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THE UNIVERSITY OF THE WITWATERSRAND

CENTRE FOR APPLIED LEGAL STUDIES

THE AIDS CONSORTIUM OF SOUTH AFRICA

FIRST NATIONAL CONFERENCE ON LEGAL RIGHTS & AIDS

CLOSING REMARKS

LIFE'S DOMINION

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Michael Kirby

The metaphors of AIDS

We have come to the end of the First National Conference in South Africa on AIDS and the Law. Because of its subject, the conference has been charged with a proper electricity of emotion. But it has also been careful, sober and painstaking in the examination of the issues before it. It has ranged from moments of great beauty, enlivened by the poetry of Auden, Yeats and the Bard.

Fortunate are we who share the English language. We can constantly explore the remarkable mind of Shakespeare. Whether it is on life or death, on love or precious friends hid in death's dateless night, Shakespeare always seems to have something relevant to say to each succeeding generation. On sexuality, his 129th Sonnet explores, with exactitude, the very essence of the problem which confronts us in the struggle against HIV/AIDS. The pursuit of sexual and other pleasure is often so consuming as to overcome all of the instruction,

all of the fear, all of the knowledge about the risks of infection:
so urgent are the demands:

*"The expense of spirit in a waste of shame
Is lust in action: and till action, lust
Is perjur'd, murderous, bloody, full of blame,
Savage, extreme, rude, cruel, not to trust;
Enjoy'd no sooner, but despised straight;
Past reason hunted; and no sooner had,
Past reason hated, as a swallow'd bait,
On purpose laid to make the taker mad:
Mad in pursuit, and in possession so;
Had, having, and in quest to have, extreme;
A bliss in proof, -and prov'd, a very woe;
Before, a joy propos'd; behind, a dream.
All this the world well knows; yet none knows well
To shun the heaven that leads men to this hell."*

The conference opened with a brilliant address by Mr Justice Ismail Mahomed of the Supreme Court of South Africa. He lent the authority of his high office, his lifetime's dedication to the protection of human rights and his well tuned intellect to our meeting. He put the AIDS crisis in the context of other great world disasters. He posed many of the taxing questions which the pandemic has presented to society, its lawyers and other citizens. At the close of his address he lifted our sights to the special spiritual and ethical questions which we must confront. It was a marvellous introduction. For such a sensitive collection of the problems we are facing, we must be grateful.

If my own remarks, which followed, had a single point which I would leave you with it was this. We should base our laws and policies, our strategies and our responses to the HIV/AIDS epidemic upon sound data. Out of a knowledge of the HIV virus, its modes of transmission, its fragility and the ways in which it is not transmitted, will come responses which are balanced, informed and above all effective. I sought to sketch the epidemic in its present phase. I outlined its macro and micro dimensions. I recounted some of the legal responses which have been tried in different parts of

the world. I sought to place these responses in the context of such knowledge as we have about the size of this epidemic in South Africa. I was grateful for the opportunity to present this address. Doing so led me into the writings on the legal issues of HIV/AIDS emanating from the pens of fine legal and other scholars in South Africa. The chance to meet them at this conference was a precious one which I shall cherish.

AIDS and human rights

Appropriately enough the first business session of the conference got underway with an address by Mr Shaun Mellors. He is a person living with HIV infection. How could we forget his introduction? He explained that he was a person with a mild speech impediment. He was a person living with AIDS. But first he was Shaun - an individual - a complex of things. It was a marvellous way to be reminded of the essential subject matter of this conference: individual human beings. Living. Breathing. Hoping. With good sides and inevitable human faults in their character. People, like the rest of humanity - precious to themselves and to their loved ones.

Shaun Mellors reminded us of the negative impact of the media upon his life and the unrelenting effort he makes to maintain his self-esteem. Cruel was the circumstance in which he learned of his infection. "Young man", said his doctor, "I am afraid to tell you you have AIDS and will shortly die". Then the doctor went off to other busy duties. Shaun, left alone, has had plenty of time to reflect upon those words. Happily he is still alive. We were fortunate indeed that he shared his insights with us. We should heed his call: it is necessary to fight AIDS not people with AIDS.

Professor Edwin Cameron then followed with a brilliant paper which chartered the progress of the legal measures in South Africa to

respond to the AIDS epidemic. He recounted the early excesses of the law and the work of the AIDS Advisory Committee. In some respects, South African legal measures have been in advance of those of other developed societies. In 1991 this country repealed its earlier laws requiring migrant workers to produce an HIV-free certificate. In this way, South Africa affirmed the rights of the migrant workers who make such an important contribution to South Africa's economy. It acknowledged the human right to freedom of movement. It accepted that the major risk to South Africans lies from other South Africans and not from strangers: others, people from outside.

