The Criminalisation of HIV Transmissions in South Africa

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SUMMARY

The HIV/AIDS pandemic sent shock waves through the world when it first appeared in around 1981. Globally, jurisdictions conceived different measures and mechanisms aimed at curbing both the spread of the virus and the premature deaths associated with the virus. The international community's work has focused its attention on advocating for those living with the virus, rather than on giving guidance and binding principles to states on how best to approach the risks associated with the virus. In the absence of proper guidance from the international community, some countries have resorted to creating HIV-specific legislation aimed at punishing those who maliciously contribute to the spread of the virus. In other countries that shun the creation of such laws, the approach has been to rely on existing criminal sanctions to punish malicious and intentional transmission of HIV. South Africa has predominantly opted to adopt the latter approach. The article analyses and explores the approach adopted by South Africa, using both common-law and legislative measures to sanction the intentional transmission of HIV where the perpetrator knew they were HIV positive. The article further analyses and critically discusses how courts have interpreted existing laws to hold accountable those who knowingly transmit the virus.

KEYWORDS: HIV transmission, criminalisation, minimum sentences

1 INTRODUCTION

The Human Immunodeficiency Virus (HIV) and Acquired Immunodeficiency Syndrome (AIDS) epidemics remain a serious public-health challenge facing the world population. Since the beginning of the epidemic, more than 70 million people have been infected with HIV, and about 35 million of those have died. Globally, in 2023, approximately 39.9 million individuals were living with HIV, with estimates ranging from 36.1 million to 44.6 million.[1] Also in 2023, approximately 1.3 million people (estimates range from 1 million to 1.7 million) were newly diagnosed with HIV.[2] Since the beginning of the

[1] UNAIDS "Global HIV & AIDS Statistics – Fact Sheet" (undated) https://www.unaids.org/en/resources/fact-sheet (accessed 2024-09-06).

[2] *Ibid*.

https://doi.org/10.17159/sbsvej90

epidemic, approximately 42.3 million people (estimates range from 35.7 million to 51.1 million) have succumbed to AIDS-related illnesses.[3] HIV and AIDS have formed part of the South African landscape since the first report in 1983,[4] and as of 2023, South Africa is reported to be a country with one of the highest number of people living with HIV/AIDS in the world.[5] As of 2023, approximately 8.45 million individuals in South Africa are living with HIV, which represents an estimated 13,9 per cent of the total population.[6] In reaction to the rapidly expanding epidemic, numerous efforts were initiated to curb the transmission of HIV.[7] Countries such as South Africa, Botswana and Namibia have addressed HIV issues in general legislation without adopting HIV-specific laws. In 2020, UNAIDS received reports from 92 countries indicating that they have enacted laws, either specific or general, to criminalise the non-disclosure, exposure and transmission of HIV.[8] The law is considered, by some, as a structural tool that can shape individual behaviour in the context of public-health challenges such as HIV, and orient how states respond to these challenges.

This article examines the context in which South Africa can punish malicious transmission of HIV. What constitutes malice may differ from one country to another. Deciding how far lawmakers should go in punishing malicious acts is even more complex. For the purposes of this article, criminalisation pertains to both the creation of laws aimed explicitly at punishing actions that could spread HIV and the enforcement of existing laws in a manner that disproportionately affects individuals with HIV engaged in such behaviours. What may be considered malicious in one jurisdiction may be considered innocent in another. Another aspect that needs closer examination is proving intent to cause harm. In addressing the issues above, the article considers international law, foreign jurisprudence, and the position in South Africa. 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. For the purpose of the analysis, the article refers to both the arguments for and against the criminalisation of HIV infections.

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3 *Ibid*.

4 Karim and Karim *HIV/AIDS in South Africa* (2005) 31.

5 Zuma, Simbayi, Zungu, Moyo, Marinda, Jooste, North, Nadol, Aynalem, Igumbor, Dietrich, Sigida, Chibi, Makola, Kondlo, Porter and Ramlagan "The HIV Epidemic in South Africa: Key Findings From 2017 National Population-Based Survey" 2002 19(13) *Int J Environ Res Public Health* 8125.

6 Bisnauth "Offer Better HIV Care to Migrant Women in South Africa" (4 July 2023) https://www.wits.ac.za/news/latest-news/opinion/2023/2023-07/offer-better-hiv-care-to-migrant-women-in-south-africa.html#:~:text=Around%208.45%20million%20people%20in,reducing%20the%20rate%20of%20transmission (accessed 2024-09-06).

7 Sun Goo "Does Criminalisation of HIV Transmission Truly Promote Public Health Goals: Review of Ten African HIV Laws" 2008 9(3) *Medical Law International* 245–262 245.

8 UNAIDS "HIV Criminalization" (undated) https://www.unaids.org/sites/default/files/media_asset/01-hiv-human-rights-factsheet-criminalization_en.pdf (accessed 2024-09-06) 1.

2 EXTRACTS FROM INTERNATIONAL LAW AND FOREIGN JURISPRUDENCE

Prof Christa Van Wyk notes that there are two international models that deal with HIV infections: one promoting non-coercive measures and the other promoting coercive measures.[9] The model advocating a non-coercive approach entails providing people with education and information, promoting voluntary testing, counselling and anti-discriminatory legislation.[10] The model advocating 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.[11] Under international law, each country can choose which behaviours and practices should be subject to criminal law. However, principles of criminal law and human rights should guide the definition and content of criminal-law offences and related penalties.[12] The UNAIDS Policy Brief notes that the two main reasons given for criminalising HIV transmission are to punish harmful conduct by imposing criminal penalties, and to prevent HIV transmission by deterring or changing risk behaviour.[13] The UNAIDS Policy Brief advises that criminal liability should not be extended to reckless conduct.[14] Such broad application, it argues, could expose many people to possible prosecution without their being able to foresee their liability for such prosecution. UNAIDS further calls on governments to restrict criminalisation to instances of intentional transmission, meaning situations where an individual is aware of their HIV-positive status, intends to spread the virus and does so.[15] It further advises that, in cases of violent crimes such as rape or sexual assault that involve the transmission of HIV or a considerable risk of transmission, the offender's HIV-positive status can be viewed as an aggravating factor during sentencing, but only if the individual was aware of their HIV-positive status at the time the crime was committed.[16] In the context of HIV, the Global Commission on HIV and the Law previously issued a report observing that "punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring HIV are fuelling the epidemic".[17] The report argues that punitive laws targeting individuals who

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9 Van Wyk "The Need for a New Statutory Offence Aimed at Harmful HIV-Related Behaviour" 2000 41 *Codicillus* 3.

