

CANADIAN

# HIV/AIDS POLICY & LAW

R E V I E W

VOLUME 8, NUMBER 1, APRIL 2003

## **The UNGASS Declaration of Commitment on HIV/AIDS: A Review of Legislation in Six Southern African Countries**

This article reviews legislation of six Southern African countries to determine what progress has been made after the UNGASS Declaration of Commitment on HIV/AIDS, particularly with regard to paragraph 58 on human rights and paragraph 69 on rights in the workplace. The article notes the complexities introduced by the coexistence of customary laws and practices and codified law. It describes certain features of specific codified and customary laws. It concludes that, with the possible exception of South Africa, the countries under review have not responded to the challenges the HIV/AIDS epidemic have confronted their legal systems with. They have resorted in the first instance to criminal law, and have allowed discriminatory customary laws and practices, which propel the epidemic, to continue to operate.

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CANADIAN | RÉSEAU  
HIV/AIDS | JURIDIQUE  
L E G A L | CANADIEN  
NETWORK | VIH•SIDA

Published by the Canadian HIV/AIDS Legal Network.  
A project funded in part by Health Canada under  
the Canadian Strategy on HIV/AIDS.



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Strategy on  
HIV/AIDS

## The UNGASS Declaration of Commitment on HIV/AIDS: A Review of Legislation in Six Southern African Countries

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In June 2001, 189 member states at the Special Session of the United Nations General Assembly on HIV/AIDS (UNGASS) adopted the Declaration of Commitment on HIV/AIDS without reservation. The Declaration contains the commitment of leaders of governments and states to take action on HIV/AIDS in a number of areas, including leadership, prevention, care, support and treatment, and HIV/AIDS and human rights.<sup>1</sup> (For a summary of the UNGASS and the Declaration, see the cover article “The UNGASS Declaration of Commitment on HIV/AIDS: One Year Later” in this issue.)

This article focuses on paragraphs 58 and 69 of the Declaration. They are aimed at implementing legislation to eradicate HIV/AIDS discrimination and to ensure the enjoyment of human rights and fundamental freedoms by people with HIV/AIDS and other vulnerable groups affected by the epidemic. The article examines whether six Southern African countries – Botswana, Lesotho, Mozambique, South Africa, Swaziland, and Zimbabwe (the study group) – have made any progress in changing or enacting legislation to give effect to these paragraphs. It is based on a report made by the AIDS

Law Project to the Human Sciences Research Council in South Africa in December 2002.<sup>2</sup>

The countries in the study group exhibit some of the highest HIV prevalence rates globally. Botswana, Zimbabwe, Swaziland, and Lesotho (in that order) are the countries with the highest HIV prevalence in the world, with adult prevalence rates of over 30 percent.<sup>3</sup> South Africa holds the sixth place and Mozambique the eleventh place in HIV prevalence in the world.<sup>4</sup> It is thus reasonable to expect the governments of the study group to engage with the AIDS epidemic in a serious and determined

manner and to pay particular attention to AIDS discrimination and stigma within their respective countries.

## The UNGASS Declaration

One way of reducing the level of AIDS discrimination in a society is to enact legislation that explicitly protects the rights of people with

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HIV/AIDS and vulnerable groups affected by the epidemic, and assigns penalties to the violators of those rights.<sup>5</sup> The relationship between the protection of human rights and the reduction of vulnerability (and therefore levels of AIDS discrimination) was recognized specifically in the Declaration's chapter on HIV/AIDS and human rights. The preamble reads:

Realisation of human rights and fundamental freedoms for all is essential to reduce vulnerability to HIV/AIDS. Respect for the rights of people living with HIV/AIDS drives an effective response.<sup>6</sup>

Paragraph 58 of the chapter binds heads of states and government to:

By 2003, enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, inter alia, education, inheritance, employ-

ment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic.

The Declaration goes further, identifying the workplace as an area of concern. Paragraph 69 of the chapter on alleviating social and economic impact commits heads of states and government to:

By 2003, develop a national legal and policy framework that protects in the workplace the rights and dignity of persons living with and affected by HIV/AIDS and those at the greatest risk of HIV/AIDS, in consultation with representatives of employers and workers, taking into account of established international guidelines on HIV/AIDS in the workplace.

The heads of government of the study group have therefore bound themselves to take the lead in transforming or strengthening their legal systems' response to the epidemic.

