral, and multilateral measures to prevent:

a) The inducement or coercion of a child to engage in any unlawful sexual activity.
b) The exploitative use of children in prostitution or other unlawful sexual practices.
c) The exploitative use of children in pornographic performances and materials.

Article 1 of the Convention states that

> *"For purposes of the present Convention, a child means every human being below the age eighteen years unless under the law applicable to child, majority is attained earlier."* [15]

In Zambia, a "juvenile" means a person who has not attained the age of nineteen years. The term includes a child. i.e. a person who has not attained the age of sixteen years.[16]

According to the World Declaration on the Survival Protection and Development of Children, it was agreed at the World Summit for children on 30th September, 1990 paragraph 4 outlined that at that time, each day, an estimation of approximately 40,000 children die from malnutrition and disease including AIDS[17]. Most of these children get HIV/AIDS through sexual abuse and this is contrary to the objectives of Article 34 of the convention on the Rights of the Child.

The enhancement of child health is a global duty so it is submitted that legislation (i.e. Article 138 of the Zambian Penal Code) that provides penalties for the defilement of a child below the age of sixteen should be amended to cater for cases in which infection with HIV results when the offence is committed.

END NOTES

[1]DIAS JURISPRUDENCE, page 197

[2]Argentina Law of AIDS No. 23 16th August 1990

[3]R v BENNET (1865) 4 Fos and Fin.1105

[4]R v SINCLAIR 13 COX Criminal cases page 28

[5]R v CLARENCE 22 Queens Bench Division page 23

[6]Ibid page 42

[7]Smith and Keenan, English law, London: Pitman Publishing Company, 1979 page 455

[8]LISWANISO v THE PEOPLE (1976) Zambia Law Report page 277

[9]Article 17 of the constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 12 of the Universal Declaration of Human Rights and the international Convention on Civil and Political Rights Articles 17 and 19(3)(a)

[10]12 East African Criminal Appeal pages 42.

[11]M.BRAUN and A.HENDRICKS(ed) excerpt from AIDS & HUMAN RIGHTS: AN International Perspective. Copenhagen: Danish Centre for Human Rights, 1988 page 36

[12]R v YOHANI MPOROKOSO, 2 Northern Rhodesia Law Reports page152

[13]R v MILLER, 1954, 2QB. 282

[14]1973, Supreme Court Judgment page 287.

[15]Section 1 of the convention on the Rights of the Child

[16]Section 2 of the Juveniles Act

[17]World Declaration on the Survival, Protection and Development of Children, World Summit for Children, 30th September 1990, paragraph 4.

CHAPTER TWO

One of the major modes of HIV/AIDS transmission is through the transfusion of infected blood. To date, up to five percent of HIV infections in the developing world may still be due to transfusion of HIV contaminated blood.[1] HIV infection by blood transfusion is almost 100 percent effective in each case. However safe and sustainable blood programmes can easily prevent this. When blood is donated, it has to be screened and certified that it is free of infectious diseases like Hepatitis B, Syphilis, as well as HIV. If the blood is infected then it is not administered.

The establishment of the Blood Transfusion Service at the University Teaching Hospital has been one of the major government responses towards the minimisation of HIV/AIDS transmission. The operations of the Blood Transfusion Service fall under the Medical Council of Zambia embodied under the Medical and Allied Professions Act Chapter 297 of the Laws of Zambia.

In many counties, like the United States of America, which has an Act relative to the Acquired Immunodeficiency Deficiency Syndrome and blood or blood products (1986), laws have been enacted as regards the procedure and the prevention of HIV/AIDS transmission when administering blood or blood products[2]. In Zambia, however, there is no specific legislation to this effect, medical personnel simply rely on the Medical and Allied Profession Act which states in its preamble that it is:

> *"An Act to establish the Medical Council of Zambia, to provide for the regulation of the medical, dental, pharmaceutical and allied professions and to provide for matters incidental to or connected with the foregoing."*

By implication, the main objective of the Medical and Allied Professions Act Chapter 297 of the Laws of Zambia is to maintain and enhance professional standards of all cadres concerned with the dispensation of medical services together with the facilities and institutions from which they operate.

The other instrument that is relied on by medical practitioners is the HIPPOCRATIC OATH[3] where doctors swear to prescribe regimens for the good of their patients according to the best of their ability and judgment.

It is inferred from the two instruments that as regards blood transfusions, all blood physicians are expected to do is to take all the necessary precautions to take care not to administer anything harmful to their patients (in this case HIV).

PROCEDURES TAKEN BY THE BLOOD TRANSFUSION SERVICE TO MINIMISE HIV/AIDS TRANSMISSION.

The following are the necessary steps taken to try to minimise the transmission of HIV/AIDS through a blood transfusion[4].

The primary objective is to avoid recruiting people who are already infected with HIV and the criterion used to achieve this is to target the low risk group. A questionnaire is prepared which is designed to look for signs of certain risky sexual behavioural patterns. Honesty is required of the donor that is why it is important to ensure that a donor is a volunteer and is not remunerated. The rationale behind this principle is to prevent the dangers of someone being dishonest when answering the questionnaire and donating blood for monetary gain. The motive of donating blood for financial gain can prove to have serious repercussions on the operations of the blood bank because it will keep on receiving infected blood that cannot be used whilst its coffers are being drained.

This principle emanates from the World Health Organization (WHO) Assembly Resolution (WHA28.72) of 1975, which urged Member States of WHO; [5]

a) To promote the development of national blood services based in voluntary non-remunerated donation of blood;

b) To enact effective legislation governing the operation of blood services and to take other actions necessary to protect and promote the health of blood donors and recipients of blood products.

The first resolution is important to minimise on having instances of increasing levels of untested blood donations especially in the developing countries. The second resolution is a stepping-stone in the direction of encouraging the enactment of effective legislation governing the operation of blood services to protect and promote the health of the donor and the recipient.

An additional requirement of the procedure used by the Blood Transfusion Service when receiving blood from a donor is that the donor is expected to sign a declaration form where a donor certifies that to the best of his knowledge he has no reason to believe that he is suffering from any infectious disease that can be transmitted through blood or engaged himself in any activity within a previous stipulated number of months that could have led him to contracting a disease which can be communicated through a blood transfusion like AIDS.[6] After the donor signs the declaration form he goes through a physical medical examination to check for any signs of diseases that could render him fit or unfit to donate blood.[7] The blood transfusion physician then certifies whether the donor is fit to donate blood or not.[8] Notwithstanding this the blood sample is subjected to medical tests to establish whether it is free of infectious diseases like HIV/AIDS. If the blood is safe it is administered to the recipient but if it is not then it is disposed of.[9]

When carrying out the blood tests confidentiality is attached to the HIV test results and it is left to the discretion of the donor whether he or she would like to know the outcome of the results. The trend usually is that most donors would like to know their HIV status that is why the blood service programmes are designed to recruit non-remunerated donors to avoid the practice of having people donating blood for monetary gain at the expense of the financial operations of the institution. Most people will not come with the objective of trying to save lives by donating blood but it

will become like a business. i.e., people donating blood that is going to be disposed of. This will prove to be a threat to the health of the donors who may be HIV positive because they need blood themselves.

The critical question to be asked is, how can we be sure that blood being used in a transfusion is 100 percent safe and rule out the chances of there having been an error made during laboratory tests as it is a notorious fact that scientific tests are not always 100 per cent reliable?

It was submitted by the only two blood transfusion physicians in Zambia Dr. Gabriel Muyinda and Dr. Mulenga at the University Teaching Hospital Blood Transfusion Service that the HIV test kit has proved to be 100 per cent accurate when used so the incidence of their being an error is ruled out[10].

Another critical issue that can be raised here is the administering of blood that is in its window period. The window period is the time when blood that is infected with HIV goes through a stage where the virus proves to be elusive when attempts are made to detect it in the laboratory.[11] When blood of this category is administered to an uninfected person, it is still in an active state and is prone to develop HIV antibodies, which can later on be detected. In such a situation, a person can become infected. The precautionary measures taken by the blood transfusion service to reduce an infection in such instances is to refer to the sexual behaviour pattern behaviour and check on when the donor was last exposed to the risk of infection.

If the time span is minimal then the donor's blood is considered to be in the window period and he is advised that he cannot donate blood. Of course this may be a very inaccurate way of determining whether blood is in its window period or not because the donor may not be honest about the last sexual encounter he had but of course it is not all who will be dishonest. However, this proves to be a step ahead in trying to minimise the infection rate through blood transfusions.

These basically are the precautionary measures taken by the Blood Transfusion Service to try to combat the spread of HIV/AIDS.

So the question of whether medical practitioners are liable for transfusion of infected blood to an uninfected person on the basis that the blood specimen was thought to be free of HIV according to laboratory tests when in fact it was not, is swallowed up by the fact that the chances of a laboratory test being inaccurate is only 1 percent.

On the question of liability of medical practitioners as regards HIV/AIDS transmission based on a blood transfusion, should a physician be held liable for administering uncertified blood, when he was of the opinion that unless a blood transfusion was carried out a patient was most likely to die and at the time he made such a decision, there were insufficient quantities of an appropriate kind of blood?

There may be times when there is inefficient blood supply in a blood transfusion service and at the time when a person is in dire need of a blood transfusion the only blood available is that which has not been tested for infectious diseases and it is necessary for the carrying on of life of the patient that a blood transfusion is carried out immediately. The subject that is raised here is that of professional negligence and this will be discussed further at length as to the extent of liability of the medical practitioner.

NEGLIGENCE AND THE MEDICAL PROFESSION

The purpose of medicine is to maintain the patient in the best of health, to overcome his disease or injury and to lengthen his life span. On the other hand, the purpose of law is to maintain peace and order in the community and respect the human personality of persons through human rights and provide equal opportunities. To achieve these purposes, medicine emerges from the laboratory by the scientific process and law emerges from the community by the process of experience. In other

words, people follow medicine, law follows people or people will follow medicine, but people must lead the law.[12]

This brings about the aspect of looking at the tort of negligence applied to the medical profession. Negligence was defined in the case of **BLYTH v BIRMINGHAM WATERWORKS COMPANY**[13] as

> *"The omission to do something which a reasonable man would do or doing something which a prudent and reasonable man would not do."*

Negligence when applied to the medical profession is called "malpractice" and is defined as the doing of some act which a reasonable and prudent person would not do or the failure to do some act which such a person should or would do.[14]

The term malpractice has broad connotations and is only employed generally to designate "bad practice". It has the following elements: [15]

a) The failure of a physician or surgeon in the treatment of a patient to possess and employ that reasonable degree of learning, skill and experience which ordinarily is possessed by others of his profession.
b) Failure to exercise reasonable, ordinary care and diligence in the exertion of skill and the application of his knowledge.
c) Failure to exert his best judgment as to the treatment of the case entrusted to him.

It must be borne in mind that for negligence of any kind to be proved it must be shown that the defendant (doctor) owed a duty of care to the plaintiff (patient), and that the defendant was in breach of that duty and lastly that the plaintiff suffered damage as a result.

As earlier stated, the subject of negligence is wide and as regards professional negligence in the medical field as Chief Justice Tindal expressed,

"A doctor who has a relationship of professional attendant with a patient undertakes to bring to the exercise of his profession a reasonable degree of care and skill and when a doctor fails in this respect he may have shown professional negligence." [16]

A person who professes to be a medical doctor implies that he is a competent worker in the medical field and therefore he undertakes to bring to the exercise of work a reasonable degree of care; the standard that is of an ordinary competent practitioner in the group or specialty to which the medical practitioner belongs.

