CRIMINAL LIABILITY FOR WILFUL HIV/AIDS INFECTION: A COMPARATIVE STUDY

by

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SUMMARY

South Africa’s high prevalence of HIV/AIDS coupled with a high crime rate and incidence of sexual violence necessitated the enquiry and study into the role of criminal law to address the wilful transmission of HIV.¹ This study shows that criminal law can be used to punish offenders for wrongdoing and therefore finds application in the wilful transmission of HIV.² The study distinguishes the dividing line between the justifiable use of criminal law and where use of the criminal law becomes discriminatory in nature and counterproductive to public health measures. The United Nations (hereinafter referred to as the UN) laid down guiding principles for countries to adopt when using the criminal law and stated that countries should use existing criminal law offences to prosecute intentional HIV infections.³ The South African Law Commission (hereinafter referred to as the SALC) endorses this approach. South Africa’s use of the criminal law, in response to harmful HIV behaviour is in line with the UN recommendations as it uses the existing common law offences to prosecute the wilful transmission of HIV, namely murder, attempted murder and assault. Drawing from the writer’s comparative study in Chapter Six below, South Africa, members of the Zimbabwean parliament, Canada, as well as the American Bar Association have all concluded that the use of specific HIV-related legislation creates some a form of stigmatization towards people living with HIV and is therefore not warranted. This study shows that criminal law has a role to play in the wilful transmission of HIV; however the creation of HIV specific legislation is not recommended and existing criminal law offences should be used to address harmful HIV related behaviour. Such an approach is in line with the guiding principles laid down by the UN and SALC.

CHAPTER ONE
INTRODUCTION

1.1 A Global Perspective of the HIV Pandemic

The Human Immunodeficiency Virus (HIV) which is the cause of Aids remains a global pandemic of our time.\(^4\) Since its discovery in the 1980’s the HIV virus spread rapidly infecting people around the world.\(^5\) The epidemic is considered to have reached its peak globally in 1999.\(^6\) AIDS has claimed the lives of millions of people, since the early days of the epidemic to date, of which there is still no cure for HIV/AIDS.\(^7\) Once a person is infected with HIV, the genetic material of HIV becomes a permanent part of the DNA of the infected person, the infected person then becomes a carrier of the HIV virus for life.\(^8\) It has been estimated that there were 34 million people infected globally with the HIV virus at end of 2010.\(^9\) On a positive note there has been a decrease in the number of new HIV infections across the globe.\(^10\) The decrease can be attributed to continuous efforts made by the UN and other international organisations. One of the UN’s more recent endeavours is a declaration adopted in June 2011 by the General Assembly.\(^11\)

The declaration is aimed at intensifying efforts to reduce the spread of HIV globally by 2015.\(^12\) Despite the decrease in the number of new infections and AIDS related deaths, there is still a high level of new infections.\(^13\)

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\(^12\) Ibid.

In sub-Saharan Africa the percentage of newly infected people dropped by 16% compared to 2001.\textsuperscript{14} The number of AIDS related deaths also decreased in 2010 by 29% compared to 2005.\textsuperscript{15} In other areas on the other hand the number of new HIV infections continues to rise, namely the Middle East, North Africa, Eastern Europe and central Asia.\textsuperscript{16} South Africa has been no exception to the HIV epidemic, it is in fact is one of the countries with the highest prevalence. In its mid-year statistical release of 2011, Statistics South Africa estimated the total number of people living with HIV at approximately 5.38 million.\textsuperscript{17}

HIV/AIDS is not just a medical problem but affects all spheres of society. A number of instances have arisen around the world whereby people have been charged under criminal offences and convicted of acts that transmit HIV or risk transmission.\textsuperscript{18}

\textbf{1 2 HIV and Criminal Law}

In 2010 a German Pop Star, Nadja Benaissa, was charged and convicted of causing grievous bodily harm by engaging in unprotected sexual intercourse with her boyfriend even though she was aware of her HIV positive status.\textsuperscript{19} The court handed down a sentence of two years suspended imprisonment and 300 hours community service.\textsuperscript{20} Democratic Alliance leader and Western Cape Premier Helen Zille made reference to case of Nadja Benaissa.\textsuperscript{21} Zille welcomed the conviction of the pop star. Zille attributed lack of personal responsibility to social ills such as HIV and called for imposition of the criminal law:

\begin{itemize}
  \item [\textsuperscript{19}] Scott Sky News Online \textit{Pop Star Gets Suspended Sentence in HIV Case} \url{http://news.sky.com/home/showbiz-news/article/15707221} (accessed on 21/03/2012).
  \item [\textsuperscript{21}] \textit{Ibid}.
\end{itemize}
“Social pathologies are complex, but I think we must all agree that promoting a culture of personal responsibility is essential to addressing all these things. We also need to take action against people who are HIV-positive and knowingly have unprotected sex without disclosing their status. This, I believe, is an offence on a par with attempted murder. This is complex and difficult, and requires enormous courage from the wronged sexual partner to lay a charge and give evidence.”

This begs the question does criminal law have a role to play in the context of HIV infections and what instances render criminal law applicable to wilful HIV infections.

Burchell describes 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.”

Criminal law is used as a mechanism to deter people from committing acts which are harmful to certain interests of society. Those who violate criminal laws, if proved, can be convicted of a criminal offence and are liable to punishment. It is submitted that these functions of criminal law can have a role to play in harmful HIV behaviour. Harmful HIV related behaviour is attributed to the wilful transmission of HIV and can constitute a crime in certain instances. Under the South African law a person who intentionally transmits the HIV virus to another can be charged with murder, culpable homicide, assault, assault GBH and attempts to commit these crimes. The UN advised that countries should guard against dropping the threshold of culpability below intention when using criminal law for intentional HIV transmissions. The wilful transmission of HIV relates to intention in the legal sense of the word. However in some jurisdictions people were prosecuted for acts which are not intentional or even harmful. In Egypt during 2008 men were being arrested under article 9(c)

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22 Ibid.
23 Burchell Principles of Criminal Law 1.
of Law 10/1961 merely for being HIV positive.\textsuperscript{29} In 2008 a man in Switzerland was held liable for negligently transmitting HIV even though he believed he was not infected with HIV at the time of the transmission.\textsuperscript{30} Application of the criminal law should have parameters in order to safeguard against using it as a tool for discrimination and stigmatisation. Some examples of wilful HIV transmissions are injecting a person with HIV positive blood with the intention to infect, knowingly having unprotected sex or not disclosing ones HIV status before engaging in sexual intercourse and rape.\textsuperscript{31}

1 3  Necessity, Hypothesis and Objectives of the Study

The increasing number of deliberate infections, the high level of HIV infections coupled with high level of violent crimes and sexual violence in South Africa, render the enquiry into criminal law measures necessary.\textsuperscript{32} Can a person be held criminally responsible for wilfully transmitting HIV? It is my hypothesis that the wilful transmission of HIV can result in criminal liability. The objectives of the study address the following:

1. To determine whether it is possible to hold someone criminally responsible for the wilful transmission of HIV;

2. to establish the medical facts relating to HIV infection;

3. to examine the requirements of criminal liability for wilful HIV transmissions;

4. to set forth the position with regard to criminal liability in South Africa for wilful HIV infections;

5. to investigate whether the creation of HIV specific statutes is warranted to address wilful HIV infections;

\textsuperscript{29} Clayton “HIV is a Virus not a Crime: Ten Reasons against Criminal Statutes and Against Criminal Prosecutions” (2008) Journal of International Aids Society \url{http://www.jiasociety.org/content/11/1/7} (accessed on 01/12/2011).

\textsuperscript{30} Ibid.


6. to compare the law of South Africa with the laws of foreign jurisdictions for wilful HIV infections.

1 4    Methodology

The researcher consulted with the following texts and materials: books, journals, reports cases, bills and legislation by means of obtaining such materials from libraries and the internet. Information pertinent to the study was extracted from these texts and analysed, compared and then articulated. Reports obtained online were sourced from official websites of the United Nations, World Health Organisation, Department of Justice and other prominent international organisations and websites dealing with HIV. Latest and current HIV statistics and medical fact sheets were mainly sourced online due to accessibility. The materials have been cross checked with other authoritative sources.

1 5    Structure

**Chapter 1**: This chapter provides an introduction to the topic. It looks at the epidemic of HIV on a global level and defines the applicability of criminal law in the context of wilful HIV infections. The chapter further sets forth the necessity, hypothesis, methodology and objectives of the study as well as the structure of the treatise.

**Chapter 2**: Chapter two examines medical aspects which are relevant to the enquiry of criminal liability for wilful HIV infections. Factors such as HIV and the window period are discussed. Other factors such as modes of transmission, the progression of HIV to AIDS, testing, treatment, prevention, high and low risk activities are also discussed with regard to its relevance to the study.

**Chapter 3**: Chapter three examines the general elements of common law to be proved for criminal liability to ensue in the context of wilful HIV infections.

**Chapter 4**: Chapter four discusses the desirability of using the criminal law in wilful HIV transmissions and the need for HIV specific legislation.
**Chapter 5:** Chapter five sets forth the criminal law offences in South Africa applicable to wilful HIV infections and how it is applied.

**Chapter 6:** This chapter sets forth the law used in Canada, Zimbabwe and the United States of America in respect of wilful HIV infections and compares it with the South African law.

**Chapter 7:** Conclusion and Recommendations

Chapter seven draws a conclusion of the enquiry into criminal liability for wilful HIV infections and sets forth recommendations.
CHAPTER TWO
MEDICAL ASPECTS OF HIV

2 1 Introduction

The consideration of certain medical aspects is necessary in the assessment of criminal liability for harmful HIV infections. Factors such as HIV and the window period, the course of HIV to AIDS, how HIV is transmitted, high and low risk activities and the prevention of HIV are considered in light of their impact on the assessment of criminal liability.