## Customary Law and HIV/AIDS

It is important to note that dual legal systems, described as follows, operate within the study group:

As a consequence of colonial rule in Africa, states in Africa provide for the recognition of various legal systems. Within these systems, customary and religious laws on the one hand, and the received laws, based on the law of the former colonial states, on the other hand, co-existed in certain fields, including family law and succession law.<sup>7</sup>

Customary law has been defined as:

an established system of immemorial rules which had evolved from the way of life and natural wants of the people,

the general context of which was a matter of common knowledge, coupled with precedents applying to special cases, which were retained in the memories of the chief and his counselors, their sons and their sons' sons, until forgotten, or until they became part of immemorial rules.<sup>8</sup>

National law in the six countries is generally divided between customary laws and practices that are generally not written up, and that of more formalized Western forms of law drawing on English common law and Roman-Dutch law. In an attempt to maintain order and deliver justice, countries may have to try to strike an uneasy balance between these different kinds of law.

Both codified forms of law and unwritten customs or customary laws play an important role in curbing or exacerbating the AIDS epidemic. In his article on customary law and HIV/AIDS, Pieterse set out a number of examples of African customary practices and beliefs that can contribute to the spread of HIV/AIDS.<sup>9</sup> He illustrated how customs and cultural institutions like polygyny, customs aimed at procreation, ritual circumcision and skin-piercing procedures, and culturally related attitudes and beliefs in which patriarchy plays a dominant role, could increase vulnerability to HIV.

UNAIDS adds more examples of the interplay between vulnerability to HIV/AIDS and cultural practices:

- the practice of mandatory wife inheritance by a brother if a woman's spouse dies;
- the "cleansing" of virgins on reaching puberty through having forced sex with a disguised male; and
- the minority status of women under customary laws and

unequal educational opportunity for the girl child.<sup>10</sup>

Numerous customary laws and practices make women particularly vulnerable to human rights violations and therefore also to HIV infection. In a

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number of countries in the study group, women are regarded as minors: married women are under guardianship of their husbands, while unmarried women are under the guardianship of their fathers. This means, for example, that women cannot register immovable property in their name (eg, Lesotho), contract without her husband's consent (Botswana), or have access or rights to land without a husband or male relative (Swaziland and Zimbabwe).

Other examples include:

- no recognition of marital rape;
- tribal courts treating adultery as a female crime only and/or assigning greater penalties to the woman for adultery; and
- mandatory wife inheritance by a brother if the woman's spouse dies.

It is clear that these practices and laws assign a lower social status to women, make them economically, physically, and socially dependent on males, and severely limit their ability and power to negotiate safer sex. These discriminatory traditions and laws therefore

compound women's vulnerability to HIV infection and serve as powerful driving forces of the epidemic.

While many instances of customary law or practices are inequitable, discriminatory, or contrary to the principles of human rights, the value and weight of customary law for African communities have been stressed.<sup>11</sup> It was clear from field research done in the study group by the author that customary laws and practices play an influential role in the lives of the citizens of the study group and would have a significant impact on the spread of the epidemic.<sup>12</sup> It therefore follows that political and community leaders should identify aspects of customary laws operating in their countries that could advance the spread of HIV/AIDS, and should positively influence and transform these aspects to take into account the new challenges brought by the AIDS epidemic and globalization.

### Legislation and HIV/AIDS

Table 1 contains a summary of legislation in the study group that specifically contains HIV/AIDS provisions. Little legislation with reference to HIV/AIDS has been enacted since the Declaration came into effect in June 2001. What follows is a brief description of the laws noted in the table, as well as those laws that could impact on the spread of the epidemic but do not expressly mention HIV/AIDS. Legislation and customary law that marginalize already vulnerable groups (such as gay men and lesbians, women, and sex workers), and therefore make them more susceptible to contracting HIV, are also noted.

#### Botswana

The Medical Council (Professional Conduct) (Amendment) Regulations

make provision for the notion of "shared confidentiality" in which medical practitioners can disclose a patient's HIV status to caregivers or to family members without the patient's consent and without ensuring that these third parties will not disclose to others.<sup>13</sup>

The Penal Code (Amendment Act) assigns different punishments for rapists with HIV than for rapists who test HIV-negative. A person found guilty of rape will only be tested for HIV after conviction by a court. When the results of the HIV test are received, the rapist could be sentenced in the following ways:

