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A Breakfast Seminar for the Legal Fraternity on Saturday, October 26th, 2002

EXECUTIVE SUMMARY

On October 26th 2002, The National AIDS Coordinating Agency (NACA), The Law Society of Botswana, and The Botswana Network on Ethics, Law, and HIV/AIDS (BONELA) hosted a seminar for 60 members of the legal fraternity of Botswana. The Seminar, “Justice, Reason and Hope in the HIV Epidemic in Botswana” was the first such gathering of legal practitioners in Botswana regarding the issue of the involvement of the legal fraternity in the fight against HIV/AIDS.

The goal of this seminar was to provide a starting point for the involvement of legal practitioners on legal, ethical and human rights issues relating to HIV/AIDS. The organizers hoped to start a dialogue and examine and brainstorm on specific legal issues surrounding the epidemic and to develop recommendations on the way forward. As respected members of the community, the legal fraternity is well placed and has a unique responsibility to take a stance and draw attention to ethical, legal and human rights issues and HIV.

The objectives were met as was evidenced by the lively discussion that followed all of the presentations as well as the formation of a Lawyers Task Force to follow-up on the issues that were raised at the workshop.

Judge Edwin Cameron of the South African Supreme Court of Appeal gave the key note address, and he was supported by an impressive panel of local speakers: Ms. Christine Stegling gave the Welcome Remarks followed by Dr. Banu Khan who delivered the Opening Statement.

The first speaker of the day was Justice Marumo of the Francistown High Court. He discussed ways in which the judiciary should become involved and stated that judges and lawyers have a moral responsibility to their constituency. Despite, a general reluctance of the judiciary to take a stand on certain legal issue Justice Marumo forged ahead with suggestions and recommendations for their involvement.

Justice DeVilliers of the Industrial Court was the next presenter and he spoke about issues of employment and HIV/AIDS and how it has affected his work at the Industrial Court. He emphasized the point that there is currently no legislation in Botswana which specifically deals with HIV/AIDS but there is an extensive regional and international framework that could provide the basis for future legislation. He stated that the Industrial Court cannot get involved in the preliminary aspect regarding a policy framework for HIV legislation, however, they can and do, develop labour law jurisprudence based on international labour conventions. In this way, they could ensure the adherence to international human rights standards.

Judge Edwin Cameron, our guest speaker, shared his thoughts on the issue of legal involvement in the fight against HIV in Botswana. He spoke about his own battle with the virus and his experience with discrimination, stigma and fear. He also challenged the legal fraternity of Botswana to examine their laws and their AIDS policies and use their expertise to ensure there is fairness and justice in all areas. "The law", he said, "cannot change peoples' minds, but it can lead society's opinion".

Mr. Duma Boko, who was representing the Law Society of Botswana, responded to all the issues presented to that point. He presented a passionate argument for the protection of all human rights in this time of HIV; he challenged Botswana to question her culture and how it is contributing to the spread of the virus. He stated that the greatest challenge to lawyers in this regard is to overcome their own personal bias.

The final speaker of the morning was the Honourable P.T.C. Skelemani, the Attorney General of

Botswana. In his closing remarks he thanked all the participants for their remarks and admitted that there was a lot to think about. He suggested there is room for improvement in the laws of Botswana and as the Attorney General he is open to suggestions on how to balance rights and responsibilities in legislation.

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Workshop Recommendations

1. There should be a committee of lawyers formed to take this meeting forward. The Committee should report back to the seminar and the Law Society of Botswana by February 2003.
2. Lawyers on this committee should investigate areas such as employment where there should be legislation on HIV.
3. Lawyers should agree to take on some pro-bono work (as per the Legal Practitioners Act).
4. Lawyers should participate in the Ethics, Law, and Human Rights Sector of the National AIDS Council. The sector has an open door policy and may call upon the assistance of legal practitioners to assist their efforts. Lawyers can have meaningful input through the sector and lawyers should not turn the Sector away when they have questions.
5. Lawyers should be at the forefront to discuss medical regulations within the legal framework.
6. There needs to be an operational medical council which can enforce issues of medical ethics and patients rights. People are becoming more aware of their rights and there needs to be institutions in place so they can claim them.
7. Legal aid needs to be seriously considered by government and VAT (Value Added Tax) should be removed from the cost of legal services.
8. There needs to be a concerted effort to educate people on their rights.
9. Employers need to be sensitized on issues of HIV and be made to understand the cost/benefit analysis of treating their employees versus dismissing them or letting them die.
10. BOCCIM needs to be involved to address their members on how to apply/facilitate an HIV policy at the workplace.
- 11.** The courts need to support the difficulties faced by PLWHA in litigation. There

needs to be a consideration of the life span of an HIV positive person to ensure that court cases relating to the violation of their rights can be resolved in a reasonable amount of time.

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Lawyers Task Force on Involving the Legal Fraternity in the fight against HIV

It was decided that the membership of the Task Force would include 5 people.

1. Mr. Duma Boko from Boko and Mothala Attorneys.
2. Mr. Dick Bayford from Bayford and Associates.
3. Ms. Botsalano Motlhabane of Botswana Telecommunications Corporation.
4. Mr. Herbert Sikhakhane of Sikhakhane and Company.
5. A lawyer from the Attorney General's Chambers.

It was further agreed that the Task Force would report back to the forum at the end of February 2003.

BONELA offered to organize both the Task Force meetings and the larger forum in February and also to act as the secretariat for the Task Force.

Seminar Programme of Events

8:30 – Arrival of Guests and Registration.

Breakfast will be available.

9:00 – Introductions and Welcome

Christine Stegling – Director of BONELA

Justice Key Dingake – Master of Ceremonies

9: 05 - Opening Statement

Dr. Banu Khan, Coordinator of NACA

9: 10 - Role of the Judiciary and the Legal Fraternity in response to the HIV/AIDS Epidemic in Botswana.

Justice Marumo – Francistown High Court

9:30 – Discussion

9:40 – Employment Law and HIV/AIDS in Botswana

Justice DeVilliers – Industrial Court

10:00 - Discussion

10:10 – TEA

10: 30 – Justice, Reason and Hope in the HIV Epidemic in Botswana

Justice Edwin Cameron - South African Supreme Court of Appeal

11:10 – Discussion

11:30 – Respondent: Challenges for the Legal Fraternity in the context of the HIV Epidemic.

Mr. Duma Boko – The Law Society of Botswana

11: 50 – Discussion

12:00 – Plenary Discussion on the role of the Legal Fraternity.

Facilitator - **Justice Key Dingake**

12: 50 – Closing Remarks

Mr. P.T.C. Skelemani – Attorney General of Botswana

1:00 - Lunch

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Welcome Remarks

Christine Stegling, Director, BONELA

Welcome everyone and thank you for coming out on a Saturday morning so early to our seminar on “Justice, Reason and Hope in the HIV Epidemic in Botswana. I would like to specially welcome: Justice Edwin Cameron, to whom we are especially grateful as he came all the way from Windhoek yesterday. We would also like to thank him for his patience as we struggled to find a date and a theme for today, which he ultimately provided us with. We are very grateful that he took the time from his busy schedule to speak to us today.

Welcome to:

Justice Marumo from the Francistown High Court.

Dr. Banu Khan, the Coordinator of the National AIDS Coordinating Agency.

Justice DeVilliers of the Industrial Court in Gaborone.

Mr. Duma Boko, from the Law Society of Botswana.

Mr. Skelemani, the Attorney General of Botswana

Justice Key Dingake, also of the Industrial Court. Justice Dingake was a strong supporter of this event right from the very beginning and we are grateful that he continued his support to this project after his appointment to the bench.

I would also like to welcome Monique Goudreau from the World University Service of Canada

(WUSC). WUSC facilitated the funding of this event through the HIV/AIDS Small Grants Fund which is supported through the Canadian International Development Agency (CIDA), The Canadian Society for International Health (CSIH), and the Inter-Agency Coalition on AIDS and Development (ICAD). We are very grateful for their support and would like to thank Monique for coming.

I would like to thank our co-organizers of this event: NACA and The Law Society of Botswana for agreeing to be part of this whole process and putting so much effort into the coordination. This was a very important partnership for BONELA; we recognize how crucial it is to work with other institutions to make a meaningful difference in the national response to the epidemic. I would like to make a special thank you to Sanji Monageng of the Law Society of Botswana for her hard work and for helping identifying participants and spending time discussing with each of you the importance of this event.