10 *Ibid.*

11 *Ibid.*

12 Bassiouni "Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions" 1993 3(2) *Duke Journal of Comparative and International Law* 235–298 276.

13 UNAIDS Policy "Brief: Criminalization of HIV Transmission" (2008) https://data.unaids.org/pub/manual/2008/jc1601_policy_brief_criminalization_long_en.pdf (accessed 2024-09-06).

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 Global Commission on HIV and the Law "Risks, Rights and Health" (2012) https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf (accessed 2024-09-06) 29.

do not harm others contribute to the spread of HIV and hinder users from accessing HIV and health-care services.[18]

The UNAIDS guidance note on ending the overly broad criminalisation of HIV non-disclosure, exposure and transmission is, to date, the most elaborate global document specifically addressing and providing recommendations on the criminalisation of HIV non-disclosure, exposure and transmission.[19] The guidance note expounds on earlier UN recommendations on HIV and criminal law. It sets out key principles that should guide any use of criminal law in this area.[20] These principles include:

a) limiting criminal liability to cases of intentional HIV transmission (negligent or reckless transmission should not be criminalised);
b) no criminal liability in cases of mere non-disclosure or exposure where transmission has not occurred;
c) no criminal liability in cases involving condom use;
d) no criminal liability where the person living with HIV has a low viral load or is on effective treatment;
e) no criminal liability when the person did not know his or her HIV status; and
f) no criminal liability in case of disclosure of HIV status before a sexual act.

Although no global human-rights treaty expressly addresses HIV, there is a wealth of norms and principles in general human-rights treaties that is relevant to HIV and the protection of people living with or affected by the epidemic. In particular, the open-ended grounds for prohibiting discrimination based on "other status" in the International Covenant on Civil and Political Rights (ICCPR),[21] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[22] and the Convention on the Rights of the Child (CRC)[23] have been or can be interpreted to include non-discrimination based on health and HIV status. Moving closer to South Africa, the review of HIV-specific laws in sub-Saharan Africa shows that nearly all of the countries (24 out of 26) criminalise HIV non-disclosure, exposure or transmission.[24] Since 2005, approximately 14 nations in West and Central Africa have enacted new legislation that makes HIV transmission a criminal offence.[25] Of the

18 *Ibid*.

19 UNAIDS "Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations" (20 May 2013) https://www.unaids.org/sites/default/files/sub_landing/files/20130530_Guidance_Ending_Criminalisation.pdf (accessed 2024-09-06) 7–10.

20 *Ibid*.

21 UNGA *International Covenant on Civil and Political Rights* 999 UNTS 17 (1966). Adopted: 16/12/1966; EIF: 23/03/1976.

22 UNGA *International Covenant on Economic, Social and Cultural Rights* (ICESCR) 993 UNTS 3. Adopted: 16/12/1966; EIF: 03/01/1976.

23 UNGA *Convention on the Rights of the Child* 1577 UNTS 3 (1989). Adopted: 20/11/1989; EIF: 02/09/1990.

24 Eba "HIV-Specific Legislation in Sub-Saharan Africa: A Comprehensive Human Rights Analysis" 2015 *African Human Rights Law Journal* 250.

25 Global Commission on HIV and the Law "Regional Dialogue: Africa 3–4 August 2011, Pretoria, South Africa FACT SHEET: HIV and Criminal Law" (undated)

countries in East and Southern Africa, 86,7 per cent have enacted similar legislation.[26] Comoros and Mauritius are the only two countries with HIV-specific laws that do not criminalise HIV non-disclosure, exposure and transmission.[27] Of the 24, seven countries allow for criminal liability based on negligence or recklessness.[28] In 16 countries, vague criminal-law provisions could be invoked to prosecute a woman who transmits HIV to her child during pregnancy, delivery or breastfeeding.

Zimbabwe became the first African country to create an HIV-specific criminal law.[29] The Criminal Law (Codification and Reform) Act was enacted in 2006.[30] Section 79 of Zimbabwe's Criminal Law (Codification and Reform) Act (Criminal Code) explicitly addresses the prosecution of individuals living with HIV for actions related to transmission and exposure.[31] Although section 79 refers to deliberate transmissions, the wording is wide enough to cover conduct neither deliberate nor transmitting HIV.[32] Zimbabwe's section 79 has been criticised for convicting individuals without meeting the scientifically established standards of proof required to establish guilt beyond a reasonable doubt for the elements of the offence.[33] Section 79 in Zimbabwe was repealed by the Marriages Act in 2022. During the announcement of the repeal in Parliament, Minister Ziyambi Ziyambi, the Minister of Justice, Legal and Parliamentary Affairs in Zimbabwe, remarked:

> "[T]he global thinking now is that that law stigmatises people living with HIV and studies have shown that it does not produce the intended results. What the ministry is going to do is to repeal that section of the law and ensure that we keep up to speed with modern trends in the world."[34]

UNAIDS welcomed the repeal, contending that criminalising HIV transmission is not effective, perpetuates discrimination, and hinders efforts to reduce new HIV cases.[35] However, UNAIDS's joy was short-lived, as, two years later, the Zimbabwean government introduced a Bill intending to recriminalise the transmission of HIV. The Criminal Laws Amendment (Protection of Children and Young Persons) Bill[36] intends to protect children and include HIV as one of the transmissible diseases criminalised by section

https://hivlawcommission.org/wp-content/uploads/2017/06/Criminalisation-Factsheet-EN.pdf (accessed 2024-09-08).

