Using Science for Justice: The Implications of the Expert Consensus Statement on Zimbabwe's HIV Criminalisation Law

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Abstract

Section 79 of Zimbabwe's Criminal Law (Codification and Reform) Act [Chapter 9:23] criminalises HIV exposure and transmission. The law, and others like it, have been criticised extensively on human rights and public health grounds and on the basis that the offence is applied in a manner that is unscientific. Despite this, the Zimbabwe Constitutional Court upheld the constitutionality of the offence in 2016. This article examines the implications of the first ever global 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' in relation to section 79 of Zimbabwe's Criminal Code. This is done to determine to what extent a scientifically accurate understanding of HIV transmission dynamics, as detailed in the Expert Consensus Statement, may impact the application of the offence and whether this may have weight in a court's assessment of the offence's constitutionality. The article finds that, if applied by lawyers, prosecutors and courts, the Expert Consensus Statement may alleviate some unjust prosecutions and convictions in guiding courts to assess evidence on HIV transmission, to draw appropriate inferences on mental elements of the offence, to recognise defences on the basis of transmission risk-reducing conduct, and to more appropriately inform the courts' assessment of the harm of HIV infection

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in sentencing. While the Expert Consensus Statement may reduce unjust prosecutions, we consider that the continued existence of the offence will nevertheless perpetuate inequality and injustice. We call for the total repeal of section 79 of the Criminal Code. The implications of the science reflected in the Expert Consensus Statement may also weigh in favour of a finding by the courts that the offence is unconstitutional if a new constitutional case is made against the offence.

Keywords: HIV Criminalisation; Science; Expert Consensus Statement; Zimbabwe.

1. Introduction

HIV criminalisation is a global phenomenon understood as the unjust application of criminal laws against people living with HIV on the sole basis of their HIV status.[1] This includes the use of HIV-specific criminal laws as well as general criminal provisions as applied to HIV transmission, potential or perceived exposure and non-disclosure of an individual's HIV-positive status.[2]

Section 79 of Zimbabwe's Criminal Law (Codification and Reform) Act [Chapter 9:23] (Criminal Code) provides specifically for prosecution of people living with HIV for transmission and exposure-related conduct. While no official disaggregated data on HIV-based prosecutions in Zimbabwe could be accessed for the purpose of this paper, monitoring of reported prosecutions by HIV Justice Worldwide indicates that Zimbabwe has the highest rate of prosecutions for HIV criminalisation in sub-Saharan Africa and the sixth highest globally.[3]

HIV criminalisation laws and their application in practice have been criticised extensively for being overbroad and for violating human rights unjustifiably, including through exacerbating stigma against people living with HIV.[4] In addition, these laws have also been criticised for being applied contrary to scientifically-informed understandings of HIV and its transmission.[5] Zimbabwe's section 79 has faced similar criticism, with people being convicted contrary to scientifically-accurate standards of proof being met beyond a reasonable doubt on elements of the offence.

[1] Edwin Bernard and Sally Cameron, 'Advancing HIV Justice 2' (2016) HIV Justice Network and the Global Network of People Living with HIV (GNP+) 9 <http://www.hivjustice.net/advancing2/> accessed 25 September 2018.

[2] ibid.

[3] HIV Justice Worldwide (2019) unpublished data, on file with authors.

[4] See Section 2.

[5] See Section 3.

In a number of jurisdictions, HIV clinicians and scientists have sought to rationalise some of the excesses of HIV-related prosecutions by providing expert statements to guide courts' and prosecutors' application of laws in line with the science, including in Switzerland in 2008,[6] Canada in 2014,[7] Sweden in 2014,[8] and Australia in 2016.[9] No comparable statements have yet been released in sub-Saharan Africa. However, in June 2018, at the International AIDS Conference in Amsterdam, a group of twenty eminent scientists from across the world (including from sub-Saharan Africa) released the first ever global 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (Expert Consensus Statement).[10] With the objective to limit unjust prosecutions and convictions, the Expert Consensus Statement analyses the best available scientific and medical research data on HIV transmission, treatment effectiveness and forensic evidence, described in language suitable to application in legal contexts.

This article analyses the Expert Consensus Statement in relation to section 79 of Zimbabwe's Criminal Code. Despite being termed an offence of 'deliberate transmission', the language of the offence itself is much broader. Case law has not adequately clarified the scope of the offence and has left open the possibility for conviction in cases of actual or perceived exposure to HIV, including in circumstances where transmission was not specifically intended. We argue, however, that the Expert Consensus Statement may be useful to constrain some aspects of the offence's overbreadth. The Expert Consensus Statement may guide the assessment of evidence on HIV transmission (to the extent actual transmission is considered an element of the offence) as well as in assessing whether the relevant conduct in fact poses a 'real risk or possibility' of transmission. The Expert Consensus Statement may also provide guidance for courts to assess contextual evidence on the applicable mental elements of the crime, to recognise defences on the basis of transmission

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[6] Pietro Vernazza et al, 'Les Personnes Séropositives Ne Souffrant S'aucune Autre MST et Suivant un Traitement Antirétroviral Efficace Ne Transmettent Pas Le VIH Par Voie Sexuelle' (2008) 89 (5) Bulletin des Médecins Suisses 165.

[7] Mona Loutfy et al, 'Canadian Consensus Statement on HIV and Its Transmission in the Context of Criminal Law' (2014) 25(3) Canadian Journal of Infectious Diseases and Medical Microbiology, 135.

[8] Jan Albert et al, 'Risk of HIV Transmission from Patients on Antiretroviral Therapy: A Position Statement from the Public Health Agency of Sweden and the Swedish Reference Group for Antiviral Therapy' (2014) 46(10) Scandinavian Journal of Infectious Diseases 673.

[9] M Boyd et al, 'Sexual Transmission of HIV and the Law: An Australian Medical Consensus Statement' (2016) 205(9) Medical Journal of Australia 409.

[10] Françoise Barré-Sinnoussi et al, 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law' (2018) 21(7) Journal of the International AIDS Society.

risk-reducing conduct, and to more appropriately inform the courts' assessment of the harm of HIV infection in sentencing.

While applying the Expert Consensus Statement to section 79 of the Criminal Code has the potential to limit the breadth of the offence in line with the science of HIV, we nevertheless consider that there remains scope for unjust prosecutions. We therefore argue that the offence should be repealed.

The Expert Consensus Statement further illuminates how HIV science has been misapplied in a number of prosecutions in Zimbabwe, revealing the true extent to which section 79's textual vagueness leads to arbitrary and irrational convictions. We argue that in this way, the Expert Consensus Statement may be a resource to strengthen legal arguments that the offence is unconstitutional.

2. HIV Criminalisation as a Threat to Human Rights

The origins of HIV criminalisation globally have arguably been grounded in good intentions to reduce HIV transmission. With high rates of sexual and gender-based violence [11] and challenges in reducing new HIV infections in countries like Zimbabwe, the criminal law was perhaps understandably sought out as an avenue to strengthen behaviour-change interventions. In the African context, some sectors in particular lobbied for the enactment of HIV criminalising laws as a means to protect women from infection.[12] In 2004, Model Legislation on HIV/AIDS for West and

[11] For example, the Zimbabwe National Statistics Agency, 'Zimbabwe Demographic and Health Survey 2010-11' (2012) 256-7 <https://dhsprogram.com/pubs/pdf/FR254/FR254.pdf> accessed 26 January 2020, indicated that 22% of women in Zimbabwe reported that their first sexual intercourse was forced against their will and 27% of women have experienced sexual violence. In the Zimbabwe National Statistics Agency, 'Zimbabwe Demographic and Health Survey 2015' (2016) 319 <https://dhsprogram.com/pubs/pdf/FR322/FR322.pdf> accessed 26 January 2019, 39% of women aged 15-49 years reported having experienced either physical and/or sexual violence at some point in their lives.