I would like to point out our two BONELA board members who are among you all today. Maame Awuah, and Gloria Jacques who have both been very supportive of these efforts. (I apologise on behalf of the Chair of the BONELA board who could not be here today because of a family funeral.)

Finally, I would like to thank the members of the organising committee.

- Dorothy Tlagae of the UNDP,
- Mr. Whendero from NACA,
- Ms. Sanji Monageng from the Law Society of Botswana,
- Mr. Colin Duncan from Colin Duncan and Associates,
- Mr. Victor Chimbwanda from Tebogo Sebego Attorneys,
- Ms. Chipo Manwa from Maripe & White,
- Justice Key Dingake, and
- Ms. Gloria Jacques.

These people have been tremendous in helping to organize this event, they have been with us for many months coming up with ideas for this day. Some of them wrote the concept paper, others provided us with logistical support and they have all been a great support during this entire process.

I would like to quickly give a brief background to this seminar and to clarify the objectives of the day.

BONELA received funding in the beginning of 2002 to sensitise constituencies who had not yet been actively involved and lacked support to become involved in the fight against HIV. With this funding, BONELA has so far worked with the trade unions and other similar associations on issues of human rights, employment and HIV/AIDS. BONELA's mandate as an organization is to address legal, ethical and human rights issues as they relate to HIV/AIDS and we recognized it was crucial for those involved in the area of law to contribute to the national response to the epidemic.

I would like to point you all to the concept paper that you received with your invitation. As part of the concept paper you will find the objectives of today's seminar. They are:

- To sensitise the legal fraternity namely lawyers, magistrates and judges, on legal and human rights issues with respect to HIV/AIDS.

And specifically:

- To examine and brainstorm on specific legal issues surrounding HIV/AIDS and create a dialogue on the possible role of the legal fraternity in the fight against the virus.

We hope that today will be a starting point for the legal fraternity to become involved in the fight against HIV/AIDS. We need to create an enabling and supportive legal environment for those in our society who are infected and affected by the virus and you are vital partners to achieving this goal.

Above all, I would hope that all of you will enjoy this event. I will now call upon the Master of Ceremonies, Justice Dingake to begin the proceedings.

BACK

Opening Statement

Dr. Banu Khan, Coordinator, National AIDS Coordinating Agency (NACA)

As one of the co-organisers of the event, I would like to welcome all of you again and appreciate that NACA, BONELA, and the Law Society of Botswana have managed to call for such a meeting which addresses a constituency that has not been specifically targeted within the national response to the HIV epidemic in Botswana. We are grateful to legal practitioners who have responded to this call to start an initial discussion on how the legal fraternity in Botswana can be involved in the fight against HIV/AIDS. I would like to give special recognition to Key [Dingake] for his involvement in the national response to the epidemic as a lawyer.

I will not give you a detailed account about the current statistics or economic and social implications of the epidemic. However, I would like to point to our latest sentinel surveillance report of 2001 which notes that the epidemic trend continues to increase, with all survey sites in 2001 having had an HIV prevalence in pregnant women of over 20% and with an overall age group [\[1\]](#) adjusted in HIV prevalence for pregnant women (15-49 years of age) of 36.2%.

These statistics clearly indicate that everybody in this country has been touched by the epidemic in one way or the other. We need to bring the statistics home, if there are 100 of us in this room then 30 of us are infected. We need to recognise the personal realities of the epidemic. Think about your own everyday situations, how many of the clients you see everyday in your law firm are infected? How many of the people that appear before you in court every day are HIV positive? Once one has appreciated the realities of this epidemic, there is no question that all of us, in all walks of life have a social and moral responsibility to address HIV and AIDS in Botswana. We should take the lead

from the commitment of our political leadership such as His Excellency the President of Botswana, and the Minister of Health to name just a few.

Recognising the fact that every sphere or sector of Botswana society needs to be part of the national response, the Botswana Government has been implementing a multi-sectoral approach since 1997 which calls on the cooperation and involvement of all public and private sector institutions, including civil society. This multi-sectoral response is coordinated by the National AIDS Coordinating Agency (NACA) which also provides the secretariat of the National AIDS Council (NAC) which is chaired by His Excellency the President of Botswana. The NAC, with its different sectors, reviews and discusses policy issues of national importance with regards to HIV/AIDS and in so doing provides for a forum for debate at the highest political level, responding to the epidemic as a matter of urgency since the HIV epidemic has been declared a national emergency.

Until very recently, the NAC had only minimal legal representation with only Attorney General's Chambers having a seat on the Council, but in June this year NACA called several concerned institutions to form a sector that specifically addresses legal and ethical questions with regards to HIV/AIDS. The sector actually started working through BONELA and has since become a sector in its own right. I have never seen such a galvanized sector. You started very recently but before we knew it you had already met several times and now the sector is busy working on its strategic plan.

The sector recognises the overall importance of human rights and is now called the Ethics, Law, and Human Rights Sector of the National AIDS Council. It is in many ways different to other sectors of the Council since it is being organised mainly through civil society institutions such as BONELA and the Law Society but it also includes representatives of Attorney General's Chambers, the Botswana Courts, the Health Research Unit and the University of Botswana.

The overall aim of this sector is to integrate an ethical, legal and human rights dimension into the national response. One of the intentions of the sector is to ensure that the national response to the epidemic is conducted in such a way that rights stipulated in the Constitution of Botswana and in regional and international human rights instruments are respected, protected and promoted. Furthermore, the sector aims at initiating and advising on the development of appropriate policies to ensure an effective, efficient, and ethical response. Today's seminar is part of the sector's vision to identify and mobilise stakeholders to ensure their active participation to the response and we would hope very much that some of the participants will be motivated to contribute to the sector's work in future.

NACA shares the understanding of the National AIDS Council that the epidemic poses numerous ethical, legal and human rights questions that need to be debated, analysed and addressed in a timely fashion and is therefore hopeful that the sector and its affiliates will assist the national programme. There is a definite need to bring human rights to the forefront of the fight against HIV/AIDS with the understanding that a rights-based prevention approach is crucial in recognising societal vulnerability to HIV/AIDS.

This sector needs to be involved in monitoring policies to ensure that those that are implemented are compliant with a human rights approach. The work of this sector is crucial to bring about social

justice in Botswana.

Taking cognisance of the important relationship between HIV and human rights, NACA has decided to mainstream human rights into the revised National Policy on HIV/AIDS. This is an ongoing process and needs a concerted effort by all key stakeholders. All these issues are becoming increasingly important, taking into consideration the many new and unprecedented developments in the area of HIV/AIDS.

I am at a loss for words to show my appreciation to you for being here this Saturday morning. NACA believes that today's discussions will provide the starting point for the increased input of legal practitioners in the country's national programme on HIV/AIDS, contributing to the national vision of a multi-sectoral approach to HIV/AIDS towards no new infections in 2016.

BACK

The Role of the Judiciary and the Legal Fraternity in Response to the HIV/AIDS Epidemic in Botswana

Justice M.B. Marumo, Francistown High Court

1. Introduction

That HIV/AIDS has become a national crisis in this country is now beyond doubt. The statistics showing the prevalence rates and the continuing rate of infection leave no doubt that what we are presently witnessing is a crisis of catastrophic proportions which calls for the marshalling of all available national resources, be they economic or human in a massive effort to mitigate the effects of the epidemic, with a view to eventually reversing the current trends.

The latest official statistics show that approximately 36% of adults between the ages of 15 and 50 are HIV positive. The rate of infection does not seem to be abating. This results in society being robbed of its most active members.

The extent of the epidemic entails that all sectors of society must not only get involved but must intensify their efforts in addressing the crisis. The legal fraternity is no exception. On the contrary, experience in other countries has shown that intervention at the level of the law is an important tool in dealing with the various manifestations of the epidemic. We shall briefly look at one example of this in the later parts of this paper. It suffices for the moment to point out that apart from a few notable individual efforts the legal fraternity in Botswana has up to this point played no role of any significance in the fight against the epidemic. We have been content to watch from the periphery, at times suspiciously with a measure of indifference, as other sectors of society rallied their efforts around the national crisis. Much time and opportunity have been lost as a result of this attitude and the situation most certainly has to be reversed.