26 Eba 2015 *African Human Rights Law Journal* 250.

27 *Ibid*.

28 *Ibid*.

29 Kanyangarara "Proposed Use of the Criminal Law to Deal With HIV Transmission in Zimbabwe" 1999 4(2) *Canadian HIV/AIDS Policy & Law Newsletter* 98–101.

30 23 of 2004.

31 *Ibid.*

32 *Ibid*

33 Raw, Clayton, Mundawawara and Jamela "Using Science for Justice: The Implications of the Expert Consensus Statement on Zimbabwe's HIV Criminalisation Law" 2020 1 *University of Oxford Human Rights Hub Journal* 1–29 2.

34 Sachiti "Zimbabwe: Decriminalisation of HIV Transmission A Milestone Development" (21 March 2022) *The Herald*.

35 UNAIDS "UNAIDS Welcomes Parliament's Decision to Repeal the Law That Criminalizes HIV Transmission in Zimbabwe" (18 March 2022) https://www.unaids.org/en/resources/presscentre/pressreleaseandstatementarchive/2022/march/20220318_law-hiv-transmission-zimbabwe (accessed 2024-09-04).

36 4 of 2024.

79 discussed above. Section 78 contained a similar provision to section 79, but, although it criminalised other viruses, it did not include HIV transmissions in its list, as the virus was provided for separately under section 79.

Another African country worth considering is Sierra Leone. Sierra Leone is a small, economically disadvantaged nation located in West Africa. The total population is 8.6 million (as of April 2024), with a per capita gross domestic product of 587 US dollars, and more than 60 per cent of the residents live below the poverty line.[37] In Sierra Leone, the transmission of HIV is regulated by the Prevention and Control of HIV and AIDS Act.[38] The first recorded instances of HIV/AIDS in Sierra Leone were reported in 1987, and involved 10 HIV-positive individuals from among commercial sex workers.[39] Article 21(1) of the Act requires anyone aware of being HIV positive to take reasonable steps to prevent transmission of the virus, including from a pregnant woman to a foetus.[40] Article 21(1) further requires the HIV-positive party to inform their sexual partner in advance that they are HIV-positive.[41] Article 21(2) of the Prevention and Control of HIV and AIDS Act of Sierra Leone, before its amendment, provided that:

> "Any person who is and is aware of being infected with HIV or is carrying and is aware of carrying HIV antibodies shall not knowingly or recklessly place another person, and in the case of a pregnant woman, the foetus, at risk of becoming infected with HIV, unless that other person knew that fact and voluntarily accepted the risk of being infected with HIV."[42]

Article 21 of the Act criminalises any contravention of the above provisions, including a mother knowingly transmitting the virus to her foetus. The outcry created by these provisions and their potential negative impact on women's willingness to come forward for HIV services led to the revision of Sierra Leone's HIV law to explicitly exclude the prosecution of mother-to-child transmission of HIV.[43]

In Kenya, the criminalisation of HIV is regulated by the HIV and AIDS (Prevention and Control) Act.[44] The Act, which took effect on 10 September 2018, aimed at preventing and managing the spread of HIV and AIDS, as well as strengthening the legal and human rights of individuals who are infected with or impacted by these conditions.[45] According to this Kenyan

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37 Statista "Sierra Leone: Total Population From 2019 to 2029" (15 April 2024) https://www.statista.com/statistics/1044783/total-population-of-sierra-leone/ (accessed 2024-09-08).

38 2007.

39 UNAIDS "Sierra Leone National AIDS Response Progress Report 2014" (March 2014) https://www.unaids.org/sites/default/files/country/documents/SLE_narrative_report_2014.pdf (accessed 2024-09-08).

40 Prevention and Control of HIV and AIDS Act, 2007.

41 *Ibid.*

42 Art 21(2) of the Prevention and Control of HIV and AIDS Act, 2007.

43 S 37(2)(*g*) of the HIV Law of Sierra Leone of 2011.

44 2017.

45 National AIDS Control Organisation "The HIV & AIDS (P & C) Act, 2017" (undated) https://naco.gov.in/hiv-aids-p-c-act-2017#:~:text=The%20HIV%20and%20AIDS%20(Prevention,affected%20by%20HIV%20and%20AIDS (accessed 2024-09-11).

legislation, anyone who is aware of their HIV status and knowingly or recklessly creates a risk of other people contracting HIV can be held criminally liable. What the legislation criminalises is the risk of virus transmission.[46] The transmission of the virus is not a prerequisite for criminal liability. However, section 24(2) of the Act, which criminalises the conduct, considers it a defence that another person knew the potential transmitter was HIV positive and voluntarily accepted the risk. Another contentious provision in Kenyan law is section 26 of the Sexual Offences Act.[47] The section makes it a crime intentionally to transmit or expose someone to life-threatening sexually transmitted infections, such as HIV.[48] The section further states that any person found guilty of contravening it must be sentenced to a minimum of 15 years.[49] In December 2018, a petition declaring section 26 unconstitutional was filed at the Nairobi High Court.[50] Justice Ong'udi rejected the petition, affirming the constitutionality of the law.[51]

Laws criminalising HIV and their implementation have faced significant criticism for being overly broad and for unjustly infringing on human rights, including worsening stigma towards individuals living with HIV.[52] Moreover, these laws have faced criticism for being enforced in a way that contradicts scientifically based knowledge of HIV and how it spreads.[53] Medical and scientific advances in the context of HIV demonstrate that people with a low viral load or who are on effective HIV treatment pose no significant risk of transmission.[54] Therefore, recognising these two factors as excluding criminal liability aligns with the best scientific and medical evidence relating to HIV. Recently, several scientists, public-health authorities and courts in Europe and Canada have concluded that people with a low viral load or who are on effective HIV treatment should not be criminalised for HIV non-disclosure, exposure and transmission.[55] Some organisations argue that many African countries use criminal laws to address specific types of

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46 Art 24(2) of the HIV and AIDS (Prevention and Control) Act, 2017.

