

**THE CRIMINALIZATION OF HIV AND THE SIGNIFICANCE OF  
KNOWLEDGE: A COMPARATIVE STUDY**

**BY**

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## LIST OF ACRONYMS

AIDS	Acquired Immunodeficiency Syndrome
ART	Antiretroviral Therapy
CMA	Canadian Medical Association
HIV	Human Immunodeficiency Virus
HPCSA	Health Professions Council of South Africa
PEP	Post-exposure prophylaxis
PrEP	Pre-exposure prophylaxis
SALC	South African Law Commission
SIV	Simian Immunodeficiency Virus
UNAIDS	The Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Programme
WHO	World Health Organisation
WMA	World Medical Association

## SUMMARY

Throughout history, epidemics have been endemic to the human experience.<sup>1</sup> Medical epidemics can cause both fear and panic among citizens around the globe,<sup>2</sup> as can be evidenced by the approaches taken for venereal disease in the past and the Human Immunodeficiency Virus (HIV) in the present.

Legal intervention for HIV and other sexually transmitted infections demonstrate how criminalization can be used as a tool to reinforce existing stigmas that separate the sick from the healthy by establishing a moral link between sickness and unlawfulness, especially in matters where sexual conduct is a factor.<sup>3</sup> The spheres of public health and criminal law are both aimed at the protection of public welfare and safety in their attempt to neutralize harmful elements in society, whether such harm is evidenced by a disease-causing biological agent or the reckless conduct of individuals.<sup>4</sup>

The enquiry into the suitability of criminal law as a method of addressing the problem of HIV transmission was necessitated by an awareness of scientific and medical progress in HIV treatment. Currently, criminal law is applied in dealing with HIV transmission in South Africa, and little cognisance is taken of scientific and medical knowledge. South Africa has endorsed the recommendations made by the United Nations to utilise existing criminal laws in the event that it needs to be applied to cases of HIV transmission.<sup>5</sup> This study acknowledges the application of criminal laws where HIV transmission occurs as a result of the accused person's intentional act or omission.

The law applicable to HIV transmission in South Africa and certain states in the United States of America (United States) is discussed. The study serves to indicate that,

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<sup>1</sup> Stein "Should HIV Be Jailed? HIV Criminal Exposure Statutes and Their Effects in the United States and South Africa" 2004 3 *Washington University Global Studies Law Review* 177 177.

<sup>2</sup> Stein 2004 *Washington University Global Studies Law Review* 177.

<sup>3</sup> Chen "HIV-Specific Criminal Law: A Global Review" 2016 9 *Intersect* 1 12.

<sup>4</sup> Arrigo and Bersot (eds) *The Routledge Handbook of International Crime and Justice Studies* 1ed (2014) 541.

<sup>5</sup> Open Society Foundations "Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission" (1 December 2008) [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) (accessed 2017-07-08) 3.



whether general or HIV-specific criminal law is imposed, criminal laws cannot contain HIV transmission, but only serve to particularly address harm suffered.

# CHAPTER ONE: INTRODUCTION

## 1 1 HIV/AIDS AS A GLOBAL EPIDEMIC

One of the world's most serious health and development challenges is a caused by the HIV epidemic, which can lead to the widespread occurrence of full blown Acquired Immunodeficiency Syndrome (AIDS).<sup>6</sup>

HIV first caught the public's attention in 1981 when the HIV/AIDS epidemic is said to have begun, although it is believed to have been present prior to this.<sup>7</sup> Since its discovery, the virus has affected about 36.7 million people currently living with HIV.<sup>8</sup>

By 2016, various factors, including ignorance of an individual's HIV-positive status, the neglect of treatment, and sexual activities between individuals whose viral load had not yet been suppressed, have led to new HIV infections in approximately 1.7 million adults.<sup>9</sup> Presently, there is no cure available for HIV/AIDS, but it can be managed through ARV treatment.<sup>10</sup>

In order to appreciate the impact of this previously unknown threat to health, it is necessary to review how the global community first become aware of the HIV virus.

It is only as a result of awareness of HIV and its consequences that legal systems worldwide were able to implement and consider prosecuting persons who unlawfully transmitted the virus. A brief discussion of the role of the United States regarding the criminalization of HIV is useful, as it served as a foundation for other nations to establish their own legal approaches to civil liability for HIV transmission.

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<sup>6</sup> Kaiser Family Foundation "The Global HIV/AIDS Epidemic" (8 August 2017) <http://www.kff.org/global-health-policy/fact-sheet/the-global-hivaids-epidemic/> (accessed 2017-08-10).

<sup>7</sup> Kaiser Family Foundation "Global HIV/AIDS Timeline" (29 November 2016) <http://www.kff.org/global-health-policy/timeline/global-hivaids-timeline/> (accessed 2017-07-01).

<sup>8</sup> UNAIDS "Global Factsheets" (undated) <http://aidsinfo.unaids.org/> (accessed 2017-07-01).

<sup>9</sup> UNAIDS "Public health and HIV viral load suppression" (19 July 2017) [http://www.unaids.org/sites/default/files/media\\_asset/20170724\\_viral\\_load\\_suppression\\_brochure.pdf](http://www.unaids.org/sites/default/files/media_asset/20170724_viral_load_suppression_brochure.pdf) (accessed 2018-08-13).

<sup>10</sup> Avert "Is there a Cure for HIV and AIDS?" (30 June 2017) <https://www.avert.org/about-hiv-aids/cure> (accessed 2017-08-13).

### 1 1 1 ACKNOWLEDGING THE EXISTENCE OF HIV/AIDS

Although the exact origin of HIV remains uncertain, the first documented case of HIV can be traced back to 1959.<sup>11</sup>

Doctor David Ho and colleagues from the Aaron Diamond AIDS Research Centre in New York analysed blood samples taken from a man, living in what was then the Belgian Congo, and found that the man had been infected with HIV.<sup>12</sup>

According to research, HIV may very well have evolved from a single introduction of the virus into the African population, which may have been the result of the consumption of the 'bush meat' of apes or monkeys by humans.<sup>13</sup>

Later studies indicated that the virus was contracted from chimpanzees, located in West Africa, who were infected with the simian immunodeficiency virus (SIV).<sup>14</sup> SIV, which is similar to modern day HIV, is thought to have mutated into HIV in the human body after chimpanzee meat was consumed as 'bush meat' by humans.

On the 5<sup>th</sup> of June 1981, the Morbidity and Mortality Weekly Report stated that between October 1980 and May of 1981, five homosexual young men had been treated for *Pneumocystis carinii* pneumonia, although two did not survive the treatment.<sup>15</sup> The report would later be regarded as the first recorded case of HIV in the United States.

After the publication of the report, research indicated that similar occurrences of *Pneumocystis carinii* pneumonia were present in homosexual men, intravenous drug users, hemophiliacs; and babies who were infected during breastfeeding.<sup>16</sup>

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<sup>11</sup> The Aids Institute "Where did HIV come from?" (undated) <http://www.theaidsinstitute.org/education/aids-101/where-did-hiv-come-0> (accessed 2017-06-28).

<sup>12</sup> Cable News Network (CNN) "Researchers Trace first HIV case to 1959 in the Belgian Congo" (3 February 1998) <http://edition.cnn.com/HEALTH/9802/03/earliest.aids/> (accessed 2017-06-28).

<sup>13</sup> *Ibid.*

<sup>14</sup> The Aids Institute <http://www.theaidsinstitute.org/education/aids-101/where-did-hiv-come-0>.

<sup>15</sup> Centre for Disease Control and Prevention (U.S.) "*Pneumocystis* Pneumonia – Los Angeles" 1981 30 *Morbidity and Mortality Weekly* 250 250.

<sup>16</sup> Dr Fauci and Dr Whitescarver "30 Years of AIDS Research" 2011 6 *MedlinePlus* 10 10.

The occurrence of *Pneumocystis carinii* pneumonia in previously healthy homosexual men was seen as one of the initial indications of the emergence of AIDS.<sup>17</sup> *Pneumocystis carinii* pneumonia came to be known as an opportunistic infection, which is commonly found among individuals suffering from HIV.<sup>18</sup>

The concept of HIV caused so much panic amongst Americans that the forty-eight percent who, in 1991, believed they could contract the virus by sharing a drinking glass with an HIV-positive individual, rose to fifty-five percent in 1997.<sup>19</sup>

## 1 1 2 THE ROLE OF THE UNITED STATES IN THE CRIMINALIZATION HIV/AIDS

AIDS activists, in the late 1980s, lobbied for the creation of a national policy to manage AIDS.<sup>20</sup> The intention of the policy was to prevent the spread of HIV despite the disease being described in a manner that served to appease the masses.<sup>21</sup> The criminalization of HIV first came to light in 1988 in Washington.<sup>22</sup>

The United States was at the forefront of the HIV epidemic and became the first recorded nation to prosecute a case involving HIV transmission. Moreover, it enacted HIV-specific criminal laws to criminalize intentional HIV transmission and exposure.<sup>23</sup> Public support for the enactment of HIV-specific legislation emerged as various criminal cases were reported in which HIV-positive individuals were judged for their “sins”.<sup>24</sup>

HIV-specific legislation during the early stages of HIV awareness in the United States was justified, as the HIV epidemic was ranked just behind war, peace and the

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<sup>17</sup> Wilken and Feinberg “Pneumocystis carinii Pneumonia: A Clinical Review” (15 October 1999) <http://www.aafp.org/afp/1999/1015/p1699.html> (accessed 2017-06-28).

<sup>18</sup> *Ibid.*

<sup>19</sup> Richardson “Wave of Laws Aimed at People With H.I.V.” (25 September 1998) <http://www.nytimes.com/1998/09/25/nyregion/wave-of-laws-aimed-at-people-with-hiv.html> (accessed 2017-08-10).

<sup>20</sup> Stein 2004 *Washington University Global Studies Law Review* 179.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> NAM “The evolution of global criminalisation norms: the role of the United States” (undated) <http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/> (accessed 2017-08-10).

<sup>24</sup> Stein 2004 *Washington University Global Studies Law Review* 180.

economy.<sup>25</sup> Accordingly, a precarious situation presented itself when deciding on a mechanism to eradicate the spread of HIV.<sup>26</sup>

The Presidential Commission on the Human Immunodeficiency Virus Epidemic stated that the extension of criminal liability to individuals who knowingly engage in behaviour resulting in the transmission of HIV was in accordance with the use of criminal law to punish harmful conduct.<sup>27</sup> The Commission acknowledged that the existing criminal laws were not suited for the prosecution of HIV transmission. Thus, the Commission called for the states to review their criminal codes and adopt HIV-specific criminal laws.<sup>28</sup>

Initial HIV-specific legislation was enacted by different states in 1987 after attempts to prosecute under the established criminal law yielded insufficient evidence of intent, and risk of harm, with regard to HIV prosecutions.<sup>29</sup> With the new legislation, the United States became the first country to convict a HIV-positive individual for having sexual intercourse without disclosing his HIV-status.<sup>30</sup> The United States, like other nations, does not follow a universal approach to HIV-transmission matters. Some states have HIV-specific laws, while others have opted to prosecute the intentional transmission of HIV under existing general criminal laws.<sup>31</sup>

## 1 2 NECESSITY, HYPOTHESIS AND OBJECTIVES OF THE STUDY

HIV transmission is a crucial global issue, as thirty-five million individuals have lost their lives as a result of the disease.<sup>32</sup> Worldwide, one million lives were lost as

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<sup>25</sup> Roberts "AIDS Alert; Politicians Awaken to the Threat of a Global Epidemic" (7 June 1987) <http://www.nytimes.com/1987/06/07/weekinreview/aids-alert-politicians-awaken-to-the-threat-of-a-global-epidemic.html> (accessed 2017-08-10).

<sup>26</sup> NAM <http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/>.

<sup>27</sup> Presidential Commission "Human Immunodeficiency Virus Epidemic" in *The Presidential Commission Report* (1988) 130.

<sup>28</sup> Presidential Commission *The Presidential Commission Report* 130.

<sup>29</sup> NAM <http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/>.

<sup>30</sup> New York Times "Soldier With AIDS Virus to Be Imprisoned for Sexual Contacts" (4 December 1987) <http://www.nytimes.com/1987/12/04/us/soldier-with-aids-virus-to-be-imprisoned-for-sexual-contacts.html> (accessed 2017-08-10).

<sup>31</sup> NAM <http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/>.

<sup>32</sup> World Health Organisation "HIV/AIDS Fact Sheet" (July 2017) <http://www.who.int/mediacentre/factsheets/fs360/en/> (accessed 2017-08-10).

recently as 2016.<sup>33</sup> The question that arises is whether medical knowledge has been acknowledged in the application of criminal laws that attempt to eradicate HIV transmission. It is the researcher's hypothesis that the criminalization of HIV transmission does not effectively eradicate the transmission of HIV.

The objectives of the study are to:

1. Examine the criminal liability which arises from HIV transmission;
2. Investigate the medical aspects relating to HIV transmission;
3. Examine South Africa's approach to HIV transmission;
4. Examine the position taken by certain statutes in the United States regarding HIV transmission;
5. Determine whether medical knowledge is acknowledged when applying criminal laws to HIV transmission; and
6. Make recommendations for the proper prosecution of individuals who intentionally infect others with HIV.

### **1 3 METHODOLOGY**

To achieve the objectives of this study, it is necessary to analyse the foundations laid by common law criminal liability as the starting point for the development of all criminal laws globally.

The medical aspects of HIV transmission are indicated to provide a context prior to considerations of whether criminalization can serve as a mechanism for the eradication of HIV transmission.

Lastly, the legal position in South Africa and the United States is examined to allow a comparison to be drawn between the two countries in an attempt to find a universal common approach to HIV transmission.

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<sup>33</sup> World Health Organisation <http://www.who.int/mediacentre/factsheets/fs360/en/>.

## **1 4     STRUCTURE**

**CHAPTER ONE:** This chapter serves as an introduction to the concept of HIV/AIDS. It looks at the discovery of the virus and the United States government's response to the spread of the disease, which led to the criminalization of intentional HIV transmission. The chapter further sets out the hypothesis, objectives of the study, methodology and structure of the treatise.

**CHAPTER TWO:** Chapter two discusses criminal liability that may be applied by the South African common law. This chapter forms the basis of understanding the application of criminal law in South African practice as discussed in chapters five and six.

**CHAPTER THREE:** The chapter examines the medical aspects relating to HIV. It looks at the risk of contracting HIV, HIV as a notifiable disease, and the liability under which non-disclosure of an HIV-status resulting in transmission would be provided by criminal law.

**CHAPTER FOUR:** In this chapter, traditional reasons for using criminal law are discussed in an attempt to determine whether HIV-specific legislation is justified. The arguments for and against the implementation of criminal law are discussed. Consideration is also given to alternative methods to curb the spread of HIV.

**CHAPTER FIVE:** This chapter acknowledges the application of common law and existing criminal law in South Africa when dealing with cases of HIV transmission.

**CHAPTER SIX:** This chapter reviews various applications of HIV-specific criminal law in parts of the United States and refers to case law where relevant. The outcome of a review of the laws in the United States is briefly stated, and the proposed modernization of United States laws is also mentioned.

**CHAPTER SEVEN:** In this chapter, a comparison is drawn between the United States and South African laws regulating HIV. A study is made of the differences and similarities with regard to specific criminal laws and general criminal laws and consideration is also given to the medical aspects affecting transmission.

**CHAPTER EIGHT:** In this chapter, a conclusion is reached as to whether the hypothesis made at the beginning of this treatise was established and recommendations are made, based on the knowledge gained from the study.



## CHAPTER TWO: ELEMENTS FOR CRIMINAL LIABILITY IN TERMS OF THE COMMON LAW

### 2 1 INTRODUCTION

South Africa makes use of a mixed legal system that includes aspects of common law and civil law.<sup>34</sup> The authority of common law is derived from universal consent and the practice of people from time immemorial.<sup>35</sup> Common law finds its application where no statute exists to govern a dispute and, therefore, the common law elements for criminal liability must be discussed.

As HIV is not governed by HIV-specific law in South Africa and is adjudicated on the basis of common law principles, it is imperative to acknowledge their basic structure.

### 2 2 CRIMINAL LIABILITY

Criminal liability will arise when it is proved beyond reasonable doubt that the accused acted voluntarily and that such conduct was accompanied by criminal capacity and fault.<sup>36</sup>

The essence of criminal law lies encapsulated in the Latin maxim *actus non facit reum nisi mens sit rea*, which holds that any criminal conviction requires proof of a criminal act as well as intent.<sup>37</sup> Criminal liability will, therefore, arise where it is proven that *actus reus* (unlawful conduct) took place in conjunction with its counterpart, *mens reus* (fault).

While the above two elements form the basic structure for criminal liability, the remaining elements of unlawfulness, causation, and criminal capacity will also be discussed in the context of HIV transmission.

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<sup>34</sup> University of Ottawa “Alphabetical Index of the 192 United Nations Member States and Corresponding Legal Systems” (undated) <http://www.juriglobe.ca/eng/syst-onu/index-alpha.php> (accessed 2017-07-15).

<sup>35</sup> USLegal “Common Law” (undated) <https://commonlaw.uslegal.com/> (accessed 2017-07-15).

<sup>36</sup> Burchell *Principles of Criminal Law* 4ed (2014) 47.

<sup>37</sup> Duhaime’s Law Dictionary “Actus Reus Non Facit Reum Nisi Mens Sit Rea Definition” (undated) <http://www.duhaime.org/LegalDictionary/A/ActusReusNonFacitReumNisiMensSitRea.aspx> (accessed 2017-06-29).

## 2 3 ACTUS REUS (UNLAWFUL CONDUCT)

*Actus reus* or “guilty act” is the objective criteria encompassing the unlawful conduct of the offender.<sup>38</sup> The unlawful conduct is required to be committed by a human being and must be voluntary.<sup>39</sup>

Criminal liability will arise where the offender carried out an act or omitted to carry out an act.<sup>40</sup>

### 2 3 1 ACT

An act of commission entails positive conduct on behalf of the offender in relation to a specific activity.<sup>41</sup> The criminal conduct must be voluntary, and the act must take place in accordance with the accused’s conscious will.<sup>42</sup>

An act may, for example, entail an individual engaging in unprotected sexual intercourse while being fully aware of his or her HIV-positive status.<sup>43</sup>

### 2 3 2 OMISSION

An omission occurs when the offender refrains from acting.<sup>44</sup> An example would be an individual not disclosing his or her HIV-positive status prior to engaging in unprotected sex.<sup>45</sup>

While there is no general duty to act, the legal convictions of society may dictate that, in certain circumstances, a failure to act amounts to criminal liability.<sup>46</sup> Failure to disclose one’s HIV-positive status may well fall within such category.

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<sup>38</sup> Sixth Form Law “Principles – actus reus – guilty conduct” (undated) [https://sixthformlaw.info/01\\_modules/mod3a/3\\_10\\_principles/02\\_principles\\_actus.htm](https://sixthformlaw.info/01_modules/mod3a/3_10_principles/02_principles_actus.htm) (accessed 2017-07-19).

<sup>39</sup> Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa 2ed* (2013) 22.

<sup>40</sup> Burchell *Principles of Criminal Law* 73.

<sup>41</sup> *Ibid.*

<sup>42</sup> Burchell *Principles of Criminal Law* 47.

<sup>43</sup> Berger “Prosecuting for knowingly transmitting HIV is warranted” 2009 180 *Canadian Medical Association Journal* 1368 1368.

<sup>44</sup> Burchell *Principles of Criminal Law* 74.

<sup>45</sup> Berger 2009 *Canadian Medical Association Journal* 1368.

<sup>46</sup> Burchell *Principles of Criminal Law* 47.

## 2 4 MENS REA (FAULT)

*Mens rea* is the embodiment of fault determined by the state of mind in which an accused finds himself/herself while undertaking to commit an unlawful act.