[12] In South Africa, the Gender and Health Group, in comments on the 2003 Criminal Law (Sexual Offences) Amendment Bill, supported the criminalisation of non-disclosure of HIV-status to sexual partners when committed with the intent to transmit HIV (Summary of Comments on Criminal Law (Sexual Offences) Amendment Bill [B50-2003] (2004) <http://pmg-assets.s3-website-euwest1.amazonaws.com/docs/2004/appendices/040126summary.htm> accessed 23 October 2019. See also, Magdalena K Rwebangira and Maria Tungaraza 'Review and Assessment of Laws Affecting HIV/AIDS in Tanzania' (2003) Tanzania Women Lawyer's Association 5

Central Africa (the N'Djamena Model Law) was developed, which proposed a number of coercive and rights-infringing provisions including the creation of a vague and broad offence of 'wilful transmission of HIV'. This controversial model law was embraced by a number of African states[13] and was influential in the development of HIV criminalisation in the region.[14]

Early warnings had, however, been sounded on the potential for overbroad and rights-violating criminalisation. Subsequent to the enactment of such laws, significant human rights concerns have indeed manifested through their application, including in their disproportionate application against women living with HIV in sub-Saharan Africa.[15].

In 1998, the Office of the High Commissioner for Human Rights (OHCHR), together with the Joint United Nations (UN) Programme on HIV/AIDS (UNAIDS), recommended in the 'International Guidelines on HIV/AIDS and Human Rights' that in exceptional cases of deliberate and intentional HIV transmission, countries should not create or enforce HIV-specific criminal laws but only apply general criminal law, while ensuring fair trial principles and the tenets of criminal law are upheld.[16]

In 2008, UNAIDS and the UN Development Programme (UNDP) developed a Policy Brief in which the organisations recommended that States repeal HIV-specific criminal laws and limit the application of general criminal law to cases of 'intentional transmission of HIV', paying careful attention to ensure that the law is not applied inappropriately.[17] A specific concern was raised that an overbroad application of the criminal law beyond this narrow remit would 'expose large numbers of people to possible prosecution without their being able to foresee their liability for such prosecution', warning that prosecutions are likely to be disproportionately applied to already marginalised groups.[18] Instead of a

<http://www.policyproject.com/pubs/countryreports/TZlawreview.pdf> accessed 23 October 2019.

[13] Patrick M Eba, 'HIV-Specific Legislation in Sub-Saharan Africa: A Comprehensive Human Rights Analysis' (2015)15 African Human Rights Law Journal 224.

[14] Richard Pearhouse, 'Legislation Contagion: Building Resistance' (2008) 13(2/3) HIV/AIDS Policy and Law Review <http://www.aidslaw.ca/site/legislation-contagion-building-resistance-hivaids-policy-law-review-1323/?lang=en> accessed 10 January 2019.

[15] Athena Network, '10 Reasons Why Criminalisation of HIV Exposure or Transmission Harms Women' (2009) <https://www.hivlawandpolicy.org/resources/10-reasons-why-criminalization-hiv-exposure-or-transmission-harms-women-athena-network> accessed 17 October 2018.

[16] See the updated and consolidated version, OHCHR, 'International Guidelines on HIV/AIDS and Human Rights' (2006) HR/PUB/06/9.

[17] UNAIDS and UNDP, 'Policy Brief: Criminalization of HIV' (2008) 6 <http://www.aidslaw.ca/site/wp-content/uploads/2014/02/1.UNAIDSUNDPposition.pdf> accessed 25 September 2018.

[18] ibid 3.

coercive and punitive approach to HIV, UNAIDS and UNDP called for states to adopt a human rights-based approach that embraces positive and empowering prevention efforts and confidential HIV testing and counselling.[19]

In a 2010 resolution of the African Commission on Human and Peoples' Rights, establishing the Commission's Committee on the Protection of the Rights of People Living With HIV, it stated that the Commission was 'deeply disturbed by the growing trend by various State Parties across Africa towards criminalisation ... of [people living with HIV] which leads to greater stigmatisation and discrimination.'[20]

The UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (UN Special Rapporteur on the Right to Health) in 2010 stated that criminalising HIV transmission and exposure infringes many human rights, including the rights to privacy and equality, the prohibition against discrimination, and the right to health.[21]

The Global Commission on HIV and the Law in its 2012 Report recommended that countries do not enact new laws and repeal existing laws that specifically criminalise HIV exposure, transmission and non-disclosure and raised concern that the use of the general law to prosecute both actual and intentional transmission should be pursued with care, under a high standard of evidence and proof.[22]

In 2013, UNAIDS further specified its position in a Guidance Note stating that the overbroad criminalisation of HIV raised serious human rights and public health concerns.[23] It recommended that non-disclosure of one's HIV status and mere HIV exposure should not be criminalised absent proof of actual HIV transmission. It called for the application of the criminal law to be aligned with current HIV transmission science. Moreover, UNAIDS stated that a specific 'intent to transmit HIV' should not be presumed from mere knowledge of one's HIV-status, non-

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[19] ibid 2.

[20] African Commission on Human and Peoples' Rights, 'Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV' ACHPR/Res163 (XLVII) 10.

[21] UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 'Right to Health and Criminalization of Same-Sex Conduct and Sexual Orientation, Sex-Work and HIV Transmission' (2010) A/HRC/14/20 [51].

[22] Global Commission on HIV and the Law, 'Risks, Rights and Health' (2012) 21 <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf> accessed 25 September 2018.

[23] UNAIDS, 'Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations: Guidance Note' (2013) <http://www.unaids.org/sites/default/files/media_asset/20130530_Guidance_Ending_Criminalisation_0.pdf> accessed 25 September 2018.

disclosure, or solely derived from conduct such as engaging in unprotected sex.[24]

In 2015, the World Health Organisation (WHO) raised concern on the adverse effect of HIV criminalisation on sexual and reproductive health and rights and women's rights in particular.[25] In its concluding observations to the State reports of Canada in 2016[26] and Tajikistan in 2018,[27] the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) expressed concerns about the violations of women's rights through HIV criminalisation and recommended reforms. In 2016, the UN Committee on Economic, Social and Cultural Rights identified the criminalisation of HIV non-disclosure, exposure and transmission as a threat to sexual and reproductive health and rights.[28]

The African Commission on Human and Peoples' Rights (African Commission) released a report in 2017 on HIV and human rights in the African human rights system, which states that overly broad criminalisation is prone to violating human rights to liberty, security, health, privacy, access to justice and non-discrimination.[29]

In addition to these critiques has been the central concern that HIV criminalisation is ineffective in its purported aim of reducing HIV transmission. To the contrary, UNAIDS and the UNDP have raised concern that overbroad HIV criminalisation threatens to increase stigma and discrimination against people living with HIV, 'driving them further away from HIV prevention, treatment, care and support services'.[30] The UN Special Rapporteur on the Right to Health stated in 2010 that the 'public health goals of legal sanctions are not realised by criminalisation' and that these applications of the law are 'generally recognised as

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[24] ibid 3.

[25] WHO, 'Sexual Health, Human Rights and the Law' (2015) <http://apps.who.int/iris/bitstream/handle/10665/175556/9789241564984_eng.pdf;jsessionid=F4B162A4052B1BC78A0EC6B75DCC58F7?sequence=1> accessed 25 September 2018, 22.

[26] CEDAW Committee, 'Concluding Observations: Canada' (2016) CEDAW/C/CAN/CO/8-9 [42]-[43].

[27] CEDAW Committee, 'Concluding Observations: Tajikistan' (2018) CEDAW/C/TJK/CO/6 [39]-[40].

