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THE NEW AIDS VIRUS - INEFFECTIVE AND UNJUST LAWS

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Abstract

Public alarm about the spread of AIDS leads to public demand for drastic laws to contain the epidemic and to punish those who spread it. In this paper, attention is drawn to the limitations of the law in achieving the modification of human behavior. Successes and failures in public health education campaigns, directed to the same end, are mentioned. The author cautions against putting too much trust in the law to achieve containment of the AIDS virus. However, he cites three reasons for optimism about the developing laws on AIDS. These are the necessity of a rare degree of international cooperation; the encouragement of attention to fresh approaches to laws on human sexuality and drug taking; and the vital importance of attention to the neglected issues of efficiency and cost effectiveness in the design of new laws.

This last point leads to a suggestion that AIDS has produced three new viruses called "HIL" (highly inefficient laws). HIL-I is the mandatory testing of the entire population for HIV antibodies. HIL-II is the mandatory testing of specially vulnerable groups, expecially foreigners. HIL-III is the mandatory requirement of HIV-free certificates at the frontier. The ineffectiveness and potential for injustice of such laws are exposed. The lesson derived is that there is no "quick fix" either for the AIDS virus itself or for the social and legal problems presented by it.

LE NOUVEAU VIRUS DU SIDA: LES LOIS INEFFICACES ET INJUSTES

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Résumé

L'alerte publique à propos de la propogation du SIDA mène à une demande publique pour l'adoption de lois draconiennes pour contenir l'épidemie et pour punir ceux qui la propage. Dans ce document, l'attention est attirée sur les limitations du droit dans la réalisation de la modification du comportement humain. Les succès et les échècs des campagnes pour l'éducation dans la santé publique, visant au même but, y sont discutés. L'auteur prévient de ne pas trop se fier au droit de réussir à limiter le virus SIDA. Cependant, il cite trois raisons pour être optimiste à l'égard des lois qui se développent sur le SIDA. Celles-ci sont - la nécessité d'un degré rare de coopération internationale;

-l'encouragement de l'attention aux approches nouvelles au sujet des lois sur la sexualité humaine et sur l'usage de la drogue;

- l'importance vitale de l'attention sur les questions négligées de l'éfficacité et du coût-effectif du développement des nouvelles lois.

Ce dernier point mène a une suggestion que le SIDA a produit trois nouveaux virus qui s'appelleraient en anglais «HIL» (highly inefficient laws, c'est-à-dire des lois hautement inefficaces). HIL-I est l'examen mandatoire de toute la population pour des anticorps HIV. HIL-II est l'examen mandatoire des groupes particulièrement vulnérables, surtout des étrangers. HIL-III est l'exigence d'un certificat «HIV-libre» à la frontière. L'inéfficacité et le potentiel pour l'injustice de telles lois sont exposés. La leçon à en tirer est qu'il n'y a pas de «remède rapide», soit pour le virus SIDA lui-même, soit pour les problèmes sociaux et légaux qu'il présente.

IV INTERNATIONAL CONFERENCE ON AIDS
STOCKHOLM, SWEDEN - 16 JUNE 1988 - PLENARY SESSION V

THE NEW AIDS VIRUS - INEFFECTIVE AND UNJUST LAWS

The Honourable Justice Michael Kirby CMG*
Australia

THE SCIENCE OF LAWMAKING

Drastic laws for drastic problems?

Enforceable laws have been a feature of human society from primitive times. The laws of the Medes and Persians may have been insusceptible to change. But nowadays, laws are made in great numbers, in every country. They are constantly changing. They are made by legislators, administrators and the courts. Such is the number and complexity of modern lawmaking, that it is difficult even for people who devote their entire lives to the law and keep up with it.

Confronted by a frightening epidemic such as Acquired Immuno-Deficiency Syndrome (AIDS), it is understandable that lawmakers and those who advise them should feel the necessity to make new laws to tackle the problem. The people are afraid. Politicians and other leaders (not to say administrators and judges) share their fears. To do nothing in the face of a threatened pandemic seems passive and

ineffectual. To take "soft" measures in the face of the rapid spread of a deadly virus appears to many citizens to be pusillanimous in the extreme. Many ordinary people tend to think quite simply about AIDS. In Western communities, few are now ignorant of the existence of the virus - such has been the media attention to it. Most citizens know that the majority of those suffering as a result of the virus acquired it (apparently) through sexual activity or the use of intravenous drugs. Sex, drugs and death are an explosive combination. Rules of morality, and law, which have developed to deal with sex and drugs seem to be vindicated by the spread of a deadly virus, seemingly the by-product of departures from chastity, monogamy, and the abstinence from illicit drugs. Hence there are many in our societies who call for increasingly vigorous enforcement of laws on these subjects. They do so in the belief that this may stem the tide of the AIDS epidemic. They are wrong. It is important that those who know something about epidemics and those who understand the operation of the law, and the making of the law, should demonstrate their error.