2 2 HIV and the Window Period

From the time of being infected with HIV and throughout the window period, an HIV positive person will not know their status even if tested for HIV. The window period varies from person to person and can last up to six months or longer. HIV will only be detected after the window period has expired in its host. The window period is still an infectious stage and an HIV positive person can infect others during this period, whilst being unaware of their status. It is submitted that the window period is a significant factor in the determination of criminal liability for wilful HIV infections. Awareness and knowledge of one’s HIV status is critical in the determination of the element of intention for wilfully transmitting HIV. It can therefore be deduced that one cannot be held criminally liable for the wilful transmission of HIV during the window period as the infected person will not have knowledge of their status.

2 3 The Course of HIV to AIDS

Attacks by the HIV virus over time damage the CD 4 cells weakening the body’s ability to ward off infections, hence making the HIV positive person more susceptible to other

35 Ibid.
36 Ibid.
37 Ibid.
38 Snyman Criminal Law 181.
opportunist infections which causes AIDS. The CDC also lists vaccinations which causes AIDS. There is no cure for HIV/AIDS. Hence preventative measures such as using a condom when engaging in sexual intercourse and disclosing one’s HIV positive status is key in the reducing the spread of HIV. The genetic material of HIV becomes a permanent part of the DNA of a host, the host then becomes a carrier of the HIV virus for life. ARVs can only reduce the rate of damage to the immune system by keeping the level of HIV in the body low, thus prolonging the progression from HIV to AIDS. Taking this fact into account it can be said that to wilfully infect another with HIV is harmful behaviour which causes irreparable damage to the victim. Criminal law is therefore justified in its use to punish an offender who wilfully infects another with HIV.

2.4 Transmission of HIV

HIV is present in blood and other bodily fluids like semen, breast milk and vaginal tissue of an HIV positive infected person. HIV is transmitted if one of these body fluids penetrates a mucous membrane, damaged tissue or the blood stream of a person. HIV will have to get past the body’s defences such as skin and saliva, therefore a person with an open wound would be more susceptible to an HIV infection.

The chance of HIV surviving outside the body is miniscule hence making environmental transmission small. HIV requires a host for survival hence it does not spread or maintain

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infectiousness outside its host. HIV is not transmitted by casual contact with HIV positive people such as shaking hands, hugging or sharing a meal with an HIV positive person. Nor is HIV transmitted by insect bites, coughing or sneezing.

HIV can be transmitted in the following ways:

“Unprotected penetrative (vaginal or anal) and oral sex with an infected person
Blood transfusion with contaminated blood
By using contaminated syringes, needles or other sharp instruments
From an infected mother to her child during pregnancy, childbirth and breast feeding.”

Single exposures such as in the case of single sexual exposure or sexual assault or single incidence of rape make it difficult to determine the risk of HIV transmission; however high risk activities coupled with violence or force increase the risk of transmission.

2.5 High and Low Risk Activities

As noted earlier transmission outside the body is remote therefore activities that would constitute a high risk in transmission are needle sharing, unprotected sexual intercourse and instances of broken condoms during sex. In these instances there is direct access for a fluid with a high HIV concentration to enter the body of another. Oral sex poses a lower risk of transmission as opposed to high risk activities mentioned above. Saliva, urine and tears of an HIV positive person contains small quantities of HIV hence making transmission miniscule to none. However HIV can still be transmitted during low risk activities if the

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51 Ibid.
52 Ibid.
57 Ibid.
blood or semen of the HIV infected person enters the body of the other through any cuts or open sores.\footnote{59}

\section*{2.6 Prevention}

The method of decreasing the risk of HIV infection depends on the type of risk activity. Condoms should be used during sexual activity, drug injections should not be shared, pregnant women who are HIV positive women should not breast feed, open cuts and sores should be protected from contact with blood.\footnote{60} The use of condoms as a preventative measure during sexual activity is highly effective. HIV cannot penetrate latex or polyurethane condoms. Condoms can enhance the prevention of HIV infection by 80\% to 97\% and fewer than 2\% break during usage.\footnote{61} Condoms however must be stored used and disposed of correctly to effectively prevent the transmission of HIV during sexual activity.\footnote{62} ARV’s do not prevent HIV transmission. As noted above condoms can be an effective measure in prevention of HIV infection. In \textit{S v Booysens} the SCA held:

\begin{quote}
“The appellant did not use a condom. This is yet another aggravating factor, specifically at a time when the whole world is grappling with the scourge of the HIV and AIDS pandemic. The majority of rape victims are not only left to deal with the physical, emotional and psychological trauma of the rape, but are also exposed to the possible hardships associated with living with HIV, its side effects and stigma. The only manner in which victims may be protected is through anti-retroviral drugs, which also have side effects.”\footnote{63}
\end{quote}

The SALC has stated that it is doubtful whether condoms will be used in the commission of sexual offences.\footnote{64} It remains to be seen whether this warning will have an impact on the behaviour of perpetrators.

\begin{itemize}
\item \textit{The Body HIV Transmission} \url{http://www.thebody.com/content/art30024.html?getPage=2#q6} (accessed on 27/04/2011).
\item \textit{Stopping the Spread of HIV} Fact Sheet 150 \url{http://www.aidsinfonet.org/fact_sheets/view/150} (accessed on 27/04/2011).
\item Avert: Using Condoms, Condom Types and Sizes \url{http://www.avert.org/condom.htm} (accessed on 27/04/2011).
\item \textit{S v PB} 2011 (1) SACR 448 par 20.
\end{itemize}
HIV testing is important in order for persons to have knowledge of their status. Furthermore the earlier HIV is detected, the faster ARV’s can be administered to slow the rate of progression from HIV to AIDS and prevent the contraction of opportunistic diseases. The right to privacy in the Constitution underpins the policy on testing. Testing individuals for HIV is done on a voluntary and informed basis. However the compulsory testing of HIV is provided for by the Sexual Offences Act 2007. According to the Sexual Offences Act a victim or interested party acting on behalf of the victim may make an application for the HIV testing of an alleged sex offender. However the matter has to be considered by a magistrate who on the basis of the evidence submitted decides whether to make an order and will only do so if there is prima facie evidence that:

“(a) a sexual offence has been committed against the victim by the alleged offender;

(b) the victim may have been exposed to the body fluids of the alleged offender; and

(c) no more than 90 calendar days have lapsed from the date on which it is alleged that the offence in question took place”.

An order for the compulsory testing is a serious matter and it is not arbitrarily granted. A person who maliciously invokes the sections in order to know the HIV status of another or who contravenes confidentiality of the test results as contemplated in the Act will be guilty of an Offence and will be liable to a fine or imprisonment. It is submitted that to allow testing of offenders when there is no prima facie evidence, will not justify a limitation to the accused’s right to privacy.

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65 Compulsory Testing in Terms of the Sexual Offences Act
66 No 32 of 2007 s 32.
69 Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 s 32.
70 Ibid.
71 Ibid.
28 Treatment

Anti-retroviral treatment is a medical means used to slow the rate of progression of HIV to Aids.\textsuperscript{72} Most people in the world infected with Aids are in the middle to low income countries.\textsuperscript{73} In these countries where there is limited access to laboratories therefore the WHO clinical staging is used to determine when the use of ARV’s is necessary.\textsuperscript{74} In higher income countries the presence of symptoms, CD 4 cell count and viral load are indicators of the necessity of treatment.\textsuperscript{75}

PEP stands for post-exposure prophylaxis and is a short term antiretroviral therapy used as a preventative measure where there has been a risk of transmission of HIV. In terms of the Sexual Offences Act,\textsuperscript{76} a victim who has been exposed to the risk of being infected with HIV is entitled to the administration of PEP to guard against an HIV infection. The receipt of PEP in terms of the aforementioned Act is subject to the proviso that the incident had to have been reported within 72 hours after the alleged offence took place that the matter had to have been reported to the South African Police Service or a designated health establishment in the prescribed manner.\textsuperscript{77}

29 Conclusion

As noted the medical aspects discussed above play an important role in the determination of criminal liability for wilful HIV infections. The seriousness and irreparable harm caused by the wilful infection of HIV justifies the imposition of criminal law.\textsuperscript{78} There is no cure for HIV and when HIV becomes AIDS it leads to death. This is constitutes harm which justifies punishment and imposition of the criminal law for the intentional transmission of HIV.\textsuperscript{79} The

\textsuperscript{72} WHO HIV/AIDS Antiretroviral therapy http://www.who.int/hiv/topics/teatment/en/ (accessed on 01/05/2011).
\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid.
\textsuperscript{76} Criminal Law (Sexual Offences and Related Matters) Amendment Act No 32 of 2007 s 32.
\textsuperscript{77} S 28.
\textsuperscript{78} Stopping the Spread of HIV http://www.aidsinonet.org/fact_sheets/view/150 (accessed on 27/04/2011).
window period during which HIV is latent, affects the knowledge of one’s status.\(^{80}\) A person’s knowledge of their HIV positive status is a crucial factor in determining the wilful transmission of HIV.\(^{81}\) The element of intention cannot be established without proof of knowledge.\(^{82}\) Activities creating a higher risk of transmission are more susceptible to criminal transmission than activities that do not pose a high risk of transmission.\(^{83}\) In terms of prevention of HIV, the use of condoms was noted as the most effective means of preventing HIV transmission.\(^{84}\) The court in *S v Booysens*,\(^{85}\) during the sentencing of an HIV positive rapist, held that not using a condom was an aggravating factor.\(^{86}\) Whether this will have any impact on the behaviour of criminals remains to be seen. The SALC had mentioned that it is unlikely that rapists would use condoms.\(^{87}\)

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80 UNAIDS Fact Sheets on *HIV/AIDS for Nurses and Midwives* Fact Sheet 1

81 UNAIDS Fact Sheets on *HIV/AIDS for Nurses and Midwives* Fact Sheet 1

82 Snyman *Criminal Law* 181.


85 *S v PB* 2011 (1) SACR 448 par 20.

86 Ibid.

CHAPTER THREE
GENERAL ELEMENTS FOR CRIMINAL LIABILITY IN TERMS OF
THE COMMON LAW

3.1 Introduction

Criminal liability requires proof that the accused committed a voluntary act or omission which was unlawful with the requisite fault and criminal capacity.\(^88\) An additional requirement of causation is necessary to be proved for completed crimes.\(^89\) The general elements for criminal liability under the common law are conduct, unlawfulness, causation, criminal capacity and fault.\(^90\) These elements have to be proved beyond a reasonable doubt.\(^91\) These elements will be discussed with a view of its application in the context of wilful HIV infections.