The standard required was generally adopted in the case of **LANPHIER v PHIPOS**[17] in which Justice Tindall said,

"It is not enough that there has been a less degree of skill than some other medical man might have shown. There must have been want of competent, ordinary care and skill. Surgeons, doctors, occupational therapists, radiographers, and nurses are not insurers. They are not guarantors of absolute safety. They are not liable in law merely because something goes wrong. The law requires him to exercise professionally that skill and knowledge that belongs to the ordinary practitioner."

A medical practitioner implies by his registration with the Medical Council of Zambia that he possesses the average degree of skill and knowledge as other doctors. He is not required to possess extraordinary learning and skill. Notwithstanding this, he is bound to keep abreast of the times. Departure from approved methods in general use, resulting in injury to the patient will render him liable no matter how good his intentions may have been. It is of course impossible for doctors or other medical practitioners to practice the art of medicine without ever being wrong in their diagnosis or making mistakes in good faith.

Medical practitioners must be profoundly indebted to Lord Denning for his summing up in the case of **HATCHER v BLACK**.[18] The sentiments in this summing up speech was vital to a fair and just appraisal of doctors' responsibilities. The sentiments were as follows:

> *"In a hospital when a person was ill and came in for treatment, no matter what care was used, there was always a risk and it would be wrong and bad law to say that simply because a mishap occurred the hospital and medical practitioners were liable."* [19]

The court must not therefore find a medical practitioner negligent simply because one of the risks inherent in an operation actually took place or because in a matter of opinion he made an error of judgment. It should find him guilty only when he has fallen short of the standard of reasonable care.

As stated earlier it is a defence to show that the practitioner acted in accordance with general and approved practice. So the critical question here is, when a blood transfusion physician in accordance with his opinion administers uncertified blood to a patient on the grounds that the patient in unlikely to survive if he does not receive blood, is the medical practitioner liable if it results in HIV/AIDS transmission if it assumed that this is the general and approved practice?

"Antidysthanasia" is defined as positive action to maintain life.[20]

So when a blood transfusion physician does not take the necessary precaution to save life (i.e. giving a patient blood even though it is uncertified), he can be said to have committed the above act. This illustrates the terrible climate within which doctors have to apply their skill. In Australia, the Blood Transfusion (Limitation of Liability) Act of 1986, section 6 provides that where: [21]

a) The relevant virus or the disease known as Acquired Immune Deficiency Syndrome or any other disease that is attributable to the relevant virus is transmitted by reason of the transfusion of blood or a blood product that was, in whole or in part, not certified.
b) Much of the blood or blood product as was not certified was taken or derived from, from a person who, not more than 12 hours before the taking of blood, signed a declaration in an approved form; and
c) Immediately before the carrying out of the transfusion not less than two medical practitioners were of the opinion that the condition of the person in the treatment of whom the transfusion was carried out was such that he was likely to die unless that blood or blood product was administered to him before sufficient quantities of certified blood or certified blood product of an appropriate kind could reasonably expected to be available to him.
d) It applies as if all blood or blood products referred to in paragraph (a) were certified.

This legislation illustrates that for medical practitioners, civil or criminal liability does not attach to any person in respect of HIV/AIDS transmission to another person by transfusing uncertified blood product as it is treated as being certified because there is an emergency and a positive action has to be taken to maintain life. This poses to be a very complicated case especially that the argument is based on there being insufficient blood samples in the blood bank that is certified. A balance has to be struck between saving a person's life and ending up infecting him with an infectious disease.

The first point to be struck is to ensure that there is always sufficient blood supply in a blood bank. This can be achieved by ensuring that there is adequate funding of HIV/AIDS projects in the country as well as of the blood service programmes. The other problem that is faced as regards sufficient blood availability of blood is the prevalence of infected blood that is donated and ends up being disposed of.

In 1987, a step was taken by the government to ensure safe blood and blood product supplies. It was during the First Medium Term Plan (MMPI: 1988-1992) that operational areas were prioritised: Tuberculosis and Leprosy, information, education and communication, counselling, laboratory support, epidemiological research, sexually transmitted diseases and clinical care programme management and home based care.

The National HIV/AIDS Policy Workshop on 14th April 2001 outlined in its draft paper that in order to resolve the challenges associated with the provision of health, government will strengthen the national blood transfusion system through upgrading and improved HIV testing facilities, training and expansion of voluntary blood donation system and discouraging blood donors who are potential AIDS patients.[22]

It has been observed that doctors are usually not held liable in such cases especially if there are laws that have been put in place limiting their liability. It is the doctor's duty to ensure that he saves somebody's life at all costs but would it be right to give uncertified blood on the grounds given? This is an issue that still has to be determined and can only be resolved if safe blood programmes are effectively funded in line with the National HIV/AIDS proposed policy framework on health which deals with national blood transfusion systems. It is submitted that this should be coupled with the enactment of effective legislation governing the operation of blood services and the taking of other actions necessary to protect and promote the health of blood donors and recipients of blood and blood products.[23]

Underlying the advocacy of both the WHO and the International Federation of Red Cross and Red Crescent Societies in the push for the global need of more safe blood and sustainable, comprehensive blood programmes, the two institutions to which the Blood Transfusion Service in Zambia is affiliated recommend that: [24]

a) All adults consider whether they are eligible to donate blood and if they are, they become regular blood donors

b) Transfusion therapy should be accessible to all those in need.

c) Civic education should be taught in schools at all levels and include education on blood donation.

d) Health authorities should implement strategies and programmes of education and promotion for preventive health care, provide alternatives to blood for volume replacements and provide access to essential drugs which may reduce the need for transfusion.

e) All blood supplies should be systematically tested before use.

f) All blood programmes of the International of Red Cross and Red Crescent Societies should be familiar with the quality concepts and the Federation's quality manual and become advocates for developing quality systems blood centres.

g) Blood transfusion services should be allocated sufficient funds to implement training programmes for developing quality systems and to maintain sustainable systems.

h) In a true spirit of capacity of building, special assistance should be given to develop strong blood programmes systematically in countries that are in most urgent need of a safe and sustainable blood supply.

It is further submitted that HIV/AIDS policy and legislation as regards minimisation of the infection rate through blood transfusions should be implemented using the above highlighted recommendations as guidelines.

ENDNOTES

[1]Safe Blood Starts With Me. World Health Organization and International Federation of Red Cross and Red Crescent Societies Publication (World Health Day, 7th April 2000) page 10.

[2]World Health Organisation, Legislative Responses to AIDS, 1989,Martinus Nijhoff Publishers page 24

[3]Annexure 1. See following page.

[4]Interview with Dr. Gabriel Muyinda and Dr.Mulenga on 27th April 2001(These are the only two blood transfusion physicians in Zambia at the moment.

[5]Safe Blood Starts With Me. World Health Organisation and International Federation of Red Crescent Societies Publication, World Health Day, 7th April 2000 page21

[6]Interview with Dr. Gabriel Muyinda and Dr. Mulenga at the University Teaching Hospital Blood Transfusion Service 27th April 2001.

[7]Ibid.

[8]Ibid.

[9]Ibid

[10]Ibid

[11]Ibid

[12]Charlesworth F. "The role of medicine and law in society" Medicine Science and the Law (July 1972) page 157.

[13](1843) All England Reports. Page 47

[14]Emmanuel H, Jonathan H. Legal Aspects of Medical Records Berwyn, Illinois 1964 page 300.

[15]Ibid.

[16]Knight B. Legal Aspects of Medical Practice, Churchill: Livingstone Press, 1972 page 37.

[17](1838) 8 C & P page 470.

[18]The Times (1954) June 29,page 52.

[19]Ibid.

[20]Shindell Sidney, "The Law in Medical Practice" USA: University of Pittsburgh, 1966,page 150.

[21]World Health Organisation Legislative Responses to AIDS Martinus Nijhoff Publishers, 1989 page31

[22]The National HIV/AIDS Policy Draft Paper presented on 14th April 2001 at the Mulungushi International Conference Centre in Lusaka. Paragraph 4.3.2.clause (n)

[23]1975 World Health Assembly Resolution.WHA28.72

[24]Safe Blood Starts With Me. World Health Organization and International Federation of Red Cross and Red Crescent Societies Publication (World Health Day, 7th April, 2000) page 21.

ANNEXURE 1

THE HIPPOCRATIC OATH

I swear by Apollo the physician, by Aesculapius, Hygeia, and Panacea, and I take to witness all the gods, all the goddesses, to keep according to my ability and my judgment the following oath:

To consider dear to me as my parents him who taught me this art; to live in common with him and if necessary to share my goods with him; to look upon his children as my own brothers, to teach them this art if they so desire without fee or written promise; to impart to my sons and the sons of the master who taught me and the disciples who have enrolled themselves and have agreed to the rules of the profession, but to these alone, the precepts and the instruction.

I will prescribe regimen for the good of my patients according to my ability and my judgment and never do harm to anyone. To please no one will I prescribe a deadly drug, nor give advice that may cause his death. Nor will I give a woman a pessary to procure abortion. But I will preserve the purity of my life and my art. I will not cut for stone, even for patients in whom the disease is manifest; I will leave this operation to be performed by practitioners (specialists in this art).

In every house where I come I will enter only for the good of my patients, keeping myself far from all intentional ill-doing and all seduction, and especially form the pleasures of love with women or men, be they free or slaves. All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal.

If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot.

CHAPTER THREE

African cultures are dynamic, like any other culture. They are not static. External forces such as colonialism, education, religion, and the growth of cities, television, etc., have all had an impact on African cultures.[1] AIDS too is an external force and has already opened up a whole cultural Pandora's box from issues such as sexual cleansing, circumcision and African forms of marriages which present the submissive role of African women and their vulnerability to the pandemic.[2]

AIDS is effectively on a collision course with African cultures and the pandemic is raising important cultural issues that traditionally are swept under the carpet and need to be openly discussed either by individuals or communities. In the wake of HIV/AIDS, there is no time for timid reflection on the sanctity of culture as an excuse for not seeking changes in behavioural and cultural patterns that are threatening the fabrics of African communities.

Of course, African societies have over the centuries evolved certain norms and values that many custodians of African culture would want to preserve yet such cultural norms and values are counter productive in the fight against AIDS. To urge that such norms and values are not subject to change is fallacious.

Examples of traditional practices that are to be analysed are sexual cleansing, circumcision, African forms of marriages, traditional methods of using herbal medicine by women in their sexual organs believed to cause dryness and warmness of the vagina during sexual intercourse (i.e. dry sex). Another aspect is the vulnerability of African women to the AIDS pandemic, which lies within the labyrinth of various African cultures.

This vulnerability arises because women are taught during marriage counselling sessions to be submissive and passive in their sexual relationships with their husbands and for many women, to assert themselves is to go against their tradition

and this may result in divorce. It is submitted that to curb the spread of the disease, women should be empowered. i.e., they should be allowed to express their sexuality in their own terms and determined by their specific needs[3].

One of the major objectives highlighted in the National HIV/AIDS Policy Draft Paper is the promotion of behavioural change in order to reduce the behaviour of having multiple sex partners and stop cultural practices which have a negative impact.[4].

This chapter will endeavour to ascertain whether cultural practices should be sustained in the light of the mushrooming of HIV/AIDS.

SEXUAL CLEANSING PRACTICES AMONG DIFFERENT TRIBES IN ZAMBIA

In Zambia, when a spouse dies, rituals are performed on the deceased's wife or husband. A comparative study will be made between the tribes that practice sexual cleansing which proves to be catalytic towards the spread of HIV/AIDS, and those that do not practice sex as a way of cleansing the deceased's surviving spouse. Furthermore, it will be demonstrated how some tribes have appreciated the fact that in the light of HIV/AIDS, the method of cleansing a deceased's spouse by practising sex should be abandoned.