Knowledge of unlawfulness is pivotal in this regard. Knowledge is, at its most basic, understood to be the awareness of a situation or the information gathered through experience.<sup>47</sup>

The American Law Institute determined that the accused would be blameworthy if he or she willingly committed the act in question with knowledge of what the final result would be; or, where he or she acted in a manner which was reckless and without consideration of the safety of others.<sup>48</sup> Consequently, ignorance of the law or a mistake of law will not serve as a defence.<sup>49</sup>

South Africa makes use of fault-based liability, in which either intention or negligence is required in order to hold an offender criminally liable.<sup>50</sup>

### 2 4 1 NEGLIGENCE

Negligence refers to the failure to adhere to the standard of care legally required of a person through an attitude or conduct of carelessness, thoughtlessness, or imprudence.<sup>51</sup> Therefore, negligence is established where a reasonable person, in the position of the accused, would have foreseen the possible occurrence of a prohibited consequence and taken steps to guard against such situation occurring neglected to do so.<sup>52</sup>

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<sup>47</sup> Oxford Living Dictionaries “Knowledge” (undated) <https://en.oxforddictionaries.com/definition/knowledge> (accessed 2017-06-27).

<sup>48</sup> Crime Museum “*Mens Rea*” (undated) <https://www.crimemuseum.org/crime-library/criminal-law/mens-rea/> (accessed 2017-09-03).

<sup>49</sup> Crime Museum <https://www.crimemuseum.org/crime-library/criminal-law/mens-rea/>.

<sup>50</sup> Burchell *Principles of Criminal Law* 27.

<sup>51</sup> Neethling, Potgieter and Visser *Law of Delict* 7ed (2015) 137.

<sup>52</sup> South African Law Commission “Project 85: The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour” in *Fifth Interim Report on Aspects of the Law Relating to AIDS* (2001) 97.

## 2 4 2 INTENT (*DOLUS*)

An accused will be at fault where he or she intentionally commits unlawful conduct while knowing that such conduct is unlawful.<sup>53</sup> Intent is assessed according to subjective criteria,<sup>54</sup> as individuals are to be regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour.<sup>55</sup>

Intention may take a variety of forms. *Dolus directus* (direct intention) manifests where the objective is to infect another individual with HIV while *dolus indirectus* (indirect intention) presents itself where HIV transmission is not the objective, but the occurrence of transmitting HIV is substantially certain, if the conduct in question was to be proceeded with.

Criminal intent, in the form of *dolus eventualis*, is present where the accused was aware of the possibility that he or she may be conducting himself or herself in an unlawful manner and continued with the intended conduct.<sup>56</sup> Therefore, this form of intention occurs where an individual, knowing he or she is HIV-positive, engages in unprotected sexual intercourse with another individual without disclosing his or her HIV-positive status and without making use of any protective measures.<sup>57</sup>

## 2 5 UNLAWFULNESS

Any act which is contrary to a directive or prohibition of criminal law is deemed to be unlawful.<sup>58</sup> Unlawfulness will be present when there is no justification for an accused's actions.<sup>59</sup>

Unlawfulness is based on the values and consensus determined by the legal convictions of society and the Constitution.<sup>60</sup> It is submitted that only sexual behaviour that would harm other individuals should in principle be regarded as unlawful.<sup>61</sup>

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<sup>53</sup> Burchell *Principles of Criminal Law* 344.

<sup>54</sup> Burchell *Principles of Criminal Law* 56.

<sup>55</sup> Burchell *Principles of Criminal Law* 344.

<sup>56</sup> Kemp *et al Criminal Law in South Africa* 23.

<sup>57</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 97.

<sup>58</sup> Visser and Vorster *General Principles of Criminal Law through Cases* 1ed (1987) 143.

<sup>59</sup> Burchell *Principles of Criminal Law* 27.

<sup>60</sup> Burchell *Principles of Criminal Law* 111.

<sup>61</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 92.

A ground of justification in the context of HIV transmission or exposure is the consent obtained from the “victim”.<sup>62</sup> Consent may be implied by conduct as well as through express indication of agreement.<sup>63</sup> *Volenti non fit iniuria* holds that an individual who consents cannot receive an injury.<sup>64</sup> Consent cannot be given by an individual who is not completely aware of what they are consenting to; therefore, consent to harm will only be valid if the individual was aware of the HIV-positive status of his or her sexual partner and the concomitant risks of HIV transmission.<sup>65</sup>

In *R v Cuerrier*<sup>66</sup> the Supreme Court of Canada confirmed that failure to disclose an HIV-positive status equated to fraud vitiating the consent of the sexual partner where the parties had engaged in unprotected sexual intercourse.<sup>67</sup>

The question arises whether an individual should be punished for the transmission or exposure to HIV where a sexual partner was aware of the HIV-positive status of their partner and engaged in sexual intercourse regardless thereof. Knowledge of the HIV infection, coupled with engagement in sexual intercourse, would indicate the awareness of the risks of HIV transmission and the subsequent acceptance of the risk.<sup>68</sup> Surely such conduct would meet the expected requirement for risk in the form of knowledge, appreciation and consent.<sup>69</sup> The author submits that where the parties engage in sexual intercourse with the knowledge that either one or both of them have HIV, the consequences thereof are theirs alone to bear. No criminal liability should arise in a scenario, such as above, where parties knowingly partake in acts which may alter their health, notwithstanding that consent is not a defence to a crime – except in rape.

## 2 6 CAUSATION

Causation remains a substantial evidentiary hurdle when prosecuting crimes involving the transmission of HIV.<sup>70</sup>

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<sup>62</sup> *Ibid.*

<sup>63</sup> Burchell *Principles of Criminal Law* 223.

<sup>64</sup> Hiemstra and Gonin *Trilingual Legal Dictionary* 3ed (2014) 306.

<sup>65</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 95. [1998] 2 S.C.R. 371.

<sup>67</sup> Burchell *Principles of Criminal Law* 225.

<sup>68</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 93.

<sup>69</sup> *Waring and Gillow Ltd v Sherborne* 1904 TS 340 344.

<sup>70</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 91.

A causal link between the initial act or omission and the ultimate unlawful consequence is required.<sup>71</sup> In terms of HIV transmission, this would require, for example, that the accused was in fact HIV-positive at the time the parties engaged in sexual intercourse as well as that the transmission of HIV occurred solely due to this act. Establishing that a person had indeed been aware of his or her HIV-status is problematic owing to the window period in which HIV remains undetectable.<sup>72</sup>

The *sine qua non* test can be applied in terms of acts and omissions in order to establish factual causation.<sup>73</sup> Simply stated, if the consequence would not have come about but for the accused's conduct, then the conduct of the accused is the factual cause of the consequence.<sup>74</sup> If the "victim" had been engaged in sexual intercourse with other participants within a reasonable period prior to or after the alleged transmission occurred, the possibility of proving beyond a reasonable doubt that the accused was indeed the cause of the transmission becomes near impossible.<sup>75</sup>

Phylogenetic analysis provides a solution to assess the relationship between different strands of HIV contracted by different individuals, as the extent of similarity between viruses from the different individuals is associated with the likelihood of a common source of infection.<sup>76</sup> The degree of certainty is not as definite as that found in DNA data, but the phylogenetic evidence coupled with clinical and epidemiological evidence concerning the likely duration of the infection, sexual history and other relevant factors can provide support between cases involving HIV, albeit not being able to prove the transmission itself.<sup>77</sup> Phylogenetic tests may assist in excluding the accused as the cause of HIV transmission, where the genetic strains of the accused differ from that of the "victim".<sup>78</sup>

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<sup>71</sup> Burchell *Principles of Criminal Law* 48.

<sup>72</sup> I-base "What is the Window Period?" (1 June 2016) <http://i-base.info/guides/testing/what-is-the-window-period> (accessed 2017-09-04).

<sup>73</sup> Burchell *Principles of Criminal Law* 48.

<sup>74</sup> *Ibid.*

<sup>75</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 91.

<sup>76</sup> Pillay, Rambaut, Geretti and Brown "HIV Phylogenetics" 2007 335 *BMJ* 460 461.

<sup>77</sup> Pillay *et al* 2007 *BMJ* 461.

<sup>78</sup> Aidsmap "Proving a cause-effect relationship between the defendant's behaviour and the alleged outcome" (undated) <http://www.aidsmap.com/Proving-a-cause-effect-relationship-between-the-defendants-behaviour-and-the-alleged-outcome/page/1444124/> (accessed 2017-09-04).

From an evidentiary point, a causal link cannot be proved beyond reasonable doubt by using a forensic test by itself.<sup>79</sup> Phylogenetic testing may be used as evidence to show an inferential link between infections, but should not be used as the sole criteria to determine guilt or innocence. It may lead to the risk of a miscarriage of justice, as such evidence has very low probative value.<sup>80</sup>

## 2 7 CRIMINAL CAPACITY

Criminal capacity requires a person to appreciate that their conduct is unlawful and to have the ability to act in accordance with such appreciation.<sup>81</sup> When determining whether a person has criminal capacity, a subjective rather than objective test is applied.<sup>82</sup>

In Singapore, individuals who do not know their HIV-status, but have reason to believe that they may have contracted the virus, are required to disclose to their prospective sexual partners that such sexual intercourse may lead to them contracting HIV or AIDS.<sup>83</sup> Prospective partners are also required to give voluntary consent to undertaking such risks prior to engaging in sexual intercourse.<sup>84</sup> Thus, individuals who behave in ways that amount to risky sexual conduct would be held criminally liable for their actions, even if they are oblivious to their HIV-status. The author submits that such an approach means that individuals, whether HIV-positive or not, should know that engaging in sexual intercourse may carry the risk of HIV transmission, and that the disclosure in relation thereto, will protect both parties, should they disclose their HIV status.

## 2 8 CONCLUSION

The element of causation is the main obstacle to establishing whether or not HIV transmission occurred as a result of the act of a specific individual. It is the author's opinion that causation plays an undeniable role in establishing the link between the

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<sup>79</sup> Kidd "Phylogenetic analysis as expert evidence in HIV transmission prosecutions" 2016 14 *HIV Australia* 21 21.

<sup>80</sup> Kidd 2016 *HIV Australia* 21.

<sup>81</sup> Burchell *Principles of Criminal Law* 53.

<sup>82</sup> *Ibid.*

<sup>83</sup> Global Criminalisation Scan "Singapore" (1 June 2017) <http://criminalisation.gnppplus.net/en/country/singapore> (accessed 2018-01-12).

<sup>84</sup> *Ibid.*

intentional act or omission and its consequences of events that led to a certain outcome, but that this principle is ill-suited to HIV cases. It is submitted that societies' social structure gravitated towards the acceptance of multiple sexual partners as a norm. Coupled with the lapse of time until HIV may be discovered among those individuals who are already infected, it is futile to contemplate that causation can serve its full purpose.

In respect of infections, the cardinal principle remains that conduct alone is insufficient to establish guilt if it is not accompanied by a blameworthy state of mind.<sup>85</sup> Is it then justifiable to punish those who transmit HIV albeit with no intention to do so? The author submits that the lack of knowledge with regard to one's HIV-status should serve as a "justification" for engaging in sexual intercourse without any protective measures being implemented. Without such knowledge, the only fault in not implementing protective measures would be based on moral obligations.

Having established the general elements required for criminal liability it is necessary to determine the impact of medical knowledge on the ambit of HIV transmission.

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<sup>85</sup> Sixth Form Law [https://sixthformlaw.info/01\\_modules/mod3a/3\\_10\\_principles/02\\_principles\\_actus.htm](https://sixthformlaw.info/01_modules/mod3a/3_10_principles/02_principles_actus.htm).



## CHAPTER THREE: THE MEDICAL ASPECTS OF HIV

### 3 1 INTRODUCTION

AIDS-related deaths peaked worldwide in 2005 but declined by 45%, resulting in the death of 1.1 million people in 2015.<sup>86</sup> Despite the available resources, 2.1 million people became newly infected in 2015.<sup>87</sup> As a consequence of claiming the lives of 35 million people to date, HIV continues to be a crucial public health issue.<sup>88</sup> Yet, there are statistical inconsistencies regarding individuals who are HIV-positive, those who know their HIV-positive-status, those obtaining medical assistance, and those who undergo treatment.<sup>89</sup>

Ignorance of the science which governs HIV transmission has resulted in overbroad criminal laws being imposed on HIV-positive individuals. It is within this setting that medical practitioners and scientists alike have a duty, both ethically and professionally, to promote an understanding of the science of HIV to eliminate potential barriers to evidence-based HIV prevention strategies.<sup>90</sup>

Assessing HIV-specific criminal laws requires consideration of the impact of medical factors such as: vulnerability to HIV transmission, the prevention and treatment of HIV; and the awareness of HIV-positive status.

### 3 2 HIV TRANSMISSION

HIV is contained in blood, the breast milk, semen and vaginal and anal fluids of HIV-positive individuals.<sup>91</sup> Sexual HIV transmission occurs if sufficiently high levels of specific bodily fluids from an HIV-positive individual come into contact with the mucous membranes of an individual who is HIV-negative.<sup>92</sup> The virus can also be transmitted

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<sup>86</sup> UNAIDS “Fact Sheet – Latest Statistics on the Status of the AIDS Epidemic” (1 December 2016) <http://www.unaids.org/en/resources/fact-sheet> (accessed 2017-08-14).

<sup>87</sup> UNAIDS <http://www.unaids.org/en/resources/fact-sheet>.

<sup>88</sup> World Health Organization <http://www.who.int/mediacentre/factsheets/fs360/en/>.

<sup>89</sup> Avert “The HIV Treatment Cascade” (7 June 2017) <https://www.avert.org/professionals/hiv-programming/treatment/cascade> (accessed 2017-08-13).

<sup>90</sup> Loutfy, Tyndall, Baril, Montaner, Kaul and Hankins “Canadian consensus statement on HIV and its transmission in the context of criminal law” 2014 25 *Canadian Journal of Infectious Diseases and Medical Microbiology* 135 135.

<sup>91</sup> Avert “The Science of HIV and AIDS – Overview” (27 July 2017) <https://www.avert.org/professionals/hiv-science/overview> (accessed 2017-08-13).

<sup>92</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 136.

by sharing injecting equipment or from a mother to a child during pregnancy, birth or breastfeeding.<sup>93</sup>

HIV is predominantly transmitted through sexual intercourse where condoms have not been used.<sup>94</sup> It is relevant to indicate that the choice to participate in sexual intercourse may be influenced by the knowledge of a sexual partner's HIV-status. Consent will be vitiated where there is significant risk of serious bodily harm, and it can be established that the complainant would have refused to engage in unprotected sexual intercourse, had he or she been informed that their sexual partner was HIV-positive.<sup>95</sup>

The virus can be transmitted during any stage of the HIV infection, even when the HIV-positive individual does not show symptoms of the virus.<sup>96</sup> Transmission predominantly occurs a short while after the virus has been contracted by the individual concerned, who may be unaware of his or her status at the time he or she decides to engage in sexual intercourse with another.<sup>97</sup>

Medical evidence indicates that HIV will not necessarily always be transmitted when individuals engage in unprotected sex. Yet, transmission can occur after a single exposure during unprotected sexual intercourse.<sup>98</sup> The risk of HIV transmission is determined by the manner in which the individual was exposed. Although some forms of transmission are biologically possible, it may in practice result in a miniscule chance of transmission.<sup>99</sup> The risk of exposure escalates when a high viral load is present, where the male is uncircumcised, and when other sexually transmitted infections are

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<sup>93</sup> NAM "HIV Basics: Transmission" (undated) <http://www.aidsmap.com/hiv-basics/Transmission/page/1412438/> (accessed 2017-08-13).

<sup>94</sup> Avert <https://www.avert.org/professionals/hiv-science/overview>.

<sup>95</sup> Canadian HIV/AIDS Legal Network "Criminalization of HIV transmission: poor public health policy" 2009 14 *HIV/AIDS Policy & Review* 61 72.

<sup>96</sup> AIDS info "HIV/AIDS: The Basics" (9 September 2016) <https://aidsinfo.nih.gov/understanding-hiv-aids/fact-sheets/19/45/hiv-aids--the-basics> (accessed 2017-08-14).

<sup>97</sup> Joint United Nations Programme on HIV/AIDS "Criminalization of HIV Transmission" in *Policy Brief* (2008) 2.

<sup>98</sup> Wilton "Putting a number on it: The risk from an exposure to HIV" (2012) <http://www.catie.ca/en/pif/summer-2012/putting-number-it-risk-exposure-hiv> (accessed 2018-08-14).

<sup>99</sup> Centers for Disease Control and Prevention "HIV Risk Behaviours" (4 December 2015) <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html> (accessed 2018-08-14).

present.<sup>100</sup> It stands to reason that multiple exposures will increase the risk of HIV being contracted.<sup>101</sup>

The manner in which sexual intercourse takes place can determine whether the risk of HIV transmission will increase or decrease.<sup>102</sup> While vaginal intercourse is less likely to result in HIV infection than anal intercourse, both activities still carry a realistic possibility of HIV being transmitted.<sup>103</sup> Three categories of HIV transmission have been described to assist the judiciary in determining the possibility of an individual contracting HIV, namely where there is a low possibility; a negligible possibility; or, no possibility of HIV transmission occurring.<sup>104</sup>

### **3 2 1 LOW POSSIBILITY**

HIV transmission predominantly takes place in this category when the basic conditions for viral transmission are present.<sup>105</sup> Recent estimates indicate that only between four and eight individuals out of every ten-thousand might contract HIV when engaging in vaginal-penile intercourse in the absence of using condoms or effective Antiretroviral Therapy (ART). This, therefore, debunks the previous assumption that such conduct poses a high risk of transmission.<sup>106</sup>

Anal-penile intercourse have yielded similar results in the absence of the preventive methods mentioned above.<sup>107</sup>

### **3 2 2 NEGLIGIBLE POSSIBILITY**

A negligible possibility of transmission arises where the potential exists for the basic conditions of viral transmission to be present within the body.<sup>108</sup> Vaginal-penile intercourse poses a negligible possibility of transmission if coupled with the use of

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<sup>100</sup> Wilton <http://www.catie.ca/en/pif/summer-2012/putting-number-it-risk-exposure-hiv>.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> Centers for Disease Control and Prevention <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html>.

<sup>104</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 136.

<sup>105</sup> *Ibid.*

<sup>106</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 137.

<sup>107</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 138.

<sup>108</sup> *Ibid.*

either a condom or ART.<sup>109</sup> When oral sex is performed on a HIV-positive individual in the absence of the use of condoms or effective ART, there is a negligible possibility of transmission occurring.<sup>110</sup>

Theoretically, HIV can be transmitted through biting and other assaultive contact which exposes an individual to the bodily fluid of an HIV-positive individual.<sup>111</sup> However, the chance of HIV being transmitted through such modes, as mentioned above, are negligible, but have not been ruled out.<sup>112</sup> Biting, specifically, will only amount to a negligible possibility of transmission if such action lacerates the individual's skin and the saliva of the biter contained traces of blood in it.<sup>113</sup>

### **3 2 3 NO POSSIBILITY**

Basic conditions of HIV viral transmission are non-existent in this category.<sup>114</sup> There is no possibility of contracting HIV when being spat on by a HIV-positive individual, despite laws which continue to criminalise such action.<sup>115</sup>

Actions such as biting predominately present no possibility of transmission, as the HIV-positive individual's saliva contains insufficient levels of the virus for transmission to occur, and the risk is further diminished by the absence of the skin breaking.<sup>116</sup>

Oral sex with an HIV-positive individual who makes use of effective ART has been said to have near zero percent chance of transmission.<sup>117</sup>

### **3 3 PROGRESSION FROM HIV TO AIDS**

Before one can grasp the importance of prevention and treatment of HIV, one must understand the effect of their absence.

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<sup>109</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 137.

<sup>110</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 138.

<sup>111</sup> Lazzarini, Bray and Burns "Evaluating the Impact of Criminal Laws on HIV Risk Behaviour" 2002 30 *Journal of Law, Medicine and Ethics* 239 239.

<sup>112</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 239.

<sup>113</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 139.

<sup>114</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 137.

<sup>115</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 138.

<sup>116</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 139.