This paper does not make any pretensions to being the blue-print for how the judiciary and the bar ought to respond to the crisis, nor will it attempt to be prescriptive in its content. These will come from intensive debates and consultations for which, hopefully this meeting is a prelude. What the

paper shall attempt to do, is highlight some of the key areas in which the legal profession can play a role.

HIV/AIDS and Human Rights – Current International Approaches

Some two or so decades ago, the world was called upon to contend fully with the problem of HIV/AIDS. At the time, it was viewed by various sectors of society as an essentially medical issue to be dealt with by the medical profession. The human rights dimension of the disease was understood narrowly and only to the extent to which people with HIV or AIDS were subjected to various forms of discrimination, notably stigmatisation, barriers to employment, housing, or international travel, [2] mandatory testing, violation of rights or privacy, etc.

A shift in thinking over the past few years has seen the universal acknowledgement and recognition of HIV/AIDS as a major human rights crisis requiring significant intervention at the level of law and policy. Not only do the issues of the 1980's remain significant and essentially unresolved they have become increasingly diverse. According to Gruskin and Tantola (2001) the 1990's have been characterized by an increased “understanding of the importance of human rights also as a factor in determining people’s vulnerability to HIV infection and their consequent risk of acquiring HIV infection and their chances of accessing appropriate care and support. And most recently human rights have also come to be understood to be directly relevant to every element of [3] the risk/vulnerability paradigm.”

In recognition of the importance of the connection between HIV/AIDS and human rights the United Nations Commission on Human Rights in 1997 issued a set of guidelines for States on the promotion and protection of fundamental rights and freedoms in the context of HIV/AIDS. The guidelines are important for a proper assessment of what the role of the legal fraternity ought to be and are reproduced hereunder.

Guideline 1: States should establish an effective national framework for their response to HIV/AIDS which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV/AIDS policy and programme responsibilities across all branches of government.

Guideline 2: States should ensure, through political and financial support, that community consultation occurs in all phases of HIV/AIDS policy design, programme implementation and evaluation and that community organisations are enabled to carry out their activities, including in the field of ethics, law and human rights, effectively.

Guideline 3: States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

Guideline 4: States should review and reform criminal laws and correctional systems to ensure that

they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups.

Guideline 5: States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living with HIV/AIDS and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies.

Guideline 6: States should enact legislation to provide for the regulation of HIV – related goods, services and information, so as to ensure widespread availability of qualitative prevention measures and services, adequate HIV prevention and care information and safe and effective medication at an affordable price.

Guideline 7: States should implement and support legal support services that will educate people affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of ministries of justice, ombudsmen, health complaint units and human rights commissions.

Guideline 8: States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.

Guideline 9: States should promote the wide and ongoing distribution of creative education, training, and media programmes explicitly designed to change attitudes of discrimination and stigmatization associated with HIV/AIDS.

Guideline 10: States should ensure that government and private sectors develop codes of conduct regarding HIV/AIDS issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.

Guideline 11: States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV/AIDS, their families and communities.

Guideline 12: States should cooperate through all relevant programmes and agencies of the United Nations system, including the Joint United Nations Programme on HIV/AIDS, to share knowledge and experience concerning HIV-related rights issues and should ensure effective mechanisms to

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protect human rights in the context of HIV/AIDS at the international level.

As will be apparent from the guidelines they call for major interventions at the level of legislation and policy. For this reason, they have been criticized in certain quarters as being too legalistic. The

better approach, however, is that whilst law reform is an important and necessary form of intervention it is by no means the only one. It can be used together with other interventions such as education and poverty reduction to good effect. The legal dimension however, remains very [\[5\]](#) essential.

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Legal and Ethical Issues in the Botswana Context

It has not been possible in the short space of time available to audit the extent to which Botswana has implemented and complied with the guidelines and other international standards. What is clear however, is that much work remains to be done and the legal fraternity has an important role to play in that regard. The following are some of the issues of major concern.

Discrimination: This manifests itself in various forms. There are still several examples of people being denied admissions to schools, scholarships, housing, employment etc, as a result of their HIV positive status.

Confidentiality and Privacy: There are known cases of health professionals, employers, neighbours and even family members revealing the HIV status of people without their consent.

Domestic Relations: The rights of spouses, vis-à-vis each other are not clearly defined. Cases have come before the courts involving disputes arising from situations of one spouse wanting to know the HIV status of the other. Some have been known to demand such information from medical professionals involved in the treatment and care of the other spouse.

Employment: Many legal issues related to HIV/AIDS arise in the employment context. Apart from discrimination at the level of obtaining employment many other issues arise once the employer/employee relationship has been formed. There have been cases of ostracism at the work-place, termination of employment on account of HIV status, and denial of certain privileges for the same reason.

Sexual Offences: Issues relating to the rights of vulnerable groups such as people of non-heterosexual disposition remain unresolved. Some (but certainly not all) answers may emerge from litigation currently pending before the Court of Appeal. Sexual offences in the context of HIV/AIDS also need revisiting.

Succession Rights: There has been much public debate recently concerning the effects of HIV/AIDS on vulnerable groups such as children and women in the context of inheritance. Apart from cases of discrimination and harassment there are documented cases of violation of inheritance rights of women and children by relatives of the deceased man on the grounds that the woman in question, 'killed' their child. There have also been questions relating to the rights of terminally ill patients to make testamentary instruments.

Public Health Issues: Current public health legislation is not adequately equipped to deal with issues raised by HIV/AIDS. Matters such as drug testing and experimentation are not adequately covered. Legislation with potential to hinder the fight against HIV/AIDS, such as the Circumcision and Initiation Rites Act, remain in the statute books.

As pointed out earlier, the widening of the scope of the human rights dimension of HIV/AIDS has brought about the recognition of the wider human rights implications of the disease. HIV thrives in environments such as poverty, cultural disempowerment, inequality, etc.. Internationally, it has since been acknowledged that socio-economic circumstances do influence the pattern of the disease. For that reason, many countries have become state parties to the Covenant on Economic, Social and Cultural Rights. Botswana is not a State Party to this particular convention. Many have

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recommended that it ought to be. The issue remains unresolved.

The issues set out above are ones that readily come to mind and are by no means exhaustive. Many others will no doubt be identified in the course of debates and consultations that will follow. What is clear, however, is that having regard to the international standards for which we must strive much remains to be done at the level of legislative intervention. The concomitant of that is the involvement of the legal fraternity at all levels of the process.

The Role of the Legal Fraternity

The role to be played by the legal fraternity will be largely influenced by both the practical situation on the ground and the norms and standards set by the international community for States. The following will have to be some of the major areas of activity:

1. Policy Formulation and Legal Reform

In formulating new policies and legislation to meet present and future challenges, the Government is obliged to consult intensely with all sectors of society, including the legal profession. The duty of the Law Society of Botswana to play an active role in these processes does not only arise from its social responsibilities with regards to the current crisis, it is in fact statutory, imposed upon it by Section 59 of the Legal Practitioners Act No. 13, 1996. This is one area of the activities of the Law Society that has been somewhat neglected in the past. Current circumstances dictate that this attitude ought to change.

Useful examples of interventions of this nature can be found in other countries. One such example is that of the Uganda Network on Law, Ethics, and HIV/AIDS (UGANET), a body established in the country to address the legal, ethical and human rights dimensions of HIV/AIDS. After carrying out extensive consultations and research, the body submitted comprehensive recommendations to the Uganda Law Reform Commission, a body mandated to perform similar functions to our own Law Reform Commission. As a result of such efforts reform was undertaken in various areas of law having a bearing on HIV/AIDS including labour law, family law, domestic violence, criminal law, as well as cultural and traditional practices which were helping to fuel the epidemic. The

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results have been very positive.

The exact area of law reform in which reform will have to be undertaken will probably be identified after further debate and consultation, but should include the socio-economic dimensions of the epidemic which have been identified as major factors in the spread of the epidemic.

The extent to which the judiciary can be involved in the initiative and pursuit of legal reform is limited by its adjudicative role in the Constitutional framework. That however, should not translate to inactivity. Frequently judicial officers identify areas in the law which are not adequately addressed and recommend in their judgements that the legislative and executive arms of Government address the shortcomings. That is a tool that can properly be utilized to highlight short comings and help to initiate reform.