47 3 of 2006.

48 *Ibid.*

49 S 26(9) of the Sexual Offences Act 3 of 2006.

50 KELIN "KELIN Disappointed by High Court Judgment in HIV Criminalisation Case" (24 January 2023) https://www.kelinkenya.org/kelin-disappointed-by-high-court-judgment-in-hiv-criminalisation-case/#:~:text=24%20January%202023%20%E2%80%93%20Nairobi%2C%20Kenya&text=This%20law%20criminalises%20deliberate%20transmission,Petition%2C%20upholding%20the%20law' (accessed 2024-09-11).

51 *Ibid.*

52 National AIDS Control Organisation "The HIV & AIDS (P & C) Act, 2017" (Undated) https://naco.gov.in/hiv-aids-p-c-act-2017#:~:text=The%20HIV%20and%20AIDS%20(Prevention,affected%20by%20HIV%20and%20AIDS (accessed 2024-09-11).

53 *Ibid.*

54 Cohen, Chen, McCauley, Gamble, Hosseinipour, Kumarasamy, Hakim, Kumwenda, Grinsztejn, Pilotto, Godbole, Mehendale, Chariyalertsak, Santos, Mayer, Hoffman, Eshleman, Piwowar-Manning, Wang, Makhema, Mills, De Bruyn, Sanne, Eron, Gallant, Havlir, Swindells, Ribaudo, Elharrar, Burns, Taha, Nielsen-Saines, Celentano, Essex and Fleming "Prevention of HIV-1 Infection With Early Anti-Retroviral Therapy" 2011 365(6) *The New England Journal of Medicine* 493–505 365.

55 Loutfy, Tyndall, Baril, Montaner, Kaul and Hankins "Canadian Consensus Statement on HIV and Its Transmission in the Context of the Criminal Law" 2014 *Canadian Journal of Infectious Diseases and Medical Microbiology* 135–140.

consensual sexual behaviours that are seen as inappropriate within their societies.[56]

3 ARGUMENTS FOR AND AGAINST CRIMINALISATION OF HIV INFECTIONS

3 1 Arguments in support of the criminalisation

Proponents of the criminalisation of HIV non-disclosure, exposure or transmission argue that it may help prevent behaviour that leads to HIV transmission, educate the public on HIV and reinforce social norms against reprehensible HIV-related behaviour.[57] The arguments in favour of using criminal punishment against persons found guilty of transmitting HIV/AIDS are grounded in the retributive and deterrent functions of criminal law.[58] The general argument for criminalisation is that the epidemic continues to spread despite the present preventative methods that have been put in place. The understanding is that, given the fatal and debilitating effects of HIV/AIDS, the law should punish those who willfully or recklessly transmit it to innocent victims. Punishment, it has also been argued, can serve as an effective deterrent to others.[59] It has, thus, been contended that criminalisation can curb the spread of HIV/AIDS by reducing new infections. The argument for special legislation criminalising HIV/AIDS transmission proceeds from the assumption that criminal punishment can play an important role in containing the spread of the pandemic. However, those in favour of criminalisation also recognise that the general criminal law is an inappropriate method for addressing HIV/AIDS transmission for several reasons. These include the fact that HIV/AIDS present unique evidentiary problems relating to proof of a criminal transmission, as not all transmissions may be criminally culpable.[60] Furthermore, the acts involved in the transmission may not easily satisfy the requirements of the existing crimes. Another important obstacle to the successful prosecution of HIV/AIDS transmission-related cases under general criminal law lies in the defence of consent. In cases of consensual sex, it is difficult to prove deliberate intention to transmit HIV/AIDS.[61]

The need for a specific law criminalising the transmission of HIV/AIDS is also based on the understanding that the central objective of the general criminal law is not the prevention of the transmission of harmful diseases.[62] Given these arguments, it has been contended that a law (in the form of legislation) that is responsive to the unique problems posed by malicious or

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56 Global Commission on HIV and the Law https://hivlawcommission.org/wp-content/uploads/2017/06/Criminalisation-Factsheet-EN.pdf.

57 Van Wyk 2000 *Codicillus* 1–11 2–10.

58 Gostin "The Politics of AIDS: Compulsory State Powers, Public Health and Civil Liberties" 1989 49 *Ohio State Law Journal* 1017–1058 1038.

59 Harris "Death at First Bite: A *Mens Rea* Approach in Determining Criminal Liability for Intentional HIV Transmission" 1995 35 *Arizona Law Review* 263.