<sup>117</sup> *Ibid.*

The immune system, in particular CD4 cells, face viral attacks which over time destroy the body cells; weakening the body's ability to ward off infections and diseases.<sup>118</sup> Treatment of HIV is of importance, as there is no means to rid the body of HIV once it has been acquired.<sup>119</sup>

If a HIV-positive individual is diagnosed and receives proper treatment they may have a life expectancy similar to that of a healthy individual.<sup>120</sup> Untreated, an individual whose infection has progressed to AIDS has a life expectancy of up to three years, and as little as one year, if the disease presents concurrently with an opportunistic illness.<sup>121</sup>

### 3 4 PREVENTION AND TREATMENT

Advancements in medical knowledge have contributed to the increase of strategies for the reduction of risk in terms of acquiring and/or transmitting of HIV. A combination of different prevention strategies can be used to further reduce the possibility of HIV transmission.<sup>122</sup>

Various avenues are available to prevent the transmission of HIV, such as the practice of safe sexual behaviour through the use of condoms, the avoidance of injecting drugs, and ensuring that blood for transfusions is tested for HIV.<sup>123</sup> It is submitted that despite the availability of preventive measures, individuals make an active decision to engage in risky sexual behaviour.

Condom use can reduce the risk of HIV transmission up to 98%, if they are used consistently, as they act as a physical barrier to HIV-containing bodily fluids.<sup>124</sup> The

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<sup>118</sup> HIV gov "What Are HIV and AIDS?" (15 May 2017) <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids> (accessed 2017-08-14).

<sup>119</sup> HIV gov <https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/what-are-hiv-and-aids>.

<sup>120</sup> Centers for Disease Control and Prevention "About HIV/AIDS" (30 May 2017) <https://www.cdc.gov/hiv/basics/whatishiv.html> (accessed 2017-08-14).

<sup>121</sup> *Ibid.*

<sup>122</sup> Centers for Disease Control and Prevention "Effectiveness of Prevention Strategies to Reduce the Risk of Acquiring or Transmitting HIV" (7 March 2017) <https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html> (accessed 2017-08-14).

<sup>123</sup> World Health Organization "10 facts on HIV/AIDS" (May 2017) <http://www.who.int/features/factfiles/hiv/en/> (accessed 2017-07-07).

<sup>124</sup> Centers for Disease Control and Prevention <https://www.cdc.gov/hiv/risk/estimates/preventionstrategies.html>.

use of condoms is recommended, as they remain highly effective with only 2% of 15 billion condoms breaking during sexual intercourse.<sup>125</sup> In *R v Cuerrier*,<sup>126</sup> although the Supreme Court of Appeal did not rule definitively on the matter, the majority acknowledged that condom use would affect criminal liability and that, as such, the risk of transmission might not be significant enough for criminal liability to arise.<sup>127</sup>

Medical male circumcision also assists in the prevention of HIV transmission by 60%, although this is eclipsed by the effectiveness of the use of condoms and ARTs.<sup>128 129</sup>

Pre-exposure prophylaxis (PrEP) should be used prior to engagement in high risk behaviour and must be coupled with post-exposure prophylaxis when there is the possibility of having been exposed to HIV.<sup>130</sup> When PrEP is administered as required, it has been shown to reduce the risk of HIV transmission to almost zero.<sup>131</sup> It is submitted that these preventive measures should be factors considered by the court prior to rendering a verdict.

Tests and treatment for sexually transmitted infections can prevent the virus from spreading.<sup>132</sup> Where individuals are diagnosed with HIV, they should make use of ART that has have been used since the mid-1990s to prevent the virus from replicating. This significantly reduces the overall amount of HIV in the individual's body, which is commonly known as the viral load.<sup>134</sup>

Post-exposure prophylaxis (PEP) is the use of emergency ART after exposure to HIV.<sup>135</sup> In South Africa, section 28 of the Criminal Law (Sexual Offences and Related

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<sup>125</sup> New Kids-Center "What Are Your Chances of Pregnancy with Condom" (undated) <http://www.newkidscenter.com/Chances-of-Getting-Pregnant-with-a-Condom.html> (accessed 2017-08-14).

<sup>126</sup> [1998] 2 S.C.R. 371.

<sup>127</sup> Aidslaw "Summary: R. v. Cuerrier" (undated) <http://www.aidslaw.ca/site/wp-content/uploads/2014/02/2.Cuerrier1998summary.pdf> (accessed 2017-11-11) 6.

<sup>128</sup> World Health Organization <http://www.who.int/features/factfiles/hiv/en/>.

<sup>129</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 138.

<sup>130</sup> Avert "Treatment as Prevention (TASP) for HIV" (28 July 2017) <https://www.avert.org/professionals/hiv-programming/prevention/treatment-as-prevention> (accessed 2017-08-13).

<sup>131</sup> *Ibid.*

<sup>132</sup> World Health Organization <http://www.who.int/features/factfiles/hiv/en/>.

<sup>134</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 136.

<sup>135</sup> Centers for Disease Control and Prevention "PEP" (6 June 2017) <https://www.cdc.gov/hiv/basics/pep.html> (accessed 2017-08-14).

Matters) Amendment Act<sup>136</sup> provides for the administration of PEP to victims of sexual offences who may have been exposed to the risk of HIV transmission. To be eligible for the administration of PEP the victim must have reported the alleged sexual offence within 72 hours of its occurrence.<sup>137</sup>

While there is still no cure for HIV, the effective use of ART regulates the virus by reducing the viral load, which in turn reduces the risk of transmitting HIV to sexual partners by up to 96%.<sup>138</sup> <sup>139</sup> An “undetectable viral load” is present when the concentration of HIV found in the HIV-positive individual’s blood, semen, vaginal fluid and rectal mucous is undetectable by laboratory tests.<sup>140</sup>

The possibility of transmitting HIV reduces significantly as the viral load becomes smaller.<sup>141</sup> Recent studies conducted with couples yielded that no HIV transmission occurred when an undetectable viral load had been obtained.<sup>142</sup> It should be noted that some individuals have a low viral load because their immune systems are able to control the HIV, thereby reducing the possibility of transmission in the same manner that ART regulates it.<sup>143</sup>

Undetectable viral loads indicate that a HIV-positive individual cannot transmit the virus to another individual.<sup>144</sup> This is confirmed when regular treatment occurs and the viral load is monitored and tested by healthcare professionals.<sup>145</sup> The World Health Organisation (WHO) recommends such tests be executed six and twelve months after the HIV-positive individual has begun ART, and those who already use ART should undergo tests every twelve months.<sup>146</sup> The author submits that such factors are of critical importance and courts should take cognisance thereof.

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<sup>136</sup> 32 of 2007.

<sup>137</sup> S 28(2) of 32 of 2007.

<sup>138</sup> World Health Organization <http://www.who.int/mediacentre/factsheets/fs360/en/>.

<sup>139</sup> World Health Organization <http://www.who.int/features/factfiles/hiv/en/>.

<sup>140</sup> Avert <https://www.avert.org/professionals/hiv-programming/prevention/treatment-as-prevention>.

<sup>141</sup> Avert <https://www.avert.org/professionals/hiv-science/overview>.

<sup>142</sup> UNAIDS [http://www.unaids.org/sites/default/files/media\\_asset/20170724\\_viral\\_load\\_suppression\\_brochure.pdf](http://www.unaids.org/sites/default/files/media_asset/20170724_viral_load_suppression_brochure.pdf) 1.

<sup>143</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 137.

<sup>144</sup> Avert <https://www.avert.org/professionals/hiv-programming/prevention/treatment-as-prevention>.

<sup>145</sup> *Ibid.*

<sup>146</sup> Avert <https://www.avert.org/professionals/hiv-programming/treatment/cascade>.

HIV-positive individuals now enjoy a longer lifespan and benefit from healthier lives owing to advances in the access of ART.<sup>147</sup> Injectable antiretroviral drugs, currently in the phase of clinical trials, have revealed that patients feel free from their illness and are able to experience near-normal life expectancy.<sup>148</sup> Global statistics provide a positive outlook for the future, as 18.2 million people are said to be accessing ART.<sup>149</sup> The result of effective ART has been to change HIV from being a death sentence to that of a chronic manageable condition.<sup>150</sup>

### 3 5 HIV DETECTION

While HIV is primarily transmitted by individuals who are unaware of their HIV-status, the knowledge and disclosure of a person's status does not in itself serve to prevent the transmission of HIV.<sup>151</sup> In South Africa, most citizens are unaware of whether or not they have HIV.<sup>152</sup>

HIV-positive individuals need to be aware of their HIV-status and to do so, they have to be tested.<sup>153</sup> Global estimates suggested that only 53% of individuals know that they are HIV-positive.<sup>154</sup> The Joint United Nations Programme on HIV/AIDS (UNAIDS) reported that such knowledge had reached 70%<sup>155</sup>. It is submitted that despite tests being more readily available in developed countries, as opposed to developing countries such as South Africa, the number of individuals in both instances that refrain from undergoing HIV tests, is similar due to the fear of being cast out.

HIV tests can determine the HIV antibodies, which are present when the human body tries to defend itself against the virus, and the p24 antigen, which indicates the

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<sup>147</sup> World Health Organization <http://www.who.int/features/factfiles/hiv/en/>.

<sup>148</sup> Mahon "Injectable antiretroviral drugs – a 'remarkable milestone'" (3 August 2017) <https://www.avert.org/news/injectable-antiretroviral-drugs-remarkable-milestone> (accessed 2017-08-13).

<sup>149</sup> UNAIDS <http://www.unaids.org/en/resources/fact-sheet>.

<sup>150</sup> Loutfy *et al* 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 140.

<sup>151</sup> Buris and Weait *Criminalisation and Moral Responsibility for the Sexual Transmission of HIV* Paper presented at the Third Meeting of the Technical Advisory Group of the Global Commission on HIV and the Law (16 July 2013) 3.

<sup>152</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* xiii.

<sup>153</sup> Avert <https://www.avert.org/professionals/hiv-programming/treatment/cascade>.

<sup>154</sup> *Ibid.*

<sup>155</sup> Moore "Over 50% of people living with HIV on treatment, says landmark global report" (20 July 2017) <https://www.avert.org/news/over-50-people-living-hiv-treatment-says-landmark-global-report> (accessed 2017-08-13).



presence of HIV.<sup>156</sup> Therefore, one cannot be criminally liable for intentional transmission in the absence of knowledge of one's HIV-status, which only testing can confirm.<sup>157</sup>

Tests cannot accurately diagnose individuals who have recently acquired HIV, as the test concentrates on searching for the presence of antibodies which are absent during the window period.<sup>158</sup> An HIV-positive individual may, therefore, test negative, when the antibody tests were executed during the window period. Such periods vary among individuals and may take up to six months to pass.<sup>159</sup> However, HIV can now be detected two weeks after transmission when tests screen for antigens that indicate the presence of the virus itself.<sup>160</sup> Laboratory tests remain the most accurate form of testing, as they identify antibodies and the p24 antigen.<sup>161</sup>

It is submitted that the application of criminal law to cases involving HIV transmission is near impossible because no uniform timeline can be applied without infringing the right of the HIV-positive individual who is to be presumed innocent until proven guilty. This causes an almost insurmountable evidentiary hurdle for the state. Furthermore, intentional HIV transmission cannot be said to have taken place if transmission occurred within the window period, as the individual has no knowledge of his or her status and, consequently, an intention to transmit the virus was not present. It is submitted that during the prosecution, an HIV-positive individual cannot be held criminally liable for the intentional transmission of HIV during the window period, as the infected individual would not be aware of his or her HIV-positive status.

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<sup>156</sup> Pebody "Factsheet: HIV Testing" (September 2015) <http://www.aidsmap.com/HIV-testing/page/2989430/> (accessed 2017-08-13).

<sup>157</sup> Avert "HIV Testing" (16 February 2017) <https://www.avert.org/hiv-testing> (accessed 2017-08-13).

<sup>158</sup> Pebody <http://www.aidsmap.com/HIV-testing/page/2989430/>.

<sup>159</sup> The Well Project "HIV Testing" (20 October 2016) <http://www.thewellproject.org/hiv-information/hiv-testing> (accessed 2018-08-14).

<sup>160</sup> The Well Project <http://www.thewellproject.org/hiv-information/hiv-testing>.

<sup>161</sup> Pebody <http://www.aidsmap.com/HIV-testing/page/2989430/>.

### 3 5 1 CONSENT TO TEST

Medical tests, such as those for HIV/AIDS, may infringe upon a patient's right to privacy;<sup>162</sup> dignity;<sup>163</sup> and bodily and psychological integrity.<sup>164</sup> It is, therefore, necessary to obtain the patient's informed consent prior to testing. Alternatively, the test may be carried out without the necessary consent, where ordered by a court, the Criminal Law (Sexual Offences and Related Matters) Amendment Act,<sup>165</sup> or legislation that complies with the limitation clause in section 36.<sup>166 167</sup>

Informed consent can only be given where a patient receives sufficient information to reach a decision based on an understanding and appreciation of the information and consequences of the treatment or procedure.<sup>168</sup> In *C v Correctional Services*<sup>169</sup> the court determined that for informed consent to be complied with, the individual in question must receive pre- and post-test counselling.<sup>170</sup> The court also alluded to the fact that any information pertaining to an HIV test, and the right to refuse such a test, should be communicated to each individual in private and should allow the individual time to reflect on its consequences.<sup>171</sup>

### 3 5 2 HIV/AIDS AS A NOTIFIABLE DISEASE

A notifiable disease legally obliges healthcare workers to release the name of any patient whom they diagnose with a notifiable disease, which may threaten the public.<sup>172</sup>

Many industrialized democracies have shifted towards declaring AIDS as a reportable disease in an effort to understand its essence; however, no universal approach has

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<sup>162</sup> S 14 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

<sup>163</sup> 10 of the Constitution.

<sup>164</sup> S 12(2) of the Constitution.

<sup>165</sup> 32 of 2007.

<sup>166</sup> The Constitution.

<sup>167</sup> South African Medical Association "A manual for Medical Practitioners" in *Ethical and Human Rights Guidelines on HIV and AIDS* (2006) 7.

<sup>168</sup> South African Medical Association "A manual for Medical Practitioners" in *Ethical and Human Rights Guidelines on HIV and AIDS* (2006) 14-15.

<sup>169</sup> 1996 (4) SA 292 (T).

<sup>170</sup> Centre for Human Rights (University of Pretoria) "C v Correctional Services 1996 (4) SA 292 (T)" [http://www.chr.up.ac.za/undp/domestic/docs/caselaw\\_17.pdf](http://www.chr.up.ac.za/undp/domestic/docs/caselaw_17.pdf) (undated) (accessed 2018-01-12).

<sup>171</sup> *Ibid.*

<sup>172</sup> Venter, Black, Allais and Richter "Should HIV be a notifiable disease? Old questions with some new arguments" 2014 104 *South African Medical Journal* 607 607.

been adopted.<sup>173</sup> AIDS is dominantly a non-notifiable disease.<sup>174</sup> It is the author's opinion that notification could play a vital role in curbing further HIV transmission. However, victimisation would be suffered by HIV-positive individuals that would negate the positive steps that have been taken to do away with the discrimination and stigmatisation which such individuals presently face.

Notification guidelines regarding reporting HIV were drafted in South Africa, although they were never enacted.<sup>175</sup> If the legislation had been enacted, all health care professionals would be required to make two forms of notification, namely:

- a) anonymous notification in which a written report containing the information about the people diagnosed with AIDS had to be completed; and
- b) named notification which report every AIDS diagnosis to the immediate family members and caretaker of the patient.<sup>176</sup>

It is submitted that the second form of notification, namely that of named notification, if implemented in the manner as suggested above, would not limit the HIV-positive individual's human rights to an extent which is unjustifiable because of the impact it would have on the health and wellbeing of another. The author submits that such a form of notification would go a long way in preventing unnecessary HIV transmission where the HIV-positive individual disregards the knowledge of his or her status, as the HIV-positive individual would be empowered to take the necessary precautions.

### **3 5 3 HIV DISCLOSURE**

UNAIDS does not recommend the placement of legal obligations on individuals to disclose their HIV-positive status, despite some countries imposing such obligations on its citizens.<sup>177</sup>

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<sup>173</sup> Bayer and Fairchild "The Role of Name-Based Notification in Public Health and HIV Surveillance" in *UNAIDS Best Practice Collection* (2000) 11.

<sup>174</sup> Burchell *Principles of Criminal Law* 88.

<sup>175</sup> Venter *et al* 2014 *South African Medical Journal* 607.

<sup>176</sup> AIDS Law Project, Centre for Applied Legal Studies "An analysis of the proposed amendment to the Regulations Relating to Communicable Diseases and the Notification of Notifiable Medical Conditions" (July 1999) <http://www.section27.org.za/wp-content/uploads/2010/04/Regulation-Relating-to-Communicable-Diseases-1999-ALP.pdf> (accessed 2017-11-15).

<sup>177</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 4.

Section 14 of the Constitution<sup>179</sup> entrenches the right to privacy (confidentiality) which must be observed by individuals and health care professionals alike. Instances where a person's HIV-positive status can be disclosed are considered below.

### **3 5 3 (i) DISCLOSURE BY HEALTH CARE PROFESSIONALS**

The World Medical Association (WMA), through the International Code of Medical Ethics, requires health care practitioners to respect the patient's confidentiality, but allows for a breach of confidentiality where real or imminent harm can be prevented by such action.<sup>180</sup> The HIV-positive individual does not have an absolute right of non-disclosure with regard to his or her HIV-status. The National Health Act,<sup>181</sup> in section 14, requires the confidentiality of the information of all patients unless non-disclosure would pose a serious threat to the public, the patient consented to the disclosure in writing, or a court had ordered the disclosure of the patient's information.

The International Guidelines on HIV/AIDS and Human Rights provide for the disclosure of an individual's HIV-status where a third party is at risk of contracting the virus.<sup>182</sup> The criteria for disclosure are as follows:

- “(i) The HIV-positive person in question has been thoroughly counselled;
- (ii) Counselling of the HIV-positive person has failed to achieve appropriate behavioural changes;
- (iii) The HIV-positive person has refused to notify, or consent to the notification of his/her partner(s);
- (iv) A real risk of HIV transmission to the partner(s) exists;
- (v) The HIV-positive person is given reasonable advance notice;
- (vi) The identity of the HIV-positive person is concealed from the partner(s), if this is possible in practice; and
- (vii) Follow-up is provided to ensure support to those involved, as necessary.”<sup>183</sup>

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<sup>179</sup> The Constitution.

<sup>180</sup> World Medical Association “WMA International Code of Medical Ethics” (30 September 2006) <https://www.wma.net/policies-post/wma-international-code-of-medical-ethics/> (accessed 2017-07-23).

<sup>181</sup> 61 of 2003.

<sup>182</sup> Diwouta “Criminalisation of wilful transmission of HIV: sitting on the fence?” (10 November 2010) <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/> (accessed 2017-07-24).

<sup>183</sup> United Nations High Commissioner for Human Rights *International Guidelines on HIV/AIDS and Human Rights* Paper presented at conference at the Second International Consultation on HIV/AIDS and Human Rights (2006) 28.

The Health Professions Council of South Africa (HPCSA) grants discretionary powers on health care practitioners to determine whether or not it is imperative for the patient's HIV-positive status to be disclosed to their sexual partner, where consent to do so cannot be obtained.<sup>184</sup>

Prior to disclosure, the health care practitioner is required to strike a balance between the possible transmission of HIV to the sexual partner of their patient and the risk of violence, amongst others, which their patient may face.<sup>185</sup>

The Canadian Medical Association (CMA), similar to the South African HPSCA, permits the disclosure of a patient's personal health information to third parties where the patient consents to such disclosure.<sup>186</sup> However, unlike their South African counterparts, Canadian health care practitioners are required by law to disclose the HIV-status of their patient when third parties would otherwise be exposed to significant risk or substantial harm.<sup>187</sup> Three conditions must be met, in terms of Canadian law, before patient confidentiality may be breached.<sup>188</sup> Firstly, an identifiable person must be facing a clear risk of harm.<sup>189</sup> Secondly, a risk of seriously bodily harm or death should be established.<sup>190</sup> Thirdly, the threat of the above should be imminent.<sup>191</sup> It is submitted that such guidelines may benefit medical practitioners in South Africa as a mechanism to ensure that disclosure is only made where the absence thereof would cause considerable harm to another.