2. Research and Reporting

This area of activity is closely linked to legal reform but extends beyond it. Some research will no doubt be useful for purposes of legal reform. Some will however be utilized for the dissemination of information and knowledge to the wider society.

Areas into which the legal fraternity may conduct research include the forms of legal structures that can be linked to the health of the population, how legal policies affect health, how the case for legal reform can be made from health issues and how to measure the success of structural legal changes

[\[8\]](#)

in social settings.

Judicial officers may inquire deeper into precedents and experiences from other jurisdictions and highlight these in their judgements. This could prove to be a good strategy for disseminating knowledge and information.

3. Litigation and Articulation of Issues

Legal practitioners have both a moral and a legal duty to take up cases involving HIV/AIDS on behalf of indigent members of society. Frequently the people whose rights are violated most are those without the means to take up the issues themselves. When the violations are allowed to go unchallenged not only does this deprive the wronged of an opportunity to vindicate their rights it also deprives the body of jurisprudence commentary and precedent on the areas involved.

Frequent use of international norms and standards by both practitioners in their submissions and judicial officers in their judgements may assist in disseminating knowledge and information and in creating a culture of rights which could help in the fight against the epidemic.

More frequent pronouncements on issues surrounding HIV/AIDS could help in removing the stigma attached to the disease and encourage more openness. More frequent commentaries on the human rights aspect of the epidemic could help engender a dynamic human rights culture which

could have a similar effect.

4. Networking

The legal fraternity has an important role to play in the creation of networks for the sharing of information and experiences. Links with various institutions and individuals both within the jurisdiction and outside it, will encourage the sharing of knowledge and experiences. Many groups and institutions within the international legal and human rights community may not be easily accessible to HIV/AIDS activists who are not themselves part of the community.

Networking is very important for the creation of a synergetic solution. This would be particularly important for us in Botswana, for we are in some ways behind our counterparts in other countries.

5. Provision of Judicial Remedies

The traditional and principal mandate of the judiciary is of course to provide judicial remedies where appropriate. Delays in providing appropriate judicial remedies is more often than not, very frustrating for those concerned, more so to those whose litigation is in the HIV/AIDS context. Judicial remedies serve both to protect and reassure those who are wronged. This is especially important to HIV/AIDS sufferers who are particularly prone to discrimination and who are frequently victims of most unpalatable practices. The judiciary should look into ways of speeding up litigation of this nature.

The creation of a friendly courtroom environment by judicial officers at all levels will encourage more frequent use of the judicial system in the fight against the epidemic. This will in turn create a large body of precedent.

Practitioners also have an obligations to ensure that violations in the context of HIV/AIDS are actively pursued and the rights of the wronged are fully vindicated.

On a proper analysis and appreciation of the issues surrounding HIV/AIDS the role of the legal profession in the response is quite apparent. Many of the issues involved are of a legal, and human rights nature. The legal fraternity being the custodian of the legal, human and constitutional rights of the populace have a central role to play. The neglect of that duty has serious implications for the fight against the epidemic, especially given the interdependence and interconnectedness of the responsibilities of the role players in the response to the epidemic. The work of various agencies and activists up to this point has been hampered severely by the inadequate and fragmented state of the legal structure, a matter falling squarely within the responsibility of the legal fraternity, and the lack of participation of the latter. The silence must be broken and action must be taken.

BACK

Employment Law and HIV/AIDS in Botswana

Justice DeVilliers, Industrial Court of Botswana



I have been asked to address this seminar on Employment Law and HIV/AIDS in Botswana.

HIV/AIDS is not, as is generally thought, only a health issue. It is also very much a human rights issue, of which the rights are protected by the Constitution of Botswana, and it is also an industrial relations matter. Most seminars and conferences concentrate on the health aspect. I will, however, first just touch on certain human rights aspects and then deal with this topic as an industrial relations problem. In other words, how should an employee, an employer and finally the Industrial Court deal with HIV/AIDS in an employment relationship. My approach will therefore be a legal one.

Before starting on a topic like this, it is important to know what is understood by Employment Law. Employment Law is more often than not referred to as Labour Law, which terminology is better understood by the layman.

Employment law covers the individual employment relationship between an employer and an employee as well as the collective relationship between a trade union or other employee organisation and employers organisations.

Employment law derives from many sources, of which the following can be regarded as the main sources:

1. The Constitution of Botswana, which also guarantees certain human rights to employers and employees;
2. The Common Law, which in Botswana and South Africa is Roman Dutch Law;
3. Legislation, for example the Employment Act, the Trade Dispute Act, the Factories Act, the Public Health Act, the Trade Unions and Employer's Organisations Act, the Workmen's Compensation Act, etc.;
4. Judgements of the Court of Appeal of Botswana, of the High Court of Botswana and of the Industrial Court of Botswana;

5. Collective agreements, the most common of which is an agreement entered into between an employer and a trade union at shop floor level.;
6. The terms and conditions of employment, contained in a contract of employment, provided that such conditions of employment are not less favourable to the employee than the conditions of employment prescribed by the Employment Act (Section 38 of the Employment Act);
7. International labour standards, contained in conventions and recommendations of the International Labour Organisations (ILO);
8. Opinions expressed by supervisory bodies of the ILO, especially the Committee of Experts and the Freedom of Association Committee, regarding the interpretation of certain conventions;
9. Codes of Practice, for example the ILO Code of Practice on HIV/AIDS and the World of Work, and Codes of Practice agreed between the tripartite partners (the Government, BOCCIM, and BFTU) or a Code issued by the Government, for example the National Industrial Relations Code of Practice and The Public Service Code of Conduct on HIV/AIDS and the Workplace. The Industrial Court may use these codes as guidelines in determining labour disputes (Section 18 (5) of the Trade Disputes Act).

Human Rights

Fundamental rights and freedoms of individuals are protected in Section 3 to 15 of the Constitution of Botswana. These rights include among others, the rights to life, liberty, security, privacy, human dignity, equal protection under the law and prohibition against discrimination. Human rights are therefore recognized by the State, which means that human rights are not negotiable, for example an employer may not exclude any of these human rights in a contract of employment.

The aforesaid human rights are guaranteed to all human beings in Botswana, irrespective of race, tribe, place of origin, political opinion, colour or creed. It therefore, includes employers and employees as well as persons infected with HIV/AIDS. They remain human beings until the day they die.

As regards to employees who are infected with HIV, one of the most important human rights is the right not to be discriminated against. It must again be emphasized that an HIV infected employee remains a human being. In this respect he is therefore no different to any other employee who is not infected with HIV.

If any of these human rights are violated in relation to any person, he/she can apply to the High Court for redress in terms of Section 18 (1) of the Constitution, which provides as follows:

“18. (1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of Section 3-16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress”.

Such redress will be in the form of a civil action. It could be an application for an interdict restraining a person from so violating another person’s human rights or it could be a claim for damages as a result of such violation.

If a person, for example, alleges that his right not to be discriminated against, has been violated, he may refer to such unfair discrimination to the Industrial Court.

Legislation

At the outset, I want to mention that at present there is no legislation in Botswana which specifically deals with HIV/AIDS. There is nothing about HIV/AIDS in the Trade Disputes Act, the Public Health Act or any other Act.

There is, however, already an international and a regional framework in place on which future legislation can be based. The aforesaid ILO Code of Practice on HIV/AIDS and the World of Work which was issued in June, 2001, provides the international framework under the following headings: key principles, general rights and responsibilities, prevention through information and education, training, testing, and care and support.

The SADC Code which was published in 1997, provides the regional framework. It was endorsed by all the countries in the SADC region. Its content is similar in every respect to the said ILO Code. Based on the SADC Code, the Botswana Ministry of Health has published the Botswana National Policy on HIV/AIDS. Clause S.1.8 of this Policy provides as follows:

“The policy has been adopted as a case to be observed by organisations, institutions, employers, etc. Legislation will be developed as the need arises, to support implementation and compliance.”

Clause 6.2 of this Policy sets out detailed guidelines, for HIV/AIDS testing and states *inter-alia* that the following principles should be observed:

1. Except for the screening of donated blood and patients presenting with HIV-suggestive symptoms, routine testing for HIV/AIDS should not be carried out, and testing should not be done without the knowledge of the subject.
2. HIV testing will not be carried out against the will of the individuals.
3. Pre-employment HIV testing as part of the assessment of fitness to work is unnecessary, and should not be carried out.
4. HIV testing should not be carried out as part of a periodic medical examination of employees.
5. Voluntary testing should be encouraged and provided, with appropriate counselling services.