60 Harris 1995 *Arizona Law Review* 240.

61 Sullivan "AIDS and the Coercive Power of the State" 1988 23 *Harvard Civil Rights Civil Liberties Law Review* 151.

62 Smith "Sexual Etiquette, Public Interest and the Criminal Law" 1991 42 *Northern Ireland Legal Quarterly* 311.

intentional transmission of HIV/AIDS is needed. Such a law could create strict liability offences to avoid problems relating to proof of the accused's intention and express disease prevention as its principal objective. It could also specifically identify conduct that has been medically proved to transmit HIV/AIDS, thereby ensuring certainty in the law.[63] According to Sullivan, strict criminal liability that does not require intention or negligence as a form of fault could be imposed through specific affirmative duties of disclosure and precaution on certain persons.[64] Sullivan argues:

> "[T]he acts most likely to transmit AIDS typically stem not from a conscious desire to transmit AIDS but rather from the taking of risks, conscious or otherwise. Clearly, however, the criminal law can play a role in inducing people not to act when they are conscious of those risks. And even when the actor is not aware of them, the criminal law can often serve to increase the standard of care. Like strict liability crimes that help to enforce the affirmative duties of those who drive dangerous cargoes or ship dangerous drugs, the purpose here is to mould behaviour, to induce people to take care to avoid spreading a dangerous disease when they are in the best position to do so."[65]

Furthermore, the notion of strict liability in HIV-criminalising legislation could address the issue of consent, which poses challenges to prosecutions of cases of HIV/AIDS transmission in intimate relationships. Most importantly, such a law could complement rather than undermine voluntary and education-based approaches to prevent the spread of HIV/AIDS.[66] The activists in favour of criminalisation suggest that criminal law could reinforce the norm of respect for the physical body and respect for women.[67] They propose that criminal law will bring justice to women who are maliciously exposed to the virus.[68] For example, in past years, especially in Africa, certain groups have started to push for legal measures against the serious issue of women contracting HIV through sexual violence or from partners who fail to disclose their HIV status.[69]

On the arguments presented above, there has not been any scientific or related proof to support their effectiveness. There has also not been adequate and reliable qualitative data to show that the above arguments have achieved the set goals in jurisdictions where HIV transmissions are criminalised. There are several reasons for this lack of data. First, many countries do not reliably monitor HIV-related criminal cases or collect specific data dealing only with such incidents. Secondly, it is very difficult to monitor and pinpoint the reasons that HIV transmissions increase or decrease, as this could be due to many social factors. Thirdly, the inconsistencies in enforcing the said legislation make it difficult to collect

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63 Shriver "State Approaches to Criminalizing the Exposure of HIV: Problems in Statutory Construction, Constitutionality and Implications" 2001 21 *Northern Illinois University Law Review* 351.

64 Sullivan 1988 *Harvard Civil Rights Civil Liberties Law Review* 151.

65 *Ibid.*

66 Smith 1991 *Northern Ireland Legal Quarterly* 330.

67 SA Law Commission *Aspects of the Law Relating to Aids: The Need for a Statutory Offence Aimed at Harmful HIV Related Behaviour* (2001) 122.

68 SA Law Commission *Aspects of the Law Relating to Aids* 10.

69 Open Society Foundation "Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission" (undated) https://www.opensocietyfoundations.org/publications/ten-reasons-oppose-criminalization-hiv-exposure-or-transmission (accessed 2024-09-16) 1.

reliable data that can be used to determine whether the legislation achieves its set goals. Also, any country that aims at criminalising malicious HIV transmissions must ensure that they have first laid the foundation, focusing on public awareness of legislation and educational programmes to minimise punishing ignorant behaviours more than malicious conduct.

3 2 Arguments against HIV-criminalising legislation

Despite the arguments put forward by proponents for criminal sanction, there is an equally overwhelming response strongly opposed to the criminalisation of the transmission of HIV/AIDS. Over the years, serious concerns have been raised about the application of criminal law, whether in the form of HIV-specific provisions or general criminal-law offences. The concerns have arisen in the context of decisions to prosecute individuals who allegedly do not disclose their HIV status before sexual relations (HIV non-disclosure), who expose others to HIV (HIV exposure), or who transmit HIV (HIV transmission). These concerns have also been linked to the human-rights and public-health consequences of applying the criminal law in the context of HIV. Human-rights-related concerns point to the fact that such criminalisation: first, often ignores the latest scientific and medical knowledge relevant to HIV; secondly, disregards generally applicable criminal-law principles; and thirdly, frequently results in disproportionately harsh sentences.[70]

An argument against creating HIV-specific legislation is that there already exist in many jurisdictions general offences to prosecute intentional HIV infections.[71] However, those who advance this reasoning forewarn that while pursuing legal action in cases of intentional transmission under current criminal statutes is suitable, caution is necessary to avoid an overly broad application of these laws.[72] According to the opponents, criminalisation of HIV is not a prevention method or a deterrence against HIV infections. Another challenge posed by criminal sanctions is that the risk of criminal liability discourages people from getting tested or treated for HIV. In countries like South Africa, where prenatal HIV testing is compulsory for pregnant women, and since women are often the only parties who get tested when attending antenatal clinics, they are more likely to be prosecuted. If people know that they could be punished for exposing others to the virus, they might choose not to investigate their HIV status. This chosen ignorance may also support a defence of lack of knowledge when the matter goes to trial, where the State has to prove that the HIV transmission was intentional. There are also many practical difficulties in applying these laws. For example, the near impossibility of proving the source of an HIV infection means that criminal sanctions often focus on exposure to HIV rather than on the factual transmission. The end result is that laws tend to punish people for merely having sex if there is a risk of transmission. Criminalisation also

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70 Burris and Cameron "The Case Against Criminalisation of HIV Transmission" 2008 300 *Journal of the American Medical Association* 578–581.

71 Open Society Foundation https://www.opensocietyfoundations.org/publications/ten-reasons-oppose-criminalization-hiv-exposure-or-transmission 3.

72 *Ibid.*

tends to punish vulnerable populations – HIV-positive women in particular, who may lack the power to negotiate safer sex. Such laws foster a destructive view that some people with HIV deserve punishment while others deserve public sympathy and treatment. Justice Edwin Cameron has come out strongly on the issue of the criminalisation of HIV transmission, appealing to states not to enact criminal laws that deal specifically with HIV transmission – for several reasons.[73] The criminalisation will not reduce the spread of HIV, he argues, and will instead result in the entrenchment of the stigmatisation of those living with HIV and may become a barrier to testing and treatment.[74] It is likely to become a reason not to test, know or treat.