An individual's right to privacy and dignity must in all instances be weighed against the role of criminal law to prevent any harm from being caused to the public at large. It is submitted that health care practitioners are best placed to breach the divide between

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<sup>184</sup> Health Professions Council of South Africa "Ethical Guidelines for Good Practice with regard to HIV" in *Guidelines for Good Practice in the Health Care Professions* (2016) 5.

<sup>185</sup> Health Professions Council of South Africa *Guidelines for Good Practice in the Health Care Professions* 5.

<sup>186</sup> Canadian Medical Association "CMA Code of Ethics" in *CMA POLICY* (2004) 3.

<sup>187</sup> Canadian Medical Association *CMA POLICY* 3.

<sup>188</sup> Symington "HIV status: Who needs to know?" (November 2013) <https://canadian-nurse.com/en/articles/issues/2013/november-2013/hiv-status-who-needs-to-know> (accessed 2017-07-23).

<sup>189</sup> Symington <https://canadian-nurse.com/en/articles/issues/2013/november-2013/hiv-status-who-needs-to-know>.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*

the interests of justice, and divulging the identity of an HIV-positive individual so as to prevent harm to endangered third parties. The identity of the individual in question can be omitted if, and where, it is possible to effectively warn a third party of the dangers which exist as a result of their sexual relations. This would uphold the right to dignity and privacy of the HIV-positive individual, albeit the approach may not be feasible. That being said, privacy cannot stand as an obstacle to the detriment of the public at large. It is submitted that the relevant health care practitioner has the discretion, and obligation, to disclose such information in a manner he or she deems fit, taking into account the impact thereof on the HIV-positive individual in question.<sup>192</sup>

### 3 6 CONCLUSION

The author submits that the advancements in medical knowledge regarding the transmission of HIV have significantly contributed to the reduction of new HIV infections worldwide, as well as the corresponding AIDS-related deaths.

ART has advanced to the extent of notably reducing HIV transmission, and albeit that no cure exists, it prolongs the life of HIV-positive individuals.<sup>193</sup> Globally, criminal laws enacted to “promote” public health, continue to neglect such medical advancements when prosecuting instances of HIV transmission.<sup>194</sup> The failure to take into account the effect of the advancements cannot be said to promote the interests of justice. The failure to adjust legislation applicable to transgressions by HIV-positive individuals in line with medical advancements serves as a blot on one’s (the judicial system’s) escutcheon. Notwithstanding, the scientific advances regarding HIV, its prevention and treatment, as well as the efforts of the global health community to reduce infections, the majority of HIV-positive people do not have access to the necessary prevention, care and treatment.<sup>195</sup>

The manner in which HIV transmission occurs has been laid out in an effort to assist the judiciary in its interpretation and understanding of HIV. A bite from an HIV-positive

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<sup>192</sup> Health Professions Council of South Africa *Guidelines for Good Practice in the Health Care Professions* 6.

<sup>193</sup> Global Commission “Risks, Rights & Health” in *HIV and the Law* (2012) 20.

<sup>194</sup> *Ibid.*

<sup>195</sup> HIV gov “The Global HIV/AIDS Epidemic” (undated) <https://www.hiv.gov/hiv-basics/overview/data-and-trends/global-statistics> (accessed 2017-07-07).

individual, for example, has been deemed to have a virtually negligible chance of transmitting HIV, and yet the prosecution of low to non-existent risks, reinforce the stigma surrounding HIV-positive as individuals who are immoral and dangerous criminals.<sup>196 197</sup> It is submitted that the very prosecution of HIV cases where transmission has not occurred, especially where preventive measures have been implemented, indicates a lack of consideration of the nature of HIV and the scientific and medical advances that continue to further reduce the possibility of transmission occurring. It is the author's opinion that these factors should be developed into criteria that should be taken into account when prosecuting any HIV related case. This would further serve to enhance the concept of HIV in relation to the various elements of criminal liability discussed above.

Disclosure of an HIV-positive status, although deemed a moral obligation to some and a legal obligation in jurisdictions that prosecute non-disclosure, will not in itself prevent the transmission of HIV; as the use of preventive measures and consistent treatment will contribute to negate the possibility of transmission from occurring. The presence of HIV-specific laws places strain on disclosures made by patients to their medical practitioner, as the law may intrude into such relationship by requiring the information to be disclosed in the pursuit of criminal justice.<sup>198</sup> Patients may refrain from disclosing symptoms of their illness in fear of being labelled "HIV-positive" and of the information being made public.

While the legal response to HIV was to treat it as a criminal offence, the author submits that little consideration was given to the medical environment in aligning the effects of the virus with the sentences which would befall the accused. It is the author's opinion that the legislature should liaise with health care professionals in order to generate guidelines, which would serve to assist the judiciary in coming to the appropriate verdict in instances where accused individuals are accused of transmitting HIV. In general, the guidelines should make it evident which acts are more likely to cause the transmission of HIV; and, with respect to each act, how the use of appropriate

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<sup>196</sup> Centers for Disease Control and Prevention <https://www.cdc.gov/hiv/risk/estimates/riskbehaviors.html>.

<sup>197</sup> Chen 2016 *Intersect* 12.

<sup>198</sup> Chen 2016 *Intersect* 11.

preventive measures would serve to further reduce the likelihood of transmission taking place. The power to decide appropriate sentences should remain firmly entrenched as a judicial discretion, with the proposed guidelines merely providing the judiciary with appropriate knowledge of the various factors at play where HIV transmission is concerned.

With this background of the medical and scientific considerations, the application of criminal law in matters related to HIV can be analysed.



## CHAPTER FOUR: THE CRIMINALIZATION OF HIV TRANSMISSION

### 4 1 INTRODUCTION

Public appeals have placed pressure on nations to implement mechanisms to curb the further transmission of HIV.<sup>199</sup> These calls have heightened instances where health systems were incapable to meet such demands, and where inadequate results were reached through public endeavours.<sup>200</sup>

The State punishes the criminal conduct of its citizens by utilising the criminal justice system to determine the circumstances and procedures by which to hold the citizens accountable for their actions.<sup>201</sup> The use of criminal law would serve to provide an attempt by courts to prevent the spread of HIV.<sup>202</sup>

HIV-specific criminal laws were adopted by several states at the onset of the HIV epidemic to penalise those individuals who were aware of their HIV-positive status and potentially exposed other individuals to the virus.<sup>203</sup> The exposure to HIV, as well as the transmission thereof to another individual, has been penalised through criminal statutes that criminalize HIV.<sup>204</sup> While these laws predominantly focus on transmission and exposure to HIV through sexual intercourse, there are jurisdictions, such as Louisiana, in which such laws are extended to include acts of spitting, biting and scratching.<sup>205</sup>

The enactment of HIV-specific laws is contentious, but remains debatable owing to the serious impact of HIV transmission upon the citizens of a country and the medical and the legal profession.<sup>206</sup>

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<sup>199</sup> Pieterse “Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa” 2011 11 *African Human Rights Law Journal* 57 62.

<sup>200</sup> Pieterse 2011 *African Human Rights Law Journal* 62.

<sup>201</sup> Kemp *et al Criminal Law in South Africa* 4.

<sup>202</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 239.

<sup>203</sup> Centers for Disease Control and Prevention “HIV-Specific Criminal Laws” (23 May 2017) <https://www.cdc.gov/hiv/policies/law/states/exposure.html> (accessed 2017-08-09).

<sup>204</sup> Buris and Weait paper presented at conference on Technical Advisory Group of the Global Commission on HIV and the Law 3.

<sup>205</sup> Arrigo and Bersot *The Routledge Handbook* 543.

<sup>206</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

Prior laws criminalizing the transmission of infectious diseases will be deemed to provide a foundation for the considerations that follow. The objectives of criminal law will be discussed as the basis for arguments for and against the criminalization of HIV transmission. Finally, alternative methods to reduce HIV transmission are considered.

## 4 2 CRIMINALIZATION OF DISEASES

HIV was not the first disease to be criminalized by society, as can be found through the isolation, imprisonment and segregation historically experienced by individuals who contracted venereal diseases.<sup>207</sup> This response was mainly attributed to the stigmatisation surrounding venereal diseases, therefore bringing about the exclusion of those infected from society much like lepers earlier in history.<sup>208</sup>

The conventional approach during this period was that venereal disease, as a result of sexual intercourse, was punishment meted out for those who transgressed or 'sinned'.<sup>209</sup> In essence, the nature of venereal disease, and the manner in which it was acquired, led to the punishment of individuals who passed on the infection.<sup>210</sup>

In the English case *R v Clarence*<sup>211</sup> the defendant, knowing he had gonorrhoea, engaged in sexual intercourse with his wife without disclosing that he had the disease.<sup>212</sup> Although his wife subsequently contracted venereal disease, the conviction of inflicting grievous bodily harm and assault was dismissed upon appeal, on the basis that her husband's failure to disclose had not diminished her consent to engage in sexual intercourse.<sup>213</sup> The conduct fell short of assault because sexual intercourse was deemed to have been consented to by virtue of the marriage.<sup>214</sup>

Until 1947 the Law Against Public Immorality and Venereal Infections was in force in Denmark to deal with those individuals suspected of various acts of immorality.<sup>215</sup> In

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<sup>207</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

<sup>208</sup> Bancroft *Human Sexuality and Its Problems* 3ed (2009) 414.

<sup>209</sup> Bancroft *Human Sexuality and Its Problems* 413.

<sup>210</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.  
<sup>211</sup> (1889) 22 QB 23.

<sup>212</sup> Webstroke Law "R v Clarence (1888)" (28 December 2014)  
<https://webstroke.co.uk/law/cases/r-v-clarence-1888> (accessed 2017-09-07).

<sup>213</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

<sup>214</sup> *Ibid.*.

<sup>215</sup> *Ibid.*

terms of this law, an individual who exposed another to any venereal infection would face imprisonment for up to two years.<sup>216</sup> It later transpired that the criminalization of venereal disease did not significantly reduce the incidence of the disease, as compared to countries with less stringent or no law on venereal diseases.<sup>217</sup>

Venereal disease, much like HIV at present, passed the plateau of mere illness and influenced society's response to it through the attitudes, values and beliefs associated with the cause of the disease.

In 1985, the Canadian Parliament repealed their law on venereal diseases for two reasons.<sup>218</sup> The first was that transmission was considered a public health matter, as opposed to one relating to criminal law.<sup>219</sup> Secondly, no prosecution for the disease had taken place for over half a century.<sup>220</sup> The conclusion reached by two federal committees was that the criminal provisions for venereal diseases were ineffective and their application hindered epidemiological efforts to curb the spread of the disease as a result of the activities of the carriers thereof being driven underground.<sup>221</sup> In essence, the criminal provisions for venereal diseases, which were applied to curb transmission, were counterproductive to the advancement of medical knowledge.

### 4 3 THE OBJECTIVE OF USING CRIMINAL LAW

Criminal law affects the behaviour of individuals through its enforcement and through the expressive role it plays in establishing societal norms. These norms can serve as a basis for acceptance of those infected with HIV, or they might just reinforce the stigma and discrimination surrounding them.<sup>222</sup> Debates will continue on the topic of *criminalization of HIV transmission* and whether it will deter, provide retribution, incapacitate or rehabilitate offenders.<sup>223</sup>

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<sup>216</sup> *Ibid.*

<sup>217</sup> *Ibid.*

<sup>218</sup> Elliot *Criminal Law and HIV/AIDS: Final Report* 1ed (1997) 22.

<sup>219</sup> Elliot *Criminal Law and HIV/AIDS* 22.

<sup>220</sup> *Ibid.*

<sup>221</sup> *Ibid.*

<sup>222</sup> Arrigo and Bersot *The Routledge Handbook* 542.

<sup>223</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 6.

HIV transmission is predominantly criminalized to punish and prevent. Firstly, the harmful conduct is punished through the imposition of criminal penalties.<sup>224</sup> Secondly, the deterrence of risky behaviour serves to prevent the transmission of HIV.<sup>225</sup> Punishment is justified by the HIV-positive individual's state of mind, behaviour and the resultant harm where he or she had knowledge of their HIV-positive status, acted with the intention to transmit the virus, and succeeded in infecting the specific individual.<sup>226</sup>

The threat of punishment being imposed is, therefore, thought to deter individuals from engaging in behaviour that would expose or cause the transmission of HIV to another individual. However, deterrence through the threat of criminal prosecution has not yet conclusively facilitated the disclosure of the individual's HIV-positive status.<sup>228</sup> The imposition of HIV-specific criminal laws is suggestive of acceptance of social norms in which precarious conduct by HIV-positive individuals is seen to be injudicious.<sup>229</sup> It is submitted that such measures cannot be said to be effective in the fight to reduce HIV transmission because their only function is to punish what has already been done, without preventing what has not yet happened.

Restorative justice seeks to place both the victim and offender in the same positions they were in prior to the criminal conduct having taken place.<sup>230</sup> As discussed above, the difficulty lies in establishing that the transmission of HIV occurred as a result of the sexual encounter in question, as well as proving that the complainant's infection originated from the offender.<sup>231</sup> Phylogenetic tests do not serve to provide a direct *nexus* between two individuals; therefore, the level of certainty is less than in the case of DNA tests.<sup>232</sup> The fact that phylogenetic analysis of sequences for forensic purposes are predominantly performed in research settings, as opposed to forensic

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<sup>224</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief 2*.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>228</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 7.

<sup>229</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 239.

<sup>230</sup> Burchell *Principles of Criminal Law* 5.

<sup>231</sup> Arrigo and Bersot *The Routledge Handbook* 546.

<sup>232</sup> Bernard, Azad, Vandamme, Weait and Geretti "HIV forensics: pitfalls and acceptable standards in the use of phylogenetic analysis as evidence in criminal investigations of HIV transmission" 2007 8 *HIV Medicine* 382 382.

facilities, serves to further reduce the level of care that is expected from any scientific or medical tests.<sup>233</sup> It is submitted that reliance on phylogenetic tests as a mechanism to prove an individual was the cause of the transmission of HIV will have far reaching consequences, none of which can be said to promote justice, as the tests cannot establish the direct cause of infection.

Another effect of the use of criminal law is seen through its ability to incapacitate HIV-positive individuals with a propensity to engage in perilous conduct through imprisonment.<sup>234</sup> Incarceration is by far the least effective method of preventing HIV transmission because prisons are high-risk environments with a prevalence of needle-sharing, high-risk sexual intercourse and rape.<sup>235</sup> Within these settings access to preventive measures such as condoms is inadequate, and facilities for clean drug-injection, are for obvious reasons, practically non-existent.<sup>236</sup> Above all, incarceration does not neutralize the individual's capacity to transmit HIV.<sup>237</sup> In the author's opinion, while incarceration removes the guilty party from society, the only real change is to shift the possibility of harm to those who already find themselves within the confines of the prison system. It should be noted that such persons enjoy equal rights under the Constitution<sup>238</sup> in relation to those individuals who are not incarcerated. It is, therefore, apparent that incarceration does not provide a solution to curb the spread of HIV.

Rehabilitation has not been achieved by criminal prosecution of HIV transmission.<sup>239</sup> Most individuals do not transmit HIV with the intention to spread the virus; therefore, the feasibility of rehabilitation as a method to eradicate HIV transmission, without punishing those affected by HIV, is impractical.<sup>240</sup> Imprisonment has not been proven to rehabilitate those who were deemed offenders, as there is no evidence to suggest a sudden desire to disclose an HIV-positive status or practice safer sex after

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<sup>233</sup> Bernard *et al* 2007 *HIV Medicine* 384.

<sup>234</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 239.

<sup>235</sup> Avert "Prisoners, HIV and AIDS" (27 July 2017) <https://www.avert.org/professionals/hiv-social-issues/key-affected-populations/prisoners> (accessed 2017-08-09).

<sup>236</sup> Stein 2004 *Washington University Global Studies Law Review* 193.

<sup>237</sup> Arrigo and Bersot *The Routledge Handbook* 546.

<sup>238</sup> The Constitution.

<sup>239</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 6.

<sup>240</sup> Stein 2004 *Washington University Global Studies Law Review* 194.

incarceration.<sup>241</sup> The author submits that incarceration as a method to curb HIV transmission is ineffective, as the very framework of prisons create an ideal breeding ground for HIV to flourish, and the time in prison does not provide a change in sexual misconduct.

An examination of the rationale behind the criminalization of HIV demonstrates that the criminalization of the transmission and exposure to HIV does not satisfy the objectives in a manner that can be considered as aligning with the use of criminal law as a whole.<sup>242</sup>

#### **4 4 CRIMINALIZATION OF HIV**

Criminalization of HIV encompasses general criminal laws that may be applied to cases of HIV transmission. It also involves HIV-specific laws that are enacted to punish behaviour that may result in HIV transmission.<sup>243</sup>

There is, as yet, no universal system of law that applies to HIV-related crimes. South Africa makes use of its own national criminal law to prosecute crimes relating to the transmission of HIV. Burchell defines national criminal law as

“the branch of national law that defines certain forms of human conduct as crimes and provides for the punishment of those persons with criminal capacity who unlawfully and with a guilty mind commit a crime.”<sup>244</sup>

There are legal philosophers who are of the view that to merely express the belief that certain behaviour is wrong is inadequate justification for imposing criminal law that might not do any apparent good and result in unintended harm being imposed instead.<sup>245</sup>

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<sup>241</sup> Arrigo and Bersot *The Routledge Handbook* 546.

<sup>242</sup> Arrigo and Bersot *The Routledge Handbook* 544.

<sup>243</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 63.

<sup>244</sup> Burchell *Principles of Criminal Law* 3.

<sup>245</sup> Buris and Weait C Buris and Weait paper presented at conference on Technical Advisory Group of the Global Commission on HIV and the Law 3.

#### 4 4 1 THE CASE FOR CRIMINALIZATION

The case for criminalization of HIV is deemed to be necessary to curb the spread of HIV because existing HIV preventive measures have not produced the desired results.<sup>246</sup> Prevention of HIV remains as the only known effective means of controlling the spread of the virus.<sup>247</sup> Therefore, the application of criminal law will deter those individuals who place others at risk of contracting the virus.<sup>248</sup>

Policymakers assert that HIV-positive individuals have a moral obligation to guard against transmitting the virus, despite being faced with the possible fear of violence, discrimination or being ostracised.<sup>249</sup> It is, therefore, argued that the criminalization of both the exposure to HIV, as well as the actual transmission thereof, is warranted.<sup>250</sup>

The principles on which criminal law rest provide that criminal sanctions should be evoked to denounce the behaviour of individuals who, through their conduct, knowingly expose others to the risk of HIV infection or intentionally transmit the disease.<sup>251</sup> Therefore, the criminalization of intentional transmission of HIV is justified.<sup>252</sup>

It is submitted that the conduct of an HIV-positive individual in pursuit of sexual gratification without the deliberate intent to infect another individual with the virus, is reckless to the extent that indirect intent to transmit the virus can be read into his or her conduct. The author submits that such conduct, in the absence of the use of preventive measures, could be subjected to criminal sanctions. The above approach is similar to the Canadian law that punishes exposure to HIV, even if transmission did not occur. The author submits that both scenarios are to be adjudicated by taking into account whether or not preventive measures had been implemented. It is submitted that South Africa could benefit from following such an approach and that the implementation thereof could be seen as promoting safe sexual practices, instead of

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<sup>246</sup> Chen 2016 *Intersect* 3.

<sup>247</sup> Elliot *Criminal Law and HIV/AIDS* 66.

<sup>248</sup> *Ibid.*

<sup>249</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 3.

<sup>250</sup> *Ibid.*

<sup>251</sup> Elliot *Criminal Law and HIV/AIDS* 63.

<sup>252</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 3.

labelling such action as an attack against HIV-positive individuals. While the implementation of such an approach would cause an increase in the number of HIV-related cases before the South African courts, it might cause a decrease in HIV transmission as well as unwanted pregnancies.