Clause 6.4 of the Policy deals with AIDS and employment and provides that *inter-alia* the following principles should apply:

1. Workers with HIV infection who are healthy should be treated the same as any other workers,

with regard to training, promotion, etc. Being infected with HIV should not be a reason for an individual being declared unfit for employment, or for dismissal from employment.

2. Workers with HIV-related illness and AIDS will be treated the same as any other worker with an illness. They should thus be retained in employment as long as they are medically fit to work.

3. HIV-infected employees should have access to and receive standard social security and occupationally related benefits.

4. Persons with HIV/AIDS in workplaces should be protected against stigmatisation and discrimination by colleagues, employers, unions and /or clients of the employers.

This is at present still a policy but employers could use it, pending legislation on this aspect, to develop their own workplace HIV/AIDS policy.

At the beginning of this month [October 2002], BONELA in partnership with BFTU held a drafting workshop on HIV/AIDS and human rights issues in employment. Representatives of several organisations came together to work on a draft policy framework for future legislation on this specific issue.

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The Role of the Court

The Industrial Court cannot get involved in any preliminary aspect regarding this issue of HIV/AIDS in employment, like for instance I told Christine [Stegling, the Director of BONELA] that I felt uncomfortable being involved in the workshop on drafting a policy framework for future labour legislation. The Court is there to interpret legislation and to apply it. This Court can therefore also not express an opinion on what future legislation in this regard should or should not deal with.

That does not mean that I cannot speak at a forum such as this and in our judgments we can reflect the shortcomings of our legislation and make it clear that our judgements could have been more adequate if there was legislation that we could apply.

The only role that this Court can therefore, play in this very serious problem in Botswana is after a labour dispute involving HIV/AIDS has been referred to the Court for determination.

Having now established from the aforesaid international and regional Codes, that an employee suffering from HIV/AIDS should not be treated differently to any other employee by the employer, that then brings us to the crucial question. How should an employer treat such an employee? Closely related to this question is how might the Industrial Court deal with such cases should such a case come before the court.

Before continuing with how this Court might deal with such cases, it is important to note that the

Botswana Industrial Court is a court of law and a court of equity. This was confirmed by the Appeal Court of Botswana in the case of **Botswana Building Society v. S. Bolokwe**, Civil Appeal No. 15 of 1999, dated 23 July, 1999.

When exercising the jurisdiction of a court of equity, this Court applies rules of fairness or rules of equity, as they are sometimes called. In Labour Law these rules of equity are derived primarily from international labour standards, as set out in conventions and recommendations of the International Labour Organisation (ILO). These rules of equity do not have the binding force of law, but are guidelines to be used in labour disputes when a Court has to decide on the fairness or otherwise of certain actions by an employers and/or an employee.

Labour courts all over the world, including Botswana, have developed a labour law jurisprudence based on such conventions and recommendations and have built up useful case law.

It is well documented that at present there is still no sure cure for AIDS and available medication is very expensive. The health of such an employee just keeps on deteriorating until it reaches a stage where it inevitably has to affect his work performance. He can then justifiably be classified as an unsatisfactory work performer.

There are well established principles of equity dealing with unsatisfactory work performance, which principles, as stated above, the Industrial Court also applies. The Industrial Court has, however to date not had the opportunity of dealing with one single case of unsatisfactory work performance due to AIDS. What now follows are therefore, only my *prima facie* views, based on the said principles of equity and the guidelines set out in the said international and regional Codes on HIV/AIDS in the workplace, of how an employer and the Court ought to handle such cases.

When dealing with unsatisfactory work performances we find that this is a broad category. The two main sub-categories are those employees who are unwilling to perform their obligations properly and those employees who cannot perform their obligations efficiently.

Those employees who are unwilling to perform their obligations, do so wilfully and are therefore guilty of misconduct and they should therefore be subjected to gradual systems of disciplinary sanctions, e.g. written warnings, a final written warning and then if need be, dismissal after a disciplinary enquiry.

Those employees who cannot perform their obligations efficiently can be divided into two sub-categories. Firstly there are those who are incompetent or incapable of performing properly, because of lack of skill or training or even poor selection or placement on the part of the employer. In such cases the employer must take all reasonable measures to try and correct such sub-standards of performance. Such an employee requires counselling because he is not guilty of any misconduct.

Secondly, there are those who are no longer competent or capable of performing the work they were originally employed to do because of medical or health reasons. It is in this category that employees who are infected by AIDS should fall.

As long as the illness of an employee suffering from AIDS does not affect his work performance, there is nothing an employer can or should do as regards to terminating the contract of employment or such an employee. He should be treated no differently to any other person suffering from a terminal illness.

The basic requirements for a substantively fair dismissal, which will include a dismissal because of incapacity due to ill health, are succinctly stated in Article 4 of the ILO Convention No. 158 of 1982, which provides the following:

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service” (Underline author’s own).”

The reason for saying that ILO Convention No. 158 is also applicable to incapacity due to ill health is because of the aforesaid underlined word, ‘capacity’, which included incapacity.

ILO Convention No. 111 of 1958, which is the Convention concerning Discrimination in respect of Employment and Occupation, is also relevant.

Le Roux and van Nieker, *The South African Law of Dismissals* deals with incapacity arising from ill health at page 228 and state the following on page 229:

“The South African industrial court has developed a similarly empathetic approach in what appears to have crystallized into the following test:

- a) the employer is obliged to ascertain whether the employee is capable of performing the work for which he was employed;
- b) if the employee is unable to perform the work, the extent to which he is unable to perform his duties should be ascertained;
- c) the employer is thereafter obliged to ascertain whether the employee’s duties can be adapted;
- d) if the employee cannot be placed in his former position, the employer must ascertain whether alternative work, at a reduced salary if necessary, is available.”

The above mentioned factors are also based on principles of equity. They have now been included in the South African labour legislation. As these factors are based on principles of equity and in the absence of any relevant legislation in Botswana, this Industrial Court will in all probability apply them in disputes of this nature.

Where the health of an HIV infected employee has deteriorated to such an extent that he can no longer perform his work efficiently, the employer is obliged to ascertain whether the employee, because of ill health, is still capable of performing the work for which he was employed and the cause of such ill health.

Because ill health is the dominant factor in a situation like this, the only way an employer can ascertain an employee’s aforesaid capability is to obtain a full medical report on him. In the said

Codes on HIV/AIDS in the Workplace, it is stated that HIV/AIDS testing should not be carried out against the will of an employee. The obvious way to do this is therefore to consult with the employee to see if he is prepared to submit to voluntary testing. The employee should be informed that he should consider this request for testing seriously as his job could be in jeopardy.

Should the employee, however remain stubborn and uncooperative in this respect, he will then be frustrating the employer's efforts to help him. Without a medical report the employer is unable to proceed to the second phase to see if such employee's duties can be adapted or whether he should be redeployed. Should the employee, however, remain intransigent, the employer will be entitled to call him in and give him a last opportunity to cooperate. If he still refuses, he has only himself to blame if the employer then decides to terminate his contract of employment, which the employer will be entitled to do, that is if the employee is no longer competent or capable of performing the work he was employed to do.

If a medical report establishes that an employee's inefficient work performance could be related to AIDS, the employer should then first see if the employee's duties could not be so adapted that he, with this incapacity due to ill health, can still perform such adapted duties. If this cannot be done, the employer should ascertain whether alternative work, even at a reduced salary, is available. Such adapted work or alternative employment will normally have to consist of light duties. The employer is not obliged to create a job for such an employee.

Should such an employee refuse to accept the adapted duties or the alternative employment, the employee should also be given a last opportunity to state his case or make suggestions after he has been warned that his job is in jeopardy. Should he still refuse what was offered to him or if his duties cannot be adapted and there is no suitable alternative employment, the employer can then terminate the contract of employment of such employee. It is not necessary to have a disciplinary enquiry as the employee is not guilty of any misconduct. Mere consultations will suffice.

As dismissals in such circumstances are not misconduct dismissals, such an employee can not be summarily dismissed. He can only be dismissed by giving him the required notice, pay in lieu of notice, or he can be offered early retirement.