Professor Cameron drew a striking analogy between the racial legacy of apartheid and the future prospects of HIV/AIDS in this country. He warned against the risk that the prejudice and discrimination of the past, directed at people of colour, might in the future be directed to gay men, intravenous drug users and black heterosexual people suspected of carrying the virus.

We should not forget his final warning. Figures and statistics devalue human life. Anything is acceptable in statistical format. We must beware of anonymous brutality and casual indifference to the millions in Africa and elsewhere who carry the burden of HIV/AIDS. We must design our laws in ways which are respectful of individuals and their rights but protective also of the community which is made up of individuals.

Mr Mahendra Chetty supplemented Professor Cameron's remarks with a detailed account of the recent decision of the Supreme court of South Africa in *Schmidt v The Administrator, Transvaal*. The case concerned the right of an actor/dancer to receive a drug necessary to treat his AIDS-related loss of vision. The State authorities refused to supply the drug. However, Mr Justice Myburgh found that Mr Schmidt had a legitimate expectation that he would

receive the drug and ordered its supply. This was a good example of the law at work. If I may say so, it showed the legal system and the courts in a very good light. Sadly, that has not always been the case.

AIDS and employment law

The sessions on employment law followed. Sue Albertyn explained the survey of employer discrimination on the grounds of HIV/AIDS. Many of the results were depressing but scarcely surprising. The prospect of cases in the Industrial Court to seek redress for unfair labour practices against people living with HIV and AIDS cannot be long delayed. Ms Albertyn emphasised the importance of employer observance of the duty of confidence owed to employees in respect of knowledge of their private health conditions. She reminded us of the guidelines of the World Health Organisation and the International Labour Office which both advise against pre-employment HIV antibody tests. Only in the rarest of cases, and then under the strictest of conditions, may such tests be justified. As a routine measure, they should not be mandated or countenanced by law.

Advocate Norman Arendse began his review of the need for law reform in the employment area with a striking reference to the "passport" we carry in the "kingdom of the well and the kingdom of the sick". Most of us will eventually visit the latter kingdom, however much we would wish to avoid that place. Realising this, Adv Arendse explained the need for law reform in South Africa to provide effective controls against the tendency of some employers to insist upon pre-work HIV testing and even to dismiss employees who, on testing, are found positive to the HIV antibodies. Because HIV is not contagious, such measures are rarely, if ever, warranted in a work setting. The proposals for law reform will repay careful

study. They could provide a model for jurisdictions outside South Africa.

AIDS and compensation and insurance law

The third session turned to compensation and insurance. Professor Coenraad Visser explained the basic tension presented to insurance law by the advent of HIV/AIDS. The insured has a duty of good faith and usually a contractual duty to inform the insurer of any matter relevant to the assessment of its risk. Warranties are invariably included in policies which provide exclusions in many cases where the insured has become infected. Professor Visser described the need for a balance between an attitude on the part of insurers that they could wipe their hands entirely of the great community challenge of HIV/AIDS (on the one hand) and the demand by some that insurers should accept risks which have already crystallised (on the other). Whilst acknowledging actuarial realities, Professor Visser proposed useful guidelines for a régime under which insurers would accept proper risks and avoid unjust discrimination. The possible need for a public fund upon which persons, unable to secure private insurance, might claim was placed before us for consideration.

Professor Paul Benjamin explained the complexities of South African compensation law. The possible application of "accidents" under that statute to certain cases of HIV infection was explored. But it was pointed out that HIV is not yet a scheduled disease under the South African legislation.

The workshops and their themes

In the final sessions the conference divided into workshops at which panels discussed in more detail the issues raised in the plenaries. According to the report of the employment law panel,

there was overwhelming agreement that the education of employers and employees about HIV and AIDS was an urgent priority in South Africa. The institution of programmes for the education of employees and the prevention of discrimination against those who had become infected was explained, as was the possible need for some degree of affirmative action and tax rebates to employers providing support for employees with economic utility suffering occasional incapacity during a long illness.

The report from the insurance and compensation session revealed the strong feelings of some insurers that they must take defensive measures to avoid the catastrophic risk potential of AIDS. That panel examined the lessons from the United States, where insurers have been subjected to legislation to prevent the worst forms of discrimination against insureds with HIV or imputed to be of a higher risk. The special dangers of medical practitioners acting as agents for insurers and providing uncounselled information about HIV status was explored.