3.2 Conduct

Unlike the element of causation, which is only a requirement only in result crimes, conduct is a requirement for each and every crime.\(^92\) Two types of conduct are distinguished; either a commission or omission in relation to a specific activity, notwithstanding the fact that conduct may appear in various forms.\(^93\) Whilst a commission requires positive action an omission consists of not taking action.\(^94\) An example of a commission in the context of deliberate HIV infections would be to inject a person with HIV positive blood.\(^95\) An act must be voluntary this means that conduct, which is not mechanical in nature but rather conduct that is controlled by the accused’s will.\(^96\) Hence it is submitted that the wilful transmission of HIV is voluntary in nature in that the perpetrator transmits the HIV virus with the intention of transmitting it. Conduct during ones sleep or whilst having an epileptic fit is not controlled

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\(^{88}\) Burchell *Principles of Criminal Law* 1.

\(^{89}\) Burchell *Principles of Criminal Law* 209.

\(^{90}\) Burchell *Principles of Criminal Law* 138.

\(^{91}\) Ibid.

\(^{92}\) Visser and Vorster’s *General Principles of Criminal Law through Cases* 45.

\(^{93}\) Burchell *Principles of Criminal Law* 185-186.

\(^{94}\) Burchell *Principles of Criminal Law* 186.

\(^{95}\) Makaula and Mnisi “HIV Nurse got ‘off too lightly’” News 24


\(^{96}\) Burchell *Principles of Criminal Law* 179; Snyman *Criminal Law* 54.
by the person who is asleep or having a fit.\textsuperscript{97} In such instances the person is acting without motive or intention but rather in a mechanical fashion.\textsuperscript{98} The duty to act is not limited to the dictates of the definition of a crime it can also exists where the accused was bound by a legal duty to act and failed to do so.\textsuperscript{99} An example of conduct in the form of an omission could be the non-disclosure of one’s HIV status prior to engaging in unprotected sex.\textsuperscript{100}

3.3 Unlawfulness

Unlawfulness is described as:

“An act which is in conflict with a directive or prohibition of criminal law is prima facie unlawful.”\textsuperscript{101}

The test for determining unlawfulness is objective and based on public policy; hence the mind of the accused is not taken into account.\textsuperscript{102} The rational considerations of society should dictate that unlawfulness only covers harmful sexual behaviour in the HIV and criminal law context.\textsuperscript{103}

A relevant ground of justification for unlawfulness is consent.\textsuperscript{104} Therefore for criminal liability in the context of wilful HIV transmission to be successful, a defence of consent to transmission of HIV must be absent. It is a function of criminal law to protect an individual against harm.\textsuperscript{105} But what if the individual him or herself consents to the harm? The UN recommended that PLWA should be free to consent to participate in activity that carries the risk of contracting HIV when equipped with full knowledge, even if the risk is substantial.\textsuperscript{106} Should the criminal law be used to punish the wrongdoer notwithstanding the victims consent? The crime of murder for example is not justifiable with the consent of the victim,

\textsuperscript{97}Snyman \textit{Criminal Law} 54.

\textsuperscript{98}Visser and Vorster’s \textit{General Principles of Criminal Law through Cases} 49.

\textsuperscript{99}Card, Cross and Jones \textit{Criminal Law} 18\textsuperscript{th} ed (2008) 43.


\textsuperscript{101}Visser and Vorster’s \textit{General Principles of Criminal Law through Cases} 143.

\textsuperscript{102}Joubert \textit{LAWSA XI Criminal Law} par 37.


\textsuperscript{104}Ibid.


for policy reasons.\textsuperscript{107} Our law does not allow you to consent to serious injury.\textsuperscript{108} An individual’s right to liberty and privacy has to be weighed against the function of criminal law to protect a person against harm.\textsuperscript{109} Sometimes it may be necessary though, in order to protect an individual to impose laws that are paternalistic.

The principles of public policy are applied to decide whether consent in the relevant circumstances is legally recognised, as a defence.\textsuperscript{110} The SALT states that the victim must have full awareness (knowledge) of the accused’s HIV positive status and associated dangers to qualify as a defence.\textsuperscript{111} Burchell’s view is that public policy would require a HIV positive person to disclose their status before engaging in sexual activity that is unprotected or at least take the precaution of using a condom.\textsuperscript{112} The UN advocates that criminal sanctions should only apply to cases of deceit.\textsuperscript{113} Full awareness clearly makes participation consensual, mere non-disclosure should not amount to a criminal offence.\textsuperscript{114} The case of \textit{R v Clarence} created the precedent that consent to sex was consent to a veneral disease.\textsuperscript{115} In this case a man did not disclose to his wife that he was infected with gonorrhoea before engaging in sexual intercourse with her.\textsuperscript{116} The court found that his non-disclosure did not vitiate her consent.\textsuperscript{117} The Canadian court in the case of \textit{R v Cuerrier} did not follow this principle and held that true consent to risk of HIV infection during unprotected sex would require disclosure from the HIV positive partner prior to engaging in sexual intercourse.\textsuperscript{118} In the case of \textit{R v Dica} the court held that the court held that consent would not be a defence in the case of intentional transmission.\textsuperscript{119} The SALT points out that consent on the part of the informed victim could either be accepted by the court as legally valid or on the contrary the court may adopt a paternalistic approach and reject consent as being a valid defence due to the extent of the

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\begin{flushright}
\textsuperscript{107} Joubert \textit{LAWSA XI Criminal Law} par 60.
\textsuperscript{108} Snyman \textit{Criminal Law} 126.
\textsuperscript{109} Snyman \textit{Criminal Law} 123.
\textsuperscript{110} Burchell \textit{Principles of Criminal Law} 333.
\textsuperscript{112} Burchell \textit{Principles of Criminal Law} 342.
\textsuperscript{114} \textit{Ibid}.
\textsuperscript{115} Burchell \textit{Principles of Criminal Law} 342.
\textsuperscript{116} \textit{Ibid}
\textsuperscript{117} \textit{Ibid}.
\textsuperscript{119} Card, Cross and Jones \textit{Criminal Law} 181.
\end{flushright}
harm posed.\textsuperscript{120} It is submitted that taking into account the principle that the court laid down in \textit{R v Cuerrier} that true consent requires disclosure of HIV and what the court held in \textit{R v Dica}, namely that consent would not be a defence in intentional HIV transmissions, it is probable that courts will not accept consent as a valid defence for the intentional transmission of HIV in South Africa.\textsuperscript{121}

\section*{3.4 Causation}

Certain crimes require that the conduct of the accused must have brought about a certain result for example in the case of murder the act of the accused must have resulted in the death of the victim – the so called completed crimes.\textsuperscript{122} In the HIV context proof is required that the accused infected the complainant with HIV.\textsuperscript{123} Whereas in the normal course of events, proof of causation is unproblematic and rarely disputed, in the HIV context on the contrary, it is extremely problematic.\textsuperscript{124} Proof of causation requires proof that the accused was HIV positive when the act was committed, this will be difficult to prove without direct evidence that the accused was HIV positive at the time of infection.\textsuperscript{125} It will also be necessary to prove that the victim actually acquired HIV from the accused and hence was HIV negative at the time that the act was committed.\textsuperscript{126} The window period will affect knowledge of one’s HIV status as during this time HIV is latent and cannot be detected.\textsuperscript{127} In South Africa prosecution of an attempt to commit a common law offence dispenses with the need to prove causation.\textsuperscript{128} In \textit{Nyalungu} the accused was charged and convicted of attempted murder, it was not necessary to prove that the accused actually infected the complainant.\textsuperscript{129} The UN provides guidance on evidence as follows:

\begin{itemize}
  \item \textsuperscript{120} SA Law Commission \textit{Aspects of the Law Relating to Aids: The Need for a Statutory Offence Aimed at Harmful HIV Related Behaviour} Project 85 (Discussion Paper 80) (2001) 82.
  \item \textsuperscript{121} Burchell \textit{Principles of Criminal Law} 342.
  \item \textsuperscript{122} Burchell \textit{Principles of Criminal Law} 141.
  \item \textsuperscript{123} SA Law Commission \textit{Aspects of the Law Relating to Aids: The Need for a Statutory Offence Aimed at Harmful HIV Related Behaviour} (2001) 78.
  \item \textsuperscript{126} Ibid.
  \item \textsuperscript{128} SA Law Commission \textit{Aspects of the Law Relating to Aids: The Need for a Statutory Offence Aimed at Harmful HIV Related Behaviour} (2001) 91.
  \item \textsuperscript{129} \textit{S v Nyalungu} 2005 JOL 13254.
\end{itemize}
“The best available scientific evidence regarding modes of HIV transmission and levels of risk must be the basis for rationally determining if, and when, conduct should attract criminal liability.”

Phylogenetic analysis is a scientific test which involves a comparison of the DNA of the HIV that the accused and complainant are infected with. It is the differences between the genetic strains of HIV that are compared to determine possibility that the complainant was infection by the accused. The test is limited by the fact that although the strains might be similar it is not definitively the accused is the source of the complainants HIV infection but merely an indicator of probability. The outcome is complicated by possibilities such as:

1. The complainant infected the defendant;
2. the person who did indeed infect the complaint has an HIV virus with a similar strain to that of the accused;
3. the complainant was already HIV-positive and was only re-infected with another strain of HIV.

Where the strains are dissimilar, however, the test is a good means of proving that the accused was not the source of infection. Completely different strains show that it is highly improbable that the accused infected the complainant. Notwithstanding its limitations, the test has been submitted as evidence in criminal trials to prove whether or not the accused infected the complainant and can lead to an acquittal. It has been advised that the evidence obtained from such a test should be seen in the light of all evidence and not in isolation.