Employees whose contracts of employment have been so terminated, have only a slender chance or no chance at all of finding further employment. For most of them it will be the end of the road of their employment careers. Employers should be mindful of this and remember that they are not bound to give such employees only the minimum prescribed period of notice. As a gesture of generosity, two or three months notice pay may be considered or an *ex gratia* severance package or even early retirement.

As stated above these are only my *prima facie* views of how AIDS cases ought to be dealt with in the work place, as no such cases have yet come before the Industrial Court. I might later have to change my views if specific legislation on HIV/AIDS introduces procedures different to those set out above or if the Court of Appeal later has different views on such procedures or if I am later persuaded otherwise by legal representatives of parties in such cases.

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Justice, Reason and Hope in the HIV Epidemic in Botswana
Justice Edwin Cameron, South African Supreme Court of Appeal



(Justice Cameron did not submit a prepared speech on this day so we will do our best to relay what he said. We do not suppose that we are capable of conveying his heartfelt sentiment through this report, but will try to capture the main themes)

Internationally there is a debate about the role of judges in the area of law reform, and whether they should just be applicants of the law. Judge Cameron was very clear in his opinion that judges should speak out about law reform because they are one of the three pillars of the judicial system.

Justice Cameron began his presentation by presenting two facts about judges in South Africa. That three of the seven members of the South African Law Commission are judges. This forum makes recommendations on all aspects of the law. And secondly, for the 300 years that South Africa suffered under Apartheid, judges remained silent and were severely criticised for this.

He then made an attempt similar to that of Dr. Khan to bring the epidemic home to the people attending the seminar. He asked how many in the audience knew someone who was sick with HIV. He asked how many in the audience knew someone who had died from AIDS. All participants in the room raised their hands to both questions. Then he reiterated the point of the silence surrounding HIV infection in Botswana, with PLWHA not speaking up.

"Justice DeVilliers talked about there not being any case law and this is shocking. Judge Marumo gave a wonderful presentation and I would like to congratulate him on that. He made a sensational remark and I would like to quote him, 'As a profession we haven't responded in any meaningful way'. He reiterated the need for the legal profession to get involved in the fight against HIV, as its part of their moral and legal duty."

Justice Cameron then went on to talk about himself and his own experiences with HIV/AIDS. He talked about his identity and how he viewed himself in society.

"I am HIV positive. I am a white South African and I identify myself as an African. I am proud to be white, its part of who I am. I am also proud to be African. I'm male and I'm proud to be a male. I am also a gay man. I'm part of the non-heterosexual minority that Judge Marumo was talking about. I am proud to be gay – that is part of my God-given identity. The role of HIV transmission from Man to Man sexual contact is vastly underestimated in Southern Africa because we do not speak about it. And although I am happy to be here today as a member of the PLWHA community I recognized that the person who should be standing here should be Motswana. It should be a woman, a child, a person living in poverty. We need those voices."

He went on to talk about four facts of HIV and the way we need to start viewing it. We need to understand the virology, the epidemiology, the physiology, and the social demography of AIDS. AIDS should no longer necessarily be considered a life threatening disease. There is treatment available and people can live for many more years with HIV than before. We also need to understand that HIV is more stigmatised than any other disease in medical history. It is stigmatised because of its nature and because it is sexually transmitted. "I knew I was HIV positive for 11 years before I could speak out about it. I was diagnosed and tested without my consent by a medical doctor in 1986. It emphasised for me the importance of voluntary testing and counselling. I contracted HIV by having sex with another man. In 1997 I was dying. I had all the signs of full-blown AIDS. I was lucky because as a judge I was able to afford to go on medication. This was around the time that the ARV cocktail had just become available and had proven to work. Within two weeks I felt the life flow back into me, I could physically feel the difference that these drugs were making to my body. The treatment for me was miraculous."

"I want to commend the efforts of the Botswana Government to tackle the epidemic through a national treatment plan. Botswana is a model to the world; your government is willing to offer treatment to people. However, I understand the uptake on the programme is low. My understanding is that only 2 500 people are currently accessing ARV therapy, out of 300,000 people with HIV and 100,000 of these with full blown AIDS the number of people who should be on treatment is exponentially bigger. Just think about it, 100,000 people in Botswana are feeling like I felt in 1997 and are facing the same trauma I faced in dealing with a life threatening disease."

"AIDS is no longer necessarily an incurable fatal disease. I'm living my life, I have healthy, happy relationships. I have the energy to do my job and to get involved in advocacy. I get a lot of support from my colleagues at the Court for the work I do in HIV/AIDS."

"The law has a vital and significant part to play and the challenge for lawyers is immense. There are three key areas that these challenges fall under.

1. Acceptance – Acceptance means non-denial of AIDS. It is the most important of all the challenges because it makes all the other problems worse. We have to accept that this epidemic is the most serious, threatening problem that we face.

2. Prevention is linked to acceptance. It involves creating an enabling environment and setting laws for people to come forward. For example, we need to equalize gender relations so women have the power to negotiate safer sex. We need to accept and accommodate same sex erotic disposition.

The legal regulations on shared confidentiality are in conflict with the idea of prevention. Where people feel safe they will come forward, but I would be very scared to be tested in this country. As lawyers, we need to debate the social policy implications of such regulations.

3. Treatment has changed the social nature of the disease. Treatment is also a form of prevention in three ways. A) In the Mother to Child Transmission (MCTC) programs by treating the woman you prevent transmission to her baby; B) treatment lowers your viral load so you become less infectious. Since I started on ARV therapy the viral load in my blood has become so low as to be undetectable. This also means I am unlikely to infect anyone else if they came into contact with my blood. C) Treatment helps create an enabling environment. Lawyers need to become involved in and debate medical regulations because as the regulations stand now in Botswana they are dangerous."

"The law must eliminate stigma and discrimination. We will only get people coming forward in addressing their HIV status if we create an environment in which their dignity is respected. The law cannot change people's minds, but it can lead society's opinion. It cannot change everything, but the law needs to be right before we can get other things right. For example in areas such as testing for the purposes of employment and care. We need to create an enabling environment for people to come forward and ensure those who do come forward are supported."



"I joined the legal profession because of an ideal. An ideal I am sure many of us share. Let us follow that ideal today, let's take the suggestions from today and use them to address the legal challenges of the epidemic."

(From left to right): Joana Wells (BONELA); Justice Edwin Cameron (South African Supreme Court of Appeal); Christine Stegling (BONELA); Maame Awuah (BONELA Board Member); & Dr. Banu Khan (Coordinator of NACA)

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Respondent: Challenges for the legal fraternity in the context of the HIV epidemic

Mr. Duma Boko – The Law Society of Botswana



(Mr. Boko did not submit a prepared speech on this day so we will do our best to relay what he said. We do not suppose that we are capable of conveying his passionate presentation through this report, but will try to capture the main themes.)

I am humbled by Judge Cameron's presentation. His speech came from a very informed insider. If I appear as an outsider when I speak I apologise. We are operating within the aspect of situation and placement. We can speak either as an insider or an outsider.

The Botswana context forces us to be heterosexual, it criminalises any other sexual activity other than heterosexual sex which is stated in Section 164 of the Penal Code. The recent case in Francistown declared that to be considered legal, sex must take place between the male private parts and the female private parts. Even masturbation would be criminalized under this recent interpretation.

This enforcement of heterosexual sex creates a problem in prisons. This country has a very large prison population. The conditions in most prisons in the country are overcrowded and unsanitary. These provide a fertile environment for the spread of communicable diseases. Those who, on entering these conditions were HIV negative, face the gravest and most real risk of infection. For those who are already HIV positive, susceptibility to the myriad of opportunistic diseases that prey on a weak immune system is heightened. It is also very doubtful whether the special dietary needs of HIV positive persons can be effectively addressed within the confines of prison.

Under current conditions of most of the country's prisons, any judge in this country must understand that sentencing anybody to a prison sentence is equal to handing down a death sentence.

There is also the grim reality of pre-marital and extra marital sex. It is a phenomenon that can

neither be denied nor reversed. The high rates of family break ups and divorces attest to the fact that multiple-partner relationships will remain the order of the day. The control of the spread of the HIV pandemic will be made even more difficult.