The following are some of the different rituals that are performed in order for the widow or widower to be cleansed and remarry:

a) **NGONI**[5] - The widow or widower follows the relatives of the deceased and if they are kind enough they follow him or her to his or her home village. Normally, the deceased's relatives should be paid some money before they can cleanse the widow or widower. The widow or widower is asked if she or he wishes to marry anyone from the deceased's relatives, preferably a cousin. If so, she or he is asked to choose one and the deceased's relative is informed of the arrangement.

If consent has been obtained from both parties, the two are taken into a room where they are expected to have sexual intercourse and after this they are pronounced husband and wife.

b) **KAONDE**[6] - The sexual cleansing ritual takes place a few months after the death of the deceased. On the day of cleansing, beer is brewed and a lot of food is cooked. A small hut known as KAMBOLO is built. If the deceased's relatives are not happy with the way the widow used to look after the deceased or his relatives, they ask the widow to give them a specified amount of money. This money is paid to the one who will have sexual intercourse with the widow as a way of cleansing her. After the money is given to the man who will have sex with the widow, the two people are taken to the KAMBOLO where they have sexual intercourse. The widow is cleansed and is free to remarry or stay single.

The two examples of Ngoni and Kaonde sexual cleansing practices promote the transmission of HIV/AIDS. There is a very high possibility that the deceased died of AIDS related complications so the surviving spouse could be infected too.

On the other hand, there are some tribes in Zambia that do not perform sexual cleansing practices, for example the:

(a) **LOZI**[7] - Cleansing takes place one week after the burial of the dead spouse. During cleansing, the widow or widower gives money or any valuable gift to any relative of the deceased. The widow or widower is bathed in some medicine and this means that she/he is cleansed. This is all that happens during cleansing in Lozi tradition. No sexual intercourse is done and this has been the practice in the past and nowadays.

(b) **SOLI**[8] - Cleansing takes place one month after burial. Beer is brewed on this special day. The widow/widower is sprinkled with mealie-meal by any relatives of the deceased. In the case of a widow, they make her wear white beads around

her wrist and she is taken back to her home village by her relatives. The widow is not allowed to look back on the way.

Fortunately in the light of HIV/AIDS, some tribes have acknowledged the dangers of the disease and have opted to change their cleansing practices. For instance, the:

(a) **TUMBUKA**[9] - In the past, the practice was that the two families would agree on who would be the next person to replace the deceased. This was usually a cousin to the deceased or a blood brother or sister. If the widow or widower agreed to marry the person (i.e. cousin or blood brother or sister) the two were asked to have sexual intercourse as a way of cleansing the widow or widower.

(b) **NSENGA**[10] - Before realising the dangers of sexual cleansing practices, the Nsenga used to encourage sexual intercourse to take place between the surviving spouse and the person chosen to cleanse the widow/widower. However, nowadays this has changed because of many sexually transmitted infections including AIDS. The widow or widower has mealie-meal sprinkled on them and are also given a haircut as a way of cleansing them.

The Tumbuka and Nsenga people have come up with an alternative way of cleansing and the ritual of sprinkling mealie-meal over the surviving spouse is carried out. A ceremony is held the whole night where people drink and eat, and then the following morning people disperse. This symbolises that the widower/widow has been cleansed and is free to remarry.

AFRICAN FORMS OF MARRIAGE

A marriage according to African customary law is potentially polygamous in the sense that there is during the time of its subsistence no legal impediment to the contracting of another marriage or having an unlimited number of wives.

The possession of a number of wives is a sign of importance and success in life and this among other reasons is something which the average African man would gladly achieve if he would: in other words monogamy is, for the majority who are in fact monogamist, a matter of necessity rather than of choice.[11]

Another equally questionable custom is that which involves a woman who, while living with a legitimate husband is encouraged to have a proxy husband. This arises in circumstances where the legitimate husband is impotent or unable to bear children and is advised by elders that his wife should sleep with a proxy husband, known among the Chewa of Eastern Province as "Fisi"[12]. "Fisi" means "Hyena" because he meets the woman in secrecy and usually only at night.[13] This is done so that children are conceived and they become legally under customary law, the legitimate children of the impotent husband.

It is submitted that these practices of polygamy and polyandry are catalytic to the spread of HIV/AIDS although they are deeply enshrined in African cultures. Polygamy, which is more common in rural than in urban areas, contributes to human vulnerability to HIV. It was estimated in 1996 that 17% of married women were in polygamous unions.[14]

TRADITIONAL HERBS

In Zambia, amongst many tribes, women indulge in dry sex practices. According to the 1998 Sexual Behaviour Survey, 13.6% of women reported that they practised dry sex within their marriages. The percentage increased to 17.6 in non-regular relationships.[15]

Dry sex practices involve the use of traditional herbs that are taken orally or inserted into the vagina in order to make the vagina dry. It is believed by most Zambian women that men prefer women who are dry during sex to those who are "wet". Being "wet" is an indication of a woman being promiscuous or having a sexually transmitted

disease so to erase these speculations, women are forced to resort to these traditional practices in order to save their marriages from breaking down.[16]

The most unfortunate thing is that women do not realise that dry sex practices makes them susceptible to HIV/AIDS infection because when the vagina is dry, there is no lubrication, thus increasing friction between the vagina and the penis. When there is friction between the vagina and the penis the chances of there being bruises inside the vagina are high and the transmission of HIV/AIDS is made easier.

CIRCUMCISION

Circumcision is defined as "the act of cutting off of the foreskin of a boy or man for religious or medical reasons"[17]. This traditional practice is linked to the initiation ceremony for adolescent boys.

In the North-Western Province of Zambia[18] mostly among the Luvales, boys are usually taken to the "Mukanda Camp", which is a place where they are initiated to enter manhood. The elders in the village determine the time to go to the Mukanda Camp by observing the number of boys who reach puberty at a certain point in time and this is usually around 14 years of age. When it is time to go to the Mukanda Camp, the boys leave the village during the early hours of the day without informing the womenfolk. When they reach the camp, lessons to prepare the boys for initiation are conducted. Emphasis is placed on how to behave like a man. i.e. being courageous, strong and being able to withstand the pain that is endured during circumcision.[19]

In the evening, the ceremony starts and the boys are made to sit in a row whilst they are naked. The foreskin of the penis is removed from each boy using one razor blade. Traditional herbs are put on the wound to make it heal. Thereafter the boys are kept in the camp until the wound heals. A final ceremony is performed when the boys are released from the camp.

In relation to this study, it is submitted that the act of using one razor blade to circumcise all the boys is a traditional practice that promotes the transmission of HIV/AIDS as one of the modes of transmission is through the use of skin piercing instruments (e.g. needles or razor blades).

It is argued by traditionalists in society that circumcision is important as it signifies the ushering into manhood of a boy who reaches puberty. Additionally, a man gains respect from women and is considered to be ready for marriage.

From a medical perspective circumcision is considered to be advantageous due to the following reasons: [20]

a) A man is less likely to get infections like syphilis and gonorrhoea, which could increase his chances of also contracting HIV/AIDS. The wound that heals has a protective skin formed on top and this what is considered to stop a man from picking up infections.[21]

b) It is more hygienic as the penis is kept clean (i.e. it is easier to clean the penis when the foreskin is removed).

Nowadays, most people prefer to go to the hospitals to be circumcised as it is considered to be more hygienic and more convenient than going to the Mukanda Camp where a lot of time is spent as one has to wait until the wound heals. Hospitals carry out the operations under hygienic conditions like using sterilised equipment making HIV/AIDS transmission minimal.

It is submitted that the traditional practice of circumcision should be retained in order to preserve culture but the practice of using the same razor blade for circumcising all the boys should be abandoned or modified. What should be encouraged is, proper sterilisation of instruments used during circumcision; that one razor blade should be used per person and good hygiene should be encouraged during surgical procedures.

INITIATION CEREMONIES FOR GIRLS[22]

Ironically, in Zambia most tribes have initiation ceremonies for girls when they attain menstruation. The major objective of these ceremonies is to teach the girl how to be a woman. Part of the teaching involves teaching the girls how to dance sexually, how to massage the man and how to bathe him. In summary, how to please and take care of the man and the home.

It is submitted that these initiation ceremonies should be altered to change the trend of having young girls indulging in early sex or having early pregnancies. Some of the teachings should be retained like the girl looking after her body during and after menstruation and how to look after the home.

It is submitted that the practice of teaching a young girl how to please a man sexually does not suffice because it implants certain attitudes in the minds of young girls that encourage them to practice sex at an early age exposing them to the risk of contracting HIV/AIDS.

CULTURE AND WOMENS' VULNERABILITY TO AIDS

The vulnerability of African women to the AIDS pandemic lies within the labyrinth of various African cultures that need to be addressed by governments, communities as well as individuals. In many countries in Africa, Zambia inclusive, women are systematically discriminated against in a number of spheres in education, health and a wide range of remunerative employment activities.

The majority of illiterate and semi-illiterate people are women, so lack of education restricts women from having access to knowledge about AIDS and measures that may be taken to prevent infection.[23] Even when some women have access to this information, their subordinate role within interpersonal relationships with men tends to deny them the opportunity of putting into practice the knowledge that they may

have.[24] In many countries in Africa, women are expected to be submissive to their husbands and to be assertive is going against tradition and may result in divorce.

In a certain court ruling in Zambia,[25] a woman who had been refusing to have sexual intercourse with her polygamous husband who had been insisting to have the sexual act in the presence of the other twenty four co-wives, in spite of arguing that she needed the privacy of her own house (which her husband was unable to provide), had her case thrown out in favour of the husband.

The local court ruled that custom demanded that the woman being legitimately married to the husband should not refuse his sexual demands. Such court rulings only go to reinforce women's passive positions in African communities and they lead towards the perpetuation of customs and traditions that are retrogressive and detrimental to women's reproductive and human rights.

Having discussed a wide range of traditional practices that contribute towards the transmission of HIV/AIDS the question that is posed is should they be retained with the onslaught of the pandemic?

The law that deals with traditional practices in society is African Customary law. African customary law is generally unwritten, fluid and diverse in nature, so one of the major problems is its administration in any given matter. Therefore, the administration of customary law is invariably dependent on the ascertainment of customary rules claimed in any given matter before the court. The ascertainment of African customary law is regarded as a question of fact since it is not incorporated in the written body of laws to be applied. In other words, elaborated provisions for the ascertainment of customary law are not laid down.

The law presupposes that the presiding official is versed in customary law. This presupposition of law was affirmed in the case of **FRANK CHITAMBALA V R**[26] as:

"A native court whether of the first instance or Appeal may be presumed to know the native law and custom prevailing in the area of its jurisdiction, in the same manner judges of this court are presumed to know the common law."

In Zambia, customary law is administered by the local courts[27] and the subordinate courts.[28] According to the Local Courts Act Chapter 29 of the Laws of Zambia, section 12 provides:

1. Subject to the provisions of this Act, a local court shall administer
   a) The African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice, morality or incompatible with the provisions of any law.

Section 12 subsection 2 provides that:

Any offence under African customary law, where such law is not repugnant to natural justice or morality may be dealt with by a local court as an offence under such law notwithstanding that a similar offence may be constituted by the penal code or by such other written law for such similar offence.

Thus for African customary law to apply, it must satisfy three conditions, notably: [29]

1. It must be applicable. i.e., the transaction must be one known to customary law and there must be rules of the particular customary law available for the decision.
2. It must not be repugnant to natural justice, equity, morality and good conscience. The custom must be reasonable before it is applied.
3. It must not be inconsistent with any legislation in force at the time in the country.

Clause (2) and (3) basically constitute what is known as the Repugnancy Clause.