The SALC is of the view that the evidentiary difficulties inherent in criminal prosecutions

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131 Avert Criminal Transmission of HIV http://www.avert.org/criminal-transmission.htm (accessed on 01/05/11).
132 Ibid.
133 Ibid.
135 Ibid.
136 Avert Criminal Transmission of HIV http://www.avert.org/criminal-transmission.htm (accessed on 01/05/11).
138 Ibid.
under common law emanate from the nature of HIV/AIDS rather than source of the law, being common law or statutory. Foreign jurisdictions have created crimes dispensing need to prove that that the accused actually infected the victim or complainant. Conduct which poses a risk of exposure to HIV is also a criminal offence, in addition to conduct that actually results in HIV infection. In South Africa prosecution of an attempt to commit a crime dispenses with the need to prove causation.

3 5  Criminal Capacity

Criminal capacity is viewed generally as being a prerequisite for mens rea. Criminal capacity means that the accused had the capacity to appreciate the wrongfulness of his or her conduct and to act whilst knowledgeable of the wrongfulness. Common examples of criminal incapacity are youth, mental illness and intoxication. Other examples are sane automatism and non-pathological incapacity. Therefore should a person without the requisite criminal capacity infect another with HIV, the requirements for criminal liability will not be met.

3 6  Fault

Criminal liability requires that intent or negligence relate to the factual elements of the crime in question, namely conduct, unlawfulness and causation. Intention in a legal sense can be defined as:

“[t]he will to commit the act or cause the result set out in the definitional elements of the crime, in the knowledge of the circumstances rendering such act or result unlawful”.

Intention manifests itself in different forms such as: dolus directus (direct intention), dolus indirectus (indirect intention) and dolus eventualis (legal or constructive intention).

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141 Ibid.
142 Joubert LAWSA XI Criminal Law par 72.
143 Burchell Principles of Criminal Law 147.
144 Joubert LAWSA XI Criminal Law par 72.
146 Snyman Criminal Law 181.
African criminal law embraces a form intention that is wide in the sense that it goes beyond direct and indirect intention and includes conscious risk taking. In *Nyalungu* the court held that *dolus eventualis* has been described as legal or constructive intention although not forming part of intention in the ordinary sense of the word; it is nevertheless a very important component. Although predominantly relevant in murder *dolus eventualis* it has also found relevancy in other crimes such as attempted murder, assault with intent to do GBH and rape. On a charge of attempted murder it will be sufficient to establish *dolus eventualis* if the accused had knowledge of his or her HIV positive status, knew that HIV could be transmitted by the risk activity in which he or she engaged and knew that an HIV infection could lead to death.

### 3.7 Conclusion

The element of causation presents a hurdle in application of the criminal law to harmful HIV infections. Proof that the accused is the source of the complainant’s infection is complicated by factors such as the window period and knowledge of one’s HIV status. Two solutions are available to address the difficulty encountered with the proof of causation. Firstly the phylogenetic analysis test, although it is not a means of definitely establishing that the accused infected the complainant it can definitely rule out the possibility that the accused infected the complainant, if the genetic strains of HIV of the accused and complainant differ. Using attempts to commit offences obviates the need to prove causation. In *S v Nyalungu* the court held that whether the victim was actually infected with the HIV was not relevant to the enquiry of attempted murder. Successful convictions based on criminal liability for wilful HIV infection, requires proof beyond a reasonable doubt of the general common law elements discussed in this chapter. Having considered the general common law elements of criminal liability and its applicability in the context of wilful HIV

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147 Burchell *Principles of Criminal Law* 152.
149 Snyman *Criminal Law* 184.
150 Joubert LAWSA XI *Criminal Law* par 89.
153 Ibid.
154 Avert *Criminal Transmission of HIV* [http://www.avert.org/criminal-transmission.htm](http://www.avert.org/criminal-transmission.htm) (accessed on 01/05/11).
155 Ibid.
156 *S v Nyalungu* 5.
transmissions, the possible common law offences will be discussed in the chapter five which sets out the law in South Africa.
CHAPTER FOUR
CRIMINAL LIABILITY FOR WILFUL HIV INFECTIONS AND THE
NEED FOR AN HIV SPECIFIC OFFENCE

4 1 Introduction

Prof Christa Van Wyk notes that there are two international models which deal with HIV infections, a model that promotes non-coercive measures and a model which promotes coercive measures. The model advocating a non-coercive approach entails providing people with education and information, promoting voluntary testing, counselling and anti-discriminatory legislation. Whilst the model that advocates coercive measures on the other hand, uses HIV specific criminal laws, quarantine and isolation. Zimbabwe is an example of a country that uses coercive measures. Zimbabwe has enacted HIV specific legislation which makes it an offence to deliberately transmit HIV. South Africa is an example of a country that adopts more of a non-coercive approach. The SALC has advised that criminal law measures only be used to prosecute intentional HIV infections. The SALC further advised that HIV statutes need not be enacted to deal with intentional HIV infections but that the common law offences should be utilised instead. This chapter examines the suitability of coercive measures in particular the instrument of criminal law in the context of wilful HIV infections. Does the criminal law have a role to play in wilful HIV infections and what is the extent of its application? The question of whether it necessary to enact HIV specific legislation or use the existing common law crimes is also considered.

4 2 The Role of Criminal Law

Burchell defines national criminal law as

159 Ibid.
160 Ibid.
161 Criminal Law (Codification and Reform) Act 2004 s 79.
162 Ibid.
―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.‖

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The rationale for proscribing certain conduct as crimes is to protect values and interests of society. The criminal law therefore punishes persons who violate prohibited conduct which poses harm to society. Whilst one purpose of the criminal law is punishment another is deterrence of future criminal acts. In light of this definition of criminal law can it be then said that the criminal law has a role to play in wilful HIV infections? Tierney suggests that with the correct safeguards in place use of the criminal law can serve three social objectives, namely preventing the spread of HIV, educating people about risky behaviour and reinforcing social norms by stipulating what types of conduct are prohibited. According to the court in the Canadian case of R v Cuerrier the following was stated regarding the role of criminal law:

“(T)he criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to ... abstain from high-risk activities ... Where public health endeavours fail to provide adequate protection to individuals ... the criminal law can be effective. It provides a needed measure of protection in the form of deterrence and reflects society’s abhorrence of the self-centred recklessness and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner. The risk of infection and death of partners of HIV positive individuals is a cruel and ever present reality. Indeed the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the Criminal Code. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances. It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken.”

The SALT states that the deliberate transmission of HIV in most instances will constitute a criminal offence. It is unlikely that evidence of a deliberate transmission of HIV will not be liable to conviction. This can be reinforced by the courts decision in the case of S v Nyalungu the accused was convicted of attempted murder for rape whilst knowing that he was HIV positive. If it is accepted that criminal law does have a role to play in HIV infections

164 Burchell *Principles of Criminal Law* 1.
165 Burchell *Principles of Criminal Law* 49.
167 Ibid.
170 Ibid.
171 S v Nyalungu 2005 JOL 13254 (T).
and that such application is limited to wilful or deliberate HIV infections the next question to be addresses is whether the common law is sufficient to prosecute the conduct of wilful HIV infections or is it necessary to create an HIV specific legislation in order to address same.

4.3 General or Existing Common Law Offences

The United Nations in its Policy Options Paper on the Criminalisation of HIV addressed the desirability of using criminal law in the context of HIV transmissions. The UN recommended that criminal law should only be used in limited instances *i.e.* wilful and intentional transmissions. It also set forth parameters that should States use when invoking the criminal law to be implemented and serve as a safeguard in the context of HIV transmissions. The UN strongly recommended that HIV specific laws should not be enacted but that states should rather use its existing and general criminal law offences to prosecute intentional and deliberate HIV infections. The elements of existing crimes would be used to determine guilty verdicts and sentences. It further recommended that application of the criminal law should only cover conduct that poses significant risk of infection and not conduct that does not constitute a significant risk. Irrespective of the degree of risk involved criminal law should be limited by consent. In the instances of deliberate deceit on the other hand criminal sanctions should apply. However criminal law should not apply for mere non-disclosure. Criminal liability also shall not ensue where there is no significant risk of transmission irrespective of consent or disclosure and where precautions were used.

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175 Ibid.
176 Ibid.
177 Ibid.
178 Ibid.
179 Ibid.
4 3 1   South African Law Commission

When investigating the need for a Statutory Offence aimed at harmful HIV behaviour the SALC recognised the three possible options. These options were to codify the common law, to criminalise behaviour not covered by the common law crimes or to maintain the present position.

4 3 2   Authors

South Africa adopts non-coercive measures to combat HIV transmissions generally and only uses criminal law in the case of intentional transmissions. Christa Van Wyk argues that since South Africa has reached a certain level in terms of education about HIV and the fact that SA has such a high HIV infection rate more coercive measures should be adopted. She recommended that the existing common law be codified and that new HIV specific offences be created to punish the negligent transmission of HIV. Viljoen on the other hand argues that although there may be benefits in codifying the common law it is not desirable to create HIV specific Offences, general offences should be used. Tierney suggests that although the criminal law in the United States has not shown to curb the spread of HIV, public health measures prove more effective. However, Tierney states there are still instances where the criminal law does find application. In these instances HIV specific statutes provides a more effective means and that traditional criminal law offences are not suitable in the context of HIV infections. Suhayafa Bhamjee noted:

“Nyalungu is the manifestation of the assurance given by the SALC in its 5th report.”

182 Ibid.
186 Viljoen “Stigmatising HIV/AIDS, Stigmatising Sex? A Reply to Prof Christa Van Wyk” Codicillus XXXXI No 1 12, 15 and 16.
188 Ibid.
189 Ibid.
Suhayafa stated that in the *Nyaliungu* case the common law was adequate to deal with intentional HIV behaviour without the need of an HIV specific statute, just as the SALC had stated in its findings. The issue of whether to enact HIV specific legislation or to use existing criminal law crimes is controversial as shown above. Set out below are the arguments in favour and against the creation of HIV specific laws.