Ordinary citizens have a touching faith in the effectiveness of the law to achieve its stated objectives. Many share with political leaders a conviction that the mere passage of a law will somehow cause modification of the stigmatised behavior and thereby solve the problem in hand. Recent widespread changes in sexual morality have many explanations. Amongst them is clearly the development of the contraceptive pill. The radical efforts of many countries to stamp out narcotic and other illicit drugs demonstrates the

weakness of the law in tackling problems of intimate personal behavior. Some people are ignorant of the law. Others, if they know of it, reject it. Their physiological needs (whether for sex or drugs) are more powerful than their fears of detection and punishment. Moreover, they become increasingly cynical about the law when they see its ineffectiveness. In the distance between the letter of a law and widespread human activity in contravention of it, lie the opportunities for the black market, corruption of officials and increasing disrespect for the law. Only highly oppressive, intrusive and expensive law enforcement has any chance of ensuring that laws on such very personal activities as sexual relations and drug taking, will be effective in securing their goals. Yet most modern societies are unwilling to pay such an oppressive price for that effectiveness. The compromise they typically strike presents a dilemma in dealing, by law, with the challenge to society presented by the spread of a virus such as human immuno deficiency virus (HIV).

Public education - failures and successes

On the other hand, tackling the challenge presented by AIDS by the use of public campaigns, and reliance upon health education, also has serious defects. The continuous and indeed growing use of tobacco products, particularly in developing countries, demonstrates the difficulty of educating the public in such a way to cause a modification of widespread harmful behavior. For more than twenty years we have known of the serious health problems caused by the use of tobacco products. Some laws have been passed, eg to forbid smoking in restaurants

and on aeroplanes or the advertising of tobacco products. Yet, despite these efforts, the aggregate growth of the tobacco industry has scarcely been affected in global terms.

On the other hand there is also evidence that public health education can sometimes be effective, particularly in concert with well targeted laws and public health policies. Perhaps the most vivid recent illustration of this assertion may be seen in the World Health Organisation (WHO) campaign to discourage the use of breast milk substitutes in developing countries[1]. It is ironic that, with the problems of neo-natal transmission of AIDS, WHO must now contemplate a reversal of that earlier, successful campaign and the possible encouragement of the use of virus free breast milk substitutes in some regions.

In connection with AIDS, there is early evidence of the effectiveness of public health campaigns, directed at high risk target groups, to secure relevant behavior modification. Thus, reports suggest significant modification of sexual behavior by homosexual and bisexual men in San Francisco[2]. Likewise, recent reports suggest a fall-off in the presentation of AIDS and AIDS related conditions (ARC) by homosexual and bisexual men in New York[3]. Given the long lead time inherent in the manifestation of symptoms following exposure to the HIV virus, these figures are already remarkable. In a bleak landscape they provide a little light. Public education, in some circumstances at least, may have an impact on the containment of AIDS.

Most citizens, however, are impatient with such approaches to the urgent problems of AIDS. Their impatience grows when they learn of the death of a young person from AIDS or that the child of a relative has suddenly presented positive to the HIV antibodies test. In these circumstances there is a natural reaction of anger which must be understood by lawmakers and those who advise them. There is a demand for urgent, radical action. They ask: if spreading of the virus causes a condition likely to produce death, why is that not the crime of murder or manslaughter[4]? In such circumstances why should not the strongest measures of law-enforcement be invoked as a statement of society's standards and for the defence of human life; as an inhibition (for fear of punishment) against irresponsible behavior which might cause death; and to provide a means of retribution which will satisfy the anger of society, given the drastic consequences of such irresponsibility?

I leave aside the question of whether spreading the HIV infection, knowingly, wilfully, or with reckless indifference to the consequences, does not already constitute a crime known to the law. My concern is not the enactment or enforcement of laws which satisfy the anxieties and punitive instincts of society. Nor is it the practical necessities of politics which operate upon the political leaders of many lands, particularly where they are immediately and repeatedly accountable in popular elections. I am not even concerned in this address with the symbolic operation of the law, in stating society's standards - although I acknowledge that the law has such a role to play. What concerns me, in the urgent predicament which our

countries, and the international community face with the advent and spread of AIDS, can be simply stated. It is: what laws and policies will be most effective, urgently to reduce the spread of this deadly condition of risk?