In order to ascertain whether the discussed traditional practices should be retained in the advent of HIV/AIDS, it is submitted that when a case comes before the local or

subordinate court where a certain custom is carried out and this may have resulted in the plaintiff or the complainant contracting HIV/AIDS, the courts will first have to qualify if the traditional practice can be dealt with under customary law by subjecting it to the Repugnancy Clause.

For example, if there is a certain traditional sexual cleansing practice that is practised by a certain tribe and the aggrieved party takes a case before the local court. Alleging that the tradition was not adhered to in a proper manner or in this case may have resulted in the contracting of HIV/AIDS, the first thing that the local court justice would have to do is ascertain whether the traditional practice is consistent with natural justice, morality, equity, good conscience or any written law in force in Zambia. If the traditional practice is inconsistent with the Repugnancy Clause, then the courts will not deal with it.

The case of the **BELUTI KANIKI V LOT JAIRUS**, [30] concerned a LALA customary law in particular a custom known as "AKAMUTWE", which apparently exists in various forms amongst a number of tribes in Zambia. It relates to certain consequences, which ensue upon the death of a spouse, in particular to the payment of compensation by relatives of the surviving spouse to the relatives of the deceased. It would seem that such payments are made upon a notional concept of the responsibility of the surviving spouse for the deceased's death or as a means of purifying or releasing the surviving spouse from the deceased's spirit so that he or she is free to remarry. The case was taken before the court because the parties could not decide on the quantum.

The law required the court of first instance to apply African customary law to the case before it but only so far as the law was not repugnant to natural justice or incompatible with the provisions of any written law. The court of the Resident Magistrate sitting as an appellate court held that the custom itself was repugnant to natural justice and was unenforceable. He emphasized that it was not an offence to observe the custom it merely was not enforceable in the court of law.

It is submitted that the element of compensating relatives of a deceased practised in some Zambian communities would be strange to English law on the ground that the death of a deceased is a loss to the whole society or to be more specific to the surviving spouse and her relatives as much as the deceased's relatives.

According to English law, natural justice basically means the general principles and minimum standards of fairness in adjudicating a dispute embodying the specific requirements that, [31]

a) No man should be judge in his own cause (*Nemo Judex in Parte Sua*) and
b) Each side should be heard and no man be condemned unheard. (*Audi alteram partem*).

As regards the first requirement, the judge should be neutral and should decline jurisdiction in a case where he has legal or pecuniary interest in the outcome of the decision. In other words, the judge is likely to be biased if he has any kind of relationship with the party or is a member of the body concerned. The second requirement provides that all the parties to the cause need equal opportunities to be heard.

In most African communities like with the Bemba, the custom of "Ukupyanika"[32] involves direct negotiations between the families and it is accepted that the deceased's relatives impose on the surviving spouse's relatives the amount that is supposed to be paid to compensate them. Further negotiations may take place on what the quantum should be. Usually, the deceased's relatives have a final say on what the amount should be and the surviving spouse's relatives usually succumb to what is decided because they would like their relative to be purified, released and remarry.
This is contrary to the rules of natural justice as the deceased's relatives can be said to have pecuniary interest in the matter and are most likely to be biased. On the other

hand, the surviving spouse's relatives are under pressure to have the matter disposed of so may give in to unreasonable demands.

The question of natural justice as regards customary law was discussed in the case of **R V MATENGULA**[33]. Matengula and three others were bearers of the coffin of Chichibanda. Under Lamba custom, the deceased could "point out" the person responsible for his death. In this case, an old woman, Mayamba Lisika was pointed out by the coffin ramming her on the chest more than three times. She later died from the injuries received. All the pallbearers were later charged with murder. They claimed that they were under a supernatural force and could not control their actions. The court rejected the claim of the accused that they had no control over their movements and that it was the coffin, which caused the death of the deceased.

However, the learned trial judge did refer to evidence of the custom as follows:

> *"... a man of some importance in this area, gave evidence as to the Lamba custom of pointing out of witches. But he spoke mainly on hearsay of what the old men of the village had told him. But he said he never remembered anyone being killed by the means of the coffin. He said that in the ancient of days after they were pointed out, they accompanied the coffin to the grave and afterwards they were put through the boiling water test and that concerning the killing of a fowl."*[34]

The Lamba may argue that the custom is consistent with natural justice because it pointed out who was responsible for the deceased's death. On the other hand, it is submitted that the custom is inconsistent because it results in the killing of a person which is a crime and additionally, the requirements of natural justice earlier highlighted would not have been adhered to.

The contention that natural justice should be of an African standard and not of a British standard is a subject which is to be determined. Justice is an abstract concept

and every community has an absolute standard of its own by which to decide exactly what justice should be.

The element of reasonableness should be introduced when attempting to determine whether natural justice should be of African or British standard. An African custom can be said to be consistent with natural justice if it is reasonable. i.e., fair, sensible and acceptable to the society. In other words it must be acceptable to the society at large and not just suitable to a particular section of society. The custom of "pointing out" in this case can be regarded as being unreasonable especially that it resulted in the killing of Mayomba.

The second aspect of the Repugnancy Rule is good conscience, which is termed as the moral faculty or capacity, which judges the moral quality of one's own or another person's motives or conduct, approving them as good or bad.[35]

So when courts are trying to determine whether a traditional custom can be enforced or dealt with by them, they try to establish whether the human mind when applied to the moral quality of the traditional act would ascertain that it is good or worth practising.

Thirdly, the aspect of morality connotes that the traditional practice should be a conduct which is accepted in society and the stratum of society in which a person lives.

As regards the aspect of written law, the customary law should not be inconsistent with any written law for the time being in force in Zambia. For example, the Constitution or the Penal Code.

Equity means evenness, fairness and justice. It is the application to particular circumstances of the standard of what seems naturally just and right in contrast to what would be unreasonable or unfair.[36]

Having looked at the components of the Repugnancy Rule and what they entail, each traditional practice will be examined to establish whether they are consistent with the rule and if a dispute was to arise in the courts, where the practice of the particular traditional act resulted in the transmission of HIV/AIDS, it would be dealt with by the courts.

It is submitted that in the light of HIV/AIDS, the courts should be reasonable when enforcing some of the these traditional practices or dealing with them in court. A custom should not be seen to be rigid and unresponsive to changing conditions in society.

In **R V MUBANGA AND SAKENI,** [37] the accused were found guilty by a native court (the predecessor of the local court) of contempt of Bemba traditional law. The accused, who were Christians, had declined to supply finger millet for the purpose of worship of certain tribal spirits and had persuaded fellow Christians to do likewise. The High Court of the then Northern Rhodesia held that even if the customary law was established it was inconsistent with the Penal code, immoral and not of good conscience especially with the advent of Christianity.

Sexual cleansing, as earlier stated has become a traditional practice that should be done away with especially with the advent of AIDS. For example, the Local Court may establish a KAONDE custom that requires the surviving spouse to have sexual intercourse with a relative of the deceased as valid but the act is not in line with morality, good conscience and equity as it would be detrimental to the health of the deceased's relative or even the surviving spouse. So if a case, was to come before the courts and one of the parties claimed that he or she had been infected the complaint would be at a disadvantage if such a custom were recognised by the court. The argument that the courts would bring forth in such a situation is that the traditional practice is enforceable in the court of law and the complainant may be advised that the custom was in order.

On the other hand, if the custom were not recognised by the courts, the complainant would still be at a disadvantage because he would not be able to be compensated for the wrong done to him. Hence it is submitted that policy or law should be implemented that will declare a ban on sexual cleansing practices.

Customary law does permit certain acts, which would otherwise amount to an offence under the Penal code. For example, the offence of bigamy, section 166 of the Penal code chapter 87 of the laws of Zambia and the related offence in the Marriage Act under section 38(a) of the Marriage Act chapter 50 of the laws of Zambia does not apply to marriages contracted solely under customary law. In **THE PEOPLE V KATONGO**[38], it was held that a previous customary marriage does not render a subsequent union under the Marriage Act bigamous. However in **THE PEOPLE V NKHOMA**[39], it was held by the High Court that a previous customary marriage could render a subsequent union under the Marriage Act bigamous. The attention of the court was not drawn to the decision in **KATONGO,** but it seems that the later decision is in line with the terms of the Act.

Polygamy, which is a well-established institution in many parts of Zambia, continues to be governed by the various customary laws of the parties concerned. The Joint United Nations Programme on HIV/AIDS estimates that out of 36.1 million people infected world wide with HIV, 26 million of them live in Africa.[40] These figures represent the cumulative effect of the pandemic in Africa due to cultural practices like polygamy alongside poverty that is widespread in the continent. To change the cultural set up of polygamous unions would prove to be a very difficult exercise because this really depends on what men and women believe in and they may see that there is nothing wrong with it. It is submitted that policy should be framed to have programmes that would sensitise people about changes of the practice and their susceptibility to the HIV/AIDS.

On the practice of circumcision, it is submitted that it should be retained since it has been medically proven that the form that the male organ is left in after the wound has

healed reduces susceptibility to HIV infection.[41] However it is important that policy frames up educational programmes about (as already pointed out), proper sterilisation of instruments for circumcision, that one razor blade should be used on one person and good hygiene should be practised during the surgical procedures to prevent infections.

Dry sex practices and marriage counselling practices that emphasise on the submissiveness and passiveness of women in their sexual relationships with their husband or in general sexual partners are issues that need to be addressed with the current social-economic impact of HIV/AIDS and these should be discouraged. African terms of sexuality are fundamentally oppressive to women because they restrict and control their sexuality. When people are allowed to express their sexuality in their own terms and determined by their specific needs, it becomes a source of strength and empowerment.

WOMEN EMPOWERMENT AND HIV/AIDS

According to the WHO estimates by the beginning of 1995,[42] the number of cumulative cases of AIDS was 4.5 million. An estimated 19.5 million women and children were infected with HIV since it was first diagnosed (as by 1995) and it was projected that another 20 million were to be infected by the year 2000.

Women are twice likely to be infected than men. It was estimated that by the year 2000, 13 million women would be infected and 4 million women will have died from AIDS related conditions. It was also observed that the rate of transmission of sexually transmitted diseases including HIV/AIDS is increasing at an alarming rate among women and girls especially in developing countries.

"Women and children are at high risk due to effects of environmental conditions, accessibility of health facilities and socio-economic factors. In addition, prevailing social, cultural factors have further contributed to the poor health status of women." [43]

Boutros Boutros Ghali, former Secretary General of the United Nations in his address to Fourth World Conference on women in Beijing, 15th September 1995 stated that,[44]

"The empowerment of women is the empowerment of all humanity."

One of the critical areas that need to be addressed is that regarding health issues especially the reproductive rights of women.

The Constitution of the WHO declares, "The enjoyment of the highest attainable standard of health is one of the fundamental rights of human beings."

The Convention for the Elimination of Discrimination Against Women provides in Article 12 that:

"State parties have the duty to take appropriate measures to eliminate discrimination against women in the field of health care service, including those relating to family planning."