[28] CESCR, 'General Comment No 22 (2016) on the Right to Sexual and Reproductive Health' (2016) E/C.12/GC/22 [40].

[29] African Commission on Human and Peoples' Rights, 'HIV, the Law and Human Rights in the African Human Rights System: Key Challenges and Opportunities for Rights-Based Responses' (2017) [38] <http://www.achpr.org/files/news/2017/12/d317/africancommission_hiv_report_full_eng.pdf> accessed 25 September 201.

[30] UNAIDS and UNDP (n 17).

counterproductive' to the HIV response.[31] The Global Commission on HIV and the Law cited research from AIDS service organisations that 'the threat of prosecution neither empowers people living with HIV to avoid transmission nor motivates [people] to protect themselves.'[32] The African Commission raised concern that HIV criminalisation undermines the relationships between healthcare workers and patients and increases people living with HIV's vulnerability to scapegoating, blame and marginalisation.[33] The WHO stated that the cumulative effect of these laws is that they 'may actually increase rather [than] decrease HIV transmission.'[34]

While national courts have generally been slow to recognise the rights limitations perpetuated by HIV criminalisation, the Kenyan High Court[35] in 2015 held that an HIV criminalising law was unconstitutional for, amongst others, being vague and overbroad. The Malawi High Court in 2016 held that the application of a general public health law to prosecute HIV exposure had violated fair trial rights and, in *obiter dicta*, questioned the constitutionality of the law.[36]

In 2016, Zimbabwe's Constitutional Court in *Mpofu and Mlilo v the State* considered a constitutional challenge to section 79 of Zimbabwe's Criminal Code on the basis that the provision was vague and overly broad (violating the right to protection of the law under section 18 of the 1980 independence Constitution as amended) and discriminatory against people living with HIV (contrary to section 23 of the 1980 Constitution).[37] In a unanimous judgment, the Court dismissed the application. It held that section 79 was sufficiently precise and did not violate the protection against discrimination because 'HIV status' was not a protected grounds of discrimination under the 1980 Constitution.[38] The Court held that even if HIV status had been protected under the discrimination prohibition, section 79 was nevertheless a justifiable limitation to the right, with the provision being 'rationally connected to, and calculated to achieve, the stated objective' of halting the spread of HIV.[39]

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[31] UN Special Rapporteur on the right to health (n 21).

[32] Global Commission on HIV and the Law (n 22) [33].

[33] African Commission on Human and Peoples' Rights, 'HIV: Challenges and Opportunities' (n 29).

[34] WHO (n 25) 22.

[35] *AIDS Law Project v Attorney General & 3 Others* [2015] eKLR, Petition No 97 of 2010.

[36] *EL v the Republic* [2016] MWHC 656 [5.1], [5.3].

[37] *Mpofu and Mlilo v the State* CCZ 08/13 (15 June 2016).

[38] Although the case was heard in 2016 after the adoption of a new Constitution in 2013, it was argued and decided based on the 1980 Constitution that was in place when the prosecution was instituted.

[39] *Mpofu* (n 37) [19].

Since the *Mpofu* case, a new Constitution (the 2013 Constitution) is applicable in Zimbabwe. This opens the possibility of a new constitutional challenge being made against section 79 of the Criminal Code. We consider it unlikely, however, that based on the textual differences between the 1980 and 2013 Constitutions, that such a constitutional case would succeed based on the law alone. In relation to vagueness and overbreadth, there is no significant textual difference between the two Constitutions to indicate that the protection against vague or overbroad laws would be differently conceived to lead to a different finding. The new, 2013 Constitution's prohibition against discrimination is, however, textually broader than the 1980 Constitution,[40] leaving the possibility open that a court, in a fresh constitutional case against section 79 of the Criminal Code, could recognise HIV-status as a prohibited grounds of discrimination and therefore find section 79 to be discriminatory. However, both the 1980 and 2013 Constitution have clauses providing for the grounds under which rights may be lawfully limited.[41] While the 2013 Constitution's limitations clause is specified in more detail, there is no jurisprudence that would indicate that the limitations analyses applied in constitutional adjudication would substantially depart under the 2013 Constitution from that which was applied under the 1980 Constitution.

The Constitutional Court's reasoning in the *Mpofu* case therefore poses a significant hurdle to the prospect that a court in a fresh constitutional case would find the offence unconstitutional based on the 2013 Constitution. This is particularly because of the *Mpofu* Court's reasoning on the adequate precision of the offence and that even if HIV-status had been a prohibited ground of discrimination, infringing this right would be justifiable because of the role of the offence in preventing HIV transmission. We therefore consider it useful to examine whether an improved understanding of the science of HIV stands to alter the interpretation of the offence in Zimbabwe, including in such a manner that may alter a court's assessment of the offence's compliance with human rights protections under the 2013 Constitution.

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[40] Neither HIV nor health-status are explicitly protected grounds of discrimination in the 2013 Constitution. However, the 2013 Constitution's prohibition of discrimination in section 56(3) provides an open-ended list of grounds of discrimination in protecting against unfair discrimination '**on such grounds as** nationality, race ...' etc. (emphasis added). This leaves open the opportunity for courts to interpret the provision to protect grounds of discrimination that are not specifically listed, such as HIV-status. In contrast, the 1980 Constitution protects against discrimination on a 'closed list' of grounds in section 23(2) where it is stated that law or treatment will be regarded as discriminatory if 'persons of a particular description **by** race, tribe, place of origin ...' etc. are prejudiced (emphasis added).

[41] The grounds for limitation of rights are detailed in section 86 of the 2013 Constitution and section 11 of the 1980 Constitution respectively.

3. Scientifically Inaccurate Applications of the Law and the Potential of the Expert Consensus Statement

The Expert Consensus Statement was developed by 20 HIV scientists with expertise in scientific research, epidemiology and patient care from across the world. On the date of publication its contents had, in addition, been officially endorsed by over 70 scientists from 46 countries as well as by the International AIDS Society, the International Association of Providers of AIDS Care and UNAIDS. The co-authors of the Statement include the Nobel-prize winning virologist, Françoise Barré-Sinoussi, one of the scientists who discovered the virus, current and past presidents of the International AIDS Society, award-winning infectious disease specialists and epidemiologists, and eminent clinician scientists. That the Expert Consensus Statement accurately reflects the best-available current science of HIV is undisputed and, we would argue, indisputable.

The Statement provides expert opinion on three broad themes: (1) the possibility of HIV transmission in a variety of different individual acts; (2) the harm of HIV infection; and (3) the ability to scientifically prove HIV transmission. The Statement's content on each of these themes is examined in turn below.

A. The Possibility of HIV Transmission

The Expert Consensus Statement provides an explanation of *individual* HIV transmission dynamics or the 'possibility' of HIV transmission. In many court cases internationally, scientific understandings of HIV and of the possibility of HIV transmission have been ignored and misinterpreted. In some cases, the risk of HIV transmission in the conduct in question is grossly exaggerated, founded in stigma against people living with HIV and fear. The exaggeration of transmission risk in court settings has at times been attributed to the misapplication of transmission risks as understood from a public health perspective where the risk of transmission is based on *population-level* risks, as opposed to standards more appropriate to criminal settings where the statistical possibility of transmission should rather be considered in respect of an *individual* act. Such assessments have tended to significantly over-estimate the possibility of HIV transmission, endorsing assumptions of accused persons' culpability to expose others to risk based on public health understandings of the relative risk of conduct.