The passage of laws, it is true, may have a very small part to play in achieving this goal. It may settle social fears to some extent. Because of the role of hysteria in earlier epidemics, that could well have an important value of its own[5]. It might, in the Realpolitik of democratic societies satisfy the politicians for a time, so that they leave alone the public health officials concerned in the actual containment of the spread of the epidemic. Of course, it is unlikely that fear of prosecution (or a fine of substantial proportion) will really deter many people from conduct which may already be criminal in any case. Such conduct carries a,by now,reasonably well known risk of lethal infection. If people will not be deterred from exposing others, and exposing themselves, to the risk of death from an incurable infection, it is somewhat naive to believe that they will be deterred by the risk of prosecution, conviction, a fine or even imprisonment. For the most part, behavior modification in the activities which result in the spread of AIDS must be achieved outside the courtroom, the police station, the investigating magistrate's office or the prison.

In practical terms, it would probably make much more of an impact on the spread of AIDS to target public education at getting the risks and means of preventing the spread of the HIV virus into the minds of young people at the times when they are

most likely to be active sexually or using intravenous drugs. It is then that the risks which they run and the preventive measures they must take, should be fully canvassed if we are serious about containment. Until there is a vaccine or a cure for AIDS, prevention is the vital objective of every serious and effective public campaign against this virus. Prevention may mean desisting from conduct (whether sexual or in the use of intravenous drugs) which exposes the subject to risk. But experience teaches that, in modern conditions, such self-denial in these activities is unlikely to attract the great majority of the populations at risk. For those who persist in potentially risky activity, the target of lawmaking and public policy must be to minimise the risks of the spread of infection. Removing those risks may be extremely difficult. Eliminating them totally may be impossible. For example, even members of high risk populations who use condoms for sex or clean syringes for drug taking may sometimes lapse. Absolute protection is the goal.

But, looking at this issue realistically in macro and not micro terms, it must be recognised that complete protection will not be achieved.

These lessons in the home truths of any major, let alone international, campaign for public health, are more the province of an epidemiologist. From the lawyer's point of view, this simple instruction may be derived. Put not your trust in the laws. Such laws as are passed should be efficient, cost effective and, so far as possible, non-discriminatory and just. A reflection on the AIDS epidemic

demonstrates the high risk which exists that it will bring in its train costly, ineffective, discriminatory and unjust laws.

In the past, there has not been a great deal of systematic attention to the science of jurisprudence. Laws have simply been made, in accordance with domestic tradition, as they are seen to be needed. There has been comparatively little attention to designing and targeting laws in such a way as will differentially achieve their often ill defined objectives. Furthermore, there has been comparatively little examination of the actual operation of laws, once made. It is simply assumed that they will achieve their objectives and little attention is paid to the extent to which (if at all) this assumption is warranted by the experience of the law in operation. It will be no bad thing if the important and urgent problems presented by the intercontinental presentation of AIDS, causes the attention of lawmakers in every land - and those who advise them - to be addressed to the necessity to be somewhat more rigorous in the design of laws than we have typically been in the past. So far as AIDS is concerned, the motivation for greater precision should surely be there. At stake is nothing less than the lives of many generally young, potentially productive citizens, with much otherwise to offer.

A concentration on the effectiveness of lawmaking could have a beneficial consequence. However, it is by no means sure that this will happen. For example, it may be concluded that the best thing our societies could do to combat the spread of AIDS would be to provide universal and explicit instruction to young people in school concerning the preventive measures which

they should take to protect themselves from exposure to infection. There will be some (perhaps the majority) in countries such as my own who would support that approach. But there will be many (perhaps the majority) in other countries who for reasons of religion, perceived morality or tradition would resist such instruction to children of tender age in matters of sexuality and drug taking[6]. Their fear would be that such instruction, given to immature minds, could undermine traditional morality and raise curiosity in the young about activities of which many would otherwise long remain innocent. The views of such people must be respected. But in the end it will be for governments and legislators, with their duty to young and vulnerable citizens of the future to decide the answer to this equation. Is it preferable to acknowledge the risk that, out of ignorance, some young people will acquire the HIV infection rather than to attempt (inevitably without universal success) to protect them by sex instruction and instruction in drugs which may have the unwanted consequence of encouraging experimentation, which would not otherwise have taken place. This is a cruel question to pose. But it is a question which will have to be answered urgently, unless a remarkable and unexpected breakthrough presents a vaccine and a cure which removes the blight of AIDS from the lives of increasing numbers of young people in many lands.