The application of an HIV-specific criminal law is a necessary evil which could suppress public outrage and, with proper application, could focus on those who are blameworthy as being exceptions.<sup>253</sup> Incapacitating offenders through imprisonment in these circumstances will serve the aim of sentencing namely, to protect society from those who seek to do it harm; albeit that the quarantine established through incarceration is limited.<sup>254</sup>

#### **4 4 2 THE CASE AGAINST CRIMINALIZATION**

It has been argued that the call for HIV to be criminalized is based on moral beliefs founded on fear of the virus itself and disdain for HIV-positive individuals.<sup>255</sup> The enactment of HIV-specific criminal laws fuels societal norms that those who are HIV-positive and who commit HIV-related crimes are criminals worthy of punishment.

Owing to fear, HIV is regarded with more repugnance than other infectious diseases which are deemed more infectious.<sup>256</sup> Stigma around the virus continues to detract from individuals undergoing HIV tests, and receiving vital ART, as it perpetuates the perception that infecting others with HIV should be criminalized.<sup>257</sup> This notion primarily prevails due to the fact that HIV is a disease transmitted through sexual activities and is principally found among marginalised groups, which include the poor, women, homosexual men, black Africans, drug users and sex workers.<sup>258</sup>

The effect of uninformed decisions and fear that fuel the call for criminalization is illustrated by the conviction of a Zimbabwe national, on ART treatment, for deliberately

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<sup>253</sup> Elliot *Criminal Law and HIV/AIDS* 63.

<sup>254</sup> Elliot *Criminal Law and HIV/AIDS* 65.

<sup>255</sup> Buris and Weait paper presented at conference on Technical Advisory Group of the Global Commission on HIV and the Law 3.

<sup>256</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 69.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*



exposing another individual to infection where no transmission had occurred.<sup>261</sup> To add insult to injury, the “victim” did not want to proceed with charges and yet a five-year sentence was imposed.<sup>262</sup> The court might have decided that intimidation may have influenced the so-called victim’s decision not to press charges. Nevertheless, it seemed that the court deemed it appropriate to respect the wishes of the “victim”, which would have been justified if preventive measures had been utilised to prevent transmission. However, these measures had not been taken, and the accused had been punished for intentionally transmitting HIV.

The Centres for Disease Control and Prevention found that the majority of laws, identified in their analysis had been enacted prior to ART being used as a mechanism for reducing HIV transmission.<sup>263</sup> Furthermore, nearly all the laws failed to take into account preventive measures, which serve to reduce the risk of HIV being transmitted.<sup>264</sup> It is submitted that punishment in the absence of recognition of preventive measures that may have been implemented adds to the stigma of HIV as a manifestation of evil.

HIV-specific legislation would be counterproductive to public health efforts in the eradication of HIV transmission.<sup>265</sup> Justice Kirby indicates that criminal law is not effective for dealing with activities engaged in for individual identity and pleasure.<sup>266</sup> In his view, the aggressive deployment of legal and punitive laws should be removed due to its counter-productive effect.<sup>267</sup>

The South African Law Commission (SALC) found that existing common law could be used to manage any potential infringement caused by an HIV-positive individual.<sup>268</sup> Additionally, the SALC indicated that statutory laws should only be introduced insofar as the common law would be inadequate.<sup>269</sup> This view accords with the

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<sup>261</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 64.

<sup>262</sup> *Ibid.*

<sup>263</sup> Centers for Disease Control and Prevention <https://www.cdc.gov/hiv/policies/law/states/exposure.html>.

<sup>264</sup> *Ibid.*

<sup>265</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* xiii.

<sup>266</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

<sup>267</sup> *Ibid.*

<sup>268</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* xii.

<sup>269</sup> *Ibid.*

recommendations of UNAIDS and the United Nations Development Programme (UNDP) in terms of the *Criminalization of HIV Transmission* policy brief.<sup>270</sup>

No justification for criminalization exists where a significant risk of HIV transmission is absent.<sup>271</sup> Similarly, such criminalization is ill-suited where the HIV-positive individual is unaware of his or her HIV-status, or had disclosed this status to sexual partners prior to engaging in sexual intercourse.<sup>272</sup> Criminalization usurps the moral onus of self-protection that should be exercised by two individuals who engage in sexual activities. Moreover, it places the duty of protection against transmission squarely on those who are HIV-positive.<sup>273</sup> In an ideal world, one would expect to be warned against any possible danger prior to engaging in conduct that may give rise to the harm. It is unreasonable for an individual to engage in possible harmful conduct without considering or implementing protection measures. The author is of the belief that, despite the implications of HIV transmission to a previously HIV-negative individual, measures should be implemented to ensure that the “victim” is not pursuing legal action as retaliation for reckless conduct in which he or she voluntarily engaged. The author submits that the State can, sometimes, be seen to pursue what can be said to be moral transgressions, as opposed to transgressions based on the application of legislation as illustrated in *R v Aziga*.<sup>274</sup> In this case, the State based its prosecution on failure to disclose HIV status, instead of prosecuting for actual transmission of HIV. In essence, the “victim” should not complain when he or she, at the time of the act, showed no concern for whether or not HIV could be contracted. As discussed above, no criminal liability should arise where parties willingly engage in acts that can place their health at risk.

Research by UNAIDS held that HIV-positive individuals do not behave differently when HIV transmission is criminalized, compared to when it is not.<sup>275</sup> Criminalizing HIV infections may create an illusion that HIV-negative individuals are protected from all

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<sup>270</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 3.

<sup>271</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 4.

<sup>272</sup> *Ibid.*

<sup>273</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 68.

<sup>274</sup> [2011] ONSC 4592; [2011] O.J. No. 3525.

<sup>275</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

possible causes of HIV transmission.<sup>276</sup> The author submits that this illustrates the harm which the application of law may cause in practice, as individuals fall prey to the illusion that the existence of legislation guarantees that they will not be subjected to the harm which the legislation punishes.

Where the criminalization goes beyond intentional transmission of HIV, it may prompt individuals to refrain from undergoing HIV tests to determine their status because ignorance thereof could serve as a defence.<sup>277</sup> As held in *R v Tolston*<sup>278</sup>, generally a crime will not have been committed where the mind of the individual, who did the act in question, is innocent.<sup>279</sup> The unintended effect of criminalization would be an increase in HIV transmission because ignorance of one's status will prevent those suffering from HIV from obtaining treatment.<sup>282</sup>

Criminal law cannot be considered as the most effective mechanism to reduce the transmission of HIV, as it is not equipped to detect or prove transgressions. This is because sexual intercourse is a private and generally a consensual affair, and the various manners in which HIV can be contracted and intentionally transmitted to others are sparse.<sup>283</sup> As discussed above, the prevalence of individuals having more than one sexual partner makes it possible for one such a partner to be incorrectly found guilty of transmitting HIV. Establishing the identity of the individual who transmitted the virus to another in modern-day society, where it is common for an individual to have more than one sexual partner, can be burdensome for the judiciary to adjudicate on. Judgement is only possible if supplementary evidence is provided in the case, and knowledge about modern day advances in medicine and science is taken into account. It is for this reason that the author believes guidelines establishing the possibility of transmission for various acts and the reduction thereof, when preventive measures are used, are needed to assist the judiciary in coming to a decision, as discussed above.

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<sup>276</sup> Pieterse 2011 *African Human Rights Law Journal* 65.

<sup>277</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 5.

<sup>278</sup> (1889) 23 QBD 168.

<sup>279</sup> Duhaime's Law Dictionary <http://www.duhaime.org/LegalDictionary/A/ActusReusNonFacitReumNisiMensSitRea.aspx>.

<sup>282</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 5.

<sup>283</sup> Pieterse 2011 *African Human Rights Law Journal* 65.

Criminalization would target the individuals who had become aware of their HIV-status and the associated risks when engaging in unprotected sex.<sup>284</sup> Moreover, it has been stated that women would be disproportionately affected, as it is they who often become aware of their status.<sup>285</sup> In Africa, prenatal healthcare facilities make provision for HIV testing, which results in knowledge of their HIV-status being found predominantly in woman.<sup>286</sup> The repercussion of criminalization of HIV transmission would be that mostly women would be prosecuted, as they would know, or ought to know, their HIV-status.<sup>287</sup>

A real risk exists for individuals to be wrongfully convicted of transmitting HIV, as phylogenetic tests cannot prove beyond a reasonable doubt that the individual was the source of the infection.<sup>288</sup> Phylogenetic tests can, as previously mentioned, determine whether or not two samples of HIV are related to another. Moreover, it can serve as a method to exclude an individual as being the source of the infection.<sup>289</sup> However, phylogenetic analysis does not currently provide substantial proof that an individual is guilty of transmitting HIV; and, its use is limited to merely proving that the individual is unrelated to the transmission in question.

Therefore, an all-inclusive approach for criminalization has the potential to cause more harm than good, as it may exacerbate the discrimination and stigmatisation surrounding HIV-positive individuals.<sup>290</sup>

#### **4 5 CONSIDERATIONS ON CONSENT**

HIV transmission is not limited to cases of rape, as the transmission can just as easily occur in cases of consensual sexual intercourse. HIV transmission is influenced by the manner in which the individual was exposed to the virus, as categorised in terms of low possibility, negligible possibility and no possibility in Chapter 3 of this treatise.

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<sup>284</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

<sup>285</sup> *Ibid.*

<sup>286</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 68.

<sup>287</sup> *Ibid.*

<sup>288</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 4.

<sup>289</sup> *Ibid.*

<sup>290</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

Intentional non-disclosure of HIV-positive and deliberate misleading of a sexual partner might be judged as amounting to fraud and, thus, vitiates the consent given by a sexual partner. On the other hand, informing a sexual partner of the risk of HIV infection prior to engaging in sexual intercourse might be viewed as diminishing guilt with regard to transmission of HIV.<sup>291</sup> While this idea is novel, the author submits that disclosure of such status would not ensure against contraction of HIV. A situation of competing rights may arise, as the HIV-positive individual has a right to privacy<sup>292</sup> while his or her partner has the right to life,<sup>293</sup> dignity<sup>294</sup> and bodily integrity<sup>295</sup>. When attempting to strike a balance between these competing rights, the rights of the individual at risk of contracting HIV would outweigh that of the HIV-positive individual's privacy as provided for by the International Guidelines on HIV/AIDS and Human Rights and the HPSCA Guidelines. Thus, whether it would be feasible to require that such disclosure take place prior to sexual intercourse seems improbable.

Where an offender intentionally misleads another individual regarding an HIV-positive status in order to engage in sexual intercourse, the risk of the activity should carry the same punishment as that of applying force to another individual.<sup>296</sup>

#### **4 6 ALTERNATIVES METHODS TO REDUCE HIV TRANSMISSION**

The first Global Parliamentary Meeting on HIV/AIDS acknowledged that access to comprehensive and evidence-informed preventive methods should be prioritised, as there was no evidence to indicate that HIV-specific criminal laws eradicated the spread of HIV.<sup>297</sup> It is submitted that the position at present has not changed and that further research should be undertaken to improve the preventive measures which have already been established.

HIV programmes such as the provision of HIV information should be made readily available to individuals to provide them with the knowledge of how to avoid being

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<sup>291</sup> Elliot *Criminal Law and HIV/AIDS* 110.

<sup>292</sup> S 14 of the Constitution.

<sup>293</sup> S 11 of the Constitution.

<sup>294</sup> S 10 of the Constitution.

<sup>295</sup> S 12 of the Constitution.

<sup>296</sup> Elliot *Criminal Law and HIV/AIDS* 107.

<sup>297</sup> Inter-Parliamentary Union *Final Conclusions* Paper presented at conference on Parliaments and Leadership in combatting HIV/AIDS (28-30 November 2007) 1.

exposed to HIV.<sup>298</sup> Age-appropriate sex and life-skills education should be provided to children and adolescents.<sup>299</sup> HIV myths, such as that which proposes sexual intercourse with a virgin as a cure for HIV, should be debunked and replaced with proper information about HIV transmission, prevention and treatment.<sup>300</sup> It is the author's submission that, in the absence of preventive measures being made readily available on a uniform basis, knowledge of how HIV transmission takes place is the most effective weapon in the fight against HIV.

Public health measures can reduce the transmission of HIV through treating those who are infected instead of making the spread of the virus a criminal offence punishable by law.<sup>301</sup> Another mechanism for eradicating HIV transmission would be an increase in access to voluntary confidential HIV testing. Conditions for voluntary, confidential disclosure should be promoted together with a system for ethical HIV partner notification.<sup>302</sup>

Public health measures, as opposed to the application of criminal law, will advance HIV prevention and treatment.<sup>303</sup> However, it is fundamentally important to respect the individual's liberty by ensuring patient confidentiality during treatment.<sup>304</sup> Thus, HIV should be viewed predominantly as a health problem.

More should be done to protect individuals from sexual and other violence, such as rape, which may lead to the transmission of HIV. Redirecting the majority of available resources to public health initiatives, as opposed to the use of criminal prosecutions, would be more effective in the eradication of the HIV/AIDS epidemic.<sup>305</sup> The author acknowledges that the wrongful conduct of an HIV-positive individual must still be punished where the conduct was intentional; however, the majority of such cases does not involve intentional conduct. Permitting the bulk of such resources to be used for

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<sup>298</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief 2*.

<sup>299</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief 6*.

<sup>300</sup> Stein 2004 *Washington University Global Studies Law Review* 196.

<sup>301</sup> Pieterse 2011 *African Human Rights Law Journal* 67.

<sup>302</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief 6*.

<sup>303</sup> Stein 2004 *Washington University Global Studies Law Review* 196.

<sup>304</sup> *Ibid.*

<sup>305</sup> Chen 2016 *Intersect* 3.

the prevention of HIV may eradicate the need for punishment as the transmission itself will be curbed.

HIV/AIDS should be approached in the same manner as any other disease.<sup>306</sup> The treatment and preventive measures available for HIV-positive individuals have advanced to such a stage that it is untenable for the virus to be treated differently from other infectious diseases. It should not be viewed in the light of criminal sanctions, except when individuals intend infecting another with the virus.<sup>307</sup> Any communicable disease, which can lead to serious injury or death of an individual, should be addressed in a uniform manner, whether it be through the application of criminal law or not.<sup>308</sup> As mentioned above, laws which have been implemented to eradicate venereal diseases in the past have not yielded successful results. The author, therefore, asserts, that HIV-specific legislation criminalizing HIV transmission faces the same peril and might fall short of its intended purpose.<sup>309</sup>

#### **4 7 CONCLUSION**

The call for the criminalization of HIV transmission stems from the high rate of rape and sexual violence experienced in South Africa<sup>310</sup> The author submits that criminalization would be applicable in South Africa owing to the high HIV prevalence rate. However, as argued above, criminalization might do more harm than good if it over-criminalizes unintentional HIV transmission.

Criminalization of HIV transmission does not take into account that there are two parties involved who are both responsible for guarding against any possible infection when engaging in sexual intercourse.<sup>311</sup> Perceiving those who are HIV-positive as criminals is tantamount to rendering a guilty verdict where no transgression has occurred.<sup>312</sup> Non-disclosure, however, could still be viewed as a serious crime committed by an HIV-positive individual.

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<sup>306</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 71.

<sup>307</sup> *Ibid.*

<sup>308</sup> Chalmers "The criminalisation of HIV transmission" 2002 28 *Journal of Medical Ethics* 160 161.

<sup>309</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 71.

<sup>310</sup> New Era "HIV criminalisation a setback to regional AIDS efforts" (16 May 2016) <https://www.newera.com.na/2016/05/16/hiv-criminalisation-setback-regional-aids-efforts/> (accessed 2017-09-10).

<sup>311</sup> Pieterse 2011 *African Human Rights Law Journal* 65.

<sup>312</sup> *Ibid.*

Despite the contribution of criminal law to the problem of HIV transmission, there have not yet been any empirical evaluations of the effectiveness of the law on individuals' intimate behaviour.<sup>313</sup> There is no evidence to indicate that criminalizing HIV will prevent the transmission of HIV nor satisfy the need for criminal justice.<sup>314</sup> In contrast, increasing evidence indicates that the application of criminal law to HIV-related matters are counterproductive to the eradication of HIV transmission, as the application of criminal law deters individuals from seeking medical assistance to treat the virus.<sup>315</sup>

Criminalization of HIV transmission would add to the complications already facing law enforcement in "ordinary" criminal law, such as establishing preconditions for culpability.<sup>316</sup>

Criminal law should not be applied in instances where intent is absent. Where moral blame is based upon a failure to disclose an HIV-positive status, the harm has already been done prior to transmission; if such transmission even took place.<sup>317</sup> The application of criminal law to HIV transmission beyond intentional transmission would only serve to increase the prosecution of marginalized groups.<sup>318</sup> The author submits that transmission which occurs as a result of an HIV-positive individual recklessly pursuing sexual gratification should be considered the same as intentional transmission in terms of *dolus eventualis*, since the intention was to have sexual intercourse regardless of the health implications to a sexual partner.

Intentional transmission of HIV is the only instance that justifies placing HIV under criminal sanctions.<sup>319</sup> For, public health initiatives cannot effectively reduce HIV transmission when its criminalization leads to fear of prosecution overriding a desire to seek treatment.<sup>320</sup> Justice Edwin Cameron has argued that the role of the law should be to contain the HIV epidemic and mitigate the overall impact of the virus.<sup>321</sup> UNAIDS

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<sup>313</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 239.

<sup>314</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 1.

<sup>315</sup> Pieterse 2011 *African Human Rights Law Journal* 57.

<sup>316</sup> Pieterse 2011 *African Human Rights Law Journal* 64.

<sup>317</sup> Chalmers 2002 *Journal of Medical Ethics* 161.

<sup>318</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 3.

<sup>319</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 2.

<sup>320</sup> Pieterse 2011 *African Human Rights Law Journal* 66.

<sup>321</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.



has recommended that the criminalization of HIV transmission should be restricted to cases of intentional transmission to prevent the undermining of public health and human rights by a widespread application of criminal law.<sup>322</sup>

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<sup>322</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief 1*.

## CHAPTER FIVE: SOUTH AFRICA

### 5 1 INTRODUCTION

South Africa is faced with a high incidence of rape and other sexual offences.<sup>323</sup> Global statistics indicate that South Africa has the highest prevalence of HIV in the world.<sup>324</sup> Cultural beliefs in South Africa tend to contribute to the high rate of HIV transmission that sexual intercourse with a virgin can cure the disease.<sup>325</sup> It is against this backdrop that there was call for the exercise of coercive power in cases of negligent and intentional HIV transmission.<sup>326</sup>

The SALC, Project 85, undertook the task of determining whether statutory intervention would be pragmatic in reducing the intentional transmission of HIV.<sup>327</sup> The outcome was a denial of strict criminalization of HIV, which would have been achieved through the enactment of HIV-specific criminal laws.<sup>328</sup>

This chapter seeks to investigate the common law and statutory provisions used for HIV-related crimes in South Africa. Case law will be used to illustrate the interpretation and application of law to HIV-related cases.

### 5 2 COMMON LAW AND STATUTORY LAW

South African criminal law, whether under common law or statutory law, can be used to prosecute the exposure to or actual transmission of HIV.<sup>329</sup> South Africa is the only country in Southern Africa that has invoked existing criminal laws to prosecute the intentional exposure and/or actual transmission of HIV.<sup>330</sup> However, in terms of current criminal law, an offender would not be found guilty of any crime if he or she informed

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<sup>323</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 9.

<sup>324</sup> Avert "HIV and AIDS in South Africa" (5 September 2017) <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> (accessed 2017-09-28).

<sup>325</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.  
<sup>326</sup> *Ibid.*

<sup>327</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* viii.

<sup>328</sup> Bernard "African HIV Criminalisation Achievements and Challenges Highlighted at ICASA 2013" (11 December 2013) <http://www.hivjustice.net/news/african-hiv-criminalisation-achievements-and-challenges-highlighted-at-icasa-2013/> (accessed 2017-07-25).

<sup>329</sup> Viljoen and Precious (eds) *Human Rights Under Threat: Four perspectives on HIV, AIDS and the law in Southern Africa* 1ed (2007) 23.