There is no data demonstrating that the threat of criminal sanctions significantly changes or deters the complex sexual and drug-using behaviours that may result in HIV transmission. Available data show no difference between behaviours in places where laws criminalising HIV transmission exist and where they do not.[75]

4 THE SOUTH AFRICAN POSITION ON THE CRIMINALISATION OF HIV TRANSMISSION

4 1 The legislative measures

In South Africa, we are guided by the Constitution.[76] Chapter 2 of the Constitution provides human rights that protect all who live in South Africa and includes rights to dignity, bodily integrity and privacy.[77] The rights entailed in Chapter 2 of the Constitution are relevant to the discussion, as any law that unjustifiably limits any of the rights in the chapter is unconstitutional and invalid. The criminalisation of the transmission of HIV is an issue that has already been considered by the South African Law Commission (SALC).[78] In 2001, the SALC submitted a report dealing with the issue of whether to enact legislation to punish those who transmit HIV. The enquiry was undertaken at the request of the Parliamentary Justice Portfolio Committee against a background of public concern and pressure for appropriate action regarding deliberate or knowing transmission of HIV infection.[79] This came about largely in response to several widely publicised incidents of deliberate transmission of HIV, accompanied by the very real

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73 Canadian HIV/AIDS Legal Network "Criminalization of HIV Transmission: Poor Public Health Policy" (2 December 2009) https://www.hivlawandpolicy.org/sites/default/files/Criminalization%20of%20HIV%20transmission%20Poor%20Public%20Health%20Policy-1.pdf (accessed 2024-09-16).

74 Legal Resources Centre "Do We Need to Criminalise HIV Transmission?" (undated) https://realisingrights.wordpress.com/2013/06/27/criminalising-hiv-transmission/ (accessed 2024-09-16).

75 Lazzarini, Bray and Burris "Evaluating the Impact of Criminal Laws on HIV Risk Behavior" 2002 30 *Journal of Law, Medicine and Ethic*s 239–253.

76 Constitution of the Republic of South Africa, 1996 (Constitution).

77 S 14 of the Constitution.

78 Treatment Action Campaign "South African Law Commission Report on Criminalisation of HIV Transmission" (20 November 2011) https://www.tac.org.za/news/south-african-law-commission-report-on-criminalisation-of-hiv-transmission/ (accessed 2017-03-30).

79 *Ibid*.

concern that mostly women and young girls are being exposed to HIV infection in this manner. During the course of the investigation, the Commission identified the following possible options for responding to the Justice Portfolio Committee's request:

a) Deliberate conduct in the form of deliberate transmission of or exposure to HIV would already be liable to prosecution under the existing common-law crimes of murder, assault, assault with intent to do grievous bodily harm, rape or indecent assault. This approach would not entail creating any additional new offence, but would put what is already illegal into statutory form.[80]
b) The second option entailed criminalising behaviour that was not previously criminal. In this regard, three possibilities arose;
    i the creation of HIV-specific measures requiring the disclosure of HIV status by all persons with HIV before engaging in certain sexual activities;
    ii the creation of an HIV-specific offence/s targeting negligent transmission of HIV or negligent transmission of and exposure to HIV; and

In its recommendations, the SALC recommended that the present legal position be maintained, concluding that statutory intervention is neither necessary nor desirable.[81] The Sexual Offences Project Committee attempted to include provisions relating to HIV transmission in the Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA).[82] The Bill leading to SORMA initially included in its definition of rape the non-disclosure of a life-threatening sexually transmissible infection.[83] The Bill later made the non-disclosure of one's HIV status an offence when engaging in sexual activity.[84] SORMA currently has several provisions specifically addressing HIV transmission and related issues. SORMA's long title entails that it seeks to revise laws so as, among other things, to equip the South African Police Service with new investigative tools for handling sexual offences and other crimes connected to the perpetrator's HIV status. SORMA's provisions mainly relate to the alleged sexual offender's HIV status rather than criminalising non-disclosure (as was the case in the Bill). For example, section 28(1)(*a*)(i) of SORMA entails that a victim who has been exposed to a risk of HIV infection must receive Post Exposure Prophylaxis (PEP) at a public health-care facility within 72 hours after the alleged sexual offence. PEP is a brief treatment with antiretroviral drugs (ARVs) provided following potential HIV exposure owing to occupational hazards or as a result of a sexual assault. The PEP medication should be taken within 72 hours of exposure, preferably as soon as possible after exposure, and must be taken consistently for a duration of 28 days. SORMA considers "a victim", for purposes of section 28(1), to be someone who has reported being sexually violated, either to the SAPS

80 *Ibid.*
81 *Ibid*.
82 32 of 2007. See Department of Justice Working document submitted to the Portfolio Committee on Justice and Constitutional Development on 10 February 2004.
83 Sabinet "Bill Tracker" (undated) https://discover.sabinet.co.za/document/2854612 (accessed 2024-09-12).
84 S 4(*c*) of the Criminal Law Sexual Offences Amendment Bill B50-2003.

community centre or a health establishment designated in terms of the Act.[85] Paragraph 11 of the South African Police Service National Instruction on Sexual Offences[86] outlines clear guidelines for the police regarding their responsibility to inform victims of sexual offences about the PEP services they can access in terms of section 28 of SORMA.[87] Within 72 hours, the victim may also apply to a magistrate for the alleged offender to be tested for HIV at the State's expense.[88] To ensure that complainants can easily find designated facilities, the Act mandates that they receive an official list containing the "names, addresses, and contact information of accessible public health establishments" that have been designated for this purpose, as published in the *Government Gazette*.[89] SORMA further provides that the victim or any interested person may, within 90 days, apply to court for the alleged offender to undergo compulsory HIV testing.[90] A police official may also make the application to subject the alleged offender to compulsory testing.[91] Section 38 of SORMA, to protect alleged offenders from malicious and false allegations, makes it a crime to use the compulsory testing provisions maliciously, and anyone who contravenes section 38 is liable to a fine or imprisonment not exceeding three years. Establishing a penalty provision was viewed as one of several safeguards designed to protect the rights of the accused by discouraging false complaints and allowing for the prosecution of those who make such allegations.[92] From the above provisions, it is clear that the South African legislature, unlike some other African countries, has moved away from the criminalisation of HIV transmission through legislation. The legislature has, instead, opted to put safeguards in place that will protect victims of sexual crimes from being infected with HIV after the alleged offence.