For example, the Canadian Manitoba Court of Queen's Bench in *R v Mabior* considered the case of a man living with HIV who was charged

with aggravated sexual assault for failing to disclose his HIV-status prior to having sex with a number of women, none of whom became HIV-positive.[42] Precedent required the accused's conduct to pose a 'significant risk' of harm through HIV transmission to sustain the conviction. In finding that the instances in which the accused had engaged in sexual intercourse without a condom did establish a 'significant risk' of harm through HIV transmission, the Court referred to the population-level risk of 80% effectiveness of condoms to prevent sexual transmission of HIV.[43] It is, however, inaccurate to determine the risk of transmission in a specific accused's conduct against population-level risks. In fact, as the Expert Consensus Statement explains, correct use of a condom (either male or female) prevents HIV transmission because the porosity of condoms is protective against even the smallest sexually transmissible pathogens, including HIV. The Expert Consensus Statement states that 'population-level estimates can only apply in situations where multiple instances of condom use have occurred, including occasional instances of incorrect use and breakage.'[44]

The Expert Consensus Statement explicitly states that its purpose is not to inform public health programming but rather to clarify scientific evidence of *absolute risk* in individual acts as should be applicable in a criminal context. The Statement clarifies that in fact 'HIV is not easily transmitted' being a 'relatively fragile virus'. It is only transmissible when a sufficient amount of the virus has direct contact with another person's bodily fluids where infection can be initiated and under conditions in which the person's immune defences do not prevent infection.

The Expert Consensus Statement examines HIV transmission dynamics in sexual activity, biting and spitting. The authors describe the possibility of HIV transmission in single, specific acts along a continuum, from a 'low possibility' at the highest (where HIV transmission during a single act is possible but the likelihood is low), to a 'negligible possibility' (where transmission in a single act is extremely unlikely, rare or remote'), to 'no possibility' on the lowest end (where transmission during a single act

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[42] 2008 MBQB 201.

[43] The Court also failed to appreciate the statistical relevance of the accused's undetectable viral load in reducing his risk of transmission.

[44] Despite the misapplication of population-level risks to individual conduct by the trial Court, the Supreme Court of Appeal, in *R v Mabior* [2012] 2 SCR 584 confirmed the accused's convictions in the cases where he had not used a condom, albeit in reference to more detailed expert evidence and in applying an amended legal test of a 'realistic possibility' of harm. For further critique of the Supreme Court's decision in *R v Mabior* see, for example, Canadian HIV/AIDS Legal Network, 'HIV Non-Disclosure and the Criminal Law: An Analysis of Two Recent Decisions of the Supreme Court of Canada', (2012) <http://www.aidslaw.ca/site/wp-content/uploads/2013/04/SCC_DecisionAnalysis-ENG.pdf> accessed 13 November 2018.

is either biologically implausible or effectively zero).[45] It further considers the role of a number of variables that may modify the possibility or risk of transmission, such as the role of viral load (the concentration of virus in an individual's blood) or the use of a condom during sexual intercourse.

For sexual intercourse, the Expert Consensus Statement describes the per-act possibility of transmission as zero to low, with estimates ranging from 0% to 1.4% per act.[46] HIV transmission from oral sex performed on an HIV-positive person ranges from 'no' possibility to a 'negligible' possibility of HIV transmission. Vaginal-penile intercourse has a 'low' possibility of HIV transmission per act at 0.08% absent risk cofactors.[47] Anal-penile intercourse also has a 'low' possibility of HIV transmission with some variability within this threshold depending on whether the HIV-positive individual is the insertive or receptive partner.

The Statement describes that intersecting factors can reduce or amplify the possibility of HIV infection in individual acts of sexual intercourse to various degrees. The possibility of transmission per act will therefore vary from the above figures depending on the absence or presence of these intervening factors. For example, correct condom use is stated to prevent HIV transmission. Furthermore, where an individual living with HIV is on effective treatment, their HIV viral load will be reduced, which in turn reduces the possibility of HIV transmission: 'a reduced or 'undetectable' viral load decreases or eliminates the possibility of HIV infection'.[48] Thus while generally vaginal-penile intercourse has a 'low' risk of HIV transmission, when a partner uses a condom **or** when the HIV-positive partner has a low viral load there is 'no' or a 'negligible' possibility of transmission. Other factors may include whether male sexual partners are circumcised or not, whether a male sexual partner ejaculates, whether the HIV-negative person is on pre-exposure prophylaxis or takes post-exposure prophylaxis, the presence of untreated (particularly if ulcerative) sexually transmitted infections, and the use of other risk-reducing practices.

The Expert Consensus Statement affirms that there is 'no' possibility of HIV transmission via contact with saliva, including through kissing, biting or spitting.[49]

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[45] Françoise Barré-Sinnoussi et al (n 10) 3.
[46] ibid.
[47] ibid 5.
[48] ibid 4.
[49] ibid 6.

B. The Harm of HIV

The Expert Consensus Statement details the long-term impact of chronic HIV-infection (the 'harm' of HIV), an aspect of significant relevance in criminal convictions, whether as an element of an offence or a consideration in sentencing. The Statement affirms that 'huge changes' have been achieved in the outlook for people living with HIV over the years.[50] The natural course of untreated HIV is described as varying widely from person to person but that 'antiretroviral therapies dramatically reduce HIV-associated disease progression'[51]:

> *Although HIV causes an infection that requires continuous treatment with antiretroviral therapy, people living with HIV can live long, productive lives including working, studying, travelling, having relationships, having and raising children, and contributing to society in various ways.*[52]

The Statement refers to research showing that in some sub-populations, ongoing clinical care (in places where people have reliable access to effective treatment) has enabled some people with HIV to live even longer than their HIV-negative counterparts.[53]

C. Proof of Transmission

Finally, the Expert Consensus Statement deals with the correct use of scientific and medical evidence in cases where it is necessary to establish that actual transmission occurred between two individuals.

It states that while an individual's medical records may provide contextual information, medical records alone cannot prove that transmission occurred between two individuals. It stresses that whether the complainant or defendant was infected first cannot be based on who tested HIV-positive first or which person brought the charges against the other. The Expert Consensus Statement also warns against the use of CD4-count[54] and viral load testing as an unreliable method to determine when someone acquired HIV.[55]

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[50] ibid 7.
[51] ibid.
[52] ibid.
[53] ibid.
[54] CD4 cells, T lymphocytes or T-cells are blood cells that help fight infection. A CD4-count is a measure of how many CD4 cells are in a unit of blood, indicating the functioning of one's immune system.
[55] Françoise Barré-Sinnoussi et al (n10) 7.

Phylogenetical analysis is a form of testing that can be used to compare the evolutionary relationship between different samples of HIV. The Expert Consensus Statement warns that results from phylogenetic analysis must be cautiously interpreted. It may be used to determine whether two individuals are part of the same 'transmission network' but current methods of analysis cannot precisely determine who infected whom.[56] The Expert Consensus Statement describes that while the results of phylogenetic analysis can be compatible with a claim that a defendant infected a complainant, it cannot conclusively prove the fact. Phylogenetic analysis may, however, exonerate a defendant because if the virus strains detected in the defendant and complainant are unrelated, this would be conclusive evidence that the defendant is not the source of the complainant's virus.[57]

4. The Ambit of Zimbabwe's HIV Criminalisation Offence

The implications of the Expert Consensus Statement for Zimbabwe depend on the breadth and scope of the offence in question. Section 79 of the Criminal Code provides:

> ***Deliberate transmission of HIV***
>
> *(1) Any person who—*
>
> *(a) knowing that he or she is infected with HIV; or*
>
> *(b) realising 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 realises 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.*
>
> *(2) It shall be a defence to a charge under subsection (1) for the accused to prove that the other person concerned—*

[56] ibid 8.
[57] ibid.