<sup>330</sup> *Ibid.*

the “victim” of their HIV-positive status prior to engaging in a consensual act which does not carry significant risk of infection.<sup>331</sup>

## 5 2 1 COMMON LAW PROVISIONS

The SALC determined that the intentional and negligent conduct of a HIV-positive individual causing HIV exposure and/ or transmission could be dealt with under common law.<sup>332</sup> Intentional conduct would fall under the crime of murder, attempted murder, assault, assault with the intent to do grievous bodily harm, or rape.<sup>333</sup>

### 5 2 1 (i) MURDER

Murder is defined as the unlawful and intentional killing of another person.<sup>334</sup> For a conviction to succeed three elements need to be present:

- a) unlawful conduct on behalf of the offender (*actus rea*);
- b) the state of mind of the offender (*mens rea*); and
- c) a causal link between the offenders’ conduct and the ensuing death.<sup>335</sup>

Firstly, for the conduct to constitute an *actus reus*, the offender must have conducted him or herself in a manner resulting in HIV transmission.<sup>336</sup> Unprotected sexual intercourse will suffice to establish this.<sup>337</sup>

Secondly, it must be established that the offender acted with the requisite intent or *mens rea* when the conduct took place.<sup>338</sup> The intention of the offender together with his or her knowledge of being HIV-positive may present in three manifestations, namely a purposeful mind, a knowing mind, or that of a reckless mind.<sup>339</sup> The offender would have acted with a purposeful mind if he or she had been aware of his or her HIV-positive status and formed his or her conduct with the intent to cause the death of

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<sup>331</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 36.

<sup>332</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* ix.

<sup>333</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* ix-22.

<sup>334</sup> Burchell *Principles of Criminal Law* 562.

<sup>335</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 24.

<sup>336</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 25.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*

another individual.<sup>340</sup> A knowing mind is present where the HIV-positive offender knew his or her status and proceeded with the conduct despite knowing that such conduct may cause HIV transmission and/or death.<sup>341</sup> The reckless mind, or *dolus eventualis*, is evident where the offender knows or suspects that he or she is HIV-positive and proceeds with the risky conduct regardless of knowledge that transmission may occur and/or result in death.<sup>342</sup>

Lastly, a causal link is established if the offenders conduct led to the victim contracting HIV.<sup>343</sup> Causation becomes problematic owing to the delay between HIV transmission and the onset of symptoms.<sup>344</sup> As discussed, the window period will affect an individual's knowledge as to whether or not he or she is HIV-positive at the relevant time. Further issues, such as determining that the victim was indeed HIV-negative at the time in question and proving that the HIV-positive individual was the sole cause of the victim contracting HIV, have been discussed at length. However, these problems should be highlighted as factors in establishing causation with regard to criminal liability.

It must be proved by *dolus eventualis*, at the very least, that the conduct by the HIV-positive individual was the cause of the deceased death.<sup>345</sup>

## **5 2 1 (ii) ATTEMPTED MURDER**

To secure a conviction of attempted murder, the court must be satisfied that the elements of unlawfulness, the intention to kill, and attempt were present.<sup>346</sup> Despite requiring the presence of a purposeful or knowing mind, the provision is beneficial as prosecution does not require proof of actual HIV transmission, causation, or death.<sup>347</sup>

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<sup>340</sup> *Ibid.*

<sup>341</sup> *Ibid.*

<sup>342</sup> *Ibid.*

<sup>343</sup> *Ibid.*

<sup>344</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 26.

<sup>345</sup> Burchell *Principles of Criminal Law* 565.

<sup>346</sup> Nienaber "The 'intentional' sexual transmission of HIV: a note of caution in light of Phiri v S" 2014 29 *SAPL* 522 523.

<sup>347</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 28.

In *S v Nyalungu*<sup>348</sup> it was decided that a charge of attempted murder is additional to that of rape when HIV was transmitted intentionally.<sup>349</sup>

### **5 2 1 (ii) (a) S v NYALUNGU**<sup>350</sup>

In *S v Nyalungu*<sup>351</sup> the victim had been raped by the offender.<sup>352</sup> Evidence from the offender's own testimony indicated that he knew about his HIV-positive status prior to raping the victim.<sup>353</sup>

The court needed to consider whether a conviction of attempted murder would be appropriate in terms of South African law.<sup>354</sup> Causation need not be proved for a conviction of attempted murder, but the remaining elements of an act, unlawfulness and culpability, had to be established.<sup>355</sup> It was held that the offender had the requisite *mens rea*, but that intention in the form of *dolus directus* was unlikely.<sup>356</sup>

Intention in the form of *dolus eventualis* was upheld, as the court was satisfied by the acknowledgement of the offender that he had been aware that the transmission of HIV could have fatal results.<sup>357</sup> A charge of rape was confirmed as well as that of attempted murder in that the offender had knowingly and intentionally attempted to murder the victim through the transmission of HIV.<sup>358</sup>

### **5 2 1 (ii) (b) PHIRI v S**<sup>359</sup>

The complainant met Phiri and an HIV/AIDS counsellor at a clinic where was tested for HIV which Phiri oversaw.<sup>360</sup> The results of the test came back as negative, thereby

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<sup>348</sup> *S v Nyalungu* 2005 JOL 13254 (T).

<sup>349</sup> Juta Law "Judgements of Interest in the July Editions of SALR and the SACR" in Juta's *Advance Notification Service* (2013) 2.

<sup>350</sup> 2005 JOL 13254 (T).

<sup>351</sup> *Ibid.*

<sup>352</sup> Bhamjee "A Tale of Attempted Murder and HIV" 2008 29 *Obiter* 317 317.

<sup>353</sup> Bhamjee 2008 *Obiter* 318.

<sup>354</sup> Jordaan "General principles and specific offences" 2013 26 *South African Journal of Criminal Justice* 364 364.

<sup>355</sup> Jordaan 2013 *South African Journal of Criminal Justice* 364.

<sup>356</sup> *Ibid.*

<sup>357</sup> *Ibid.*

<sup>358</sup> Bhamjee 2008 *Obiter* 318.

<sup>359</sup> *Phiri v S* (A 400/2012) [2013] ZAGPPHC 279; 2014 (1) SACR 211 (GNP).

<sup>360</sup> *Phiri v S* 2.

establishing that she had not contracted HIV.<sup>361</sup> Phiri, meanwhile, was HIV-positive and had been aware of his status for three years.<sup>362</sup>

A relationship had developed between the complainant and Phiri resulting in two acts of consensual unprotected sexual intercourse despite the complainant's insisting that a condom be used.<sup>363</sup> As Phiri was the complainant's only sexual partner at the time, he was deemed to have been responsible for her contracting HIV.<sup>364</sup>

Attempts by Phiri to convince the court that he had indeed disclosed his HIV-status and made use of condoms as a precaution against the spread of the virus were held to be improbable, when weighed against the testimony of the offender.<sup>365</sup>

The High Court held that the appellant's knowledge of his HIV-positive status and of the complainant's HIV-negative status, together with his decision to engage in unprotected sexual intercourse regardless, was sufficient for a conviction of attempted murder.<sup>366</sup>

The significance of the case lies in the fact that the charge was upheld despite the State not proving that the appellant transmitted HIV to the complainant.<sup>367</sup> This case became the first ever successful prosecution for exposure to HIV upheld by the High Court.<sup>368</sup> This judgment, in the author's opinion, is an anomaly, as no person in such a situation should be prosecuted without proof, such as phylogenetic testing, for HIV transmission. The author submits that the court should remain vigilant by obtaining available evidence through the use of phylogenetic tests for exclusionary purposes, for example, to ensure that justice is not attenuated due to complacency.

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<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> *Phiri v S 3.*

<sup>364</sup> *Ibid.*

<sup>365</sup> *Phiri v S 4.*

<sup>366</sup> *Phiri v S 9.*

<sup>367</sup> *Phiri v S 15.*

<sup>368</sup> HIV Justice Network "Advancing HIV Justice: Achievements and Challenges in Global Advocacy Against HIV Criminalisation" (undated)  
<https://www.scribd.com/document/190880968/Advancing-HIV-Justice-Achievements-and-challenges-in-global-advocacy-against-HIV-criminalisation-African-update-ICASA-2013>  
(accessed 2017-07-25) 1.

### **5 2 1 (iii) ASSAULT**

South Africa makes a distinction between common assault and assault with the intent to do grievous bodily harm.<sup>369</sup> Assault is defined as unlawfully and intentionally applying force or inspiring a belief that force will be imminently applied.<sup>370</sup> Assault with the intent to do grievous bodily harm is deemed more appropriate when HIV-related behaviour is deemed unacceptable.<sup>371</sup>

Prosecution under the assault provision may take place in the instance of HIV exposure and actual transmission of HIV.<sup>372</sup> A conviction can only be obtained if it is proved that the offender possessed knowledge of his or her HIV-positive status and believed that the conduct in question could result in HIV transmission.<sup>373</sup>

### **5 2 2 STATUTORY LAW PROVISIONS**

The SALC provided that HIV transmission and/ or exposure could be considered as a crime on the same level as rape in common law. Rape has since been elevated to a statutory crime through the enactment of the Criminal Law (Sexual Offences and Related Matters) Amendment Act<sup>374</sup>. Thus, the crime of rape now includes a variety of serious sexual violations.<sup>375</sup>

### **5 2 2 (i) RAPE**

South Africa passed the Compulsory HIV Testing of Alleged Sexual Offenders Bill that allows victims of sexual offences to apply for the alleged offender to be subjected to an HIV test.<sup>376</sup> The Bill became known as the Criminal Law (Sexual Offences and Related Matters) Amendment Act.<sup>377</sup>

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<sup>369</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 28.

<sup>370</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 102.

<sup>371</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 103.

<sup>372</sup> *Ibid.*

<sup>373</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 27.

<sup>374</sup> 32 of 2007.

<sup>375</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 161.

<sup>376</sup> Stein 2004 *Washington University Global Studies Law Review* 188.

<sup>377</sup> 32 of 2007.

Chapter five of the Act acknowledges that victims of sexual offences may be exposed to HIV and, therefore, makes provision for compulsory testing of alleged sex offenders.<sup>378</sup> The victim has the option to apply to a magistrate for an order compelling the alleged offender to be tested for HIV.<sup>379</sup> Applications of this nature need to be made within ninety days after the rape allegedly took place and could, therefore, be effected prior to the arrest of the alleged offender.<sup>380</sup> The results of the HIV tests are to be disclosed to the victim, any interested person who acts on behalf of the victim, and to the alleged offender.<sup>381</sup>

Life imprisonment is given to HIV-positive individuals convicted of rape and who knew of their HIV-positive status at the time of the crime, irrespective of whether HIV transmission occurred or not.<sup>382</sup> In *S v Snoti*<sup>383</sup>, an HIV-positive individual who raped a nine-year-old girl was sentenced to life imprisonment.<sup>384</sup> Despite HIV transmission not having taken place, the offender was aware of his HIV-status and committed rape.<sup>385</sup> A lesser sentence is only imposed if there are exceptional and compelling circumstances.<sup>386</sup> Non-transmission of HIV would not form exceptional or compelling circumstances for not receiving a life sentence. Thus, that South African courts could indeed, as proposed by the author, act against those individuals who commit crimes in the pursuit of sexual gratification despite transmission not occurring. The author is in favour of the prosecution of individuals who recklessly endanger others by neglecting to use preventive measures in their pursuit for sexual gratification. It is the author's opinion that such conduct is intentional in the sense that the HIV-positive individual makes a deliberate decision to have sexual intercourse and, thus, by remaining silent and denying a partner the right to make an informed choice intentionally transmits the virus and causes HIV infection.

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<sup>378</sup> Nienaber 2014 *SAPL* 218.

<sup>379</sup> S 28(1)(b) of 32 of 2007.

<sup>380</sup> Nienaber 2014 *SAPL* 218.

<sup>381</sup> S 30(1)(a)(i) of 32 of 2007.

<sup>382</sup> Pieterse 2011 *African Human Rights Law Journal* 63.

<sup>383</sup> [2007] JOL 19383 (E).

<sup>384</sup> *S v Snoti* [2007] JOL 19383 (E) 1.

<sup>385</sup> *S v Snoti* [2007] JOL 19383 (E) 4.

<sup>386</sup> Pieterse 2011 *African Human Rights Law Journal* 63.



### 5 3 CONCLUSION

South Africa has not adopted any specific laws to criminalize HIV-related offences.<sup>387</sup> Moreover, HIV-positive individuals who transmit or expose others to HIV are prosecuted under the common law provisions, as the SALC held that statutory intervention was neither needed nor necessary.<sup>388</sup>

Considering that South Africa still has the highest number of HIV-positive individuals in the world, the application of existing laws may need to be re-evaluated.<sup>389</sup> The author submits that individuals who pursue sexual gratification while disregarding preventive measures, even if HIV transmission does not occur, should be prosecuted as illustrated by the Canadian case of *R v Aziga*,<sup>390</sup>. This could serve as a measure to curb HIV transmission and promote overall safe sexual practices. A murder conviction is inappropriate, as the use of ART can negate the threat of death and, thus, provide a victim with a lifespan enjoyed by most otherwise healthy individuals.<sup>392</sup>

It seems that the only readily accessible legislation for HIV-related behaviour would be that pertaining to attempted murder, assault and, specifically, assault with the intent to do grievous bodily harm. Both these provisions obviate the requirement of causation; and, whether they are satisfactory or not is subject to debate. Nevertheless, a victory has been won by the practical circumventing of the need to establish causation that has not been able to ameliorate the providing of proof of the events which led to HIV being transmitted.

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<sup>387</sup> Global Criminalisation Scan "South Africa" (17 September 2014)

<http://criminalisation.gnpplus.net/country/south-africa> (accessed 2017-09-10).

<sup>388</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* xi.

<sup>389</sup> Kaiser Family Foundation <http://www.kff.org/global-health-policy/fact-sheet/the-global-hiv-aids-epidemic/>.

<sup>390</sup> [2011] ONSC 4592; [2011] O.J. No. 3525.

<sup>392</sup> World Health Organization <http://www.who.int/mediacentre/factsheets/fs360/en/>.

## CHAPTER SIX: THE UNITED STATES

### 6 1 INTRODUCTION

The United States consists of thirty-four states and two territories all of whom enact and apply different laws regarding HIV.<sup>393</sup> A multitude of these laws are overly broad, vague, and inconsistent with the scientific knowledge of HIV.<sup>394</sup> However, the states do receive general guidance in the form of the American Law Institute's Model Penal Code.<sup>395</sup>

Most laws in the United States criminalize behaviour that may lead to the risk of HIV transmission, irrespective of whether preventive measures were used or not.<sup>396</sup> Criminal laws have been enacted and used to prosecute individuals who pose actual or perceived risks of HIV transmission.<sup>397</sup> Some states have even enacted sentence enhancing provisions where HIV-specific laws are applied to HIV-positive individuals.<sup>398</sup>

What follows is a discussion of general criminal laws and HIV-specific criminal laws as applied in Louisiana and California. In conclusion, a brief overview of the statutes and proposed modernization is given.

### 6 2 GENERAL CRIMINAL LAWS

#### 6 2 1 RECKLESS ENDANGERMENT

'Reckless endangerment' charges arise where an individual's behaviour is reckless and may cause serious bodily harm or death.<sup>399</sup> Recklessness involves a conscious disregard of substantial and unjustifiable risk.<sup>400</sup> However, only when the threat of

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<sup>393</sup> Global Criminalisation Scan "United States of America" (17 September 2014) <http://criminalisation.gnpplus.net/country/united-states-america> (accessed 2017-09-10).

<sup>394</sup> Global Criminalisation Scan <http://criminalisation.gnpplus.net/country/united-states-america>.

<sup>395</sup> Skinner-Thompson (ed) *Aids and the Law* 5ed (2017) 7-13.

<sup>396</sup> Bernard "Getting tough on criminalisation" (3 February 2012) <http://www.aidsmap.com/Getting-tough-on-criminalisation/page/2232678/> (accessed 2017-09-29).

<sup>397</sup> Skinner-Thompson *Aids and the Law* 7-11.

<sup>398</sup> Skinner-Thompson *Aids and the Law* 7-12.

<sup>399</sup> S 211.2 of the Model Penal Code 1962.

<sup>400</sup> S 2.02(2)(c) of the Model Penal Code 1962.

harm is not deemed serious can consent on the part of the injured party be used in the accused's defence.<sup>401</sup>

## 6 2 2 ASSAULT

Assault is the act of attempting to cause or purposely, knowingly, or recklessly inflicting physical harm to another person.<sup>402</sup> An individual is guilty of aggravated assault when there is an attempt to purposely, knowingly, or recklessly cause serious bodily injury by using a deadly weapon.<sup>403</sup>

## 6 2 3 MURDER AND ATTEMPTED MURDER

General criminal laws regarding attempted murder and murder can be applied to cases of HIV exposure and transmission.<sup>404</sup> HIV-positive individuals have been prosecuted under these provisions for engaging in sexual conduct with another and for acts of spitting or biting.<sup>405</sup>

Murder is the act of purposefully, knowingly, recklessly, or negligently causing the death of another person with extreme disregard for the value of human life.<sup>406</sup> The Model Penal Code recognises three elements that need to be present for a murder conviction to be upheld.<sup>407</sup> Firstly, certain conduct must have taken place,<sup>408</sup> and, this is similar to South African law that requires the offender to have engaged in unlawful conduct. Secondly, the state of mind is evaluated; and, finally, causation is established.<sup>409</sup>

A conviction of first degree murder can be obtained if the accused committed the crime of murder and knowingly caused the death of another individual after having contemplated the possible outcome of his or her conduct.<sup>410</sup> It would be necessary for the offender to have intended that such death be caused by HIV infection. Second

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<sup>401</sup> S 2.11(2)(a) of the Model Penal Code 1962.

<sup>402</sup> S 211.1(1) of the Model Penal Code 1962.

<sup>403</sup> S 211.1(2) of the Model Penal Code 1962.

<sup>404</sup> Stein 2004 *Washington University Global Studies Law Review* 180.

<sup>405</sup> Skinner-Thompson *Aids and the Law* 7-12.

<sup>406</sup> S 210.2(1) of the Model Penal Code 1962.

<sup>407</sup> Stein 2004 *Washington University Global Studies Law Review* 181.

<sup>408</sup> *Ibid.*

<sup>409</sup> *Ibid.*

<sup>410</sup> *Ibid.*

degree murder takes place when the individual knowingly caused the death of another individual or did so with the aim of causing serious physical injury to cause serious physical injury to the individual.<sup>411</sup>

Many states require the death of the victim to have occurred within a year and a day of the criminal act for a murder conviction. This makes murder prosecutions problematic.<sup>412</sup> It is submitted that such a requirement should rather be omitted, as no one person is alike; and, the lapse of time until death, especially if ARTs are made use of, creates only one certainty, which is that death cannot be scheduled. A further hurdle is the causation requirement, as it needs to be proved that the offender was the cause of HIV being transmitted to the victim.<sup>413</sup>

There are United States courts that are of the view that the actual risk of HIV transmission is irrelevant when the offender believed that transmission was possible.<sup>414</sup> It is troubling that the intention of the HIV-positive individual to transmit the virus is a predominant factor for consideration in sentencing, despite the extent to which transmission may or may not be possible. Intention is the foundation upon which the action is to be judged. However, intention to transmit could be present if there is no possibility of transmission occurring. This opens arguments for the application of attempted murder. The author submits that the judiciary must strike a balance between the intention to act and the possibility of achieving such act. Moreover, medical and scientific evidence might be useful in making judgement. The author submits that the mere fact that transmission did not, or could not occur, does not eradicate the intention to transmit the virus. Thus, the judiciary has an obligation to impose a sentence which acknowledges the guilty mind of the accused.

Prosecutions for attempted murder take place more frequently than murder, as the risk of HIV transmission is inherently low and rarely leads to death when contracted.<sup>415</sup> However, juries have been persuaded that actions such as spitting and biting may

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<sup>411</sup> *Ibid.*

<sup>412</sup> Skinner-Thompson *Aids and the Law* 7-13.

<sup>413</sup> *Ibid.*

<sup>414</sup> Skinner-Thompson *Aids and the Law* 7-12.