### 4 4  Criminalisation of HIV

#### 4 4 1  Arguments in Favour of HIV Specific Legislation

The proponents of HIV specific laws submit that the existing laws are inadequate to deal with harmful HIV infections. The main reasons advanced relate to proof and evidence. Transmission of HIV in the sexual context would take place in private settings and therefore there would be no witnesses except one person’s word against another. Proponents argue that to prove that somebody was actually infected is a dilemma therefore; statutes could be tailored in its definition to address situations in which HIV is likely to be transmitted. They further argue that there are a limited number of possible options of crimes to secure conviction and that it is difficult to prove that a person knowingly infected another. Proponents advance that penalties provided for by the existing laws are restrictive and statutory intervention can expand on this. Transforming the common laws into statutes according to the proponents, will create certainty on what is prohibited and in doing so will have deterrent effect.

The International Consultation Paper on the criminalisation of HIV recognised that the pro HIV specific law activists further justify the need for statutory intervention as a protection measure for women and girls who are vulnerable to HIV infections especially in African

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Women are disadvantaged and vulnerable to HIV not only due to biological factors but also due to social factors and subservience to men. The activists in favour of criminalisation suggest that criminal law could reinforce the norm of respect for the physical and respect of women. They propose that criminal law will bring justice to women who are maliciously exposed to the virus. The activists have even gone as far as to advocate that the main reason for the criminalisation of HIV infections stems from the need to protect women who are vulnerable to being maliciously infected.

Proponents also advocate that education and counselling is ineffective in slowing the spread of HIV and therefore criminal law and in particular HIV specific legislation is necessary to stop the spread of HIV.

4.4.2 Arguments Against HIV Specific Legislation

Opponents of creating HIV specific legislation argue that there are already general offences which exist to prosecute intentional HIV infections. They argue that problems inherent in the prosecution of HIV infections will not be cured by HIV specific legislation. Problems relating to proof and evidence will still persist. There usually will only be one witness. Opponents suggest that unless strict liability exists, intention still needs to be proved. Criminalisation of HIV is not a method of prevention or deterrence of HIV infections according to opponents.

201 Ibid.
202 Ibid.
206 Viljoen “Stigmatising HIV/Aids, Stigmatising Sex? A Reply to Prof Christa Van Wyk” 14.
207 Ibid.
Contrary to the belief that criminalisation of HIV would protect vulnerable group and that its primary object is to protect women, several organisations and even women’s organisations are opposed to criminalisation. In the paper 10 Reasons Why Criminalisation Harms Women endorsed by 21 organisations internationally, it is believed that instead of providing justice to women criminalisation would further oppress them. These ten reasons stated are as follows:

“Women will be deterred from accessing HIV prevention, treatment, and care services, including HIV testing
Women are more likely to be blamed for HIV transmission
Women will be at greater risk of HIV-related violence and abuse
Criminalization of HIV exposure or transmission does not protect women from coercion or violence
Women’s rights to make informed sexual and reproductive choices will be further compromised
Some women might be prosecuted for mother-to-child transmission
Women will be more vulnerable to HIV transmission
The most ‘vulnerable and marginalized’ women will be most affected
Human rights responses to HIV are most effective

In actual fact it has been averred that since women are often the only parties who get tested when attending antenatal clinics they are more likely to be prosecuted.

Opponents aver that education and counselling is the most effective tool to control the epidemic. HIV specific legislation will undermine public health efforts such as education and counselling. People will be more afraid to test for HIV as knowledge of their status

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211 Ibid.
212 Ibid.
213 Tierney “Criminalizing the Sexual Transmission of HIV: An International Analysis” 488.
could implicate them in criminal prosecutions. PLWA may also be discouraged from seeking treatment.

4.5 CONCLUSION

The application of criminal law to wilful HIV infections can serve the function of deterrence and in outlawing and punishing behaviour that is harmful. The UN recommended that the criminal law should be used for intentional HIV infections only. It stated that to apply criminal law outside of intentional HIV infections would not serve the functions of criminal law to deter future harmful acts and to protect against harm. It light of the above it can be concluded that yes criminal law does have a role to play in wilful HIV infections but not to curb the spread of HIV. Arguments that were advanced in favour of HIV specific laws were that existing laws are inadequate, criminalisation will serve to protect women and that criminal law is necessary to curb the spread of HIV. Arguments advanced against the creation of an HIV positive statute were that existing criminal law offences suffice, criminal law is the very instrument that will be detrimental to women and that public health measures are most effective in curbing the spread of HIV. Due to the fact that the inefficiency of the common law has not been shown, it is not necessary to enact HIV specific laws at this stage. Use of the criminal law to prevent the spread of HIV will undermine public health measures to reduce the spread of HIV. The reasons that were advanced to support the argument that the criminalisation will be detrimental to women outweigh the argument that it will protect women. It is submitted that criminal law does have a role for the intentional transmission of HIV however due to the reasons submitted above enactment of HIV specific laws are not warranted.

215 Ibid.
216 Ibid.
CHAPTER FIVE
THE SOUTH AFRICAN PERSPECTIVE

5 1  Introduction

South Africa has the highest prevalence of HIV in the world.\(^{224}\) This coupled with the high incidence of crime and sexual violence necessitates the enquiry into the role of criminal law in the context of harmful HIV behaviour.\(^{225}\) Harmful HIV behaviour is attributed to the wilful transmission of HIV.\(^{226}\) The first criminal prosecution for the deliberate transmission of HIV in South Africa was instituted 1998.\(^{227}\) A man was charged with attempted murder for having sex with two women without disclosing his HIV positive status.\(^{228}\) In a desperate attempt to curb the spread of HIV, South Africa questioned the use of criminal law in order to combat HIV/AIDS and to address growing incidence of harmful HIV related behaviour. The SALC investigated the applicability of the common law in the context of harmful HIV related behaviour in 1995 and 2001.\(^{229}\) The SALC recommended in 1995 that whilst criminal law finds application in the context of intentional HIV transmissions enacting HIV specific legislation is not warranted.\(^{230}\) This was reiterated by the SALC in 2001.\(^{231}\) South Africa does not have any HIV specific statutes for the wilful transmission of HIV; however provisions regarding HIV transmission are included in the Criminal Law (Sexual Matters) Amendment Act 32 of 2007\(^{232}\) and the Criminal Law Amendment Act 105 of 1997 (as amended). To follow is a discussion of the possible common law offences that can be used to prosecute the wilful transmission of HIV, namely murder, attempted murder and assault. The Criminal Law Sex (Sexual Offences) Amendment Bill B50-2003, section 51(1) of the

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\(^{228}\) Ibid.

\(^{229}\) Ibid.

\(^{230}\) Ibid.


\(^{232}\) Criminal Law (Sexual Matters) Amendment Act 32 of 2007 ss 28 and 32.
Criminal Law Amendment Act 105 of 1997 (as amended), and South African case law will also be examined.

5.2 Common Law Offences

The SALC discussed the different offences that could be used to deal with harmful HIV related behaviour. The crimes that the commission stated were murder, culpable homicide, rape, assault, assault GBH and attempts to commit these crimes.233 The Sexual Offences Act234 repealed the common law definition of rape. Furthermore, criminal liability for the wilful transmission of HIV/AIDS excludes culpable homicide as a possible offence as it covers the negligent killing of another.235 The common law offences therefore, that could be used to prosecute wilful HIV infections would include the above-mentioned offences excluding rape, which is now a statutory offence, and culpable homicide as this deals with the negligent killing of another. Below is a discussion of murder, attempted murder and assault GBH, which are of particular relevance to wilful HIV infections.

5.2.1 Murder

The definition of murder is the unlawful and intentional killing of another human being.236 A charge of murder for wilful HIV infections therefore requires proof that the complainant actually infected the victim with HIV and that the victim died as a result.237

Murder is a consequence crime; hence causation also needs to be proved.238 Proof of causation for wilful HIV infections will therefore require proof that the accused actually infected the victim with HIV.239

235 Burchell Principles of Criminal Law 1.
236 Burchell Principles of Criminal Law 667.
238 Burchell Principles of Criminal Law 669.
It is submitted that murder will find limited application in the context of wilful HIV infections for the reasons listed below. Firstly, the offence of murder is limited to instances where victim dies as a result of being infected with HIV by the accused. Secondly, it is also possible that the perpetrator dies before the victim, if his or her HIV infection was at an advanced stage at the time committing the unlawful act. Thirdly a conviction of murder is further complicated by proof of causation, which does not need to be proved in the offences of attempted murder and assault.

5 2 2 Attempted Murder

As mentioned above, a conviction of murder requires that the state must prove that the accused intentionally and unlawfully intended to cause the death of the victim. Applied to the context of wilful HIV infections, conviction based on attempted murder will require proof that the perpetrator had knowledge of his or her HIV status and intent in the form of dolus directus, dolus indirectus and dolus eventualis. The factors that need to be proved in order to establish dolus eventualis are knowledge by the accused of his or her HIV status, knowledge that HIV could be transmitted by the risk activity and knowledge that HIV could result in death. Whether or not the victim was actually infected with HIV is irrelevant. Furthermore being an attempt to commit murder the actual death of the victim is also not a requirement for an offence of attempted murder.

5 2 3 Assault

There are three species of assault; common assault, assault GBH and indecent assault. The SALC described the charge of assault GBH as the most appropriate to prosecute instances of

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241 Burchell Principles of Criminal Law 669.
243 Ibid.
246 Ibid.
harmful HIV related behaviour.\textsuperscript{247} In order to establish criminal liability on the basis of assault GBH it will be necessary to prove that the accused had intention to assault the complainant and the intention to cause grievous bodily harm, either in the form of \textit{dolus directus} or \textit{dolus eventualis}.\textsuperscript{248} Grievous bodily harm entails assault by application of actual force as opposed to common assault which also encompasses assault by means of inspiring fear of an assault.\textsuperscript{249} This was described by the SALC as being the most suitable offence as no causal link is required and furthermore the victim need not actually be infected with HIV for criminal liability to ensue, mere exposure to the virus suffices.\textsuperscript{250}

5 2 4 \hspace{1em} \textbf{Suitability of the Common Law Offences}

As seen above the common law offence of murder finds limited application in the context of wilful HIV infections. The offence of murder is limited to those instances where victim actually dies as a result of being infected with HIV by the accused; furthermore it requires proof of causation.\textsuperscript{251} Attempted murder on the other hand obviates the need to prove causation and it has been used successfully in the case of \textit{S v Nyalungu}.\textsuperscript{252} Assault GBH also does not require proof of causation to found criminal liability for wilful HIV infections. Therefore it is submitted that the offences of attempted murder and assault GBH are more suitable as options to found criminal liability for wilful HIV infections. The offence of murder finds limited application.