The focus here is on the patterns of behaviour in the private sphere that affect women's health and related rights. Health is a state of complete physical, mental, and social well being and not merely the absence of disease or infirmity.[45] Good health is essential to providing a productive and fulfilling life and the right of all women to control aspects of their health in particular to their own fertility is basic to their empowerment. [46]

Discriminatory social practices, negative attitudes towards women and girls and the limited power that they have over their sexual and reproductive lives are some of the critical issues that need to be addressed as they have contributed to the poor status of women's health. Lori Heise stated,

> *"Many women limit their use of contraceptives out of fear of male reprisals. Men in many cultures reject birth control because they think it signifies a woman's intention to be unfaithful (based on the logic that protection against pregnancy allows a woman to be promiscuous). Fathering of children is a sign of virility, a woman's request to use birth control may be interpreted as an affront to his masculinity."*[47]

This was reaffirmed by Mere N Kisekka who observed that

> *"Women have internalised the ethic of nobility in suffering such that pain and discomfort emanating from their reproductive and sexual roles are accepted as the very essence of womanhood ... Social stigma and hence the culture of silence are attached to sexual and reproductive problems."*[48]

All of the human rights to which women are entitled, the right to whose observance is frequently the precondition to the enjoyment of others is the right to reproductive self determination. This transcends the right to reproductive health, reproductive health care and the right to sexual non-discrimination. It concerns the fundamental principle of respect for the inherent dignity, the equal and inalienable rights of the human family, which the Universal Declaration of Human Rights observes to be the forum of freedom, justice and peace in the world.[49]

The WHO defined "reproductive health" as a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity in all matters relating to the reproductive system and to its functions and process.[50]

Reproductive health therefore implies that people are able to have satisfying, safe sexual lives and they have the capability to reproduce and the freedom to decide if, when, and how often to do so. In fact, in the last condition is the right of women and men to be informed and to have access to safe, effective, affordable and acceptable methods of family planning, method of their choice of regulation of fertility which are not against the law and the right of access to appropriate health care services. This means that decisions should be free of coercion, discrimination, and violence. There should be equal relationships between men and women in matters of sexual relations and reproduction including full respect for the integrity of the person, mutual respect, consent and shared responsibility for sexual behaviour and its consequences.

It is submitted that reproductive health eludes a lot of people around the world because of such factors as inadequate levels of knowledge about human sexuality and inappropriate or poor quality reproductive health information and services; the prevalence of high-risk sexual behaviour, discriminatory social practices, negative attitudes towards women and girls and the limited power most women have over their sexual and reproductive rights

It has been observed that reproductive rights prove to be a very controversial topic because it relates to areas of life that are most intimate and personal such as sexuality, sexual relations and reproduction as well as to matters that are central to how the members of a family relate to one another and how they perceive themselves. Moreover, they touch on matters that in may societies are inextricably tied to morality, tradition, cultural and religious values that arouse strong feelings in many persons. They are also linked with the status of women, matters which themselves, provoke controversy. Given their fundamental nature, they are key to the development of the quality of life of individuals and society as a whole as well as to the ascertainment of other rights. Although in recent years there has been some improvement in this area, in many parts of the world, reproductive rights have not been respected and there are many new challenges ahead.

Although the concept of reproductive rights is of relatively recent origin, there is ample support for such rights in existing international documents and human rights treaties. While the documents are not legally binding in terms of international law, they do bear great normative authority and have been endorsed by the vast majority of governments. Additionally, these documents that are endorsed may be international statements of stature but they are not international treaties with legal validity so countries have no obligation to adopt specific measures. Moreover, there is no enforcement mechanism in place. The strength of the documents rests on its moral weight and the willingness of governments to abide by their commitments to its provisions.

It is submitted that in the light of HIV/AIDS which is a direct consequence of reproductive rights that are not observed by State Parties, it is necessary that countries come up with policies at national level that address the issue.

Among the actions to be taken by governments, international bodies including relevant United Nations Organisations bilateral and multilateral donors and non-governmental organisations is[51] to review and amend laws and combat practices, as appropriate, that may contribute to women's susceptibility to HIV infection and other STD's, including enacting legislation against those socio-cultural practices that contribute to it and implement legislation, policies and practices to protect women, adolescents and young girls from discrimination related to HIV/AIDS. Additionally, measures must be put in place to develop gender-sensitive multi-sectoral programmes and strategies to end social subordination of women and girls to ensure their social and economic empowerment and equality; facilitate promotions of programmes to educate and enable men to assume their responsibilities to prevent HIV/AIDS and other STD's.

The Zambian Constitution does not have any enforceable provisions that relate to health. However, the Directive Principles of State Policy observe the issue of health policy but it is done narrowly.

Article 110 of the Constitution of Zambia Chapter 1 of the Laws of Zambia, Subsection 1 provides that:

The Directive Principles of State Policy set out in this part shall guide the executive, the legislative and the Judiciary as the case may be in the:

a) Development of national policies
b) Implementation of national policies
c) Making or enactment of laws
d) Application of the Constitution and any other law

Article 112 of the Constitution provides that the following directives shall be the Principles of State Policy. Among them are, the state shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons and take measures to constantly improve such facilities and amenities; the state shall take measures to promote the practice, enjoyment and development by any person of that person's culture, tradition, custom or language in so far as these are not inconsistent with the constitution.

The fallacy of the Directive Principles of State Policy lie in Article 111 of the Constitution which provides that the directive principles of State Policy set out in Article 112, shall not be justicable and shall not thereby, by themselves, despite being referred to as rights in certain instances, be legally enforceable in any court, tribunal, or administrative tribunal or entity.

This provision overshadows the spirit of the Directive Principles of State Policy, which is to provide for human rights, which are not expressly provided in the Bill of Rights. Hence, if anybody has a complaint as regards any of the directives outlined in Article 112 they cannot bring a matter before the courts of law, as it will not be legally enforced.

One of the objectives of enacting legislation as regards health should be mainly to confer rights on individuals according more attention to fundamental rights. There has been great awareness among health policy makers, administrators, consumers and health activists of the rights of individuals with regard to access to health care facilities and related matters. In some countries this awareness has resulted in health-related rights being articulated in national constitutions and health codes.

When law confers a right, the State, a corporate body or an individual is under a duty to permit such right to be exercised in accordance with the law. The conferment of a right is not merely of symbolic importance. It no doubt signifies the importance that the State attaches to such a right. Some legal systems permit violations or deprivations of legal rights to be adjudicated by courts of law or other tribunals and to provide redress, as deemed necessary. The articulation of a right in the national constitution provides legitimacy to programmes, interventions and other measures that are a necessary consequence of the right or that are otherwise necessary to give effect to such right. The incumbent of a right is entitled to expect meaningful action being taken to enable the right to be exercised.

Therefore, it is proposed that the right to health as well as women's rights should be enshrined in the Zambian Constitution. In other constitutions like the Malawian[52] and the Ugandan Constitution[53] women's rights are enshrined in the constitution. The South African Constitution on the other hand expressly provides for reproductive health rights in its Bill of Rights.[54]

Laws, cultures, customs or traditions which are against the dignity welfare or interest of women or which are undermine their status, are prohibited by these constitutions.

Moreover, the Uganda, Malawian and South African Constitutions have enforcement provisions as regards these rights.[55] It follows that these legal systems permit violations or deprivations of legal rights to be adjudicated by courts of law or other tribunals.

In Zambia, these rights (i.e. women's rights and health rights) are not expressly provided for in the Bill of rights and one will be at a disadvantage if he or she relies on the Directive Principles of State Policy because they have no enforceable action in the courts of law.

It is submitted that the Zambian Bill of Rights should be amended and have women and health rights enshrined in it because it already has an enforcement provision under Article 28, which would make it easier for an individual to seek redress before a court of law. Additionally if these two rights are recognised in the Bill of Rights it will be easier to come up with policy or legislation that will combat traditional practices that catalyse the rate of HIV/AIDS infection amongst women and come up with strategies in which to enhance the advancement and empowerment of women.

ENDNOTES

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CHAPTER FOUR

INSTITUTIONAL AND LEGAL FRAMEWORK IN ZAMBIA TOWARDS COMBATING THE SPREAD OF HIV/AIDS

The world is faced with a daunting problem (i.e. HIV/AIDS) such that the most innovative ideas must be mustered to address the pandemic. AIDS is not just a health issue. It affects other sectors of national development like the educational, agricultural, and industrial sectors. The impact of the pandemic in Africa must be understood in the context of critical social and economic problems experienced by the continent; viz. poverty, famine, inadequate sanitation and health care, the subordination of women and adjustment programmes that allocate insufficient resources to social sectors.[1]

In some African countries, AIDS is already having an impact on the productive structures of their economies. It is estimated that one in four men and women are already infected in most of the African countries and in others even higher.[2] It is against this background that people must begin to assess their individual roles and responsibilities. Although it is true that there is no cure or vaccine at the moment, it is not true to say that there is no hope in trying to combat the spread of the disease because this pandemic has to do with choices and lifestyles. One has to make a choice and deliberate decision before exposing themselves to the virus. What will that choice be? What will the decision be?

As HIV/AIDS is a multi-sectoral problem, the information provided to each sector as it maps out its strategy towards combating the pandemic must be taken into consideration. This can be done at global, regional, and national levels. Before addressing the national strategy of trying to reduce HIV/AIDS prevalence in Zambia, through the National HIV/AIDS/TB Council, Global and Regional strategies will be analysed.

GLOBAL STRATEGY TO COMBAT HIV/AIDS

A global problem, a global response. AIDS has become a great and powerful symbol for a world threatened by its East-West, North-South divisions. In a deep and remarkable way, the child with AIDS is the world's child; the woman or man dying of AIDS has become the world's image of our own mortality. AIDS is also uncertainty and the unknown: yet we face our responsibilities for this day and these lives. Against AIDS we have set our common course- the Global Aids Strategy.[3]

The Global AIDS strategy has three objectives; [4]

1. To prevent HIV infection.
2. To reduce the personal and social impact of HIV infection, including the care of those already infected.
3. To unify national and international anti-HIV/AIDS efforts.

The Global AIDS strategy is based on the following principles: [5]

1. Public Health must be protected;
2. Human Rights must be respected and discrimination must be prevented;
3. We know enough about how to prevent the spread of HIV, even though a vaccine is not yet available;
4. Education is the key to AIDS prevention, precisely because HIV transmission can be prevented through informed and responsible behaviour;
5. AIDS control will require a sustained social and political commitment;
6. All countries need a comprehensive national AIDS programme, integrated in national health systems and linked with a global network;

In a nutshell, the Global AIDS strategy establishes a policy framework for national and international efforts to prevent HIV/AIDS infection, to provide care for millions of men, women and children already affected and otherwise reduce the AIDS impact on individuals and society and to mobilise ethical sustainable and concerted efforts against the pandemic. Based on current scientific understanding of AIDS and its causal virus, HIV, the global strategy draws on years of practical experience to propose ways of meeting the new challenges of the evolving pandemic.

The following are the suggestions that the Global AIDS strategy implemented to the New AIDS challenge.[6]

1. Increased emphasis on supportive care, including counselling and clinical management to assist infected persons take precautions against infecting their sexual partners. With proper care and support, HIV infected persons can lead useful and productive lives for years, provided their dignity is safeguarded.
2. Better treatment of other sexual transmitted diseases as a way of preventing HIV/AIDS infection.
3. Greater efforts in HIV prevention through improvement of women's health, educational, legal and social status.
4. A more supportive environment for prevention programmes.
5. Provision for the socio-economic impact of the pandemic.
6. Greater emphasis on explaining the public health dangers of stigmatisation and discrimination.

From these objectives and recommendations of the Global AIDS strategy, a regional strategy towards combating the spread of HIV/AIDS in Africa was adopted.

REGIONAL STRATEGY TO COMBAT HIV/AIDS IN AFRICA

In the African Region, the World Health Organisation African Regional Office (WHO/AFRO), concerned with the disastrous effects of the AIDS pandemic on the member states of the continent most affected by the pandemic, received a mandate from the WHO regional committee (AFR/RC40/R7) to adopt the Global strategy for accelerating the prevention of HIV/AIDS in the region.[7]

A regional strategy document was drawn up with proposals for accelerating the process as appropriate, within the social, cultural and economic milieu of the countries of the region.