<sup>415</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice* 3ed (2017) 3.

transmit HIV, irrespective of modern and scientific knowledge to the contrary.<sup>416</sup> With regard to the adjudication of cases involving HIV, medical and scientific knowledge is accepted as the courts deem fit, whilst other knowledge, equal to folklore, is often also acknowledged. On the one hand, the court recognises that the possibility of transmission is lower than what was previously believed; and, sentencing should be adjusted accordingly. On the other hand, punishment is given for actions such as biting and spitting, which carry virtually no possibility of transmission. This creates the impression that medical and scientific knowledge is to be placed on the backburner. It is clear that there are inconsistencies within the legal systems, which need to be addressed to give equal footing to proven medical and scientific knowledge in an effort to provide clarity for society. The author submits that a guideline needs to be created to assist the judiciary in striking a balance in the quest for justice, the use of existing legislation and acknowledgement of scientific and medical advances.

### **6 3 HIV-SPECIFIC LAWS**

To overcome the evidentiary complications faced when applying general criminal laws to crimes where HIV is relevant, states opted to enact HIV-specific laws.<sup>417</sup> Thus, two forms of criminalization arose. The first criminalized conduct committed by an HIV-positive individual in general, while the second aimed at punishing specific conduct, such as spitting, blood donation and engaging in sexual intercourse.<sup>418</sup>

Three general elements need to be proved in order to secure a conviction relating to exposure to HIV. Firstly, the individual must know that he or she has HIV, which means that they possessed the necessary knowledge.<sup>419</sup> Secondly, the individual must have engaged in conduct that is prohibited by law.<sup>420</sup> Lastly, the offender must not have any defences available.<sup>421</sup> This will include disclosure of an HIV-positive status to the relevant sexual partner after consent to engage in sexual intercourse had been received.<sup>422</sup>

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<sup>416</sup> Skinner-Thompson *Aids and the Law* 7-12.

<sup>417</sup> Stein 2004 *Washington University Global Studies Law Review* 181.

<sup>418</sup> Stein 2004 *Washington University Global Studies Law Review* 182.

<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

Convictions for HIV-specific criminal offences and/or the use of HIV as an aggravating factor in prosecutions for general sexual offences, have resulted in classifications of sexual offenders being adopted by numerous states.<sup>423</sup>

### **6 3 1 LOUISIANA**

#### **6 3 1 (i) INTENTIONAL EXPOSURE TO HIV**

An individual who intentionally exposes another to HIV/AIDS through sexual contact is deemed to have committed an unlawful act that is punishable by up to ten years imprisonment and/or a fine.<sup>424</sup> The intentional exposure of another to HIV through any means or contact is also punishable.<sup>425</sup> Contact in this sense means spitting, biting, and stabbing an individual with an object contaminated by AIDS or throwing blood or other bodily substances at another.<sup>426</sup>

In *State v Gamberella*<sup>427</sup> the interpretation of “expose”, as opposed to the use of “transmit”, was held to portray the intention of legislature to criminalize the risk of contracting HIV rather than the actual transmission thereof.<sup>428</sup>

An offender may escape punishment for the above offences if he or she acquired the knowing and lawful consent of the victim.<sup>429</sup> Prosecution is, therefore, not a given if an individual engaged in sexual intercourse knowing that the other party was HIV-positive.<sup>430</sup> This position, in the author’s opinion, seems novel, but does not relieve any evidentiary burdens, as the victim can simply claim that informed consent had never taken place.

The courts have, irrespective of the wording in the statute, found that it is not necessary to establish that there was an intention to transmit HIV nor that actual transmission had taken place.<sup>431</sup> It is submitted that this enshrines the idea that any person living with HIV is already a criminal, despite any action or lack thereof. It is the

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<sup>423</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 5.

<sup>424</sup> S 14:43.5(A) read with s 14.43.5(E) of the Louisiana Laws Revised Statutes 2016.

<sup>425</sup> S 14:43.5(B) of the Louisiana Laws Revised Statutes 2016.

<sup>426</sup> S 14:43.5(D) of the Louisiana Laws Revised Statutes 2016.

<sup>427</sup> 633 So. 2d 595, 602 (La. Ct. App. 1993).

<sup>428</sup> *State v Gamberella* 633 So. 2d 595, 602 (La. Ct. App. 1993).

<sup>429</sup> S 14:43.5(A) read with s 14:43.5(B) of the Louisiana Laws Revised Statutes 2016.

<sup>430</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 177.

<sup>431</sup> *Ibid.*

author's opinion that justice cannot be seen as having taken place if the intention to transmit the virus and the actual transmission are both deemed inconsequential. In fact, an individual may have the intention to transmit the virus, but no transmission is possible. However, to simply ignore the intention behind an individual's conduct, is to hand over the reins of justice to those who seek to destroy it.

In the appeal in the *Gamberella*<sup>432</sup> case, the defendant contended that the court had erred in its conviction because the law did not define what amounted to 'exposure' and 'sexual conduct' respectively.<sup>433</sup> It was argued that by not defining the term 'exposure', the statute was being unconstitutionally vague. A person can be exposed to the virus through a multitude of activities that might not necessarily cause transfer of HIV.<sup>434</sup> The court held that the term 'sexual conduct' unambiguously refers to unlawful conduct that involves the use of the sexual organs of one or more of the participants in an attempt to satisfy sexual desires.<sup>435</sup> It is submitted that exposure is an overly broad provision and does not equate to transmission. The author submits that the court has the discretion to determine the impact of an individual's intention with regard to an act, but that provisions such as those above disregard the progress of medical and scientific knowledge.

An individual convicted under the Louisianan provision will be regarded as a sex offender.<sup>436</sup> In addition, registered sex offenders are not eligible for a suspended sentence, probation or sentence reduction for good behaviour.<sup>437</sup>

### **6 3 1 (ii) SPITTING, BITING AND EXPOSURE TO BODILY FLUIDS**

Several forms of behaviour which pose no risk of HIV transmission have been criminalized.<sup>438</sup> Conduct such as biting and spitting constitute unlawful acts punishable by imprisonment and/or a fine, as it exposes an individual to HIV.<sup>439</sup>

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<sup>432</sup> *State v Gamberella* 633 So. 2d 595, 602 (La. Ct. App. 1993).

<sup>433</sup> *Ibid.*

<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*

<sup>436</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 178.

<sup>437</sup> S 15:538(B) of the Louisiana Laws Revised Statutes 2016.

<sup>438</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 180.

<sup>439</sup> S 14:43.5(B) read with s 14:43.5(E)(1) of the Louisiana Laws Revised Statutes 2016.

“Means or contact” in the Louisiana statute are defined as spitting, biting, or stabbing an individual with an object contaminated by AIDS or throwing blood or other bodily substances at another.<sup>440</sup> The term “bodily substances” is not defined in the statute and could be interpreted as including saliva, urine and sweat as substances subject to prosecution.<sup>441</sup>

It is submitted that such provisions display a general ignorance of HIV transmission and of medical and scientific progress made from the advent of HIV awareness that went to the extent of elevating HIV to be subjected to superstition. In 2008, a homeless man who spat at a public servant, who was in the process of detaining him for drunk and disorderly conduct, was imprisoned for harassment with a deadly weapon.<sup>442</sup> As the man was HIV-positive, his saliva was considered to be a deadly weapon.<sup>443</sup> The serious offence earned him a thirty-five year prison sentence. Saliva, as scientific knowledge confirms, has never been the cause of HIV transmission.<sup>444</sup> Therefore, superstition instead of knowledge is often used in cases made against people who are HIV-positive. This reaffirms the need to focus on scientific knowledge when attempting to criminalize HIV transmission.

### **6 3 1 (iii) ACKNOWLEDGEMENT OF ADVANCES INVOLVING HIV**

Richard Covington was charged with intentionally exposing a person to AIDS as a result of biting another individual. However, the charges were dropped, as it was held to be difficult to establish that the bite would cause HIV transmission.<sup>445</sup> In reviewing the case, the statute on intentional exposure to AIDS was scrutinised. At the time of the law enactment, little was known about the science behind HIV/AIDS.<sup>446</sup>

The laws surrounding the criminalization of HIV/AIDS have been deemed to be problematic and subject to legislative redress, as AIDS is no longer the death sentence

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<sup>440</sup> S 14:43.5(D) of the Louisiana Laws Revised Statutes 2016.

<sup>441</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 179.

<sup>442</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 63.

<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid.*

<sup>445</sup> Lane “Is Louisiana’s ‘AIDS exposure statute outdated? Advocates say it adds to stigma” (17 May 2016) [http://www.nola.com/news/baton-rouge/index.ssf/2015/09/is\\_louisianas\\_aids\\_exposure\\_st.html](http://www.nola.com/news/baton-rouge/index.ssf/2015/09/is_louisianas_aids_exposure_st.html) (accessed 2017-09-29).

<sup>446</sup> Lane [http://www.nola.com/news/baton-rouge/index.ssf/2015/09/is\\_louisianas\\_aids\\_exposure\\_st.html](http://www.nola.com/news/baton-rouge/index.ssf/2015/09/is_louisianas_aids_exposure_st.html).



that it was before owing to medical advancements made in terms of managing and preventing HIV transmission.<sup>447</sup> The risk of HIV transmission has also been proven to be smaller than before. As discussed above, the use of effective ART provides HIV-positive individuals with a near normal life-expectancy; and, medicine and science has acknowledged that transmission does not occur as frequently as was believed before. However, the provision still applies, if it can be proved that an individual's actions were intentional and that he or she successfully transmitted the virus.<sup>448</sup>

## **6 3 2 CALIFORNIA**

### **6 3 2 (i) EXPOSURE TO HIV**

California criminalized exposing another to HIV infection by enacting a statute. Various periods of incarceration are provided for under this statute when an HIV-positive individual exposes another to the virus. Conviction depends on the following:

- 1) engaging in unprotected vaginal or anal sexual intercourse;
- 2) knowledge of one's HIV-positive status;
- 3) failure to disclose one's HIV-positive status to a sexual partner; and
- 4) specific intent to transmit HIV.<sup>449</sup>

"Sexual activity" is defined as: insertive consensual vaginal or anal intercourse on the part of an HIV-positive male with a female partner; insertive anal intercourse on the part of an HIV-positive male with a male partner; receptive consensual vaginal intercourse on the part of a HIV-positive woman with a male partner; and receptive consensual anal intercourse on the part of an HIV-positive male with a male partner.<sup>450</sup>

"Unprotected sexual activity" will take place if condoms are not used when engaging in sexual intercourse.<sup>451</sup>

It is difficult to prove that an individual had knowledge of his or her HIV-positive status and that specific intent for the purpose of transmitting HIV was present. However, the

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<sup>447</sup> *Ibid.*

<sup>448</sup> *Ibid.*

<sup>449</sup> S 120291(a) of the California Health and Safety Code 2017.

<sup>450</sup> S 120291(b)(1) of the California Health and Safety Code 2017.

<sup>451</sup> S 120291(b)(2) of the California Health and Safety Code 2017.

medical records of the offender may be accessed by prosecutors to prove that the individual had this knowledge at the time of the sexual act.<sup>452</sup>

A conviction in terms of the statute requires both non-disclosure of an individual's HIV-positive status and engagement in unprotected sexual intercourse.<sup>453</sup> If the offender can prove either that a condom was used, or he or she had disclosed their HIV-status prior to engaging in sexual intercourse, a prosecution in terms of the statute seems unlikely. Likewise, intent must be proven.<sup>454</sup> The author is of the opinion that providing either disclosure or preventive measures would indicate that the legislature acknowledges medical and scientific advances, which in turn might provide guidance for countries worldwide.

### **6 3 2 (ii) ALTERNATIVE SENTENCES**

Californian law provides for alternative sentences to be applied when it cannot be proven that the offender intended to expose an individual to HIV. Instead the offender may be prosecuted for exposing the individual to other communicable diseases. Where an HIV-positive individual wilfully exposes the virus to another, he or she will be found guilty of a misdemeanour, which is punishable by up to six months imprisonments and/or a fine.<sup>455</sup>

### **6 3 2 (iii) ENHANCED SENTENCES**

An individual convicted of various crimes would receive an enhanced sentence of three additional years of incarceration for acting in full knowledge of having an HIV-positive status. These crimes include: unlawful intercourse with a minor; oral copulation; sodomy; or spousal rape.<sup>456</sup>

HIV test results from mandatory tests given to an offender accused of prior sexual offences may be used to establish that the offender had knowledge of his or her HIV-

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<sup>452</sup> S 120292 of the California Health and Safety Code 2017.

<sup>453</sup> S 120291(a) of the California Health and Safety Code 2017.

<sup>454</sup> *Ibid.*

<sup>455</sup> S 120290 of the California Health and Safety Code 2017

<sup>456</sup> S 12022.85 of the California Penal Code (2017).

positive status.<sup>457</sup> Intent to transmit HIV, as well as the actual transmission of HIV, is not required for a sentence to be enhanced in terms of the statute.<sup>458</sup>

### **6 3 2 (iv) PROSECUTION UNDER GENERAL CRIMINAL LAWS**

Even if there is no intent to carry it out, a criminal threat, whether verbal or written, is a threat to commit a crime which may result in death or serious bodily injury to another individual.<sup>459</sup>

In *Beauford v People*<sup>460</sup> the HIV-positive defendant issued a threat to police officials claiming that he would make their lives miserable by spitting on them. For a prosecution to succeed under the Californian provisions it must be proved that:

- a) the defendant threatened to inflict serious bodily harm on or kill another individual;
- b) the threat must be understood as such;
- c) the accused must have communicated a serious intention to carry out the threat;
- d) the threatened individual must have been induced to fear the threat; and
- e) the fear must be reasonable.<sup>461</sup>

While most laws on HIV convey the presence of some sort of risk, prosecutions under this provision avoid having to prove that there was a risk of HIV transmission.<sup>462</sup> In the author's opinion, allowing prosecutions for actions which pose no threat shows complete disregard for the rule of law.

## **6 4 HIV STATUTES AND MOVING FORWARD**

In 2011 the Repeal HIV Discrimination Act was introduced to review all federal and state laws, policies and regulations that dealt with offences in which HIV-positive individuals could face criminal prosecution.<sup>463</sup>

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<sup>457</sup> S 12022.85(c) of the California Penal Code (2017).

<sup>458</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 42.

<sup>459</sup> S 422(a) of the California Penal Code (2017).

<sup>460</sup> No. B196860, 2008 WL 5091389 (Cal. Ct. App. Dec. 4, 2008).

<sup>461</sup> S 422 of the California Penal Code (2017).

<sup>462</sup> Skinner-Thompson *Aids and the Law* 7-32.

<sup>463</sup> Global Criminalisation Scan <http://criminalisation.gnpplus.net/country/united-states-america>.

A model for instituting HIV testing and sexual behaviour decisions was created to assess the effectiveness of specific criminal laws in the United States relating to HIV.<sup>464</sup> The outcome indicated that criminal laws were effective for the reduction of HIV transmission.<sup>465</sup> However, amendments were required because the avoidance of HIV tests would prevent punishment for the exposure to, or actual transmission of HIV, as most of the laws required the HIV-positive individual to be aware of his or her status.<sup>466</sup> It was recommended that one uniform law should be enacted to incarcerate offenders for knowingly, or unknowingly, transmitting HIV.<sup>467</sup> The recommendation provided for a period of incarceration of one to two years and for the repealing of any laws previously imposed for exposing a person to HIV without transmission ensuing.<sup>468</sup>

The above provision acknowledges scientific and medical developments by recommending that punishment should not be meted out in cases of non-transmission. However, recommending the punishment of individuals who are not aware of their HIV-positive status, as opposed to those who do know their status, is problematic as it seems to be a return to draconian law.<sup>469</sup> Theoretically, the law may urge individuals be more prone to undergo HIV tests that are, however, subject to availability<sup>470</sup>

The Consensus Statement on HIV “Treatment as Prevention” in Criminal Law Reform was launched in July 2017.<sup>471</sup> It acknowledges that the risk of HIV transmission from a HIV-positive individual who is on ART and has a continuously undetectable viral load is almost nil.<sup>472</sup> Awareness of this finding should cure the ignorance currently surrounding the risk of HIV transmission, which fuels stigma and discrimination.<sup>473</sup>

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<sup>464</sup> Chen 2016 *Intersect* 10.

<sup>465</sup> *Ibid.*

<sup>466</sup> *Ibid.*

<sup>467</sup> *Ibid.*

<sup>468</sup> *Ibid.*

<sup>469</sup> *Ibid.*

<sup>470</sup> *Ibid.*

<sup>471</sup> Bernard “US: Advocates Launch Consensus Statement on HIV “Treatment as Prevention” in Criminal Law Reform” (14 July 2017) <http://www.hivjustice.net/news/us-advocates-launch-consensus-statement-on-hiv-treatment-as-prevention-in-criminal-law-reform/> (accessed 2017-09-30).

<sup>472</sup> Center for HIV Law and Policy “The Consensus Statement” (13 July 2017) <https://www.hivtaspcrimlaw.org/the-consensus-statement> (accessed 2017-09-30).

<sup>473</sup> *Ibid.*

The problem faced when applying HIV-specific criminal laws is that the focus is placed on disclosure, as opposed to intent to do harm.<sup>474</sup> Secondly, the punishment treats the risk of transmission as though it were assault or murder.<sup>475</sup> Modernized laws should take cognisance of risk reduction methods used by an offender, as the chances are slim for contracting HIV during a single sexual act, even when ART was not used by the offender.<sup>476</sup>

The movement aims to ensure that criminal laws are applied in a just manner throughout the United States and that HIV prosecutions should require:

- a) proof of intent to do harm;
- b) conduct which is likely to result in harm;
- c) proof that the offenders' conduct resulted in the alleged harm; and
- d) punishment which is proportionate to the actual harm that was caused by the conduct of the offender.<sup>477</sup>

## 6 5 CONCLUSION

The United States has implemented specific criminal laws to punish exposure to HIV.<sup>478</sup> Their effect is similar to that of South Africa in that they do not serve to curb the proliferation of HIV.<sup>479</sup> Moreover, cases of HIV transmission predominantly dealt with instances involving consensual sexual intercourse.<sup>480</sup>

An analysis indicated that almost twenty-five percent of the HIV-related cases could have fallen under general criminal laws as they involved behaviour, such as biting, spitting and scratching, that carries low or no significant risk of HIV transmission.<sup>481</sup>

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<sup>474</sup> *Ibid.*

<sup>475</sup> *Ibid.*

<sup>476</sup> Center for HIV Law and Policy "Frequently asked questions" (undated) <https://www.hivtaspcrimlaw.org/faq/> (accessed 2017-09-30).

<sup>477</sup> Positive Justice Project "Consensus Statement on the Criminalization of HIV in the United States" (undated) <https://www.hivlawandpolicy.org/sites/default/files/PJP%20Consensus%20Statement%20with%20Endorsers%20%28updated%202.13.17%29.pdf> (accessed 2017-09-30) 1.

<sup>478</sup> Stein 2004 *Washington University Global Studies Law Review* 189.

<sup>479</sup> *Ibid.*

<sup>480</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 251.

<sup>481</sup> Lazzarini *et al* 2002 *Journal of Law, Medicine and Ethics* 244.

Modernization of laws as contemplated by the Consensus Statement is, therefore, justifiable.

Louisiana has attempted to use medical and scientific knowledge when applying its laws on HIV. However, an evaluation of the laws reveals a mere acknowledgement of advancements in medical knowledge relating to HIV prevention and treatment instead of an application of the information to the law, as HIV-positive individuals are still prosecuted for spitting and/or biting other individuals.

In the author's opinion, the Californian law is more progressive than Louisiana legislation, as it explicitly acknowledges preventive measures. The legislation goes a step further in providing for the use of disclosure or preventive measures as evidence for the defence argument. The possibility of prosecuting someone under criminal law for spitting, for example, is submitted to be a mistake because there is no evidence to support it.