> *(a) knew that the accused was infected with HIV; and*
>
> *(b) consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it.*

Internationally, a central human rights concern with HIV criminalising laws is that they are overbroad. As stated by the African Commission, these vague and overly broad laws are 'contrary to key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof.'[58] Zimbabwe's law under section 79 of the Criminal Code is no exception and is in fact cited by the African Commission and the UN Special Rapporteur on the Right to Health as an example of overbroad HIV criminalisation.[59] As explained below, judicial interpretations in Zimbabwe have not authoritatively clarified the ambit of the offence, particularly in detailing what conduct is prohibited. In discussing aspects of section 79 of the Criminal Code below, we restrict ourselves to elements of the offence that we consider relevant to the analysis of the Expert Consensus Statement.

A. Prohibited Conduct

There are three aspects of the scope of conduct prohibited under section 79 that are analysed to follow: first, whether the offence applies strictly to cases of HIV transmission or whether mere exposure or non-disclosure of HIV status is criminalised absent proof of transmission; second, whether the provision applies only to sexual conduct; and third whether the offence requires a certain objective level of risk of transmission to sustain conviction.

1. Is Actual Transmission Required?

The title of the offence under section 79 as 'deliberate transmission' has been described as 'somewhat misleading'.[60] While the title appears to limit the crime to conduct that in fact leads to HIV transmission, the language of the provision does not explicitly state that proof of HIV transmission is required. The breadth of the language of section 79 can be understood to imply the possibility of conviction in cases of HIV exposure where no

[58] African Commission on Human and Peoples' Rights, 'HIV: Challenges and Opportunities' (n 29) [36].

[59] ibid [37] and UN Special Rapporteur on the right to health (n 21) [59].

[60] Geoff Feltoe, 'Constitutionality of the Offence of Deliberately Transmitting HIV: Case Note on the Case of *S v Mpofu & Anor* CC-5-16' (2016) 1 Zimbabwe Electronic Law Journal.

transmission is proved: Section 79 requires merely the doing of 'anything' or permitting 'anything' to be done which the individual knows 'will infect' another with HIV or which the individual realises involves a 'real risk or possibility' of infecting another with HIV. The meaning of 'realisation of real risk or possibility', is described in section 15 of the Code as a subjective element and inclusive of conduct in which the accused is aware that the relevant consequence 'might arise', inferring the inclusion of circumstances in which the consequence (HIV infection) does not actually arise. While section 15 details aspects of the mental element of the offence, read together with section 79, the provision appears on its face to include cases of both HIV transmission and HIV exposure absent proof of actual transmission.

Read with section 79(2) of the Criminal Code, in which the defence of the complainant's knowledge and consent is established, the offence can be further understood to in effect criminalise HIV non-disclosure in contexts where the conduct is something which the accused knows or realises to constitute a real risk or possibility of transmission.

In applying the offence, courts have not been consistent or clear on whether proof of transmission is an element of the offence. In *S v Kaiboni Mlambo*,[61] the accused was charged and convicted for contravening the (now repealed) sections 3(a) section 51(1)(b) of the Sexual Offences Act,[62] the HIV-criminalising law applicable at that time. It was alleged that the accused had sexual intercourse with a child below the age of 16 years and that he deliberately or wilfully transmitted HIV to her. It was alleged that he had actual knowledge that he had HIV and had unprotected sex with the complainant, conduct the State presented as likely to lead to the complainant becoming infected with HIV. As there was no evidence led on the complainant's HIV status at any material time, it can be inferred that the trial court did not require proof of transmission to be established for the purposes of conviction.

In *Perfect Ngwenya v the State*,[63] the High Court's description of the elements of the offence do not include a requirement of proof of transmission.[64] In that case, the complainant and defendant had been in a sexual relationship and there was evidence that the defendant had sexual intercourse with the complainant after he tested HIV-positive and after he had initiated antiretroviral treatment. The High Court appeared to

[61] 2004 (Unreported).
[62] Chapter 9:21.
[63] [2017] ZWBHC 59.
[64] At 1, the Court states that the offence 'is committed where an accused knows that he is or she is infected with HIV or realizes there is a risk of this and an accused intentionally does something or permits the doing of anything which he or she realizes involves a real risk of infecting the other'.

confirm his conviction under section 79 on the mere basis of those facts, and no evidence of HIV transmission to the complainant was noted in the decision.

In contrast to the *Mlambo* and *Ngwenya* decisions, the High Court in *Semba v the State* held that the crime's ambit does not include mere HIV exposure: transmission must be proved.[65] The Court reasoned that the language of 'realising the real risk or possibility of' transmission does no more than describe the element of foreseeability and does not extend the sanctioned conduct to mere exposure to HIV.

Unfortunately, decisions from Zimbabwe's apex court have not definitively clarified the conflicting decisions of lower courts. The Constitutional Court's decision in the *Mpofu* case, in giving reasons for why the criminal sanction was considered to be an effective measure to prevent HIV transmission, appears to imply that transmission *is* an element of the offence. Here the Court stated, 'Because of the grave danger to life presented by infection with the HIV virus, [section] 79 providing as it does for the prosecution of persons accused of *spreading the disease* by deliberately or recklessly *infecting others* with it, is rationally connected to, and calculated to achieve, the stated objective.'[66] However, this question (of whether actual transmission is an element of the crime) was not in issue before the Court and, in our view, the judgment does not clarify whether mere exposure or non-disclosure is sufficient to secure conviction.

2. Is Only Conduct of a Sexual Nature Criminalised?

On its face, section 79 is broadly worded. It prohibits doing or permitting the doing of 'anything'. This may be interpreted to include *any* conduct posing a possibility of HIV transmission, thus not limited to sexual transmission.

Court decisions have not clarified this question. While convictions under section 79 have occurred for conduct not limited to sexual intercourse, such as breastfeeding, in *Semba v the State*, the High Court held that section 79 is restricted to 'sexual transmission' only, specifically excluding cases of 'vertical transmission',[67] such as through breastfeeding. However, the Constitutional Court in the *Mpofu* case implied that non-sexual conduct could be prosecuted under section 79. In giving reason's for the Court's confidence in the crime's precision, it cited an example

[65] [2017] ZWHHC 299.

[66] *Mpofu* (n 37) [19]. Emphasis added.

[67] 'Vertical transmission' is used to refer to mother-to-child transmission of HIV or the transmission of HIV to a child from an HIV-infected woman during pregnancy, delivery or breastfeeding.

given by the first applicant of the provision's overbreadth in which the applicant argued that 'innocent people' would fall foul of the provision even if an individual has 'no reason to believe that he or she is infected ... where infection has, unknowing to him or her, been brought about by an injection with an infected needle.' The Court rejected this as an example of section 79's overbreadth stating that in such a case, there was no danger of conviction because the elements of subjective awareness and recklessness would be absent. The Court stated further that prosecution in cases of blood transfusions could 'be allayed by full disclosure of such fear [of the possibility of transmission] to the intended partner'. In both examples, the Court's preclusion of the possibility of conviction was not on the basis that the offence applied only to sexual conduct but for other reasons – in the injection example, because the mental element was absent and in the transfusion example, because of the fulfilment of the defence of disclosure. This could be read to infer that prosecution is possible for non-sexual conduct in which HIV transmission is possible such as through injections, blood transfusions, childbirth and breastfeeding.

3. Is a Certain Objective Level of Transmission Risk Required to Sustain Conviction?

The Constitutional Court in *Mpofu* considered an argument made by the first applicant that the offence under section 79 was overbroad. The first applicant argued that as a person living with HIV, even if a condom was used during sexual intercourse, they nevertheless risked prosecution under section 79 because of the risk that the condom could be ineffective, for example, if the condom broke or was damaged. In response to this argument, the Court held that the 'fears expressed by [the first applicant] in regard to [potentially] ineffective condoms ... can be allayed by full disclosures of such fears to the intended partner'.[68] We concede that it is possible to interpret this statement by the Court to mean that *any* risk of HIV transmission, no matter how remote, is prosecutable under section 79 and incurs a duty to disclose that risk.