The Regional Thrusts are based upon the following considerations: [8]

1. The need to secure and sustain political will at the highest possible level, for the struggle against AIDS so as to ensure commitment at the national and other levels of government. The programme should have a high political and national profile and possibly a supra-sectoral controlling body.
2. The need to strengthen activities organised by the health, private and non-governmental sectors. These activities should focus on the following:-
   a) Detailed epidemiological study of HIV infection and AIDS.
   b) Safety of blood and blood products, and traditional skin piecing practices (tattooing) which are very common in the region.
   c) Care of AIDS patients and counselling of HIV infected persons.
   d) Support of the orphans and affected families.
   e) Information sharing among interested parties.
3. The need to emphasize information, education and communication in all the components of HIV/AIDS prevention and control programmes. The Information, Education and Communication (IEC) programmes target youths, women and workers at risk and involve them in working at solutions appropriate in their circumstances.

4. The need to involve other sectors and all communities in the struggle against AIDS through the formation or strengthening of multi-sectoral committees and action groups at local, intermediate and control levels.
5. The need for affective community participation in the provision of care and counselling to persons with HIV/AIDS.

In order to rationalise and systemise the support for community oriented activities, the Regional Committees for WHO in Africa decided in 1985 in Lusaka to strengthen the health systems and accelerate the implementation of the "Health For All" Strategy.[9] The Health Development Strategy that has been adopted throughout the region enables health-related and community support activities benefit from operational support at the district level, technical support from the intermediate or provincial level and strategic support from the control level.[10]

In 1987, this approach received the support of the heads of state and governments of the Organisation of African Unity (OAU) as contained in the declaration on "HEALTH AS A BASIS FOR DEVELOPMENT"[11] (1987). In their declaration in 1988, the African parliamentarians manifested their determination to support and stimulate health development efforts in Africa.[12]

The declaration of Heads of states of OAU on the health crisis in Africa (Abuja 1991)[13] underlies their concern to fight negative consequences of the economic crisis on health and reinforce the National Health system. This declaration also emphasized the willingness to contribute effectively to AIDS prevention and control, particularly with reference to management, integration, and multi-sectoral approach to health systems.

The Dakar Declaration of 1992[14] recalls and emphasizes the Abuja Declaration and confirmed their willingness to assume leadership in the fight against AIDS and confirms their commitment to establish all necessary plans at the national level.

It is submitted that AIDS prevention and control activities must therefore be undertaken in Africa within the Health Development framework. This includes the following:[15]

a) Fighting HIV/AIDS at community level with community participation and

b) Organising supportive activities at the central, intermediate and district levels.

The implementation of these declarations and resolutions demands that effective management structures be established at all levels of national development and that human, material and financial resources be made available for the activities. However, cooperation and collaboration between the health institutions, other government sectors, non-governmental organisation and the private sector, should be encouraged in order to ensure strong and effective action at national level.

NATIONAL STRATEGY TOWARDS COMBATING HIV/AIDS IN ZAMBIA

In the year 2000,[16] the government established a National HIV/AIDS STD and TB Council and Secretariat as a multi-sectoral structure at national level to appropriately deal with the challenges and coordinate a multi-sectoral response to the epidemic. The Council and Secretariat have created: [17]

a) A forum for common sectoral approach to the strategic planning of HIV/AIDS, STD's and TB; and

b) A coordinated priority setting for fighting HIV/AIDS, STD's and TB by all stake holders with effective utilisation of resources.

Although the National HIV/AIDS STD and TB Council has been established there is lack of a principal and comprehensive Act to support and guide its operations.

On 14th April, 2001,[18] a workshop on the drafting of a HIV/AIDS policy was held at the Mulungushi International Conference Centre and one of the topics discussed was

coming up with institutional arrangements and functions of the Council that would later be legislated upon.

In order to achieve the vision of the Council which is responsible for directing the national effort in the control and prevention of AIDS, Government is to establish structures at national, provincial and district levels.

NATIONAL LEVEL

ORGANIZATIONAL STRUCTURE[19]

1. The National HIV/AIDS/STD and TB Council will be placed under the Minister responsible for Disaster Management and Mitigation.

MEMBERSHIP

1. Senior Official from the Ministry of Health, Education, Finance and Economic Development
2. A Legal Practitioner
3. Director of the Secretariat
4. Four persons representing Non Governmental Organisations involved in the prevention and combating of HIV/AIDS, STD's and TB.
5. Representatives from the Ministry responsible for Disaster Management and Mitigation
6. Representatives from the Medical Council of Zambia
7. Representatives from the Churches Medical Association of Zambia.
8. Representative from the Nursing Council of Zambia.
9. Representative from the National Traditional Healers Association.

FUNCTIONS OF THE COUNCIL[20]

a) Provision of guidance and technical support on how HIV/AIDS, STD's and TB are to be addressed;

b) Mobilisation of resources to promote and support identified priority research;

c) Creation of a forum for a common sectoral approach in the strategic planning for HIV/AIDS/STD/TB;
d) Creation of coordinated priority setting for fighting HIV/AIDS/STD/TB by all stakeholders with utilisation of resources.
e) Promotion of advocacy on the HIV/AIDS/STD and TB epidemic.
f) Ensuring that the decisions of the Council are cognisant of and consistent with overall government policies and programmes;
g) Development of national and international partnership for the prevention and combating of HIV/AIDS;
h) Overall coordination of programmes and projects on HIV/AIDS/STD/TB.
i) Monitoring and evaluating the implementation of programmes and projects on HIV/AIDS/STD/TB.

THE FUNCTIONS OF THE COUNCIL SECRETARIAT[21]

a) Ensuring accessibility of HIV/AIDS, STD's and TB information to all people the throughout the country;
b) Assisting in the development of guidelines for the screening of blood and blood related products in accordance with international standards;
c) Development of guidelines for community based care for people living with AIDS in consultation with stakeholder institutions;
d) The development of strategies for appropriate interventions in fighting the epidemic; and
e) Provision for guidelines for testing and counselling for people who have HIV/AIDS/STD/TB.

NATIONAL APPROACH[22]

Government will:

a) Incorporate HIV/AIDS, STD's and TB and their impact on the economy and mobilise each sector in response to HIV/AIDS, STD, and TB within the various sectors both on prevention and impact utilisation.

b) Ensure that funding of HIV/AIDS/STD/TB is sufficiently increased to match the levels of the pandemic.

c) Devise measurable indicators for monitoring the fight against HIV/AIDS etc.

d) Protect human rights by ensuring that;

(i) People go for voluntary testing

(ii) Confidentiality of HIV/AIDS, STD and TB testing is kept; and

(iii) Promote the availability of confidential counselling and other support services

e) Orient resources towards rural development as a way of addressing poverty and food security; and

f) Adopt a gender-based approach to planning so that programmes do not perpetuate gender stereotypes.

SECTORAL APPROACH[23]

1. EDUCATION[24]

In order to redress the challenges associated with education, primarily access to information and knowledge, Government will:

a) Integrate education on HIV/AIDS, STD's and TB in the school curriculum;

b) Mount effective awareness campaigns to sensitise school children on the existence of HIV/AIDS, the reduction and alleviation programme; and

c) Introduce public education on the dangers of certain cultural and religious practices that perpetuate HIV/AIDS.

2. HEALTH[25]

In order to resolve the challenges associated with provisions of health, Government will:

a) Embark on counselling families affected by HIV/AIDS, i.e. help them cope with the HIV status of their own family members, including children;

b) Promote and mount awareness campaigns on the need for male involvement in preventing transmission of the pandemic and in taking care of the chronically ill;

c) Introduce counselling for the vulnerable groups in order to reduce stigmatisation;
d) introduce programmes aimed at reducing mother to child transmission by advising women of childbearing age who are HIV positive not to have babies to avoid prenatal transmission. This will require intensive education programmes among men and women to promote safe sex behaviours;
e) Improve hospital level care for all patients,
f) Strengthen existing sexually transmitted diseases programmes and set up of pilot programmes in urban areas in order to control the diseases;
g) Ensure that the quality of condoms is improved and promote their use;
h) Strengthen the national blood transfusion system through upgrading, improved HIV/AIDS testing facilities, training and expansion of voluntary blood donation system and discouraging blood donors who are potential AIDS patients;
i) Intensify counselling of persons with HIV/AIDS and promote the setting up of home care services;
j) Subsidize treatment for patients;
k) Involve traditional healers programmes for HIV/AIDS;
l) Promote intensive education among medical personnel to ensure that there is no reuse of needles and syringes in the administration of drugs; and
m)Promote community-based service to support traditional structures.

3. **COMMERCIAL SEX WORKERS**[26]

a) Promote and intensify the implementation of education programmes on the use of condoms; and
b) Introduce more income-generating ventures in order to discourage females from becoming sex workers (e.g. TASINTA)

4. **PRISONS**[27]

In order to resolve the challenges associated with prisons, Government will:

a) Ensure that condoms are made available to prisoners if any possibility of sexual intercourse exists; and

b) Ensure that aggressive sexual behaviour such as rape is combated by adequate staffing, surveillance and disciplinary sanctions, stiff punishment as well as education.

5. **COMMUNICATION METHODS**[28]

a) Promote sale of affordable radios to provide information on the AIDS pandemic;

b) Promote information, education and communication and social mobilization for education programmes directed at the general public and specific target groups for prevention of HIV/AIDS/STD/TB;

c) Devise a mechanism for documenting innovations on HIV/AIDS as they emerge and disseminate them to stakeholders in a timely manner; and

d) Build capacity in data collection and management information systems in order to improve quality of information and research;

6. **STREET KIDS AND ORPHANS**[29]

a) Ensure that parents of street kids are located penalised and made to fulfil their child rearing obligation; and

b) Introduce community-based support for orphans and vulnerable children. e.g. the S.O.S. Children's Village along Great North Road, Lusaka and Kabwata Orphanage.

7. **INDUSTRY**[30]

In order to resolve the challenges associated with HIV/AIDS; Government will:

a) Promote counselling of workers

b) Not allow discrimination of people living with AIDS; and

c) Not allow compulsory HIV testing at places of work

8. **AGRICULTURE**[31]

In order to resolve the challenges associated with agricultural production, Government will:

a) Promote the mainstreaming of HIV/AIDS in agriculture;

b) Promote the empowerment of rural women in order to reduce the impact of HIV/AIDS;
c) Re-orient resources towards rural development; and
d) Provide training facilities needed to foster peoples participation in programme addressing HIV/AIDS.

On the other hand, another national strategy that can be undertaken to combat HIV/AIDS in Zambia is to have a principal and comprehensive Act that covers issues on the pandemic. At the moment, this is what is lacking.

THE FUNCTIONS OF HEALTH LEGISLATION IN RELATION TO AIDS

Laws are intended to serve certain purposes and functions. The five basic functions are: [32]

1. Conferring rights;
2. Providing protection
3. Promoting health
4. Financing health; and
5. Exercising surveillance over quality of heath care

The scope and context of each of these five functions will be considered.

1. HEALTH RELATED LAWS CONFER RIGHTS ON INDIVIDUALS[33]

The preamble of the World Health Organization states that:

> *"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."*

This has resulted in health related rights being articulated in national constitutions. Issues relating health arise in relation to many fundamental rights. For example, the right to life, liberty and security; the right to equal protection of the law, the right to privacy, the right to free movement, the right to marry and to start a family, the right to education, the right to work, the right to social security and social welfare and freedom from inhuman or degrading treatment or punishment.