Three reasons for optimism about AIDS laws

There are three reasons for optimism about the impact which AIDS will have upon the law. The first is to be derived from the international character of the challenge. This has

already produced an international response. By cooperation stimulated by WHO, an example will be given of the way in which humanity - with all of its divisions - can at a critical moment in human history come together to combat a common problem. It will not be feasible (at least for the overwhelming majority of countries) to tackle lawmaking and policy development to deal with AIDS alone. It will be necessary, if the measures are to be successful - for a high degree of coordination in lawmaking and public policy to be achieved. The introduction of punitive or discriminatory laws or policies in one country may provoke a "ripple effect" in lawmaking. They may stimulate the enactment of retaliatory laws and policies. This risk must be remembered by all countries - but especially by countries with large numbers of their population engaged in travelling.

Secondly, as I have said, the urgent need to find effective well targeted laws and policies may stimulate attention to efficient lawmaking and policy development. The goal is law which achieves its objective with minimal interference in basic human rights and maximum attention to the avoidance of discrimination and the achievement of justice. Of course, justice necessarily includes justice for the overwhelming majority of the population presently free of exposure to AIDS . Their right to be protected from infection makes a strong demand upon lawmakers. But if that protection is to be achieved, it is essential that the laws which are passed should be designed to promote behavior modification in the respects in which it is essential if AIDS is to be contained. Punitive laws which merely add to the affliction of

AIDS patients the burden of discrimination and stigmatisation are likely to reinforce a ghetto mentality at the same time as they increase suffering. They are unlikely to achieve the objective of protecting the uninfected population.

Thirdly, it is possible that AIDS will result in the necessity of completely fresh approaches to the legal regulation of sexual activity and drug taking - if only out of the self protection of a vulnerable society. In the past, the law's punitive approach to these activities has not only been frequently ineffective. It has also sometimes caused individual injustice and promoted cynicism about, and direspect for, the law. Even now we see the same tendency to discriminate against and to stereotype people with AIDS, ARC or people in the suggested high risk groups. Thus, homosexuals stress the growing number of heterosexuals presenting with HIV infection. Homosexuals and bisexuals point to the increasing number of IV drug users presenting, so that in New York, now, they include nearly 50% of all new cases. Western Europeans point to the African states as a major source of the infection and some screening policies have been designed accordingly. The healthy point to the haemophiliacs. There has always been discrimination against the handicapped.

To achieve the only practical present objective of containment, it will be essential to avoid such discrimination and the tendency of denial that is inherent in discrimination. AIDS is not someone else's problem. It is the problem of all of us. The best ethical judgments about AIDS will be derived from sound data, not data distorted by stereotyping

preconceptions or wishful thinking. It is precisely because of the urgency of the problem presented by AIDS that it is essential to win the cooperation of all groups specially at risk, and indeed of the entire population - especially the young. This is why the developing policies on AIDS may necessitate more rational laws and policies to deal with human sexuality and drug taking. Out of the misfortune of AIDS may come more rational and effective laws and policies in this regard.

THREE NEW VIRUSES

An important announcement

With this background, I am able to make an important announcement which I previously foreshadowed at a conference organised by the French Government in Paris in October last. It is that three new strains of the AIDS virus have been discovered. I want there to be no unseemly contest as to whether they were discovered in Europe, on the other side of the Atlantic or elsewhere. They have been finally isolated by me in Sweden. I make no claim for financial reward from this discovery. It is one which must be shared with humanity. In any case, since the collapse of the stock markets, one-third of the value of Australian shares has been wiped out. Australia is now a developing country. It stands shoulder to shoulder with the other developing countries in the struggle against AIDS.

The three new viruses I have designed HIL-I, HIL-II, and HIL-III. They are, of course, mutants of the same AIDS virus. As we all know, the AIDS (HIV) virus is susceptible to mutation. The virus of which I speak is not a physical one,

detectable under the microscope in a laboratory. It is nonetheless a tangible development which may be detected in a growing number of societies. In some ways it is as frightening and dangerous as the AIDS virus itself. It attacks not the body of an individual victim; but the body politic. In this way it reaps its dangerous harvest amongst many citizens. Happily there is a ready cure. There are numerous preventive measures. Awareness of the virus is, as usual, the first step in combating its spread.

I should explain that "HIL" are the initials which stand for "Highly Inefficient Law". HIL-I is mandatory testing of the entire population for the HIV antibodies. HIL-II is mandatory testing of particular groups who are vulnerable and who are deemed especially at risk. HIL-III is the mandatory requirement of a certificate at the frontier demonstrating a negative antibody test as a precondition to entrance. I shall proceed to describe each of the mutants of the AIDS virus in turn.