Ours is a society in which issues of sex and sexuality are not openly discussed. Parents find it unacceptable to discuss sex with their children. Where any mention at all is made of sex, it is simply in the context of discouraging it completely. In consequence, for most young persons, sex acquires the flavour of the proverbial forbidden fruit. They are curious and anxious to engage in it, yet because of the disturbing secrecy in which it is shrouded, they are deprived of the most basic information and guidance. Such information might mark the difference between life and death. Perpetuation of this culture of silence condemns a lot of these young people to a life of trial and error. The trail of tragedy this approach has left behind bears no rehearsal here.

The approach adopted by organised religion, of preaching a return to the virtues of marital fidelity, discouraging pre-marital sex and promoting abstinence do not seem to have worked. This is a message around which much of religious doctrine is constructed and has focused long before the outbreak of HIV. This approach has the unfortunate effect of being dismissed as unworkable. Consequently it does not assist people to change their behaviour. The reason may lie in the fact that most people know and believe that there is absolutely nothing wrong with sex. In fact, most people know sex is good. A message that portrays sex as evil and even shameful will not find any audience in today's age. One of the real dangers of such a message is that it demonises persons who contract HIV as unfaithful and promiscuous. This label that seems to attach to those who become HIV positive discourages people from undergoing tests and, once a person has determined their status to be positive, to disclose to relatives, friends, and partners. The ripples generated by a determination that a person who is HIV positive reach far and wide. They affect the person's social life, work and access to needed amenities and support. It is not uncommon for these persons to turn to suicide as a way of escaping the social opprobrium their condition attracts.

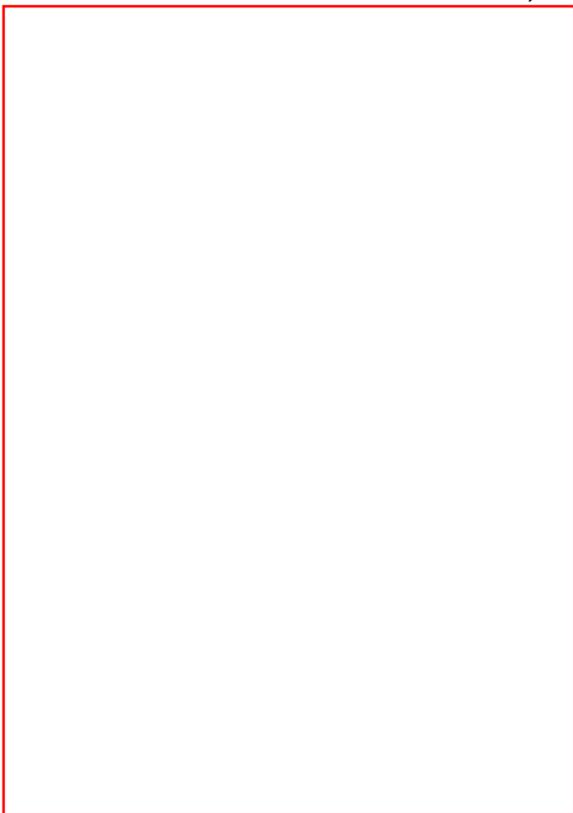
I commend Judge Cameron on his openness with regards to speaking on sexual issues and sexuality. When I was defending the case of homosexuality in Francistown that I alluded to earlier, there was a lot of publicity. I got a call from my cousin on my cell phone. He was very upset and said, "Duma. You have to sue these people. They are associating you with this homosexuality". I told him No. I said I am proud to be associated with these people, I am proud to defend their rights in a court of law. We need to be able to stand up for other people whose rights are being violated and we need to not be scared to be associated with them.

Sometimes judges in this country seem to be allergic to the arguments that we make in their court with regards to human rights; arguments that we make as practitioners. Our challenge as legal practitioners is to have the courage to make these uncomfortable arguments and take a stance in court where it is necessary. One example of this is the Penal Code Amendment Act and the revised sentences for rape. In essence, an HIV positive rapist gets a stiffer sentence effectively criminalizing his HIV status. This is unacceptable, and our greatest challenge as lawyers is to overcome our personal biases. In the same way as heterosexuals do not have to defend their sexuality, I find it unreasonable that people with different sexual identities need to defend theirs.

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Closing Remarks

The Honourable P.T.C. Skelemani, Attorney General of Botswana



I would like to thank all of you who have led us in our discussions today from the bottom of my heart.

Judge Cameron, thank you for taking your time and making yourself available to us. Thank you to the organizers for putting all of this together and getting all of us here this morning.

Perhaps some of the ways we have adopted in the past were more down to fear rather than reason. Everyone agrees that the response thus far by the legal fraternity has been nil. There was some discussion earlier of section 164 to 167 of the General orders with regards to testing of non-Batswana for jobs in the public service. The question is why? Perhaps these regulations came out of the feeling of being under attack. It was also becoming an enormous expense for the government to repatriate expatriate workers who passed away in Botswana. I would urge us to

revisit these sections of our legislation.

To be HIV positive cannot disqualify someone from employment. The presenters have given us enough food to deal with these issues in our committee. I would like to thank the panelists for the great thought they put into what they were going to say to you.

I would also like to emphasize that the rule of confidentiality also applies to lawyers and their clients, not just medical practitioners.

Our views need to be balanced, we need to have further debate on these issues and balance the rights of everyone involved. Especially on the issue of homosexuality. It is known in every language in this country, we all know about it, it exists. This is something that we should definitely have a look at. If the Committee can find a Saturday to meet, I would be more than happy to join them to discuss such issues.

In conclusion I would like to say that the views that I have expressed here are my own and not necessarily those of the government of Botswana. Thank you all again for taking the time to come out today and I hope that we can follow up on these issues to ensure we have an effective legal response to the HIV epidemic.



APPENDIX 1

Concept Paper for “Justice, Reason and Hope in the HIV Epidemic in Botswana”

Objectives of the Planned Seminar:

Overall Objective:

- To sensitise the legal fraternity namely lawyers, magistrates and judges, on legal and human rights issues with respect to HIV/AIDS.

Specific Objective:

- To examine and brainstorm on specific legal issues surrounding HIV/AIDS and create a dialogue on the possible role of the legal fraternity in the fight against the virus.

Overall Objectives

- At the broadest level, there is no specific legislation on HIV/AIDS in Botswana. It is, therefore, important to lobby for the enactment of legislation, providing for the rights and duties of people infected with HIV. Such legislation needs to provide for rights and duties at a social and professional level.
- To raise awareness of the legal community of the discrimination of HIV infected people, and make recommendations as to how the legal profession can help. For example, *pro bono* work for those who have suffered discrimination on the grounds of their HIV status in such situations as landlord-tenant relationships, doctors-patients, employer-employee, and customer-insurance.
- To provide a starting point for the involvement of judges, magistrates and lawyers in issues of human rights and HIV/AIDS.

Specific Areas To be Covered

- **Employment:**

The present Employment Legislation hardly complies with international minimum standards set by the ILO, most of whose core conventions, Botswana has signed and ratified. Present legislation offers people infected with HIV/AIDS very little protection in the area of employment and the workplace. It is therefore important to lobby the Government of Botswana to conform with ILO standards and for lawyers, through cases, to ensure that legislation is being implemented conforms with these standards.

The right to work of a person living with HIV/AIDS needs to be clearly stipulated and safeguarded in legislation. Such a person should be treated no less than any other person suffering from a terminal or chronic disease. Therefore, legal instruments need to ensure that:

- A person living with HIV is protected from any form of discrimination at the workplace on the basis of HIV status.
- An employee who is HIV infected is entitled to minimum health standards and a safe working environment. First Aid kits need to be provided at the workplace and workers have the right to a tobacco free environment, as well as condoms and surgical gloves as part of the standard issue for workplace equipment.
- Legislation that safe-guards the interests of women in the workplace, e.g. longer maternity leave and 100% maternity benefits compared with the current 25% and longer sick leave as compared with the present minimum 14 days for the private sector. Employers should reasonably accommodate the needs of their employees who are infected and affected by HIV/AIDS.

- **Criminal Issues:**

Criminal legislation is inadequate to address offences related to HIV/AIDS and no serious attempt has been made to address this problem. Issues of criminality are dealt with under the Penal Code and the Criminal Procedures and Evidence Act. There is no legislation that specifically deals with sexual offences, which could also address the problem of offences related to HIV/AIDS. It may therefore be necessary to consider other legislation that deals specifically with such offences.