As indicated above, South Africa does not have legislation that directly addresses HIV transmission. Instead, the issue has been incorporated into various pieces of legislation to address specific issues relating to HIV-positive accused persons. The areas addressed in legislation tend to be procedural rather than substantive laws seeking to criminalise transmission. Also, the statutes containing the provisions on HIV stretch over the various proceedings of a criminal case's lifespan – that is, from the time of bail proceedings up to the sentencing stages, when a person has been convicted of an offence. The laws focus mainly on the accused, the person who has allegedly committed sexual crimes. In bail proceedings, there are more stringent requirements for a person to be released on bail where it is alleged that the accused raped another person while being knowingly HIV positive. Section 60(11)(*a*), read with Schedule 6 of the Criminal Procedure Act,[93] requires that such a person not be released on bail until they produce

85 S 28(2) of SORMA.
86 3 of 2008.
87 GN 865 in *GG* 31330 of 2008-08-15.
88 S 28(1)(*b*) of SORMA.
89 GN R545 in *GG* 34420 of 2011-07-05.
90 S 30 of SORMA.
91 S 32 of SORMA.
92 Roehrs "Chapter 16 Sections 30–39: Compulsory HIV Testing of Alleged Sex Offenders" in *Sexual Offences Commentary* (2019) 59.
93 51 of 1977.

evidence that shows exceptional circumstances exist to warrant their release. In addition to adducing exceptional circumstances, the bail applicant must persuade the court that they are released on bail in the interests of justice.[94] The South African legislature has also inserted a provision on rape by a person who is knowingly HIV-positive. Section 51(1), read with Schedule 2 of the Criminal Law Amendment Act,[95] sets a minimum sentence of life imprisonment for a person (knowingly HIV-positive) who is found guilty of rape. The only time that the court may deviate from this minimum sentence is when the convict adduces evidence of substantial and compelling circumstances during mitigation of sentence.[96] The courts have acknowledged that the legislature intentionally incorporated rape into section 51, specifically when the perpetrator was, at the time of the assault, aware that they were HIV positive, for important policy reasons that fall within the scope of legislative decision-making.[97] The bail and minimum-sentence provisions discussed above apply regardless of whether the victim contracted the virus.

4 2 South African court decisions

As will be evident from the subsequent paragraphs, the South African courts have arguably, through established common-law principles, delivered judgments that criminalise the intentional transmission of HIV. However, in many cases, the complainant contracted the virus and subsequently laid a charge against the person from whom they think they contracted it. This paragraph discusses some of the cases that have reached the courts. The first case to consider is *S v Nyalungu*.[98] The accused, knowingly HIV positive, was charged with rape and attempted murder. The attempted murder charge emerged from the understanding that HIV is a deadly virus that has the potential to kill a person. On the date of the incident, the complainant was walking next to the railway tracks when she was approached and raped by the accused. The complainant later identified the accused through an identity parade, and the latter was also linked with DNA to the crime.[99] During the police investigations, the accused indicated to the police that he was HIV positive.[100] The legal question the court *a quo* had to consider was whether a conviction of attempted murder was in line with South African jurisprudence.[101] The court *a quo* found the question whether the victim was infected with HIV irrelevant to the enquiry.[102] The accused did not have a direct intention; therefore, the question was whether the accused had the intention in the form of *dolus eventualis.*[103] The accused was

94 *Ibid.*
95 105 of 1997.
96 S 51(3)(*a*) of the Criminal Law Amendment Act.
97 *Maphuma v S* [2021] JOL 49880 (ECG) par 5.
98 *S v Nyalungu* 2005 JOL 13254 (T).
99 *S v Nyalungu supra* par 3.
100 *Ibid.*
101 *S v Nyalungu supra* par 5.
102 *Ibid.*
103 *Ibid.*

convicted in the Pretoria regional court on all charges.[104] The accused was sentenced to life imprisonment in terms of section 51 of the Criminal Law Amendment Act.[105]

In 2006, a former nurse, Pinky Mabuza, was convicted of attempted murder for deliberately injecting her stepson with HIV.[106] She was sentenced in the Mhala regional court in Bushbuckridge to five years' imprisonment with an option to pay a R10 000 fine.[107] Another case where an HIV-positive person was criminally prosecuted for engaging in sexual intercourse is *S v Phiri,* where the accused, Mphikeleli Phiri, was convicted of attempted murder in the Piet Retief regional court in 2013.[108] The charge emanates from the accused having unprotected sex with the complainant while knowing that he was HIV-positive.[109] The accused met the complainant at a local clinic, which the complainant had visited for an HIV test.[110] The accused worked as an HIV/AIDS counsellor at the same clinic and was also in charge of conducting HIV tests. The accused tested the complainant, and she tested HIV-negative. The two started a relationship after the encounter at the clinic. During the trial, it was revealed that Mr Phiri had been HIV-positive for three years before the relationship, was aware of his condition, and this fact was undisputed.[111] The evidence was that during the course of their relationship, they had sexual intercourse on two occasions, and they did not use a condom because the accused refused. Later in the relationship, the complainant tested HIV-positive as part of her prenatal routine. On appeal, the defence argued that during the trial, the State had not established that the appellant had the necessary *mens rea* to sustain a conviction on attempted murder.[112] The court of appeal rejected this argument.[113] The court reasoned that to secure a conviction for attempted murder, it was enough to demonstrate that the appellant, aware of his HIV-positive status, had unprotected sexual intercourse with the complainant, whom he knew was HIV-negative.[114] The court further reasoned that the accused's conduct had the intention in the form of *dolus eventualis*.[115] The court, in its reasoning, took judicial note that HIV/AIDS does not have a cure and may lead to a reduced lifespan.[116] The last note was an important one for the court to make to sustain the argument of justifying a conviction of attempted murder on the facts – especially since attempted murder is traditionally understood to be a failed attempt at killing someone; in other words, the person intended unlawfully to kill another person but fell short. In