However, we would argue that if the conduct in question poses no objectively relevant risk of HIV transmission, there would be no rational purpose to the offence. In the *Mpofu* decision, the Constitutional Court held that the objective of the offence under section 79 'is to halt or prevent the spread of HIV/AIDS'.[69] If the conduct in question poses no risk of transmission, the need to prevent that conduct through criminal law falls away. In line with this objective and the actual language of the offence (and

[68] *Mpofu* (n 37) [12].
[69] ibid [18].

assuming the offence applies to a broad understanding of 'any' conduct, i.e. including exposure or non-disclosure of HIV-positive status absent transmission) it can be argued that the criminal conduct must at a minimum be something which objectively 'will infect' another person or involves a 'real risk or possibility' of HIV infection.

While section 15 of the Criminal Code's elaboration of the term 'realisation of real risk or possibility' describes mental elements of the offence relating to foreseeability and recklessness, aspects of section 15 affirm an interpretation that a level of real, objective risk is required in the conduct in question. In application to section 79, section 15(1)(a) of the Criminal Code states that the element requires, in part, awareness by the accused that 'there was a risk or possibility, other than a remote risk or possibility' that their conduct 'might give rise' to HIV transmission. An objectively 'remote risk' of HIV transmission in particular conduct would therefore not be sufficient for conviction.

We are not aware of any reported court decisions in Zimbabwe that have dealt directly with this issue in relation to section 79 in which the conduct in question has been meaningfully assessed on evidence, whether the conduct necessarily 'will' lead to another being infected or is something which objectively poses a 'real risk or possibility' of risk of infection. In most cases, it appears that social understandings of conduct presumed to risk HIV infection (likely informed by public health messaging and HIV stigma) are accepted as sufficient without questioning the scientific basis of those assumptions.

The High Court in *S v Semba* did, however, in *obiter dicta,* discuss factors that are recognised 'to be relevant to issues of transmission'. In stating that there is a need to revisit the section to recognise defences in line with the science of HIV, the Court referred to the Swiss expert statement[70] and recognised the role of antiretroviral adherence in reducing the risk of transmission through lowering viral load. The Court's concern therefore appeared to be that the offence on its face provided only for defences based on the complainant's knowledge of and consent to the exposure to HIV and did not permit the Court to recognise other defences, such as where an accused's conduct has no scientifically relevant risk of transmission, for example where the accused has an undetectable viral load or used protection such as a condom.

We argue that the High Court in *S v Semba* was correct to highlight the relevance of such defences but that there is no need for the provision to be redrafted in order for a court to consider these aspects. It can be argued that the language of the provision requires the prosecution to prove, beyond a reasonable doubt, that the particular conduct of which an

[70] Pietro Vernazza et al (n 6).

individual stands accused either 'will transmit' HIV or has a 'real risk or possibility' of transmission. If a defendant raises reasonable doubt in regard to these standards, a conviction ought not to be secure.

In summary, until the Supreme Court or Constitutional Court have confirmed the ambit of the conduct element of the offence, the conflicting judgments at High Court level leave the breadth of the offence open to determination on a case-by-case basis, potentially including both sexual and other forms of conduct as well as conduct that implicates mere exposure or non-disclosure of HIV-positive status, absent proof of transmission. While not clearly affirmed in precedent, there is however a strong argument to make that an objective level of 'real risk' of transmission is required to convict an accused.

In the context of this indeterminacy, the Expert Consensus Statement is nevertheless of significant value in rationalising the application of section 79.

If actual transmission *is* considered an element of the offence, courts and defendants may use the Expert Consensus Statement to scientifically ground a point of departure that establishing transmission between two individuals is in reality very difficult to prove. In the least, the Expert Consensus Statement would unsettle assumptions of transmission on the mere basis that both complainant and accused are found to be living with HIV. If the science in the Statement is taken into account, courts would at least insist that evidence is led on this issue of transmission as part of the burden the State has to discharge, and not merely assume this as fact. The Expert Consensus Statement empowers a defendant's insistence that the mere fact that an accused tested first as HIV-positive is not proof of transmission and establishes scientific consensus that reliable inferences cannot necessarily be drawn from viral load testing and CD4-count tests on the timing of transmission and certainly not of the direction of transmission. Moreover, while we are not aware of any cases in Zimbabwe that have used phylogenetic analysis in evidence, the Expert Consensus Statement places the courts in a better position to evaluate such evidence should it be presented, taking into account the highly qualified and limited value any such evidence would have in positively establishing the route of transmission.

The Expert Consensus Statement is also valuable to courts navigating presuppositions about whether given conduct meets a standard of having an objective 'real risk or possibility' of transmitting HIV. For example, the Statement's clarification that a single act of unprotected vaginal-penile intercourse, even without the use of a condom or where the individual does *not* have a low viral load, has a 'low' possibility of transmission of about 0.08% would be relevant to a court's assessment. Such a low level of risk would certainly not meet the threshold of conduct that 'will' transmit

HIV, and we would argue is insufficient to even establish a 'real risk or possibility' of transmission. Should an accused person in this position be on effective antiretroviral therapy, the courts may use the Expert Consensus Statement to recognise the likelihood that the accused would have a lowered viral load that would further reduce any risk of transmission below 0.08% to effectively zero. In particular, if there is reasonable doubt that a condom was used *or* that the accused's viral load was clinically suppressed or undetectable, we would argue that a court should not convict the individual on the basis that these factors would mean there is no to negligible possibility of HIV transmission in terms of the science set out in the Expert Consensus Statement.

B. The Mental Elements

As with the conduct elements of the offence under section 79, the language of section 79 is similarly vague on the mental elements. While the title of 'deliberate' transmission infers a legislative aim of criminalising only intentional and deliberate transmission, the contents of the provision, read with section 15 of the Criminal Code, are more broadly worded.

The Constitutional Court's judgment in the *Mpofu* case did provide some clarification. The question of whether constructive intent was sufficient to sustain a conviction under section 79 was in issue before the Constitutional Court. The Court held that the offence embraces both actual intent (*dolus directus*) and constructive intent (*dolus eventualis*): 'the offender who has an actual intent to infect another and the one who is reckless as to whether or not his actions will result in the infection of another are caught by [section] 79.'[71] The Court held that the duty created to disclose one's HIV-positive status under section 79 does not only apply to individuals who have actual knowledge of their HIV-status but also those who have 'reason to believe that one might be' HIV-positive.[72] This means that it punishes those who seek to spread HIV with prior knowledge of their status and those who act recklessly with the knowledge that they *could* be HIV-positive.

It is noted that while the accused need not have actual knowledge of their HIV-positive status to sustain a conviction, proof that the accused is in fact HIV-positive is generally understood to be an element of the offence. Since a 2016 amendment to the Criminal Procedure and Evidence Act [Chapter 9:07], accused persons can now be subjected to

[71] *Mpofu* (n 37) [11].
[72] ibid [13].

forcible, non-consensual HIV-testing for use against them in evidence at trial.[73]

While the mental elements of the crime refer to subjective assessments of the accused's state of mind, courts in other jurisdictions have considered that where there is objectively no real risk or possibility of HIV transmission in the conduct of which an individual stands accused, the courts should consider this as contextual evidence that the accused could not have believed or have had knowledge that their conduct would have or posed a real risk of transmission. In Malawi, the High Court in *EL v the Republic*, conducted precisely such an analysis.[74] The appellant in that case was a woman living with HIV who was accused of breastfeeding another woman's child under an offence requiring proof of the accused's intent or recklessness in relation to conduct they reasonably believed to be likely to transmit a disease. The Court considered expert evidence that the risk of HIV transmission through a single exposure to breastmilk was 'infinitesimally small'. It considered further that international and domestic health guidelines in fact recommended women living with HIV who are on treatment to breastfeed their children as safe and that the accused in fact breastfed her own child. The Court held:

> *As a result, having no intention to cause harm to her own child through breastfeeding or other ways would not breastfeed another child and her intention be interpreted to mean that she had knowledge or reason to believe that her actions were likely to spread HIV/AIDS to the other child. It is this court's considered view that the Appellant did not have the requisite knowledge or belief that breastfeeding the Complainant's child would likely spread the infection to the Complainant's child.*[75]

The Zimbabwe High Court in *Semba v the State* held similarly that, there was no proof in that case that the defendant knew that her conduct (also breastfeeding another woman's child) would result in HIV transmission.