- *tests HIV-negative*: the minimum sentence is 10 years, but could be higher if serious violence was committed during the rape;
- *tests HIV-positive without prior knowledge and diagnosis*: if the rapist does not know his HIV status at the time of the rape, the minimum sentence is 15 years; or
- *tests HIV-positive with prior knowledge and diagnosis*: if the rapist knew he was HIV-positive at the time of the rape, the minimum sentence is 20 years.<sup>14</sup>

Botswana's Penal Code makes it a criminal offence for any person to commit an act deemed "against the order of nature."<sup>15</sup> A judge interpreted "against the order of nature" to mean any act that involves anal or oral sex.<sup>16</sup> This legislation clearly marginalizes gay men and lesbians; it also severely limits access to information on safer same-sex sexual practices and on the dangers of HIV transmission through anal or oral sex. The Penal Code also makes sex work an offence.<sup>17</sup> There is a clear absence of domestic-violence legislation,<sup>18</sup> and

**Table 1:** Legislation Specifically Mentioning HIV/AIDS

Country	Legislation	Year Enacted
Botswana	Medical Council (Professional Conduct) (Amendment) Regulations	1999
	Penal Code (Amendment Act)	1998
Lesotho	None	
Mozambique	Labour Legislation (Act No. 5 of 2002)	2002
South Africa	Promotion of Equality and Prohibition of Unfair Discrimination Act	2000
	Employment Equity Act	1998
	Medical Schemes Act	1998
	Criminal Law Amendment Act	1997
	Criminal Procedure Second Amendment Act	1997
	National Education Policy Act	1996
	National Policy for Health Act	1990
Swaziland	None	
Zimbabwe	Sexual Offences Act	2001
	Labour Relations (HIV and AIDS) Regulations	1998

the law does not provide for marital rape.

### Lesotho

Lesotho has no laws that refer specifically to HIV/AIDS. A Sexual Offences Bill is soon to be enacted that will provide for the following:

- widening the definition of rape to include an interpretation of marital rape;
- sentences that will take into account the HIV status of the rapist (a person who, knowing or having a reasonable suspicion that he has HIV, rapes another can be sentenced to death); and
- free medical attention to rape victims.

Another proposed piece of legislation entitled the Married Persons Equality Bill will attempt to rectify inequality between husbands and wives.

Currently, under customary law women are regarded as minors, while married women are under the guardianship of their husbands and unmarried women are under the guardianship of their fathers.<sup>19</sup>

### Mozambique

An untitled law called Act No. 5 of 2002 contains a number of provisions that deal with HIV/AIDS in the workplace. The Act prohibits pre-employment testing for HIV and guarantees the right to confidentiality with regard to HIV status in the workplace. In the

event of occupational exposure to HIV, “guaranteed medical assistance as well as adequate medication” is provided for and must be paid for by the employer. This law makes it compulsory for employers to provide HIV/AIDS education, information, and advisory services to their employees. Dismissal on the grounds of HIV/AIDS is “regarded as dismissal without just cause.”

No legislation currently exists in Mozambique that provides for the special needs of targets of domestic violence. According to Article 1674 of the Civil Code, the husband is seen as the head of the household, which effectively makes the wife his subordinate. The property of the wife is

given to the husband and she can only transact commercially with her husband's authorization.

### South Africa

The Employment Equity Act prohibits unauthorized employment-related HIV testing.<sup>20</sup> It also provides that no person may unfairly discriminate against an employee or job applicant in any employment policy or practice on the basis of 20 listed grounds unless it is an inherent requirement of the job. "HIV status" is listed as one of the grounds on which an employee may not be discriminated against.<sup>21</sup>

The Criminal Law Amendment Act<sup>22</sup> provides for a higher minimum sentence in the absence of substantial and compelling circumstances for a first-offender rapist who knows that he has HIV than for a first offender who does not have HIV. The Criminal Procedure Second Amendment Act<sup>23</sup> provides for stricter bail measures. It denies bail to a person accused of rape who knows he has HIV unless exceptional circumstances are established.

The Medical Schemes Act<sup>24</sup> ensures that medical schemes may not exclude any person able to pay their contributions (this will include people with HIV/AIDS). HIV-associated diseases are now a category under the Prescribed Minimum Benefits, which provide for the compulsory coverage of medical and surgical management for opportunistic infections or localized malignancies.

The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>25</sup> is intended to implement and give greater effect to the equality clause of South Africa's Constitution. Section 6 of the Act prohibits unfair discrimination on the ground of disability (which may be interpreted to include HIV/AIDS, but this is not expressly provided for in the Act).