My own panel on human rights explored as well the correlative duties which arise in people who are already infected to protect themselves and to protect others. There is no human right to spread a life-threatening virus. But the coincidence of self-protection and community protection is often stressed in the context of HIV/AIDS. The panel on human rights recognised this inter-action.

Professor Ruben Sher examined cases of breaches of confidentiality about HIV status and departures from the strict rule of informed consent to HIV testing. He tabled the enlightened new guidelines on treatment of persons with HIV/AIDS, issued for discussion by the Medical Association of South Africa to coincide with this conference. Those guidelines emphasise that the risk of acquiring the virus from HIV infected patients is small and that

there is no justification for the refusal of health workers to attend to HIV positive patients or to discriminate unjustly against them.

The human rights panel received an interesting report by Ms Michaela Figuerira on the Namibian policy on HIV/AIDS. Whilst the report emphasised the commitment of the government to the protection of basic rights guaranteed in the constitution and by international instruments, actual practice in hospitals and prisons often left something to be desired.

Questions from the floor to this panel indicated the difficulties of the practical decisions which have to be made in dealing with the problems of HIV whilst respecting the rights of patients. Should information about HIV status ever be given over the telephone? Is the case of the Florida dentist who is said to have infected five patients wholly exceptional or a warning of things to come? Who may give consent to the administration of an HIV test to a child said to have been abused by a family member? What limits can be imposed on insurance brokers to respect the confidentiality of HIV information when they are not subject to the professional disciplines of healthcare workers? What measures should be adopted in prison to diminish the spread of HIV by unprotected sexual intercourse or drug use?

Basic rights in global context

The need for a diversity of viewpoints was stressed in this session. For my own part, I urged the necessity to see the issues of human rights and HIV/AIDS in a wider context. Being close to a particular problem it is often easy to lose one's sense of direction and perspective. The application of basic human rights to the predicament of HIV/AIDS is no more than another instance of the invocation of fundamental rules which have been developed and expressed by nation states and the international community,

particularly since 1945. In every society, we must seek to live out our lives and to reflect in our laws such basic rights for they inhere in each one of us as human beings. They are guaranteed by international law. If they are not yet all reflected in domestic law, it should be the duty of lawyers to see that domestic law is brought into harmony with fundamental principles of basic rights.

And basic rights must be weighed with basic duties which are owed to the whole community. This much is recognised in the South African *Charter on HIV and AIDS* which was tabled at this conference. The *Charter* lists the suggested rights of persons with HIV or AIDS to liberty, autonomy, security of the person, freedom of movement and to other privileges enjoyed in education, employment, health and support services and so on. But it finishes, appropriately enough, with a statement of the duties of persons with HIV or AIDS. Such persons have a duty to respect the rights, health and physical integrity of others and to take appropriate steps to ensure such protection where that is necessary.

One of the prices that had been paid for the isolation of South Africa as a result of apartheid has been its removal from the great world movement of human rights which has been such a feature of the last forty years of human history. From the *Charter of the United Nations* and the *Universal Declaration of Human Rights* (upon which South Africa abstained) we have seen the development of the *International Bill of Rights* and of machinery to enforce it. We have also witnessed the creation of regional conventions on human rights, including the *African Charter on Human and Peoples' Rights* to which South Africa is not yet a party. It may be expected that, as South Africa moves towards a truly democratic polity, it will become a party to this international movement of human rights and an active participant in the instruments -

international and regional - which give force and meaning to the promises of basic rights.

Death shall have no dominion

It remains only to thank all of the participants in this conference. To thank the speakers and presiding officers, the conference organisers and the venue staff who acted with such efficiency. Indeed to thank all participants. I would single out for special appreciation the group of sixty participants who filled the places reserved for people living with AIDS and their advisers and supporters. They are the people in the front line. By their courage and example they afford us a positive reason to re-dedicate our efforts to the avoidance of discrimination and to the provision of just laws in the fight against this epidemic. The day will come when HIV/AIDS is consigned to a footnote to human history. We will not be overcome by HIV/AIDS. Death will not dominate us. Life will assert its dominion. In the end, with the spirit of cooperation amongst people of every nation, every race, every age group, every expression of sexuality, every walk of life: we will overcome HIV/AIDS. And then death will have no dominion:

*"And death shall have no dominion.
Dead men naked they shall be one
With the man in the wind and the west moon;
When their bones are picked clean and the
clean bones gone,
They shall have stars at elbow and foot;
Though they go mad they shall be sane,
Though they sink through the sea they shall
rise again;
Though lovers be lost love shall not;
And death shall have no dominion."*

Dylan Thomas