In future charges under section 79 of the Criminal Code, the Expert Consensus Statement may provide important contextual guidance for courts to assess whether the mental element of the crime is met. For example, where an individual's conduct poses a low risk of HIV transmission, it cannot be inferred that on the basis of their conduct alone,

[73] Section 264 of the Criminal Procedure and Evidence Act as promulgated through section 40 of the Criminal Procedure and Evidence Amendment Act 2 of 2016.

[74] *EL* (n 36).

[75] ibid [4.15].

that there is circumstantial evidence proving an accused's intention to transmit HIV or proving the accused's knowledge that their conduct is something that poses a sufficient risk to transmit HIV.

C. Defences

Section 79(2) of the Criminal Code creates a defence to the charge if the accused can prove that the complainant both knew of the accused's HIV-positive status and consented to the conduct while appreciating the nature of HIV and the possibility of HIV infection. While it does not provide any additional explicit defences, this does not mean that other defences are not available. Courts should be open to consider whether the State has discharged its onus by considering other relevant factors, for example, that an individual may fail to disclose their HIV-status with neither intent to infect another nor recklessness but due to the individual fearing that their partner will harm them if they disclose their HIV status.

In this context, the Expert Consensus Statement is valuable as discussed above in providing accused persons with grounds to contest whether the State has discharged its onus to prove certain elements of the offence relating to both the conduct and mental elements. These need not be recognised explicitly in section 79 for a court to consider them in assessing the evidence.

E. Sentencing

Section 79 sets a maximum sentence of twenty years' imprisonment. The Constitutional Court in the *Mpofu* judgment, made repeated reference to the gravity of the offence and the consequences of transmission on complainants, aspects that would weigh on a court in determining sentencing. The Court described HIV as a 'grave danger to life'[76] that 'could be fatal to the victim' and that infection is '[i]n effect, in some if not in all cases, a death sentence'.[77]

The Expert Consensus Statement has significant relevance to better informing these assumptions that courts may make in sentencing. While the Statement acknowledges that the natural course of HIV if left untreated can result in increased mortality and morbidity and it by no means understates the seriousness of HIV, the Statement's affirmation of the prospect of a long, full and healthy life if a person receives treatment, should change the courts' assessment of both the gravity of the offence and in assessing the harm that transmission causes.

[76] *Mpofu* (n 37) [19].
[77] ibid [20].

5. Section 79 Should Nevertheless Be Repealed

The High Court in *S v Semba* describes the Zimbabwean approach to HIV through section 79 as 'fear and panic-driven'.[78] Outdated, fear- and panic-driven responses to HIV are unwarranted, inappropriate, and harmful. Such approaches fuel stigma and discrimination against people living with HIV. Continuing such responses in the context of current and evolving scientific understandings of HIV and transmission dynamics is also inappropriate considering that, as the Expert Consensus Statement explains, HIV is scientifically harder to transmit than commonly assumed by courts and because of the incredible impact of antiretroviral treatment.

However, the courts' use of the science to limit fear- and panic-driven approaches in the criminal justice system can only bring a limited measure of justice to the offence under section 79. Because even if improvements are made to limit unjust prosecutions and convictions through more scientifically consistent jurisprudence and prosecutorial decisions, convictions may persist under section 79 against people whose conduct ought not to be considered criminally culpable.

The consideration of viral loads and viral load testing exemplifies this problem. In addition to the significant improvements in mortality and morbidity, the impact of antiretroviral treatment includes, as the Expert Consensus Statement describes, the phenomenon that a person with an undetectable viral load cannot transmit HIV and that the lower an individual's viral load is, the less likely they are to transmit HIV. An 'undetectable viral load' means that the number of virus copies in a unit of a person's blood is undetectable by a standard laboratory test. Depending on the sensitivity of tests used, 'undetectable' can range from between 20 viral copies to 400 viral copies per mL of blood plasma.[79] The Expert Consensus Statement describes studies from Uganda that indicate the probability of HIV transmission through sexual intercourse where an individual's viral load is lower than 1,700 copies per mL is reduced to 1 in 10,000. Therefore, even if an individual living with HIV has a low but detectable viral load, their probability of HIV transmission is measurably lowered.

As argued above, convicting someone for HIV exposure under section 79 where they have an undetectable viral load, simply based on their actions with no proven HIV transmission, would be irrational because there is no realistic risk of transmission. A court's assessment of the risk of transmission in any act of HIV exposure should take into account the risk-

[78] *Semba* (n 65).
[79] Françoise Barré-Sinnoussi et al (n 10) 4.

lowering effect of a person having a low viral load (among other factors) at the time. Unless the State can prove otherwise, we would argue that being on antiretroviral treatment should be sufficient to at least establish a presumption that there was no real risk of HIV transmission. This should preclude conviction, regardless of whether or not the individual disclosed their HIV-positive status.

However, even accepting these scientifically informed limits of section 79, unjust convictions may continue against individuals who don't know their HIV status, individuals who aren't on treatment or who don't have low viral loads despite being on treatment. Holding these people criminally liable would be unjust in our view and deeply distorts the public health inadequacies that perpetuate HIV transmission in an era of effective treatment-as-prevention.

Zimbabwe has made significant progress in its HIV response since the time that HIV criminalisation was enacted. But despite this progress, there remain people living with HIV who don't know their HIV-positive status, people who are still not able to access treatment despite an HIV-positive diagnosis, and a number of people living with HIV who are not virally suppressed.[80]

The barriers to HIV testing, treatment, and viral suppression are varied. For example, people living with HIV in Zimbabwe have described many barriers to their ability to access HIV services including health system-related barriers (such as user fees, long waiting times, lack of patient confidentiality, negative attitudes of healthcare workers and the absence of consistent community-based services), community-related barriers (including stigma and discrimination, food insecurity, distance to facilities and counterproductive messaging from religious sectors); and others.[81]

Viral load testing is also not as accessible as it should be in Zimbabwe. While it is understood that improvements have since been made, one study showed, for example, that in 2015 only 5.6% of people living with HIV in Zimbabwe who were on antiretroviral treatment had access to viral load testing.[82] This means that healthcare workers may not be able to identify people living with HIV who are not virally suppressed despite

[80] See National AIDS Council, 'Global AIDS Response Progress Report 2017: Fast Track Commitments to End AIDS by 2030' (2017) <http://www.unaids.org/sites/default/files/country/documents/ZWE_2017_countryreport.pdf> accessed 27 September 2018 and ICAP, 'Zimbabwe Population-Based HIV Impact Assessment: ZIMPHIA 2015-2016' <https://phia.icap.columbia.edu/wp-content/uploads/2016/11/ZIMBABWE-Factsheet.FIN_.pdf> accessed 27 September 2018.

[81] TA Tafuma et al, 'Barriers to HIV Service Utilisation by People Living with HIV in Two Provinces in Zimbabwe: Results from 2016 Baseline Assessment' (2018) 19(1) Southern African Journal of HIV Medicine 721.

[82] PH Kilmarx and R Simbi, 'Progress and Challenges in Scaling Up Laboratory Monitoring of HIV Treatment' (2016) 13(8) PLoS Med.

being on treatment in order to assist them[83] whether through changing medications, providing further counselling, addressing treatment access barriers, or managing side effects and co-infections, etc.