When the law confers a right, the state, a corporate body, or an individual is under a duty to permit such right to be exercised in accordance with the law and such other reasonable requirements as may be applicable. The conferment of a right signifies the importance that the state attaches to a right. Some legal system permit violations or deprivations of legal rights to be adjudicated by courts of law or other tribunals and to provide redress, as deemed necessary. The articulation of a right also provides legitimacy to programmes intervention and other measures that are a necessary consequence of the right or that are otherwise necessary to give effect to such a right.

Hence, it is submitted that if legislation relating to HIV/AIDS is enacted it will confer rights on individuals. It will place government under an obligation to allow the duty to be exercised. If there are any violations, e.g. the right to employment because of one's HIV status, this can be adjudicated on by the courts of law or other tribunals because there would be legislation to this effect.

2. THE LAW PROHIBITS OR REGULATES CONDUCT AND THE USE OF PRODUCTS INJURIOUS TO HEALTH[34]

Many common law legal systems are structured on the general premise that what is not prohibited by law is normally permissible.[35] It is practical to structure legal systems on such a premise as it is virtually impossible to set out what individuals may do. In selected situations, of course, it is possible to specify certain things that individuals may do and may not do, but this is not feasible for all situations and all circumstances. Through laws and regulations, certain types of behaviour and

activities can be regulated. There can be a requirement of total prohibition or partial prohibition.

Applying this to AIDS legislation, the law would prohibit conduct such as intentionally transmitting HIV/AIDS to an uninfected person and practicing sexual cleansing which proves to be catalytic towards the spread of HIV/AIDS. On regulation of conduct, the circumcision practices done in the past would have to be regulated in the light of HIV/AIDS. Instead of using the same razor blade on all the boys, what should be encouraged is the use of one razor blade for each boy and proper sterilization of the equipment to be used.

On the prohibition or regulation of products injurious to health, blood transfusion systems would be taken into consideration. The law would prohibit the use of uncertified blood (i.e. blood that has not been tested for HIV/AIDS that is to be administered to a patient). On the other hand, regulation of the use of products injurious to health would involve the requirement of blood to be administered to a patient, satisfy the international standard guidelines for blood transfusions.

3. THE LAW AUTHORISES PROGRAMMES AND SERVICES THAT PROMOTE HEALTH AND REGULATES THE PRODUCTION AND PROVISION OF RESOURCES FOR HEALTH SERVICES[36]

An important function of law is to authorize Health Care programmes and interventions. This is either done through a general law that provides for such programmes and services as are needed to be formulated or through special laws formulated for the purpose. In some countries National Health Councils and similar mechanisms have been created by law to give guidance or to coordinate activities or programmes.

Law also plays a critical role in mandating, regulating and overseeing health care establishments and institutions set up to train Health manpower. It is submitted that if

there is AIDS Legislation in Zambia it will authorize a number of health care programmes on HIV/AIDS in Zambia and moreover, it will give the National HIV/AIDS/STD/TB Council a legal framework.

4. THE LAW PROVIDES FOR THE FINANCING OF HEALTH CARE[37]

Financial support is required to produce and maintain the resources required for health services. Law plays an important role by allocating, channelling or regulating the finances required for the purpose.

5. THE LAW EXERCISES SURVEILLANCE OVER THE QUALITY OF HEALTH CARE [38]

Citizens have a right not only to have access to Health Care systems, but also to receive quality treatment. Consequently, closer attention is being paid to the type and nature of the services that are being provided. This includes not only a review of the facilities, services, and treatment procedures but also the qualifications of the service providers. In order to achieve and maintain high standards of health personnel and institutions, laws provide for licensing and similar procedures. The applicable standards are often laid down in codes or in subsidiary legislature instruments.

Having outlined the purposes and functions of enacting health related laws, in this case AIDS legislation, a study will be made to examine the Public Health Act Chapter 295 of the Laws of Zambia and AIDS legislation that has been enacted in some countries.

COMPARATIVE STUDY OF THE PUBLIC HEALTH ACT CAP 295 AND OTHER AIDS RELATED LEGISLATION

To date, Zambia has not enacted legislation on AIDS. However the legislation that governs health related issue in Zambia is the Public Health Act Chapter 295 of the Laws of Zambia.

Section 22(1)(a) of the Public health Act prohibits wilful exposure of infectious diseases by persons suffering from such disease or person closely connected to infected people. Additionally, section 28(c) of the Public Health Act specially talks about the measures to be taken for preventing the spread of eradication of .... any other infectious disease. This section can be read with Article 13(1)(g) of the Constitution of Zambia, which empowers detention of a person for the purpose of preventing the spread of an infectious or contagious disease. Both the Public Health Act and the Constitution of Zambia lack the express mentioning of HIV/AIDS in their provisions.

The Public Health Act drafters did not foresee HIV/AIDS. Consequently, applying HIV/AIDS to the aforementioned Acts becomes problematic. The problem is that the methods of infections common to ordinary infectious diseases seem not to apply well to HIV/AIDS.

Moreover a rule of interpretation states

"Express enactment shuts the door to further implication." [39]

This means that what is not expressed is excluded. That there is no express inclusion of HIV/AIDS among infectious disease in the laws of Zambia may be offset by interpreting the existing law widely so as to make it apply to this disease. This is not unusual but where drastic consequences can flow from a wide interpretation it is not advisable to rely on a law which is not expressly stated. It is submitted that in the absence of express enactment in the Constitution and the Public Health Act on HIV/AIDS, drastic consequences may come about by widely interpreting sections in the Constitution (i.e. Article 13(1)(g)) and the Public Health Act, (sections 22 (2) and 28(c)), such as the compulsory screening of people for HIV/AIDS. There seems to be no defensible ground for relying on the implication of wide interpretation of provisions of the aforementioned Acts.

It is submitted that the Public Health Act should be amended to include a list of infectious diseases and this should include HIV/AIDS. On the other hand, the interpretation section of the Public Health Act may also be amended and include HIV/AIDS with a short interpretation to say that it is to be included on the list of infectious diseases as was the case in 1983 when the United States of America (New York) established legislation (Chapter 823 of the laws of 1983) to amend the Public Health Law to include HIV/AIDS.[40]

The other option that Zambia can take is to enact principal legislation on HIV/AIDS in Zambia. At the moment legislation and policy proposals are only in draft form.[41] An important aspect to consider before proposing legislation is that legislative drafters and stakeholders will need to understand HIV/AIDS very well. In this regard the wise advice of Justice Michael Kirby becomes appropriate.

> *"I now want to assert a fundamental rule and a paradox. The rule should apply to all law making. But it is especially vital that it be observed in respect of laws on AIDS. It is, that such laws must be based upon a thorough understanding of the target. In the case of HIV/AIDS this requires a defaulted knowledge of the virus and its modes of transmission.*
>
> *"AIDS laws must not be based upon ignorance, fear, political expediency and pondering to the demand of the citizenry for "tough" measures ... because this is a major health crises, the least that we can expect from politicians, bureaucrats and judicial officers is that they will inform themselves about the features of this epidemic before they make laws and policies or handing down decisions relating to it. Nothing less will do."*[42]

Indeed, the widest consultation should be carried out before policy and subsequent legislation on HIV/AIDS in Zambia is released. Apart from conducting research on HIV/AIDS which would provide as guidelines when implementing policy and legislation on HIV/AIDS in Zambia, the international developments relating to

information on national and sub national laws and policies directed towards the control of AIDS and HIV infection that were implemented by WHO should be adopted.

WORLD HEALTH ORGANISATION DEVELOPMENTS RELATING TO THE CONTROL OF AIDS AND HIV INFECTION[43]

1. Resolution WHA40.26 of the Fortieth World Health Assembly on the "GLOBAL STRATEGY FOR THE PREVENTION AND CONTROL OF AIDS", adopted on 15th May 1987 requested the Director General of the World Health Organization to *interalia*, assert WHO's international directing and co-ordination role in support of national AIDS programmes". It is evident that dissemination of authoritative information on legislatively mandated and other programmes represents an essential element in fulfilling this role.

2. Resolution 42/8 of the General Assembly of the United Nations on "Prevention and Control of Acquired Immune Deficiency Syndrome (AIDS), adopted on 26th October 1987. This invited the World Health Organization to, *interalia*, facilitate the "exchange of information ... the prevention and control of AIDS".

3. The London Declaration on AIDS Prevention adopted on 28th January 1988 by the World Summit of Ministers of Health on Programmes for AIDS prevention. This Declaration included provisions calling on WHO through its Global Programme on AIDS to "promote, encourage, and support the worldwide collection and dissemination of accurate information on AIDS."

4. Resolution WHA41.24 of the Forty- First World Health Assembly on "AVOIDANCE OF DISCRIMINATION IN RELATION TO HIV-INFECTED PEOPLE AND PEOPLE WITH AIDS" adopted on 13th May 1988. One of the preamble's paragraphs of this resolution notes the "medical, ethical, legal implications of AIDS prevention and control programmes," while one of the operative provisions urges member states to "include in any reports to WHO on AIDS strategies, information on measures

being taken to protect the human rights and dignity of HIV infected people and people with AIDS".

Aristotle, a Greek philosopher said, "Give me a point of support and I will move the world." [44]

In a world beset with great tragedies, people may lose a sense of direction. What can give us a sense of direction is what Descartes (another Greek Philosopher) called "Clear and distinct ideas." [45]

The function of philosophy is to teach people to think and act wisely. Law is said to be "applied philosophy".

Ann Scales has made this observation;

> *"Law is applied philosophy of a sort, but better than pure philosophy in two ways. Firstly, it is not as rigorous; it has no requirement of logical consistency. Indeed for the law to work and move, it can't be logically consistent. Secondly though philosophy in my opinion has amazing persuasive power, there are no winners or losers. In law, at least theoretically, if you have got the best argument, you win and the world changes. Law is second rate philosophy backed by force of the state."*[46]

It is submitted that law is applied philosophy in that it can practically change people's attitudes towards a projected goal. In other words, law must enforce norms and ideas propounded by scholars from all branches of society and direct human activity towards addressing the HIV/AIDS pandemic. It is along this line of thinking that when AIDS legislation comes into force in Zambia, human activity (i.e. industrial sector, educational sector and agricultural sector as well as the family and house hold level) in all sectors of society will be directed towards curbing the spread of HIV/AIDS.

ENDNOTES

[1]Remarks by Dr W. S. Boayue, World Health Organization Representative in Zambia. Speech read on the World health Organization Perspective of the HIV/AIDS pandemic at the Positive Living Networking in Support of HIV/AIS for Youth Programmes in Africa Workshop, Lusaka, Zambia, 13th to 18th September 1993

[2]Ibid

[3]Excerpt from statement given at the World Summit of Ministers of health on programmes for IDS Prevention, London 26-28 January 1988. Jointly Organized by the World Health Organization and the United Kingdom Government) see in LEGISLATIVE RESPONSES TO AIDS, World Health Organisation Publication, Martnius Nijhoff Publishers (1989).

[4]*Ibid page 283.*

[5]Ibid

[6]Current strategies for combating HIV/AIDS. Regional and national Strategies to combat HIV/AIDS by Dr. T. Lesikei excerpt from proceedings at the positive Living Networking in Support of HIV/AIDS for youth programmes in Africa workshop, Lusaka, Zambia. 13-18 September 1993 page 40.