5 3 \hspace{1em} \textbf{Sexual Offences Bills}

The Sexual Offences Project Committee attempted to include provisions relating to HIV transmissions in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.\textsuperscript{253} The first draft Bill\textsuperscript{254} was submitted to Parliament in 2003 and the second draft


\textsuperscript{248} Burchell \textit{Principles of Criminal Law} 688.

\textsuperscript{249} Ibid.


\textsuperscript{251} Burchell \textit{Principles of Criminal Law} 669.

\textsuperscript{252} \textit{S v Nyalungu} 2005 JOL 13254.

\textsuperscript{253} Department of Justice \textit{Working document submitted to the Portfolio Committee on Justice and Constitutional Development} on 10 February 2004.
Bill\textsuperscript{255} was submitted in 2004, however neither survived inclusion in the aforementioned Act.\textsuperscript{256} The Bill\textsuperscript{257} submitted to parliament in 2003 included in the definition of rape the non-disclosure of a life-threatening sexually transmissible infection.\textsuperscript{258} The Bill submitted to parliament in 2004 made the non-disclosure of one’s HIV status an offence when engaging in sexual activity.\textsuperscript{259}

The provision in the Draft Sexual Offences Bill of 2002 read as follows:

\begin{quote}
“(2) An act which causes penetration is \textit{prima facie} unlawful if it is committed—
\begin{enumerate}[label=(\alph*)]
  \item \ldots;
  \item under false pretences or by fraudulent means; or
  \item \ldots;
\end{enumerate}

(4) False pretences or fraudulent means, referred to in subsection (2) (b), are circumstances where a person—
\begin{enumerate}[label=(\alph*)]
  \item \ldots;
  \item \ldots;
  \item intentionally fails to disclose to the person in respect of whom an act which causes penetration is being committed, that he or she is infected by a life-threatening sexually transmissible infection in circumstances in which there is a significant risk of transmission of such infection to that person.”\textsuperscript{260}
\end{quote}

It has been submitted that the rationale for inclusion of this provision in the Bill was based on a misinterpretation of the case of \textit{R v Cuerrier}.\textsuperscript{261}

The provision in the Sexual Offences Bill submitted to cabinet read as follows:

\begin{quote}
“5 (1) A person (‘A’) who engages in intimate contact with another person (‘B’) and who intentionally does not disclose to B that he or she has HIV or AIDS is guilty of an offence of criminal non-disclosure of HIV or AIDS.

(2) ‘Intimate contact’ means contact of a sexual nature that exposes the body of one person to a bodily fluid of another person.
\end{quote}

\textsuperscript{254} Criminal Law Sex (Sexual Offences) Amendment Bill B50-2003.
\textsuperscript{256} Criminal Law (Sexual Offences and related Matters) Amendment Act 32 of 2007.
\textsuperscript{257} Criminal Law Sex (Sexual Offences) Amendment Bill B50-2003.
\textsuperscript{259} Criminal Law Sexual Offences Amendment Bill B 50-2003.
\textsuperscript{260} \textit{Ibid.}
(3) It is a defence to a charge under subsection (1), if B was aware that A was infected with HIV or AIDS and consented to intimate contact with that knowledge.\(^{262}\)

 Provision 5(1) of the Bill would have made it a criminal offence of non-disclosure for instances where a person did not disclose their HIV status when engaging in intimate contact with another. It is worthy of note that provision 5(2) requires mere exposure to HIV and not exposure where there is a significant of transmission.\(^{263}\) Provision three recognised consent as a defence where the accused disclosed his or her HIV status, hence limiting the offence to instances of non-disclosure.

### 5.4 Criminal Law Amendment Act\(^{264}\)

South Africa has introduced the concept of minimum sentencing where serious crimes are committed.\(^{265}\) Section 51(1) of the Act\(^{266}\) prescribes a sentence of life imprisonment for any person convicted of an offence referred to in Part 1 of Schedule 2 thereof.\(^{267}\) It is an offence in terms of Part 1 Schedule 2 of the Act\(^{268}\) for a person to have committed a crime of rape whilst knowing that he or she was HIV positive at the time the offence was committed.\(^{269}\) In *S v Chepete* the accused was sentenced to life imprisonment in terms of section 51(1) of the Criminal Law Amendment Act 105, for raping the victim whilst aware of his HIV positive status.\(^{270}\) In *S v Booyse* the SCA held that the fact that the accused did not use a condom is an aggravating factor in sentencing, specifically at a time when the whole world is grappling with the scourge of the HIV and Aids Pandemic.\(^{271}\) The victims do not only have to deal with physical emotional and psychological trauma of the rape but are also exposed to the hardships associated with living with HIV, its side effects and stigma.\(^{272}\)

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264 105 of 1997 (as amended).
266 Criminal Law Amendment Act 105 of 1997 (as amended).
267 *Ibid*.
268 *Ibid*.
269 *S 51(1) of the Criminal Law Amendment Act 105 of 1997 (as amended).*
270 *S v Chepete* ECGHC (2009-03-9) Case No 168/08.
271 *S v PB* 2011 (1) SACR 448 par 20.
272 *Ibid*.
5.5 Case Law

There have been a few instances where the criminal law was used to prosecute the intentional transmission of HIV. It is worthy of note that the first criminal prosecution was instituted in 1998. A man was charged with attempted murder as he knew he was HIV positive and had sex with two women without disclosing his status.\(^{273}\) The first case of its kind in South Africa was *S v Nyalungu* where the accused was convicted of attempted murder for intentionally transmitting HIV.\(^{274}\) In 2006 a former nurse, Pinky Mabuza, was convicted of attempted murder for deliberately injecting her stepson with HIV.\(^{275}\) She was sentenced in the Mhala Regional Court in Bushbuckridge to five years imprisonment or the option of a ten thousand rand fine.\(^{276}\) The community was outraged by the lenient sentence in light of the fact that the boy was infected with HIV and that his life would be changed forever.\(^{277}\) Another case involving the intentional transmission of HIV was in 2009 when an HIV positive infected father was charged with attempted murder for raping his son.\(^{278}\)

5.5.1 *S v Nyalungu*\(^{279}\)

The court noted that this case was the first of its kind.\(^{280}\) The victim a 26-year-old female was raped by the accused.\(^{281}\) The accused confessed to raping the victim\(^ {282}\) and his confession was corroborated by evidence.\(^{283}\) The accused appeared in the Pretoria Regional Court on four charges.\(^ {284}\) He was found guilty of two of the four charges Rape and Attempted murder.\(^ {285}\) The fact that he raped the victim whilst knowing that he was HIV positive resulted in a conviction of attempted murder by the trial court.\(^ {286}\) The case was sent to the Pretoria


\(^{274}\) *S v Nyalungu* [2005] JOL 13254 (T).


\(^{276}\) Ibid.

\(^{277}\) Ibid.

\(^{278}\) Ibid.


\(^{280}\) *S v Nyalungu* [2005] JOL 13254 (T).

\(^{281}\) *Supra* *S v Nyalungu* 5.

\(^{282}\) *Supra* *S v Nyalungu* 2.

\(^{283}\) *Supra* *S v Nyalungu* 2.

\(^{284}\) *Supra* *S v Nyalungu* 2.

\(^{285}\) *Supra* *S v Nyalungu* 1.

\(^{286}\) *Supra* *S v Nyalungu* 5.
High Court for sentencing, rape in the circumstances attracted a life sentence in terms of the Criminal Procedure Act 105 of 1997 as the accused knew that he was HIV positive at the time of the crime. The legal question to be considered in this case was whether a conviction of attempted murder is in line with our law. The court stated that causation was not in issue but that the elements of the crime in question were act, unlawfulness and intention. Whether or not the victim was infected with HIV was considered as an irrelevant fact to the enquiry. It was certain that the accused engaged in sex and the act was unlawful. The element that was in issue was intention. The accused did not have direct intention therefore the question was whether the accused had intention in the form of dolus eventualis.

In terms of the evidence the accused knew that he was HIV positive and despite this knowledge proceeded to rape the victim. He also knew he could infect another with HIV through sex and that HIV could cause the death of another person. Despite the fact that the accused had knowledge of his HIV infection and the consequences of having unprotected sex, he nevertheless engaged in risky behaviour.

5.6 Conclusion

South Africa has elected not to enact legislation which specifically criminalises wilful HIV infections but uses the common law instead to prosecute such conduct. The approach adopted by South Africa not to enact legislation which specifically criminalises wilful HIV infections is in line with the United Nations recommendations that countries should rather apply general criminal law offences and not create specific offences to deal with intentional or reckless HIV infections. The draft Sexual Offences Bill sought to introduce intentional HIV transmissions as a provision; however it did not survive inclusion in the Sexual Offences Act. Although South Africa does not have legislation specifically for intentional HIV

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287 Supra S v Nyalungu 4.
288 Supra S v Nyalungu 5.
289 Supra S v Nyalungu 5.
290 Supra S v Nyalungu 5.
291 Supra S v Nyalungu 5.
292 Supra S v Nyalungu 5.
293 Supra S v Nyalungu 5.
294 Supra S v Nyalungu 5.
295 Supra S v Nyalungu 6.
296 Supra S v Nyalungu 6.
297 Supra S v Nyalungu 20.
transmissions the Criminal Procedure Act addresses intentional infections in two aspects. Rapists who know that they are HIV positive when they commit the crime of rape face stricter bail requirements and sentencing.\textsuperscript{299}

It is concluded that the case of \textit{S v Nyalungu} shows that the South African common law is adequate to deal with intentional HIV infections.

\textsuperscript{299} \textit{S v PB} 2011 (1) SACR 448 par 20.
CHAPTER SIX
A COMPARATIVE STUDY ON THE CRIMINALISATION OF WILFUL HIV INFECTION

6.1 Introduction

This chapter provides an outline of how the issue of criminalisation of wilful HIV infection has been dealt with in South Africa and internationally. The comparative study will be done between South Africa and the following countries, namely, Canada, the United States of America, and Zimbabwe. Criminal trials have taken place in many countries around the world for HIV infections. As will be seen from the discussion below, countries such as the United States of America and Zimbabwe have enacted laws to specifically deal with HIV Infections whilst other countries such as Canada and South Africa use the existing offences.