HIL-I: universal mandatory testing

So far this virus has not been definitely detected. But it has been rumoured in a number of countries and others appear to be moving towards isolating it. When, for example, the Reagan Administration in the United States of America announced its policy in connection with AIDS, there was much talk of mandatory testing of a large number of groups - migrant workers, applicants for immigration entry, applicants for marriage licences, the defence forces, police and prison inmates and others. The aggregation of these targets presents

the possibility of a small step towards universal mandatory testing of the whole population.

Public opinion polls in several countries have demonstrated widespread popular support for such a measure. It must be acknowledged that there would be some advantages. It could accompany a major public education campaign. The very step of testing for the antibodies would reinforce community realisation of the seriousness of this challenge to the public health of our communities. Furthermore, the test would identify some people who would not otherwise be found to have the virus. Only a universal test would identify everyone with a positive reaction to the antibodies test. The test would also, in many cases, provide the first step on the path to self protection, particularly amongst those who test negative.

The proposal could also have political advantages. It would be the most dramatic way of doing something which affected everyone in connection with AIDS. It would carry the reminder of the earlier universal testing and vaccination campaigns, eg for tuberculosis and poliomyelitis. What then are the arguments against? There are many:-

* Unlike tuberculosis and polio, the AIDS tests lead to no cure for the infected and no vaccination for the uninfected. The question is posed what would be done with the information so procured? Unless a mass scale program of quarantine is to be contemplated, the positive results would simply provide an extremely expensive, universal epidemiological data base. We do not have enough barbed wire, nor the guards and other

paraphernalia to isolate completely the large numbers in our population who would test positive to the HIV antibodies. Nor would such quarantine be warranted. Many such people, so long as they do not engage in risky activities, present no threat to society. Their economic contribution to society is still significant. The costs of isolating them would be prohibitive. It would be a burden on them and their families. It would not be warranted by the risk they present, at least if education and some laws can encourage them to take measures which diminish the risk of the spread of the infection.

* It has been estimated that two in one thousand tests present with "false positives"[7]. The cost of the test is significant. Such cost necessarily diverts available funds from research for the cure and for a vaccine and assistances to the ill and to their "carers". The public health costs of AIDS will be already enormous. Adding to those costs a universal testing program would be a most inefficient use of resources.

* Because the present test is for the antibodies, and because these take a time after infection to manifest themselves, there would be many who would slip through the net of universal testing, although already exposed to the virus. Such people would not be detected unless mandatory testing were constantly repeated. Such repetition would also be necessary for people entering the country, unless the mandatory testing within a

country were accompanied by mandatory requirement of a certificate at the frontier (HIL-III). Yet even such certificates, on current tests, would be inadequate. They might have been taken during the "window period". They might have been taken immediately before an exposure to the virus led to infection.

* Furthermore, there must be weighed against the marginal utility of universal testing for epidemiological purposes, the costs involved - not only in economic terms but in the risks of discrimination. A study of past epidemics shows how our communities generally try to identify those "responsible" for the infection. For example, in early Australian epidemics, the Chinese were usually blamed[8]. The risk of the provision of a universal data base of all persons with the HIV virus is one which the history of this century should teach us to avoid. Stigmatisation of particular groups, and the wipping up of hatred against them, has been a blight on recent human history. We should ensure that we do not repeat it in confronting AIDS.

In short, mandatory universal testing would have comparatively few benefits. It would involve large disadvantages and many inefficiencies. There will be pressure on politicians in many lands to introduce such measures. They should be warned of the HIL-I virus and of its costly and pernicious effects.

HIL-II: mandatory testing of vulnerable groups

The mandatory testing of vulnerable groups is a much more common phenomenon. HIL-II has been reported in many

countries. For example, there are reports that applicants for work permits in Kuwait must be certified as HIV negative[9]. Similarly, foreign workers applying for a resident's permit in the city of Klagenfurt in Austria are required to be certified as HIV negative[10]. The Bavarian Ministry of the Interior has recently given notice that applicants for a residence permit in Bavaria will be required to undergo a test for HIV antibodies. The requirement does not apply to aliens whose residence abroad has been temporary or to nationals of the member states of the European Communities or of certain other Western European countries[11].

In India, all foreign students admitted to educational institutions are now required to undergo an antibodies test within a month of their arrival. If a student is found to be sero positive, he or she is deported forthwith. Foreign students who have already been in India for some time are not required to undergo the test, except in the event that they leave the country and thereafter return to India to complete studies. Furthermore, all foreigners, except the staff of diplomatic missions, who apply to stay in India for more than a year are now required to undergo the HIV antibodies test[12].