One could examine the constitutionality of:

- Testing convicted sexual offenders so as to determine the severity of the sentence. (The Court of Appeal has dealt with this issue recently.)
- Testing a victim of rape and what impact his/her HIV/AIDS status has on the penalty imposed on the offender.
- Examining the need to introduce legislation that clearly criminalizes sexual offenders who wilfully infect their victims. (The penal code touches on this issue in a very general context e.g. the wilful spread of infectious diseases)
- Should a spouse who wilfully infects the other be liable to be treated as a sexual

offender in light of the Common law principal that a spouse's consent to sexual intercourse is infinite in marriage?

- **Right to Confidentiality and Privacy:**

- There is the issue whether the requirement of shared confidentiality in the National AIDS Policy does not violate the right to privacy or dignity. Therefore, the rights to privacy and dignity should be clearly governed by legislation spelling out the respective rights of doctors and patients.
- The right of a patient to privacy and confidentiality should be balanced with the doctor's right to be well informed of his patient's medical condition. While a patient has the right to be well, a doctor, in appropriate cases, should be given a right to be well informed in order to be able to do his job properly.
- How private is the present ARV treatment that is being given *gratis* to citizens of Botswana and does it impinge on the privacy and confidentiality with the present medical structures?

- **Spouses Rights:**

- Related to the above-mentioned right to confidentiality, is the question whether health professionals are or should be obliged to inform a spouse if the other spouse has been diagnosed to be HIV positive.
- There is the need to clearly identify sexual rights of spouses and others.
- The rights of the infected party to enjoy safe sex.
- The respective rights and duties of the spouse living with HIV/AIDS vis-à-vis the spouse not living with HIV.
- Is it constitutional for the Minister to require that both parties have prior knowledge of each other's HIV/AIDS status before performing the rites of marriage.

- **Counselling:**

- In general, legal provisions should be made to protect a person's right to quality pre- and post-test counselling. While this is currently stated in the National Policy on HIV/AIDS, there is no legal provision to ensure that people are being counselled.
- The issue of counselling minors is important, the legal question being whether minors can be counselled and in the process whether family planning and HIV testing can be recommended to minors without parental or guardian involvement and/or consent.

- **Prisoners:**

- The prison environment could have prescribed minimum health standards such as the availability of First Aid Kits and Medical Aid Kits.

- Whether there is a need to address homosexuality and men having sex with men (MSM) in prisons in light of HIV/AIDS and its effects on sexual partners of ex-convicts.

- **Universal Precautions**

- Legal provisions could ensure that universal precautions are always taken when people handle blood, injuries, treat patients at home and in the hospitals, regardless of whether the HIV status of a person is known or not.

- Regular first aid training may be prescribed for officers at places of higher concentration i.e. prisons, factories, colleges, schools etc. In prisons, for example, trained people can train fellow inmates on general behaviour/precautions to avoid infections in emergencies and also create general awareness.

- **Landlord/Tenants:**

- Checks need to be in place to monitor possible discrimination of people living with HIV when renting housing. Rental control boards could be set up to deal with such cases.

- **HIV Testing**

- While the National HIV/AIDS Policy clearly indicates that there should be no mandatory or compulsory testing, this is not enacted in our legislation. Therefore, currently, expatriates are being tested before receiving government contracts and Debswana is allowed to test candidates for scholarships, regardless of the named policy. There is a need to draft legislation on this issue.

- **Confidentiality**

- The Botswana Medical Council (Professional Conduct) (Amendment) Regulations, 1999 which states that a person coming in close regular contact with a patient shall be informed of that patient's condition create many problems with the issue of confidentiality. There is no burden of maintaining confidentiality on the people who are in close regular contact.
- The concept of shared confidentiality is contrary to the Public Health Rational which states that by forcing disclosure of a person's status you engender an atmosphere of fear and distrust which only serves to push the epidemic further underground.

The right to Health Care

- Since the constitution does not provide for economic, social and cultural rights, there is no provision for aspects such as the right to health care. Perhaps there is a need to discuss whether Botswana should sign the Convention on Economic, Social and Cultural Rights to provide for such rights in domestic legislation. There is also the question of providing ART for residents rather than just citizens.

Compiled by:

O. K. Dingake

C. Duncan

C. Stegling
C. Manwa

Name	Organisation	Contact No.
Mr. K. Osei Ofei	Armstrong Attorneys	395-3481
Ms. B. Mguni	Attorney General's Chambers	361-3600
Mr. Sampa Chuma	Attorney General's Chambers	361-3600
Ms. K.F. Matthews	Attorney General's Chambers	361-3600
K. Leinaeng	Attorney General's Chambers	361-3600
Ms. D. Matlakala	Attorney General's Chambers	361-3600
Ms. Lindy Muzila	Attorney General's Chambers	361-3600
Ms. M. Tabengwa	Awuah, Khan and Partners	241-7979
Ms. M. Awuah	Awuah, Khan and Partners	395-9478
Mr. Dick Bayford	Bayford and Associates	395-6877
Mr. Duma Boko	Boko, Mothlala Attorneys	390-9696
Mr. J. M. Seema	Botswana Housing Corporation	360-5183
Ms. K. B. Makgabenyana	Botswana Meat Commission	331-22 7
Joanna Wells	Botswana Network on Ethics, Law, and HIV/AIDS	393-2516
Christine Stegling	Botswana Network on Ethics, Law, and HIV/AIDS	393-2516
Ms. T. Tau	Botswana Telecommunications Authority	395-7755
Ms. B. Motlhabane	Botswana Telecommunications Corporation	395-8900
Mr. Collin Duncan	Collin Duncan and Associates	390-1704
Mr. Colling Duncan	Collin Duncan and Associates	390-1704
Mr. V. Vergeer	Collins, Newman and Company	395-2702
Ms. Linette Dowa	Dowa Attorneys	395-7434
Judge Marumo	Francistown High Court	
Justice B.K. Lesetedi	Lobatse High Court	333-103
Mr. Tebogo Maruping	Industrial Court of Botswana	390-0565
Justice D. DeVilliers	Industrial Court of Botswana	390-0567
Justice O.K. Dingake	Industrial Court of Botswana	390-0567
Justice. M. E. Carstens	Industrial Court of Botswana	390-0567
Ms. Amy G. Lunanga	Institute of Development Management	395-2371
Mr. M. L. Mogobe	Lerumo and Mogobe	397-4002
Ms. Lea Roodt	Lifeworks	390-2266
Mr. S. Kebonang	Magang and Company	395-3303
Mr. O.M. Motumise	Moeletsi & Motumise	391-1893

Mr. D. Leburu	Monthe, Marumo and Company	395-1984
Mr. G. Manyeneng	Motor Vehicle Accident Fund	358-8529
M. B. Rugaba	Motor Vehicle Accident Fund	318-3533
Dr. Banu Khan	National AIDS Coordinating Agency	390-3188
Mr. A. Whendero	National AIDS Coordinating Agency	390-3188
Mr. R. Molefhabangwe	National Assembly	390-7034
Ms. A. Mpe	National Development Bank	395-2801
Ms. K Makgekgewewe	Private Consultant	395-2836
Mr. R. Lyons	Richard Lyons Attorneys	398-2364
Mr. Shiripinda	Shiripinda and Company	391-4102
Mr. H. Sikhakhane	Sikhakhane and Company	393-9749
Justice Edwin Cameron	South African Court of Appeal	
Mr. P.T. C. Skelemani	The Attorney General of Botswana	361-3600
Ms. Sanji Monageng	The Law Society of Botswana	390-0200
Mr. G.M. Kakuli	University of Botswana	355-2214
Mr. Z. Kebonang	University of Botswana	355-2345
Mr. B.K. Othogile	University of Botswana	395-3766
Ms. Gloria Jacques	University of Botswana	355-2687
Ms. S. Mosienyane	Voluntary Counselling and Testing	7170-4765
C.O. Sekga	Water Utilities Corporation	360-4483
Ms. J. White	White and Maripe	390-3258
Ms. Cheryl Lockhart	World University Service of Canada	395-2208
Ms. Monique Goudreau	World University Service of Canada	395-2208

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