6.2 South Africa

In 1995 the SALC stated that it was not necessary to create new statutory offences to deal with intentional HIV infections and that the existing common law be used in South Africa.  

It was further concluded that although criminal law is not a measure to prevent the spread of HIV, it finds application in cases of intentional HIV transmission. In 2001, the South African Law Commission undertook a comprehensive review of the need for an HIV-specific criminal law. It concluded:

“an HIV-specific statutory offence/s will have no or little practical utility; the social costs entailed in creating an HIV-specific statutory offence/s are not justified; and an HIV-specific statutory offence/s will infringe the right to privacy to an extent that is not justified”


301 Ibid.

6 2 1 Common Law Offences

The SALC discussed the different offences that could be used to deal with harmful HIV related behavior.\(^{303}\) The crimes that the SALC stated were murder, culpable homicide, rape, assault, assault GBH and attempts to commit these crimes.\(^{304}\) As discussed in Chapter Five on the South African perspective, the above-mentioned offences could be used to prosecute willful HIV transmissions excluding rape, which is now a statutory offence, and culpable homicide which applies to negligent transmissions.

6 3 Canada

Canada has not enacted HIV specific legislation. Existing offences under the Criminal Code\(^{305}\) are used to prosecute HIV infections.

Even though it is a criminal offence to transmit HIV to another, under the Criminal Code,\(^{306}\) there is no specific section dealing with the transmission of HIV.\(^{307}\) Certain charges have been laid against people for conduct that carries a risk of transmitting HIV or is perceived to carry such a risk.\(^{308}\) These are assault in terms of section 265,\(^{309}\) assault causing bodily harm in section 267\(^{310}\) and aggravated assault in section 268. Section 265\(^{311}\) of the Criminal Code describes the general elements that underlie all of the assault offences, including assault, assault causing bodily harm, aggravated assault, sexual assault and aggravated sexual assault.

Section 180\(^{312}\) of the Canadian Criminal Code defines Common Nuisance as an unlawful act or failure to discharge a legal duty and, as a result, endangers the lives, safety or health of the

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\(^{304}\) Ibid.


\(^{306}\) Ibid.


\(^{308}\) See R v Cuerrier 1998 127 (3d) 1 (SCC), R v Williams 2003 2 SCR 134 (SCC).


\(^{310}\) Ibid.

\(^{311}\) Ibid.

\(^{312}\) Ibid.
public.\textsuperscript{313} As a result of this section there have been a number of criminal prosecutions in Canada which involved sexual activities by HIV positive persons.\textsuperscript{314}

In terms of section 229 of the \textit{Criminal Code} a person commits a murder if he or she causes the death of another human being, either

(a) with the intent to cause death,
(b) with the intent of causing bodily harm that she or he knows is likely to cause death, or
(c) showing reckless disregard as to whether death ensues from that act or not.

Attempted murder is also an offence, where a person does something with the intent to cause another person’s death.\textsuperscript{315} In 2009 a precedent was set in Canada when one man was charged with murder for infecting two women, who subsequently died with HIV.\textsuperscript{316}

Attempted murder charges have been laid in a few cases in Canada, in which a person has deliberately exposed someone else to blood; although in some cases the risk has been minimal, raising the question of whether such serious charges are appropriate. For example, in one case, an HIV-positive man was convicted of attempted murder for having deliberately cut his finger before engaging in a fistfight outside a bar.\textsuperscript{317}

The accused \textit{R v Cuerrier}\textsuperscript{318} was charged with two counts of aggravated assault pursuant to section 268 of the \textit{Criminal Code}.\textsuperscript{319} The accused was warned by a public health nurse to inform all prospective sexual partners that he was HIV-positive and was advised to use condoms every time he engaged in sexual intercourse, notwithstanding this the accused proceeded to have unprotected sexual relations with the two complainants without informing them he was HIV-positive. The complainants had consented to unprotected sexual intercourse with the accused, however they both testified at trial that if they had known that he was HIV positive they would never have engaged in unprotected intercourse with him.\textsuperscript{320} The

\textsuperscript{313} S 180(2)(a).
\textsuperscript{315} S 239.
\textsuperscript{316} \textit{R v Aziga} 2008 OJ No 3053.
\textsuperscript{317} \textit{R v MacKenzie} 1993 (unreported).
\textsuperscript{318} \textit{R v Cuerrier} 1998 127 CCC 3d 1 SCC.
\textsuperscript{319} \textit{R v Cuerrier} 2.
\textsuperscript{320} \textit{R v Cuerrier} 2.
court held that a person who knows that he or she is HIV positive and has unprotected sex with another person without disclosing this fact is fraudulent conduct that vitiates consent.

The accused R v Aziga\(^{321}\) faced 13 counts of aggravated sexual assault and two counts of first-degree murder for not disclosing his HIV status before having unprotected sex. Seven of the 13 women complainants contracted HIV and two died of AIDS related illnesses.\(^{322}\) The accused eventually pleaded guilty to 15 counts of aggravated sexual assault. In 2009, Aziga was found guilty of two counts of murder in the first degree, 10 counts of aggravated sexual assault, and one count of attempted aggravated sexual assault by the Hamilton Superior Court jury.\(^{323}\) Aziga was sentenced to life imprisonment with no possibility of parole for 25 years.\(^{324}\) In 2011 Johnson Aziga was sentenced to an indefinite sentence in terms of the Dangerous Offenders Act.\(^{325}\)

6.4 Zimbabwe

Zimbabwe became the first African country to create an HIV-specific criminal law.\(^{326}\) In August 2011 a Member of Parliament, Siyabonga Malandu-Ncube was facing charges of deliberately infecting a female journalist with HIV.\(^{327}\) Currently there is one piece of legislation that specifically deals with the transmission of HIV.

The Criminal Law (Codification and Reform) Act, 2004, came into effect in 2006.\(^{328}\) In terms of section 79 of the Criminal Law Code,

“Any person who-

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\(^{321}\) R v Aziga 2008 OJ No 3053.

\(^{322}\) Ibid.


\(^{324}\) Yau “Crime in Canada” (6-12-2011) http://www.crimeincanada.wordpress.com/1900-1920/page/2 (accessed on 16/03/2012).


(a) knowing that he or she is infected with HIV; OR
(b) realizing that there is a real risk or possibility that he or she is infected with HIV; intentionally does anything or permits the doing of anything which he or she knows will infect or does anything which he or she realizes involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV, whether or not he or she is married to that other person, and shall be liable to imprisonment for a period not exceeding twenty years.\(^\text{329}\)

Although section 79 refers to deliberate transmissions, the wording is wide enough to cover conduct neither being deliberate nor actually transmitting HIV.\(^\text{330}\) Cameron describes section 79 of the Zimbabwe Criminal Law (Codification and Reform) Act 23 of 2004 to be an extraordinary piece of legislation.\(^\text{331}\) Cameron states:

“\(\text{\ldots}\) makes it a crime for anyone who realizes that there is a real risk or possibility that he or she might have HIV; to do anything that he or she realizes involves a real risk or possibility of infecting another person with HIV.\(^\text{332}\)"

The Zimbabwean courts have ever since the enactment of the Act, seen an increasing number of cases in which former lovers bring charges against each other claiming that the ex-partner knowingly and wilfully transmitted HIV.

\section*{6.5 United States of America}

Unlike South Africa and Canada that use existing criminal law offences to deal with wilful infection of HIV, in United States of America, the Presidential Commission on the Human Immunodeficiency Virus Epidemic concluded that HIV infected individuals who knowingly conduct themselves in ways that pose significant risk of transmission to others must be held accountable for their actions.\(^\text{333}\) The Commission appealed to state legislature to adopt criminal statutes relating specifically to HIV infections.\(^\text{334}\) This resulted in several states enacting new legislation specifically criminalising certain behaviour by people with HIV/AIDS. There are 36 states in the USA that criminalise behaviour related to HIV.

\begin{itemize}
\item \(^\text{329}\) Criminal Law (Codification and Reform) Act, 2004 s 79.
\item \(^\text{331}\) Ibid.
\item \(^\text{332}\) Ibid.
\item \(^\text{334}\) Ibid.
\end{itemize}
The majority of these laws impose liability only on persons who are aware of their HIV status and fail to disclose it to a sexual partner. The statutes vary from one State to another in their details. It ranges from prohibitions against the intentional transmission of HIV to another, to more detailed statutes that attempt to define the precise conduct that is criminalized. Most statutes require neither specific intent nor actual transmission of HIV to trigger prosecution, and, indeed, in most cases that have been prosecuted transmission has not occurred. Such states include Alabama, Arkansas, California, Illinois and Louisiana, which will be explained in detail below.

6.5.1 Alabama

Alabama has one statute that allows for criminal prosecution for related to transmission of STDs including HIV. In terms of Ala. Code § 22-11A-21(c)

“any person afflicted with an STD who knowingly transmits, assumes the risk of transmitting, or does any act which will probably or likely transmit such disease to another person is guilty of a class C misdemeanor”.337

HIV is included in terms of Al. Admin. Code r. 420-4-1-03, therefore, in Alabama, someone with an STD, including AIDS, can be charged with a misdemeanor for knowingly transmitting, assuming the risk of transmitting, or committing any act that could potentially transmit the STD.

Arkansas

In Arkansas, it is a class A felony for a person who knows that he or she has tested positive for HIV to expose another to HIV

(1) through the transfer of blood or blood products, or

(2) by engaging in sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, without first having informed the other person of the presence of HIV. The emission of semen is not a required element of the crime.

California

California is more expressive when it comes to unprotected sexual intercourse as it clearly states that any person who exposes another to HIV by engaging in unprotected sexual activity (anal or vaginal intercourse without a condom) when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony. A person's knowledge of his or her HIV-positive status, without additional evidence, is not sufficient to prove specific intent. The state of California further provides for sentence enhancement in terms of which, when a person commits a sexual offence with the knowledge that he or she is infected with HIV at the time of commission shall receive a 3 year enhancement for each violation in addition to the sentence provided for the sexual offence.