[7]Ibid

8Ibid

[9]Ibid page 41

[10]Ibid

[11]Ibid

[12]Ibid

[13]Ibid

[14]Ibid page 42

[15]Ibid page 42 –43

[16]The National HIV/AIDS Draft Policy Paper

[17]Ibid page 10

[18]See National HIV/AIDS Draft Policy paper, Chapter 4

[19]Ibid paragraph 4.1.2

[20]Ibid paragraph 4.1.3(a)

[21]Ibid paragraph 4.1.3(a)

[22]Ibid paragraph 4.2

[23]Ibid paragraph 4.3

[24]Ibid paragraph 4.3.1

[25]Ibid paragraph 4.3.2

[26]Ibid paragraph 4.3.3

[27]Ibid paragraph 4.3.4

[28]Ibid paragraph 4.3.5

[29]Ibid paragraph 4.3.6

[30]Ibid paragraph 4.3.7

[31]Ibid paragraph 4.3.8

[32]Global Health Law, World health Organization Regional Office for South East Asia New Delhi Publication (1997) page 50

[33]Ibid

[34]Ibid page 52

[35]Ibid

[36]Ibid

[37]Ibid

[38]Ibid

[39]Dean v Wiesengrund (1955) 2Q BQpg 131 cited in Drafting of Legislation: 1967 Ghana University press, Accra by S. Namasivagam. It is submitted that not even Article 13 subsection 1 (g) of the Constitution of Zambia can be relied on.

[40]Legislative Responses to AIDS World Health Organization Publication. Netherlands: Martinus Nijhoff Publishers page 39.

[41]National HIV/AIDS draft Policy paper Presented at the Mulungushi International Conference Centre on 14th April 2001

[42]Mr. Justice Kirby, AIDS and the Law, in the Commonwealth Law Bulletin Volume 19 No. 1, January 1993 at page 355 paragraph 3 and 4

[43]Legislative responses to AIDS. World Health Organisation Publication Netherlands: 1989 page 39

[44]As quoted by V.A.L. Kabonga ESQ in his presentation on Human Rights and Ethical Aspects of Public Health Measures to Support Young People with HIV/AIDS check preface.

[45]Ibid

[46]Excerpt taken from an Article entitled "Midnight train to us" in Cornwell Law Review, Volume 75 No3, March 1990. Paragraph 2 at page 710 see Valentine Kabonga's presentation on Human Rights and Ethical Aspects of Public Health Measures to Support Young People with HIV/AIDS pg (i) (PREFACE).

CHAPTER FIVE

RECOMMENDATIONS

RECOMMENDATIONS FOR CHAPTER ONE

Section 183 of the Penal Code Chapter 87 of the Laws of Zambia provides that:

> *"Any person who unlawfully or negligently does an act which is and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life is guilty of a misdemeanour."*

It is proposed that this provision should be amended and it should include a list of infectious diseases dangerous to life, for instance in this case, HIV/AIDS. A further amendment to this section would be the inclusion of a provision to demonstrate that it is an offence to intentionally expose another person to HIV through sexual contact without the victim knowing about the defendant's medical condition and without the lawful consent of the victim. The section should also provide a penalty for a person who commits such an offence.

On the other hand, sexually related offences should be amended to include a provision to cater for a sexual offence committed resulting in the infection of the complainant. It is submitted that in the case where a child under the age of sixteen years of age is defiled and it results in an infection, the punishment should be stiffer than the offence of rape.

RECOMMENDATIONS FOR CHAPTER TWO

An Act should be passed to regulate the administration of blood and blood products in Zambia as an effective way to minimize HIV/AIDS transmission.

What should be taken into consideration is the procedure that should be followed when administering blood or blood products in order to minimize HIV/AIDS transmission.

a) The primary objective is to avoid recruiting people who are or could possibly be HIV positive and the criteria used is to target the low risk group. Prostitutes cannot be asked to donate blood because they are considered to be in the high risk group;
b) A questionnaire has to be answered with all honesty by the donor and this is designed to check for signs of risky sexual behavioural patterns;
c) The donor must sign a declaration form where he certifies to the best of his knowledge that he has no reason to believe that he is suffering from any infectious disease that can be transmitted through blood or blood products or engaged himself in any activity say within six months that could have led him to contracting HIV/AIDS;
d) After signing the declaration form the donor is expected to go through a medical examination to check for any physical signs that could render him fit or unfit to donate blood;
e) The blood transfusion physician should certify by issuing a certificate that the donor is fit to donate blood;
f) After issuance of the certificate, the blood sample should be subjected to an HIV test, among others;
g) Any blood shown by appropriate medical testing to be potentially contaminated with HIV shall not be used for transfusion or for any other purpose which may pose a treat of transmission of the virus and the blood sample should be disposed of.

It is submitted that the legislation on blood transfusion and the minimization of HIV/AIDS transmission should also contain ethical aspects. These are:

a) Confidentiality should be attached to the HIV test results of the blood samples and only the donor is entitled to know the outcome of the results if he so wishes.
b) The National Blood Transfusion Service should be based on voluntary non-remunerated donation of blood. This will promote the development of the national blood transfusion system because donors will be volunteers who will have the goal of being potential blood donors for a long period of time and so will try and lead healthy lifestyles. This is a step forward in ensuring that safe blood is always available in the blood bank.

On the aspect of liability of medical practitioners, any person who contracts AIDS from any contaminated blood shall have a cause of action for damages, including medical expenses, against the blood transfusion service who administered blood to him or her, if such a person can establish that he or she received any untested blood derived therefrom, from such supplier.

It is proposed that the policy should also be framed in line with the recommendations forwarded by the World Health Organization and the International Federation of Red Cross and Red Crescent Societies to ensure that Zambia has a safe and sustainable blood programme to reduce on cases where doctors administer uncertified blood to a patient in an emergency situation, thus exposing the patient to HIV/AIDS infection. This procedure has proved to have drastic effects on the patient and the doctors always tend to escape liability.

It is submitted that to cure this defect, the following recommendations must be implemented:[1]

1. All adults should consider whether they are eligible to donate blood and if they are, they become regular blood donors.
2. Civic education on blood donation should be taught to people in all sectors of society so as to educate people on how to lead healthy lifestyles so that they become potential regular blood donors.
3. Health authorities (i.e. the Ministry of Health) should implement strategies and programmes of education and promotion of preventive health care, provide alternatives to blood for volume replacements and provide access to essential drugs which may reduce the need for transfusion.
4. All blood supplies should be systematically tested prior to use.
5. Blood transfusion services should be adequately funded to implement training programmes for developing quality sustainable blood supply systems.
6. All blood programmes of the International Federation of Red Cross and Red Crescent Societies should be familiar with the quality manual of the Federation and become advocates for developing quality systems in blood centres.
7. In a true spirit of capacity building, special assistance should be given to develop strong blood programmes systematically in countries that are in most urgent need of a safe and sustainable blood supply system.

RECOMMENDATIONS FOR CHAPTER THREE

As regards the traditional practices in Zambia and controlling the spread of HIV/AIDS infection, the following recommendations are put forth:

a) **SEXUAL CLEANSING** - Sexual cleansing practices should be banned in the advent of HIV/AIDS. It is very possible that the deceased could have died of the diseases and his wife could also be infected. Maintaining such practices would therefore be catalytic towards the spread of the infection. However, the other

methods of cleansing like sprinkling mealie-meal over the deceased's spouse or making him or her wear beads around the wrist can still be practiced, as this does not involve sexual contact.

b) **CIRCUMCISION** - This practice should be maintained since it has been proved medically that a circumcised male organ reduces a man's susceptibility to HIV infection. However, a policy framework should include formulation of education programmes that encourage proper sterilization of instruments to be used for circumcision, that one razor blade should be used on one person and good hygiene should be practiced during surgical procedures to prevent infections that could make HIV/AIDS transmission easier.

c) **DRY SEX PRACTICES** - This should be discouraged because not only is it dangerous to the health of a woman but it also facilitates friction during sex, thus bruising the vagina and making the woman more vulnerable to HIV infection.

d) **EMPOWERMENT OF WOMEN AND AIDS** - It is recommended that policy should be framed in order to allow women to express their sexuality in their own terms. This can be achieved by the following legislative proposals:

i) Laws should be reviewed and amended to combat cultural practices, as appropriate, that may contribute to women's susceptibility to HIV infection. This includes enacting legislation against social-cultural practices that contribute towards HIV/AIDS and implement legislation, policies and practices to protect women, adolescents and young girls from discriminatory practices that expose them to the risk of HIV infection.

ii) Measures should be put in place to develop gender-sensitive multi-sectoral programmes and strategies to end social subordination of women and girls to ensure their social and economic empowerment and equality and to facilitate promotion of programmes to educate and enable men to assume their responsibilities to prevent HIV/AIDS.

iii) It is proposed that the right to health should be enshrined in the Zambian Constitution as well as women's rights as has been done in the Malawian and the Ugandan Constitution.[2]

iv) Reproductive Health rights should also be enshrined in the Zambian Constitution. If reproductive health rights, the right to health and women's rights are enshrined in the Zambian Constitution they shall have the force of law in Zambia due to the enforcement provision in Article 28 of the Constitution of Zambia Chapter 1 of the Laws of Zambia. This enforcement provision will enable an aggrieved party to seek redress in a court of law.

RECOMMENDATIONS FOR CHAPTER FOUR

a) It is proposed that the Global AIDS strategy to combat HIV/AIDS as well as the WHO/AFRO Regional Strategy should be implemented in trying to come up with a national strategy to combat HIV/AIDS in Zambia.

b) The national strategy to combat HIV/AIDS in Zambia via the National HIV/AIDS/STD/TB Council should be a multi-sectoral response to the pandemic. The Council is well positioned at national level to appropriately deal with the challenges and coordinate the national strategy to address the HIV/AIDS pandemic.[3]

c) The multi-sectoral approach towards addressing the HIV/AIDS pandemic shall be that outlined in Chapter Four of this essay. That is to say, national approach, and the sectoral approach. The sectoral approach is divided into the following sectors education, health, commercial sex workers, prisons, communication sector, street kids and orphans, industrial sector and the agricultural sector.[4]

d) AIDS Legislation should be passed in Zambia either as a principal Act that will include all the recommendations mentioned in this Chapter.

e) On the other hand it is proposed that the Public Health Act Chapter 295 of the Laws of Zambia should be amended as well as Article 13 subsection 1 sub clause g to include HIV/AIDS as an infectious disease. This will cure the defect the Acts have towards the rule of interpretation that:

"Express enactment shuts the door to further implication."[5]

If these Acts are amended and HIV/AIDS is expressly stated as an infectious disease, it will mean that it is included to mean infectious disease under the provisions of section 22(2) and 28(c) of the Public Health Act and Article 13 subsection 1 sub clause g of the Constitution of Zambia Chapter 1 of the Laws of Zambia.

CONCLUSION

The law must draw on various fields to be able to give human direction in trying to curtail the spread of HIV/AIDS. Moreover, a modern lawyer should be like a broad based legal drug capable of helping society cure various ills of the Constitution, statutory rights of human beings. and bringing the law in conformity with the changes occurring in society. The need for law reform is a unique feature of this essay and it would not be right to simply propose reforms and put them on a shelf to gather dust. Society is duty bound to argue for and substantiate the reasons for proposals.

Hence law reform should be reviewed as a renewal and re-orientation of the law so as to adapt to recurrent and emerging pandemics like AIDS that is leading the human race to extinction. Advocacy for law reform is aimed at changing the thinking of people in society to suit change. Lastly, it is submitted that we can turn the tables and rule the AIDS pandemic rather than let it rule us through effective legislation that will minimize the transmission rate of HIV.

ENDNOTES

[1]**Safe Blood Starts With Me**. World Health Organization and International Federation Of Red Cross Societies Publication World Health Day 7th April page 21
[2]See chapter three of the Obligatory essay or see Article 33 and 24 of the Ugandan and Malawian Constitution respectively.
[3]**National HIV/AIDS Draft Policy Document**
[4]See endnotes 22-31 of Chapter four of this obligatory essay
[5]See endnote 39 in Chapter Four of this obligatory essay.

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