

Criminalizing the Transmission of HIV-Lessons for South Africa

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Abstract : South Africa has one of the highest rates of HIV infection in the world, with a sizable percentage of the population living with HIV. A substantial number of new infections occur as a result of sexual activity. South African courts have awarded civil claims for damages as a result of the transmission of HIV as a result of non-disclosure by the HIV-positive sexual partner, and more recently, the criminal courts have also convicted and sentenced individuals accused of infecting others as a result of sexual activity. This paper will analyse some case law from South African court cases that have dealt with criminal convictions for the transmission of HIV, and the potential for more widespread prosecutions of these cases. It will also address the desirability of this trend in light of the social public health system, as well as human rights concerns surrounding this highly contentious issue. This will be done by considering some applicable provisions of the Bill of Rights such as the right to privacy and equality, as espoused in the Constitution of the Republic of South Africa. The paper further addresses the experience of other jurisdictions such as Canada, Singapore, Lesotho and Uganda, by analyzing case law, and consider the pitfalls of criminalizing a wide spectrum of sexual conduct that could result in the transmission of HIV. The paper concludes with a proposal that the issue of criminalizing the transmission of HIV cannot be addressed by the criminal justice system alone, as to do so could result in harsh consequences for those living with HIV. As such individuals may be burdened with additional responsibilities that could potentially impact on the rights of the individual. This may ultimately result in injustice for those living with HIV.

Keywords : criminalization, HIV, human rights, South Africa

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