It has been reported that medical examinations are carried out in Belgium on a number of categories of persons coming from abroad or returning to Belgium. The examination includes a test for HIV antibodies. The persons examined include students and trainees from foreign countries proceeding to Belgium under development cooperation programs. It is understood that a draft regulation to authorise these

administrative practices is presently under discussion in the Belgian Council of Ministers.

It is true that HIL-II is not as dangerous as HIL-I. It is infinitely less expensive in social costs. It is also true that it has certain political advantages. It tends to leave the local population alone. It tends to concentrate on foreigners. If they are foreigners of different language, race, colour and appearance, such measures may even prove popular. They may draw strength from the tendency, with AIDS, to consider the condition as something affecting others and not ourselves. It is as if there is a reversion to Biblical times, with the belief that the infection will pass over the protected population and affect only others against whose risks that population needs to be safeguarded.

What are the costs of this approach to AIDS regulation? HIL-II presents many of the problems already isolated with HIL-I. It may lull the population into a false sense of security. It may divert attention from the urgent necessities of research and public health education. It is so much easier to pursue a law of this kind than to tackle the very hard questions about educating young people concerning sexuality and drug taking. It runs the risk of causing discrimination and even of promoting xenophobia. It runs the risk of retaliation. If Belgium imposes such regulations on foreign nationals visiting Belgium, many not foreign countries consider such laws appropriate in respect of Belgian nationals? In any case, such an approach cannot provide total security because of the imperfections of the current antibodies test, the risk that

the subject may be in the "window period" and the even greater risk that the subject may shortly thereafter become infected. Unless the logic of testing is carried through, and it is performed (at prohibitive cost) repeatedly with strict consequences for the isolation for those found positive, the expenditure on such tests may outweigh the utility of them. In short, HIL-II may be even more insidiously dangerous than HIL-I because it can spread, at relatively little cost. It may produce a false sense of achievement equalled only by the discrimination which comes in its train.

HIL-III: certificates at the frontier

The third mutant of the HIL series is the requirement of certificates at the frontier. This virus is spreading rapidly. There was an early report of its appearance in the Republic of Korea. It was said that all participants in, and visitors to, the forthcoming Olympic Games would need to produce a certificate that they were negative to the HIV antibodies test. However, this was later denied by the Korean Government. Whether this was because of the public reaction or the prospects that elderly tourists might be discouraged from visiting the Games, is not certain.

Illustrations of the HIL-III virus are many. In Saudi Arabia it is essential that the people coming to work in the Kingdom have a certificate indicating freedom from AIDS. So far this certificate has only been required in respect of persons arriving from countries deemed to have high numbers of AIDS cases, eg the United States of America, Canada and several European countries. Those coming from other countries do not need to produce the certificate[13].

In China one of the regulations governing entry and exit procedures for aliens indicates that those suffering from AIDS (as well as other sexually transmitted diseases etc) are not eligible for an entrance visa permitting them to reside in China for more than a year or to settle permanently[14]. It is not clear from the report whether sero positive persons, ie without clinical symptoms, are excluded. However, it is provided that in the event of an alien contracting or manifesting AIDS and certain other diseases whilst resident in China, the health authorities are empowered to call upon the police to order the person's departure from China. There are reports that persons arriving on flights to China are required to sign a declaration of health to the effect that they are not suffering from AIDS and are not sero positive. Certain other diseases are listed in the same declaration. It has also been reported that the Chinese national airline would not carry, except on prohibitive terms, an American citizen who was diagnosed in China as suffering from AIDS. Special arrangements had to be made for his evacuation[15].

According to reports from Cuba, all persons arriving in Cuba, other than tourists, are required to undergo testing for HIV infection. Why tourists should be exempted is not clear, given that they may be more likely to carry the infection (in some cases at least) than other entrants[16].

In Iraq it has been provided that all aliens entering the country are required to attend designated hospitals within five days of arrival in order to undergo testing for HIV infection. Medical certificates issued by health services

outside Iraq are not accepted. It is not clear what is to occur when the subject of the test proves sero positive. A number of persons are, apparently, exempted from this requirement including official visitors, persons leaving the country within five days and persons over sixty years of age[17].

There were reports in the media some months ago to the effect that sero positive entrants were being excluded from entry to the United Kingdom. In one case, on the basis of information which came to the attention of immigration officers at Heathrow Airport near London, entry was refused to a steward of a United States airline. He was returned to the United States. There is a general power under pre-existing law by which such officials can refuse entry to the United Kingdom of persons suffering from communicable diseases who are considered to represent a hazard or potential hazard to public health. However, so far, no policies have been developed or steps taken by the United Kingdom to prevent the entry of HIV positive persons generally[18].