[104] *S v Nyalungu supra* par 1.
[105] 105 of 1997.
[106] Makaula and Mnisi "HIV Nurse Got Off Too Lightly" (2007-03-27) https://www.news24.com/News24/HIV-nurse-got-off-too-lightly-20070327 (accessed 2024-09-13).
[107] *Ibid.*
[108] *Phiri v S* NGHC (unreported) 2013-08-08 Case no A 400/2012.
[109] *Phiri v S supra* par 1.
[110] *Phiri v S supra* par 2.
[111] *Ibid.*
[112] *Phiri v S supra* par 5.
[113] *Phiri v S supra* par 19.
[114] *Phiri v S supra* par 9.
[115] *Ibid.*
[116] *Ibid.*

both the cases already discussed, there is no evidence that even remotely suggests that the perpetrators intended to kill their victims but failed. From the discussed cases, it would have been more appropriate for the accused person in the *Phiri* case to have been found guilty of assault to cause grievous bodily harm. During the trial of Mr Nyalungu, the government's programme of rolling out the ARVs was still in its infancy, as it started in April 2004.[117] In 2013, at the time of Mr Phiri's case, the roll-out of ARVs was already in full swing, and the life expectancy of people living with HIV had significantly improved. Thus, the conviction on attempted murder misaligns with the medical advancements available at the time and the facts warranting such a conviction. In South Africa, HIV is no longer regarded as a "life sentence" or "death curse" but as a chronic, treatable illness. This change of perception over the past years has been due to the government's programmes aimed at minimising life-threatening illnesses associated with the virus through accessible drugs like ARVs. The realigned idea of HIV as no longer life-threatening needs to be focused on eliminating the stigma previously associated with the virus. Any policy that has the potential to discourage people from learning about their HIV status through voluntary and confidential testing would appear to be counterproductive to public health. It is the stigma that cripples governments' educational and preventative efforts globally.

In South Africa, the criminal sanctions on HIV transmission have also featured in South African courts' sentencing proceedings. There has also been a noticeable change in how courts have sentenced accused convicted of contravening the legal precepts discussed in the preceding paragraphs. This change in pattern can also be attributed to the change mentioned above in the stigma surrounding HIV. For example, the accused in *S v Nyalungu* was sentenced to life imprisonment as the court found that no substantial and compelling circumstances were present to deviate from the prescribed life imprisonment. However, in more recent cases involving circumstances similar to those in *Nyalungu*, the courts have been more lenient in sentencing proceedings. However, in 2021, the court in *Maphuma v S* found it necessary to deviate from a life-imprisonment sentence solely because the accused was a first offender at 49 years and was married.[118] The accused was convicted and sentenced to life imprisonment by the court *a quo* for raping his niece after his wife refused to have sexual intercourse with him.[119] The court of appeal, despite being convicted of raping someone while knowingly HIV positive, found it suitable to reduce the sentence to 15 years' imprisonment.[120]

5 CONCLUSION

Efforts to fight HIV emphasise the need for actions that can reduce the virus's transmission. One approach suggests that using criminal law and the

[117] Simela and Venter "A Brief History of South Africa's Response to AIDS" 2014 104(3) *SAMJ* 249–251 249.

[118] *Maphuma v S supra* par 12.

[119] *Maphuma v S supra* par 1.

[120] *Maphuma v S supra* par 14.

penalties associated with criminal activity can help address the spread of the virus. South Africa, as is evident from the above discussions, seems to have taken the stance that criminalising wilful HIV transmission through legislation is not the best approach. However, those who argue against HIV-specific legislation acknowledge that criminal law has a role in deterring those with the virus from putting the lives of others at risk and in protecting the public from irresponsible behaviour.

Globally, HIV transmissions and new infections may be reduced compared to the virus's early stages, but the panic accompanying the epidemic has not fully subsided. For this reason, some jurisdictions resorted to sanctioning even non-deserving behaviours. Also, it seems some countries, especially in sub-Saharan Africa, have opted to focus on punishing the act of transmission regardless of malicious intent. In the absence of a clear standard of legitimacy under international and regional human-rights law regarding what states can criminalise in the realms of sexuality and reproduction, at a minimum, resources should be directed toward ensuring transparency and accountability within justice systems and government health facilities. The law should be used rather as an exception to the general rule and only be applied in exceptional cases where the intention to transmit the virus can be proved beyond a reasonable doubt in criminal cases. As for punishment of non-malicious transmissions, it is undoubtedly unwarranted and should not be happening today.

South Africa has approached the issue through already existing general laws rather than creating HIV-specific laws to curb malicious behaviour when establishing criminal liability. However, for those found guilty, the South African legislature has introduced HIV-specific provisions to ensure a sentence for those found guilty of raping another person, while knowingly HIV positive. The legislature has further made it more difficult for such accused persons to be released on bail. The effectiveness of South Africa's approach in achieving the intended goal has not yet materialised, nor been adequately measured.