Illinois

In terms of the Illinois Transmission of HIV Act 720 ILCS 5/12-162,

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338 Ibid.
339 Ibid.
340 Ibid.
“a person who knows that he or she is infected with HIV commits criminal transmission of HIV if he or she (1) engages in contact with another person involving the exposure of the body of one person to a bodily fluid of another in a manner that could result in HIV transmission; (2) transfers, donates or provides his or her blood, tissue, semen, organs or other potentially infectious body fluids for administration (e.g., transfusion) to another person, or (3) in any way transfers to another any non-sterile IV or intramuscular drug paraphernalia”.

The actual transmission of HIV is not a required element of this crime. It is an affirmative defense that the person exposed knew the infected person was infected with HIV, knew the action could result in infection, and consented with that knowledge.

6 5 5    Louisiana

It is unlawful for any person to intentionally expose another to HIV through sexual contact or through any means or contact (including spitting, biting, stabbing with an HIV contaminated object, or throwing of blood or other bodily substances) without the knowing and lawful consent of the victim. The offence under this code is punishable by a fine not more than $5000, imprisonment with or without hard labor for not more than 10 years, or both.

6 6    A Comparison of the South African Law with the Law of Canada, Zimbabwe and the United States of America

As seen above South Africa and Canada both use traditional/general offences to address the intentional and reckless transmission of HIV. South Africa uses the offences of murder, attempted murder and assault under the common law. In Canada on the other hand these general offences of murder, attempted murder and assault falls under the Criminal Code. Canada in addition uses the offence of common nuisance to prosecute an unlawful act or failure to discharge a legal duty and, which as a result, endangers the lives, safety or health of the public. Furthermore, under the Canadian common law there is a legal duty to disclose your HIV positive status to sexual partners before having sex that poses a significant risk of

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343 Ibid.
HIV transmission, whereas in South Africa there is no legal obligation to disclose one’s HIV status. However the public health sector in South Africa does encourage for people to inform their sexual partners if they are HIV positive. Naylor argues that to adopt the recommendation by the South African Council of Churches to impose a legal duty to disclose ones HIV status would be counteractive to public health measures of encouraging testing.

The difference between South Africa and Zimbabwe lies in the fact that while South Africa uses the existing common law to prosecute willful transmissions of HIV, Zimbabwe has created specific sections under the Criminal Law (Codification and Reform) Act, 2004 that criminalizes the deliberate transmission / exposure to HIV. Zimbabwe and most states in the United States of America share common ground in respect of enacting HIV specific legislation.

As noted above, most states in the USA, unlike South Africa, have criminalized the intentional and reckless transmission of HIV. The majority of these laws impose liability only on persons who are aware of their HIV status and fail to disclose it to a sexual partner. Although there is no legal duty to disclose in South Africa, non-disclosure of ones HIV status when engaging in risk activity is a factor taken into account to found liability in terms of the common law offences. The state of Illinois created an HIV specific statute to deal with the intentional transmission or exposure of HIV, namely the Illinois Transmission of HIV Act. According to the Act the actual transmission of HIV is not a required element of this crime. In South Africa an attempt to commit the common law offences also does not require the actual transmission of HIV. Illinois Transmission of HIV Act further provides the defence of consent if the person exposed knew the infected person was infected with HIV, knew the

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348 Bowman Gilfillan Ribisi In sickness and in Health: At what point in a romantic Relationship is there a duty to disclose One’s HIV Positive Status (2006) http://www.bowman.co.za/LawArticles/Law-Article-id--2064025105.asp.
353 720 ILCS 5/12-162.
action could result in infection, and consented with that knowledge.\textsuperscript{356} A similar provision was proposed for inclusion in the Sexual Offences Act in South Africa. A draft bill in 2004 was submitted to parliament and thereafter Cabinet.\textsuperscript{357} It contained provisions, which made the intentional non-disclosure of ones HIV positive status an offence when engaging in intimate contact. It also provided for the defence of consent where if the complainant had knowledge of the accused’ HIV status.\textsuperscript{358}

6 7 Conclusion

The general common law offences under the South African common law adequately deals with the willful transmission of HIV, hence enacting legislation which specifically deals with HIV, as done in Zimbabwe and some states in the USA, is not warranted.

\textsuperscript{358} Ibid.
CHAPTER SEVEN
CONCLUSION

7.1 Application of the Criminal Law

This study set out to prove the hypothesis that the wilful transmission of HIV can incur criminal liability. Harmful HIV infections are attributed to the wilful transmission of HIV and it has been established that criminal law does have a role to play in the wilful transmission of HIV.\(^{359}\) In South Africa common law offences of murder, attempted murder and assault GBH may be used to prosecute the intentional transmission of HIV.\(^{360}\) Criminal law must be used within parameters to safeguard against misuse to HIV transmission. The UN set forth guidelines to be adhered to when using the criminal law.\(^{361}\) The UN has advised criminal law may appropriately be applied to those who intentionally or recklessly transmit HIV or expose others to a significant risk of infection, as in these cases the person is aware that their conduct risks harming another.\(^{362}\) It advised against the creation of HIV specific legislation and recommends that existing general criminal law be used.\(^{363}\) The UN further advises that criminal liability for negligent transmission or exposure should be avoided, given the absence of this awareness, and the persistence of misinformation about modes of transmission and levels of risk.\(^{364}\) Criminal liability should not be imposed on any person unless it is proved, in accordance with the applicable standard of proof in that jurisdiction’s criminal law, that the person knew he/she was infected with HIV, and that he/she knew the conduct of which they are accused posed a significant risk of transmitting the virus.\(^{365}\)


\(^{362}\) Ibid.

\(^{363}\) Ibid.

\(^{364}\) Ibid.

\(^{365}\) Ibid.
South Africa uses the criminal law in line with the guidelines suggested by the UN; in particular it has not created HIV specific legislation. The UN further recommended that governments that already have HIV-specific criminal laws should repeal them as well as laws that directly mandate disclosure of HIV status, and other laws which are counterproductive to HIV prevention, treatment, care and support efforts, or which violate the human rights of people living with HIV.  

South Africa and Canada opted to use existing laws to prosecute wilful transmission of HIV, which falls in line with the UN recommendations. South Africa is viewed as a country where there are still high levels of discrimination against people living with HIV, and that therefore a specific law criminalizing HIV transmission should not be implemented. Criminalization would defeat attempts to encourage testing and voluntary disclosure. It will also further perpetrate stigma, creating a parallel society of “us” and “them.” In Canada critics have argued that there is little reason to think that the criminal law plays any significant role in reducing the spread of HIV. Despite claims to the contrary, applying criminal law to HIV risk behaviour has not been shown to reduce the spread of HIV by incapacitating or rehabilitating particular offenders, or by deterring others. Indeed, what little evidence there is suggests the absence of any deterrent impact.  

On the other hand some states in the United States of America have acted upon the recommendation of the United States of America’s Presidential Commission on the HIV Epidemic, by adopting criminal statutes relating specifically to HIV transmission. However some authors believe that in South Africa if the legislature had created and HIV specific

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legislation, it would not survive a constitutional challenge, as South Africa’s constitution is more specific than the U.S. Constitution in its due process, privacy, and liberty guarantees.372

The Policy Recommendations made by the American Bar Association questioned the deterrent effect of criminal sanctions and pointed out the variety of harms that may flow from such a response, such as stigmatization and invasion of privacy.373 It further concluded that existing civil and criminal remedies are available to prosecute the instances in which specific criminal sanctions might apply and that HIV-specific criminal sanctions should only play a limited role in combating the HIV epidemic.374

The Zimbabwean Members of Parliament have admitted that their present laws on criminalisation of HIV transmission are wide in scope and seek to punish and control. They declare that it hampers efforts to deal with HIV openly without fear and secrecy thereby discouraging disclosure, testing and uptake of health care services.375 One Zimbabwean HIV activist, head and founder of Choose Life, an organisation in Zimbabwe, that addresses HIV in communities and schools, pointed her view on Criminalisation that

“it serves to deepen the prejudice surrounding AIDS and that it adds to peoples fear of being tested and adds to the stigmatisation linked to being HIV positive”.376

South Africa, Canada, members of the Zimbabwean Parliament as well as the American Bar Association have all concluded that the use of criminal law and the use of specific HIV-related crimes, as a form of deterrent are not effective in combating the spread of HIV infections and it creates some form of stigmatization towards people living with HIV.

374 Ibid.
7.3 Conclusion and Recommendations

In conclusion one should consider the words of the South African judge and HIV activist living with the disease, Edwin Cameron, when stating that

“the role of the law in a public health crisis should be to contain the epidemic and to mitigate its impact.”

He adds that

“The law’s function should be primarily protective and should aim to save the uninfected from infection and to protect the infected from the unjust consequences of public panic.”

Therefore in line with the United Nation’s guiding principles, whilst the criminal law should only find application in exceptional cases \textit{ie} the intentional transmission of HIV, it is recommended that HIV specific statutes should not be enacted and existing HIV specific statutes should be repealed.

\footnote{\textit{Human Rights Protected?} Nine Southern African Country Reports on HIV, Aids and the Law 2007, iv.}
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## CANADA

- Criminal Code, Revised Statute of Canada, 1985

## ZIMBABWE

- Criminal Law (Codification and Reform) Act, 2004

## UNITED STATES OF AMERICA

- Arkansas Code Annotated § 5-14-123
- California Health and Safety Code § 120291
- Illinois Transmission of HIV Act 720 ILCS 5/12-162
# APPENDIX A

## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
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<tr>
<td>ARVs</td>
<td>Anti-Retroviral Drugs</td>
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<td>CPA</td>
<td>Criminal Procedure Act 51 of 1977</td>
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<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
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<td>PEP</td>
<td>Post Exposure Prophylaxis</td>
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<td>PLWA</td>
<td>People Living with HIV/Aids</td>
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<td>SALC</td>
<td>South African Law Reform Commission</td>
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