Under the terms of regulations issued on 29 August 1987, a number of categories of persons are now subject to the requirement of testing for HIV antibodies following entry to the Soviet Union. These include Soviet citizens returning from foreign assignments of more than one month's duration and aliens coming to the Soviet Union for study, work or other purposes for a period of more than three months from countries where AIDS is prevalent[19].

Similarly it has been reported that foreigners applying to stay in Bulgaria for more than a month are required to

submit to an antibody test. It is understood that foreigners proving sero positive are immediately deported.

HIL-III presents the same advantages and disadvantages as HIL-II. Especially in small countries, presently generally free of AIDS, this measure may seem an appropriate response to preserve the effective quarantine of an unexposed population. However, some countries will be much more vulnerable to the entry of the virus than others. Those depended upon tourism, foreign assistance, transit and other large scale movements of population will be less readily able to resort to such quarantine type arrangements than those which are comparatively isolated, self sufficient and not reliant on foreign travellers.

The imposition of regulations at the frontier is always a comparatively popular measure. Those who suffer are generally unable to have their voices heard. When they do, they rarely attract the attention of locals. When that happens, it is often as a result of retaliatory measures. Quite apart from the costs, comparative ineffectiveness and diversion of effort from containing the spread of AIDS, there is a special reason for resistance to HIL-III. This is the fact that international travel is an important contribution to international commerce, economic development and, indeed, peace. The risk that is run by the spread of HIL-III is that, as one country introduces such regulations, others will retaliate and do likewise. Doing this will effectively diminish the freedom of international travel. It will add to the cost of such travel. It will ineffectively target laws and

policy on those who have the HIV infection as distinct from upon the activity which is likely to spread the infection. Preventing all persons who are positive to the HIV antibodies test from engaging in international travel may involve a disproportionate and quite unjust burden upon them. It may do so without an equivalent return in protection of populations which are not presently infected. Again, it is necessary to do the sums. It is important to consider the extent of the protection secured by an undertaking signed by a passenger on an aircraft winging its way to a long planned destination, that the passenger is free of the virus, against the utility of diverting measures to combat AIDS in such a way. The idea that any of our countries is going to be wholly immune from the AIDS virus is a pipe dream. Once it is admitted into the human population, such are the modes of transmission and the ease of international travel today, that policies addressed to local self protection are likely to give, at best, a short respite. Much more likely to be effective are international cooperative measures. These should concentrate on the research necessary to find a cure and a vaccine. Pending that development, there are other measures which can be taken to promote containment. The most important of these, at the moment, is to secure public awareness of the risks and how to avoid them - especially amongst the young people who are most in danger.

CONCLUSION

This paper has presented a number of reasons why an orthodox and unimaginative approach to lawmaking concerning

AIDS is likely to be ineffective and even counter productive - especially on a global scale. The legal face of AIDS is already apparent. We will see its outline more clearly in the months and years ahead[20].

AIDS is already presenting itself in the courts in many ways. A prisoner seeks a reduction of his sentence because of his isolation in the prison following a positive antibodies test[21]. Relatives seek access to the normally confidential data of the blood bank in order to secure the name of a blood donor who spread his infection to the recipient of contaminated blood[22]. Dependants of a person who died from AIDS seek an extension of time within which to sue, necessary because of the long incubation period of AIDS[23]. A motorist seeks to be excused from the offence of refusing to give a blood sample for testing because he was afraid of acquiring the virus in the process of giving the sample[24].

These individual cases will be solved by the courts, using analagous reasoning from earlier precedents. However, the large measures of policy and lawmaking will be decided by administrators and legislators. There are some reasons for optimism that they will act with restraint and wisdom. These include the growing recognition of the need for attention to the cost effectiveness of lawmaking on AIDS as on other topics. To be effective, it may become essential to adopt wholly novel approaches to laws relevant to human sexuality and drug taking. The necessity to do this will become imperative if a cure and a vaccine are not quickly found.

Meantime, the risk to our societies lies not only in HIV infection. It lies also in the way in which our societies respond to that infection and the pandemic which it threatens. Already three viruses of AIDS lawmaking can be detected. They are the call for mandatory testing of the whole population (HIL-I); the introduction of measures targeted on vulnerable groups, especially foreigners (HIL-II) and the introduction of the necessity of certificates based on the antibodies test at the frontier (HIL-III).

Condoms and clean syringes are not required to protect our societies from these legal mutants of the AIDS virus. What is required is common sense among lawmakers and the willingness to perform, scientifically, the equations which are essential in working out the appropriate and effective way to tackle this unprecedented challenge to the health of mankind. Fortunately, the international community has WHO to provide information, to give leadership and to stimulate the urgent search for a vaccine and a cure. But when it comes to lawmaking, there will be potent forces at work in all of our societies - no matter what their political organisation - to provide a "quick fix" to still the growing public alarm about AIDS.