If the legal system is to align itself with the science as seen through the Expert Consensus Statement, it is fair and just to consider the impact of an accused's viral load on their culpability. We argue that, on the basis of this science in Zimbabwe's context, if an individual accused under section 79 is on treatment, they ought to enjoy the presumption of non-transmissibility and not face conviction. This position is consistent with current scientific knowledge. Yet it remains that some individuals who the State and the healthcare system have failed (people who do not know their HIV status or are not on effective treatment) may still be vulnerable to prosecution under section 79.

This situation perhaps most acutely exemplifies the discriminatory and unjust consequences of retaining HIV criminalisation laws because these laws in essence impose individual criminal responsibility on people whose right to health has most likely already been infringed due to the failure of the State and health systems to provide accessible testing, treatment and prevention services. These are the very same people who are already likely to be marginalised based on poverty, age, gender and other factors.

The Constitutional Court's decision in *Mpofu*, appears to accept that the imposition of individual criminal responsibility in these circumstances is in any case just because 'public policy requires' the protection of people from HIV infection and that if people living with HIV disclose their status or concerns to individuals exposed, they will be exempt from criminal liability.[84] Section 79(2) exempts individuals from liability if the individual exposed to HIV 'knew that the accused was infected' and 'consented to the act in question, appreciating the nature of HIV and the possibility of becoming infected with it'.

This position fails to appreciate, however, that there is a mass of sound empirical research that explains the varied and complex reasons why people fail to disclose their HIV-positive status to others and, in fact, that the existence of a criminal offence of this nature may only perpetuate stigma and peoples' anxieties to further inhibit disclosure.[85] Studies in Canada[86] and the United States of America (USA),[87] for example, have

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[83] ibid.

[84] *Mpofu* (n 37) [12].

[85] Matthew Weait, 'Knowledge, Autonomy and Consent: *R v Konzani*' (2005) Criminal Law Review 763.

[86] P O'Byrne, 'Criminal Law and Public Health Practice: Are the Canadian HIV Disclosure Laws an Effective HIV Prevention Strategy?' (2012) 9(1)Sexuality Research and Social Policy 70.

[87] Scott Burris et al, 'Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial' (2007) 39 Arizona State Law Journal 467.

shown that HIV criminalising laws may in fact make HIV-status disclosure more difficult.

Moreover, the requirement that the person living with HIV's (sexual) partner 'appreciates the nature of HIV and the possibility of becoming infected with it' is arguably an extraordinarily high standard for courts and legislatures (who themselves have shown difficulties keeping up to date with knowledge of HIV transmission dynamics) to exempt liability, in a country in which a significant portion of the population doesn't even know their HIV status, never mind appreciate 'the nature of HIV and the possibility of becoming infected with it'.

Studies show that most people living with HIV do not want to transmit HIV and believe that either safe sex practices or disclosing their HIV-positive status to their sexual partners is the right thing to do.[88] A study in the USA showed that these beliefs are grounded in notions of moral responsibility, and are not impacted by their knowledge of whether or not the criminal law applied.[89] The application of the criminal law has not shown to deter people on the fringes of these statistics from behaviour posing a risk of transmission or from failing to disclose their HIV status.

The existence of section 79 is simply bad public health policy and emboldens the dangerous myth that people living with HIV are culpable for the epidemic. This is at the expense of a rights-affirming response that would create an enabling environment where all people can access accurate HIV information, testing, treatment, monitoring and complimentary services. Section 79 should be repealed. In the meantime, section 79 should only be applied in its most limited form, with strict adherence to human rights principles and in line with accurate and scientifically informed understandings of HIV transmission dynamics.

6. Conclusion

The Zimbabwean Constitutional Court in the *Mpofu* case missed an opportunity to recognise significant human rights concerns in section 79 of the Criminal Code.[90] It is possible that the Court failed to comprehend the overbreadth of the offence because of a misunderstanding of the

[88] Edwin Bernard, 'HIV and the Criminal Law' (2010) NAM 57 and studies cited therein, including CL Galletly and DL Dickson-Gomez, 'HIV Seropositive Status Disclosure to Prospective Sex Partners and the Criminal Laws that Require It: Perspectives of Persons Living with HIV' (2009) 20(9) International Journal of STD & AIDS 613; K Siegel, HM Lekas and EW Schrimshaw, 'Serostatus Disclosure to Sexual Partners by HIV-Infected Women Before and After the Advent of HAART' (2005) 41(4) Women & Health 63.

[89] Scott Burris et al (n 87) and MD Phillips and G Schembri, 'Narratives of HIV: Measuring Understanding of HIV and the Law in HIV-Positive Patients' (2016) 42 Journal of Family Planning and Reproductive Health Care 30.

[90] *Mpofu* (n 37).

scientific complexity of HIV. Had the Expert Consensus Statement been available to the Court at the time, one would hope that the Court's analysis would have been better informed in not only its assessment of the overbreadth of the offence but also in appreciating the clumsiness of section 79 as an effective HIV-prevention tool. This may have countered the Court's acceptance that the provision's discrimination against people living with HIV was justified in terms of the permissible grounds for limiting rights under the Constitution.

Much of the Constitutional Court's comfort in the offence being sufficiently precise was founded in its confidence that courts would not apply section 79 in an arbitrary manner because any court would 'assess the evidence in a rational manner'.[91] Embracing the implications of the Expert Consensus Statement indicates to the contrary, however, that Zimbabwe courts have indeed failed to apply the offence in a rational and non-arbitrary manner particularly as the courts have not clarified the ambit of the offence sufficiently. If a new constitutional challenge is brought against the offence under the 2013 Constitution, consideration should be made to pursue the case through action proceedings in the High Court, allowing expert evidence to be led, which could include the Expert Consensus Statement.

Nevertheless, there is certainly hope that while the offence remains on the books, the Expert Consensus Statement provides an authoritative tool for courts, prosecutors and defendants to assess the relevance of the evidence in a case. In particular, the Expert Consensus Statement offers a means to evaluate evidence of actual HIV transmission, to determine the relatively low level of risk of transmission in certain types of conduct, to draw appropriate inferences on mental elements of the offence, to appreciate how certain conditions or risk-reducing conduct may have scope for recognition as defences to the crime in its existing form, and to appropriately inform the court's assessment of the impact of HIV transmission in sentencing.

The High Court in *S v Semba* suggested the need to revisit section 79 through developing prosecutorial guidelines that are more in line with the science.[92] The Expert Consensus Statement ought to be a useful starting point for the Prosecutor-General to restrain the unjust application of the law, particularly as many defendants who stand to be convicted under the offence may be unlikely to enjoy legal representation in their defence at trial.

But the Expert Consensus Statement is not a panacea. While it has the potential to temper and possibly prevent unjust prosecutions if embraced,

[91] ibid [19].
[92] *Semba* (n 65).

the offence’s mere existence perpetuates stigma against people living with HIV and undermines important public health messaging on the shared responsibility for health and HIV prevention of adults in consensual sexual relationships. Moreover, by remaining on the books, the offence exists as a threat, particularly for women living with HIV in power-imbalanced relationships for whom a great harm is done by the mere fact of bringing a charge publicly, regardless of the prosecution’s success.

Zimbabwe has made great progress in its HIV response, but its poor health system infrastructure continues to leave many people without access to testing, effective treatment and viral load testing. While recognising the science of the absence of a transmission risk where an individual has an undetectable viral load is undeniably important to rationalising the law, we remain concerned that those most on the periphery of healthcare services in Zimbabwe will remain vulnerable to prosecution.

In our view, the only just and equitable course of action is for the total repeal of section 79 of the Criminal Code.