The United States HIV transmission laws need to be uniform for clarity of application and for individuals in each state to understand their effects. It is submitted that if and when uniform legislation is enacted, the uncertainty regarding different state laws created in each region will be eradicated. Moreover, this will provide guidance for cases involving individuals who do not remain in only one state. A uniform rule will eliminate the burden of establishing when transmission occurred and where the individuals were geographically located at the time of the incident as a prerequisite for establishing jurisdiction. Should uniform rules be implemented, individuals will be punished in accordance with laws applied throughout the United States in a uniform manner, as opposed to facing different charges based on the jurisdiction of the court in whose area the cause of action arose.

## CHAPTER SEVEN: A COMPARISON BETWEEN SOUTH AFRICA AND THE UNITED STATES

The approach taken by the United States is unlike that of South Africa. The United States Presidential Commission on the Human Immunodeficiency Virus Epidemic supports the extension of criminal liability to individuals who knowingly engage in behaviour that could bring about HIV transmission. According to the Commission, this is in accordance with the criminal law objective of punishing harmful conduct.<sup>482</sup> In line with the Commission's recommendation, HIV-specific criminal law was adopted in various states in the United States.<sup>483</sup> South Africa took the opposite approach after the SALC held that legislative intervention in the form of adopting HIV-specific laws was not warranted in South Africa.<sup>484</sup>

The laws applied in the United States generally punish individuals who are aware of their HIV-positive status. Similarly, common law in South Africa takes into account whether there was knowledge of an HIV-positive status prior to sexual intercourse. It is submitted that, ultimately, the United States HIV-specific laws promote a culture of "no knowledge, no problem", which negatively impacts upon public health measures aiming to eradicate HIV transmission. Knowledge regarding an individual's HIV-positive status is the key to the imposition of appropriate sentences. A guilty person without this knowledge may, in certain circumstances, escape punishment. Furthermore, the United States approach guarantees that the courts will continue to face new cases involving HIV transmission, as the law could be perceived as punishing those who endeavour to become aware of their status and/or seek treatment.

South Africa and the United States both generally make use of assault to prosecute HIV cases. In South Africa, assault in the prosecution of HIV is associated with intent

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<sup>482</sup> Presidential Commission *The Presidential Commission Report* 130.

<sup>483</sup> NAM <http://www.aidsmap.com/The-evolution-of-global-criminalisation-norms-the-role-of-the-United-States/page/1442035/>.

<sup>484</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* (2001) 266-267.

to do grievous bodily harm, whilst charges are laid in terms of aggravated assault in the United States.<sup>485 486</sup>

Louisiana has HIV-specific legislation that provides for intentional exposure to HIV.<sup>487</sup> However, this particular state is in the process of reviewing its laws that regulate exposure to HIV, as it acknowledges that science has made discoveries that eradicate stigmas and myths concerning risks previously associated with HIV/AIDS transmission, such as being bitten.<sup>488</sup> Currently, the provisions still allow the scientifically unjustifiable prosecution of behaviour such as spitting that poses no risk of HIV transmission.<sup>489</sup>

South African legislation does not make provision for the prosecution of cases that involves no risk of HIV exposure and transmission.<sup>490</sup> It does, however, allow prosecution for exposure to HIV in terms of the common law of assault.<sup>491</sup> It is submitted that the approach by South Africa is more justifiable than that of, for example, Canadian law that considers exposure to HIV and the risk of infection as crimes.<sup>492</sup> The case of *R v Aziga*<sup>493</sup> serves to illustrate that the risk of HIV infection and the actual transmission are deemed to be one and the same under Canadian law, as a murder conviction was handed down for the failure to disclose an HIV-status.<sup>494</sup> The South African position is more aligned with the advances in medical and scientific knowledge. South African law does not require that both the use of a condom and a low viral load must be present to reduce the risk of transmission from “realistic” to “merely speculative”, as was determined in the case of *R v Mabior*.<sup>495 496</sup> To this extent, South African law acknowledges the role of preventive measures and adjusts sentences accordingly. Although a criminal conviction in the absence of transmission

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<sup>485</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 28.

<sup>486</sup> S 211.1(2) of the Model Penal Code 1962.

<sup>487</sup> S 14:43.5 of the Louisiana Laws Revised Statutes 2016.

<sup>488</sup> Lane [http://www.nola.com/news/baton-rouge/index.ssf/2015/09/is\\_louisianas\\_aids\\_exposure\\_st.html](http://www.nola.com/news/baton-rouge/index.ssf/2015/09/is_louisianas_aids_exposure_st.html).

<sup>489</sup> The Center for HIV Law and Policy *HIV Criminalization in the United States* 180.

<sup>490</sup> South African Law Commission *Fifth Interim Report on Aspects of the Law Relating to AIDS* 103.

<sup>491</sup> *Ibid.*.

<sup>492</sup> Swiffen “Bio-Crime: The Criminalization of HIV in Canada” 2015 5 *Law and Governance* 1 1.

<sup>493</sup> [2011] ONSC 4592; [2011] O.J. No. 3525.

<sup>494</sup> Swiffen 2015 *Law and Governance* 1.

<sup>495</sup> 2012 SCC 47, [2012] 2 S.C.R. 584.

<sup>496</sup> Swiffen 2015 *Law and Governance* 3.



may seem unjust, it is submitted that such conviction should stand where the intention and/or conduct of the HIV-positive individual is seen to be a threat aimed at the victim of the offence. However, such conviction, as mentioned above, should take into account the fact that transmission had not occurred.

Californian law is precise in defining the confines of specific conduct that gives rise to prosecution.<sup>497</sup> It is submitted that the legislature, in specifically indicating what certain acts amount to, has attempted to avoid the law being questioned for vagueness, as happened in Louisiana in the case of *State v Gamberella*.<sup>498</sup>

A murder conviction, whether in South Africa or the United States, is problematic in that it requires that the transmission of HIV must have led to the death of an individual, which is never an immediate result of transmission. Furthermore, the possibility exists that the offender may pre-decease his or her victim, thereby rendering a conviction under the provision futile.<sup>499</sup>

Progressive steps have taken place when statutes acknowledge the use of preventive measures. In Californian law, the use of condoms is acknowledged, as the failure to make use of them amounts to unprotected sexual intercourse.<sup>500</sup> While South African law does not make mention of preventive measures, the court can acknowledge the presence or absence thereof in reaching a verdict.

HIV legislation in the United States has made progress but it has also gone backwards to the era of draconian law, as juries have on occasion been persuaded that actions such as spitting and biting can transmit HIV, irrespective of modern scientific knowledge.<sup>501</sup> In the light of the various statutes applied by the different states in the United States, it can be seen that criminal prosecutions appear draconian in their application, as HIV does not always pose a risk despite being portrayed as such in many of the laws which prosecute HIV-positive individuals.<sup>502</sup> It is submitted that South

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<sup>497</sup> S 120291(b) of the California Health and Safety Code 2017.

<sup>498</sup> 633 So. 2d 595, 602 (La. Ct. App. 1993).

<sup>499</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 26.

<sup>500</sup> S 120291(b)(2) of the California Health and Safety Code 2017.

<sup>501</sup> Skinner-Thompson *Aids and the Law* 5<sup>th</sup> ed (2017) 7-12.

<sup>502</sup> Skinner-Thompson *Aids and the Law* 7-12.

Africa's position with regard to law to HIV transmission is an attempt to normalize the disease instead of elevating it to an exceptional disease that requires specific legislative attention.

Basic human rights, such as the right to privacy,<sup>503</sup> dignity,<sup>504</sup> and bodily and psychological integrity,<sup>505</sup> need to be acknowledged in both South Africa and the United States, as their impact on the spread of HIV is evidenced worldwide as individuals refuse to disclose their HIV-positive status due to the fear of stigmatization. Individuals remain vulnerable when their civil and economic rights are not fully realized and equality in this regard can never be achieved, as not all the countries worldwide are on the same footing in terms of economic and social development as well as the available infrastructure.<sup>506</sup> Despite the differences between the United States and South Africa, both countries are the same in that there is room for improvement with regard to human rights. Moreover, if stigma and discrimination can be addressed, individuals will be more likely to undergo testing and receive treatment, which will have a knock-on-effect of curbing further HIV transmission. While both South Africa and the United States were equally ineffective in their early pursuits to curb the spread of HIV, South Africa is now seen as a leader, as it boasts with having the largest HIV treatment programme in the world, with its success being evident in the increase of the national life expectancy from 61.2 years in 2010 to 67.7 years in 2015.<sup>507</sup>

It appears that there is not much difference between using HIV-specific legislation in the United States and general common law in South Africa. In both instances, HIV continues to spread owing to HIV exposure and actual transmission, whether through sexual conduct or other methods. The United States HIV-specific legislation, therefore, does not achieve a greater result than those countries who do not criminalize HIV.

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<sup>503</sup> S 14 of the Constitution.

<sup>504</sup> S 10 of the Constitution.

<sup>505</sup> S 12(2) of the Constitution.

<sup>506</sup> United Nations Human Rights "HIV/AIDS and Human Rights" (undated) <http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx> (accessed 2017-11-17).

<sup>507</sup> The Joint United Nations Programme on HIV/AIDS "South Africa" (undated) <http://www.unaids.org/en/regionscountries/countries/southafrica> (accessed 2017-11-11).



## CHAPTER EIGHT: CONCLUSION AND RECOMMENDATIONS

### 8 1 INTRODUCTION

A brief review of the objectives of the study are discussed along with recommendations to address any shortcomings or problems.

### 8 2 OBJECTIVES OF THE STUDY

#### 8 2 1 TO EXAMINE THE CRIMINAL LIABILITY WHICH ARISES FROM HIV TRANSMISSION

HIV itself should not be criminalized. However, exceptional cases of intentional HIV transmission, should be subjected to the criminal laws that are already in place in various countries globally.<sup>508</sup> To criminalize HIV would undermine the right to human dignity<sup>509</sup> and equality<sup>510</sup>, to which HIV-positive individuals are entitled. A distinction would be made between individuals who are “sick”, as opposed to those who are not, and the worlds’ population would be divided into two groups depending on a person’s HIV status. It is submitted that such a distinction would fundamentally infringe upon human rights, as people would be discriminated against and stigmatised. Moreover, people would hide their true status for fear of marginalization, shy away from being diagnosed and treated for HIV, and be potential transmitters of the disease.

The study indicates that criminal liability in the United States arises when HIV transmission has occurred. The motive behind the call for the criminalization of HIV in the United States is the determination to inhibit the spread of HIV.<sup>511</sup> As no law can prevent the spread of HIV, the application of HIV-specific laws to infections is severely misdirected.<sup>512</sup> Criminalization of HIV risks perpetuating the stigma surrounding HIV/AIDS. This, in turn, impedes public health measures aimed at controlling and preventing the spread of HIV in an attempt to guard human life.<sup>513</sup>

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<sup>508</sup> Open Society Foundations [https://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](https://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf) 2.

<sup>509</sup> S 10 of the Constitution.

<sup>510</sup> S 9 of the Constitution.

<sup>511</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 67.

<sup>512</sup> *Ibid.*

<sup>513</sup> Arrigo and Bersot *The Routledge Handbook* 547.

The imposition of specific criminal laws does not effectively curb the proliferation of HIV. As was remarked by Patrick Eba from the Human Rights and Law division of UNAIDS, the criminalization of HIV undermines global scientific advances and established public health strategies.<sup>514</sup> While criminalization originated as a structural intervention for decreasing potentially harmful individual behaviour, which might result in HIV transmission, it relies on the assumption that HIV-positive individuals will alter their behaviour if legislation is in place.<sup>515</sup>

To require every individual to be aware of their HIV status is an unattainable goal. Consequently, to place a burden on the individual who is aware of his or her HIV-positive status, and not place a protective burden on a possibly ignorant individual, is a flawed attempt to protect sexual partners from possible transmission of HIV.<sup>516</sup> If individuals involved in sexual activity are given the obligation to disclose that they are not aware of their current status, they may be given the opportunity to proceed with caution. They have a choice to either take precautions, such as using a condom, or decline to continue with their interaction until they both know their HIV status. It is submitted that an HIV-positive individual's sexual partner should also face criminal liability for engaging in sexual activities without any preventive measures regardless if use of preventive measures was proposed or not, and/or whether or not the other individual had HIV. All parties involved in sexual activities should face the consequences of their neglect. Both parties should be prosecuted for their contributory negligence.

## **8 2 2 TO INVESTIGATE THE MEDICAL ASPECTS RELATING TO HIV TRANSMISSION**

HIV is no longer a death sentence; instead, it is a chronically treatable health condition. Prosecution for murder is no longer tenable, as death is no longer a given fact.

Problems in the application of the law to cases of HIV transmission include proving intention, as HIV tests may indicate negative as a result of the window period, while

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<sup>514</sup> New Era <https://www.newera.com.na/2016/05/16/hiv-criminalisation-setback-regional-aids-efforts/>.

<sup>515</sup> Chen 2016 *Intersect* 5.

<sup>516</sup> Buris and Weait paper presented at conference on Technical Advisory Group of the Global Commission on HIV and the Law 10.

subsequent tests will yield a positive result.<sup>517</sup> Establishing that transmission was caused by the offender, and not another individual, is equally problematic, as phylogenetic tests cannot prove, beyond a reasonable doubt, that the individual was the source of the infection.<sup>518</sup> The possibility of contracting HIV is much lower than what was originally presumed. Moreover, the use of contraceptives and ART make transmission negligible, if not impossible. What remains evident is that the use of criminal law in attending to public health issues such as HIV transmission, is largely misplaced.<sup>519</sup> If criminal law is to be used, it must take into account the probability of transmission occurring together with any preventive measures that are used. Only then, will it be possible to fully comprehend particular cases involving possible HIV exposure and/ or transmission. Finally, scientific and medical evidence should be used on a case-by-case basis to determine whether or not a significant risk was present. It is submitted that the judiciary has the discretion to determine the impact of the individual's intention. However, any decision taken must take cognisance of the nature of HIV, as neglecting it would place a guilty verdict on an individual for living with HIV.

### **8 2 3 TO EXAMINE SOUTH AFRICA AND THE UNITED STATES APPROACH TO HIV TRANSMISSION**

In the United States there are various states that impose punishment for HIV-specific conduct provided that transmission of HIV occurred.<sup>520</sup> South Africa, in contrast, has not adopted HIV-specific legislation and, as indicated, has not been found necessary to do so. It is the author's submission that general laws should be implemented as far as possible to avoid placing an emphasis on HIV as a specific crime. The advantage of HIV-specific law is that it makes provision for specific conduct or outcomes. General criminal laws may fall short when specific conduct is envisaged, but they can be amended to provide for specific outcomes without establishing HIV as a separate crime. Thus, the provisions can be amended to include intentional HIV transmission.

Where criminal laws impose additional burdens on individuals with an HIV-positive status, they fail to take into account the medical advances and scientific discoveries

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<sup>517</sup> Viljoen and Precious (eds) *Human Rights Under Threat* 25.

<sup>518</sup> Joint United Nations Programme on HIV/AIDS *Policy Brief* 4.

<sup>519</sup> Pieterse 2011 *African Human Rights Law Journal* 73.

<sup>520</sup> Global Criminalisation Scan <http://criminalisation.gnpplus.net/country/united-states-america>.

regarding the fight against HIV infection and fuel discrimination and fear.<sup>521</sup> It is submitted that ignoring these crucial factors is not in the interests of justice.

Whether existing criminal law is applied or HIV-specific legislation is implemented, HIV transmission remains a problem that should be resolved through public health efforts. However, unlawful human conduct regarding HIV infection can be punished by law. Public health measures should be enhanced in order to make ARTs more readily accessible, as availability can be seen to have an impact on reducing the spread of HIV infection. Prevention, as opposed to punishment, is the only effective weapon against the spread of HIV. When comparing the approach taken by the United States regarding prosecution of HIV transmission cases to that of South Africa, the author submits that the latter is more favourable.

#### **8 2 4 TO DETERMINE WHETHER MEDICAL KNOWLEDGE IS ACKNOWLEDGED WHEN APPLYING CRIMINAL LAWS TO HIV TRANSMISSION**

The study has shown that various medical and scientific advances have led to the acceptance that HIV is no longer a death sentence. While there are laws that impose sentences on the basis that HIV is a death sentence for which no cure exists, South African legislation acknowledges medical and scientific advances and imposes sentences accordingly.

The United States, in contrast, acknowledges some of the medical and scientific advances which have been made, but fails to adapt their sentences accordingly. While no blanket acceptance or rejection exists, the United States needs to align medical and scientific knowledge with the legislation used to prosecute those who are charged with various HIV-related transgressions.

It is the author's submission that clear guidelines on the risk associated with HIV transmission should be created for the use of the judiciary to assist them in rendering verdicts that reflect current medical and scientific knowledge about HIV transmission.

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<sup>521</sup> Bernard <http://www.aidsmap.com/Getting-tough-on-criminalisation/page/2232678/>.

These guidelines would enable the judiciary to grasp the full extent of the possibility of contracting HIV and the reduction of such risk through preventive measures.

### 8 3 RECOMMENDATIONS

The study recommends the development of HIV health care policies and education, especially with regard to HIV transmission, to curb the spread of HIV.

HIV-specific laws neglect to take into account the nature of the behaviour engaged in; and, the preventive measures used determine the degree of risk involved in possible HIV transmission.<sup>523</sup> Legislation regulating exposure to HIV should be re-evaluated to take account of risk reduction brought about by the use of preventive measures. With ART providing a 96% reduction in the risk of HIV transmission, decriminalization of HIV in South Africa and the United States should strongly be considered, except where a clear intention to transmit the virus can be reasonably established.<sup>524</sup>

HIV-specific criminal laws should be replaced by general criminal laws dealing specifically with cases involving individuals who know they are HIV-positive, act with the intention to transmit the virus, and succeed in doing so.<sup>525</sup> If HIV transmission has not occurred, there is still the notion of *attempt to transmit* even if it failed.

It is submitted that guidelines should be drafted by legislature, in conjunction with health care practitioners to indicate when there is a possibility of contracting HIV and how risks diminish when preventive measures are implemented. These guidelines could serve as a tool to recognise recent medical and scientific knowledge about HIV to assist the judiciary in rendering an appropriate verdict. The author submits that these guidelines may be applied in South Africa and could pave the way for universal redress of HIV transmission legislation.

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<sup>523</sup> Chen 2016 *Intersect* 7.

<sup>524</sup> New Era <https://www.newera.com.na/2016/05/16/hiv-criminalisation-setback-regional-aids-efforts/>.

<sup>525</sup> Bernard <http://www.aidsmap.com/Getting-tough-on-criminalisation/page/2232678/>.



#### 8 4 FINAL REMARKS

Laws criminalizing HIV are overly broad, fail to consider the evidence provided by medical science, and have grave consequences for those who are HIV-positive as well as for the public health measures that attempt to prevent further transmission.<sup>526</sup> Many laws prosecute acts that constitute no or little risk of HIV transmission.<sup>527</sup> HIV will only be defeated by the combination of education and medical treatment.<sup>528</sup> It will never be defeated by the application of criminal laws.<sup>529</sup>

This study set out to prove the hypothesis that criminalizing HIV does not reduce the transmission of HIV. The author proposes that medical and scientific knowledge regarding the prevention and treatment of HIV should be combined with the application of criminal law, as the law on its own is not the correct tool to curb the spread of HIV.<sup>530</sup>

In conclusion, the researcher submits that HIV transmission should be dealt with by the implementation of public health policies, except in rare cases of intentional transmission of HIV. Prevention, care and treatment of HIV may solve the problem rather than criminal provisions.<sup>531</sup>

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<sup>526</sup> Canadian HIV/AIDS Legal Network 2009 *HIV/AIDS Policy & Review* 70.

<sup>527</sup> HIV Justice Network <https://www.scribd.com/document/190880968/Advancing-HIV-Justice-Achievements-and-challenges-in-global-advocacy-against-HIV-criminalisation-African-update-ICASA-2013> 2.

<sup>528</sup> Stein 2004 *Washington University Global Studies Law Review* 198.

<sup>529</sup> *Ibid.*

<sup>530</sup> Diwouta <https://idasa.wordpress.com/2010/11/10/punitive-law-no-magic-bullet-in-stopping-hiv/>.

<sup>531</sup> Stein 2004 *Washington University Global Studies Law Review* 196.

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