The lesson of this paper is that there is no "quick fix". Just as the cure for AIDS has proved so intractable to scientific investigation, so do the laws on AIDS to the study of social scientists. However, just as we have made remarkable advancements in recent years in virology, we should be no less determined to make equal advances in the understanding of the regulation of our societies and in the enforcement and just

modification of dangerous behavior on the part of our people. Out of the melancholy predicament of AIDS may come a better appreciation of the utility - and the limitations - of the law when human behavior and public health are the targets of the law's concern.

FOOTNOTES

* President, Court of Appeal, Supreme Court of New South Wales, Australia; Commissioner, International Commission of Jurists; Former Chairman of the Australian Law Reform Commission and Judge of the Federal Court of Australia. Views expressed are personal views only.

1. See M D Kirby, "The Role of Law Reform in Bioethics: The Case of Breastmilk Substitutes" (1982) 6 Uni of NSW LJ 67.

2. B Darrow, "Changes in Behavior", unpublished paper for International Symposium on AIDS, Paris, 23 October 1987.

3. R Sullivan, "AIDS Deaths in New York are Showing New Pattern" in New York Times, 22 October 1987, B 1.

4. Cf "Old Penalties for a New Disease", Editorial, The Age (Melbourne) 19 October 1987, 13.

5. P H Curson, "Times of Crisis", Syd Uni Press, Sydney, 1985. See also W H McNeill, "Plagues and People", Anchor, New York, 1976.

6. See R Barnes, "AIDS Education Plan Attack", in The Washington Post, 23 September 1987, 20.

7. M M Weldom-Line & Ors, "AIDS - Virus Antibody Testing: Issues of Informed Consent and Patient Confidentiality" 75 Illinois Bar J 208 (1986).

8. See Curson, above, 159.

9. B H T D. There has been no official confirmation of this report.

10. B H T D report.

11. Notice 1A2-2081.10, Bavarian Ministry of the Interior, 19 May 1987.

12. This is according to information given to WHO by Indian officials.

13. See report from WHO Regional Office for the Eastern Mediterranean, 21 May 1987.

14. Rules and Regulations for Implementing Entry and Exit Administrative Procedures, ratified by the State Council of the People's Republic of China, 3 March 1986; promulgated by the Ministry of Public Security and

Ministry of Foreign Affairs on 27 December 1987. A copy of the English translation was published in the People's Daily of the last mentioned date.

15. As reported Sydney Morning Herald, 16 July 1987.

16. See address by Dr H Terry, Vice Minister of Public Health, Pan American Health Organisation Meeting on AIDS, Quito, Ecquador, 9 September 1987.

17. Resolution No 229 of the Revolutionary Command Council of Iraq, 16 April 1987. An English translation was published in the Baghdad daily newspaper Al Thawara, 21 April 1987.

18. See Immigration Act 1971 (UK). See also Contagious Diseases Act, 1866 (UK) and J Morton, "AIDS and the Contagious Diseases Act" (1987) 137 New LJ 764.

19. Union of Soviet Socialist Republics, Decree of 25 August 1987 of the Presidium of the USSR Supreme Soviet on Measures for the Prevention of Infection by the AIDS Virus. Reported Izvestia 26 August 1987, 2.

20. See eg discussion N L Jones, "Acquired Immune Deficiency Syndrome (AIDS): A Brief Overview of Major Legal Issues", unpublished paper, Library of Congress, Washington DC, USA, 10 February 1987; M D Kirby, "AIDS Legislation - Turning up the Heat?" (1986) 60 Aust Law J 324; D Brahams, "AIDS and the Law" (1987) 137 New LJ 749; W H L Dornette, "AIDS and the Law", John Wiley, New York, 1987. See also the indispensible regular publication by WHO "Tabular Information on Legal Instruments Dealing with AIDS and HIV Infection". The latest issue is dated Novmeber 1987.

21. R v Bailey, unreported, Court of Criminal Appeal (NSW), 11 September 1986. Cf The Queen v Michael Smith, unreported, Court of Criminal Appeal (S.A.) 19 March 1987.

22. See Loker v St Vincents Hospital (Darlinghurst) & Anor, unreported, Supreme Court (NSW)(Allen M), 11 October 1985.

23. Dwan v Farquhar [1987] Qd L Rep 600; s1r HCA.

24. Director of Public Prosecutions v Fountain, Queen's Bench Divisional Court (England) 9 October 1987, unreported.