Section 34(1) contains specific directive principles on HIV/AIDS, while section 32 provides for the establish-

It is imperative that the respective governments of these countries embark on a process of legislative reform. Strategies to transform discriminatory customary laws and practices are of particular importance.

ment of an Equality Review Committee mandated to meet within one year of promulgation of the Act to make recommendations to the Minister of Justice on whether "HIV status" and "AIDS" should be included in the Act as prohibited grounds of unfair discrimination.<sup>26</sup>

Both the National Policy for Health Act<sup>27</sup> and the National Education Policy Act<sup>28</sup> contain provisions for the drawing up of policies on HIV/AIDS. Following these directives, the National Policy on Testing for HIV was published in August 2000, while the Minister of Education launched the National Policy on HIV/AIDS for Learners and Educators in 1999.

### Swaziland

There is not yet any legislation that makes express mention of HIV/AIDS, but some changes to current Swazi laws have been proposed. The process of drafting an Employment Bill is under way. It is likely to incorporate most aspects of the various International Labour Organization conventions to which Swaziland is a

signatory, as well as regional instruments such as the SADC Code on HIV/AIDS and Employment. A Public Health Bill is envisaged that will incorporate issues related to HIV/AIDS, while criminal and correctional services laws are to be amended to address the new challenges posed by HIV/AIDS. Funds have been allocated to assist the Correctional Services department to review legislation in order to make it responsive to the needs of prison inmates with HIV/AIDS.

Under Swazi common law and customary law, the status of women is that of legal minors. Women have to obtain permission from their husbands or guardians in all legal matters or important transactions. Swazi inheritance law prevents a woman from inheriting anything from her deceased husband's estate in her own right. Rural women can have access to land only through a husband if she is married, or through a male relative if she is single.

### Zimbabwe

The Sexual Offences Act imposes greater penalties for rape on the perpetrator if he has HIV.<sup>29</sup> Section 15 of the Act makes it a criminal offence to wilfully infect another with HIV, while sections 9 and 11 criminalize sex work.

The Labour Relations (HIV and AIDS) Regulations of 1998 provide for the availability of HIV/AIDS education and information in the workplace and for confidentiality, while prohibiting pre-employment testing and unfair dismissal on grounds of HIV/AIDS.

According to customary laws, women have no independent access or rights to land, as they can access land only through their husbands or male relatives.

## Conclusion

With the possible exception of South Africa, the countries of the study group have not adequately responded to the challenges the AIDS epidemic has confronted their respective legal systems with. The first reaction of many countries to the epidemic is to enact criminal laws. This approach may not only impair the effective and sensitive approaches necessary to control the epidemic;<sup>30</sup> it also often comes at the expense of putting into place laws that could target AIDS discrimination, provide special protection for people with HIV/AIDS, and strengthen the position of vulnerable groups such as women, gay men and lesbians, and sex workers. It is plain that discriminatory customary laws and practices operate powerfully in the study group and propel the epidemic.

It is commendable that three of the six countries – Mozambique, South Africa, and Zimbabwe – have enacted progressive workplace legislation in keeping with paragraph 69 of the Declaration. Yet there is no indication that Botswana, Lesotho, Mozambique, Swaziland, or Zimbabwe will be able to comply with the directives set out in paragraph 58 by 2003. Little or no progress has been made to eliminate HIV/AIDS discrimination, ensure the enjoyment of human rights by people with HIV/AIDS and other vulnerable groups affected by the epidemic, and reduce HIV/AIDS-related stigma and social exclusion.

It is thus imperative that the respective governments of these countries embark on a process of legislative reform to remedy these problems – one in which strategies to transform discriminatory customary

laws and practices are of particular importance. Only after these strategies have been executed can it be said that heads of government have made progress in honouring their commitments on human rights and HIV/AIDS.

– Marlise Richter

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<sup>1</sup> United Nations General Assembly Special Session on HIV/AIDS. Declaration of Commitment on HIV/AIDS. Resolution A/Res/S-26/2, 27 June 2001 ([www.unaids.org/UNGASS/docs/AIDSDeclaration\\_en.pdf](http://www.unaids.org/UNGASS/docs/AIDSDeclaration_en.pdf)).

<sup>2</sup> The research report, entitled "Review of HIV/AIDS Legislation in Six Southern African Countries," is available online ([www.alp.org.za](http://www.alp.org.za)). The HSRC commissioned similar studies into the study group's HIV/AIDS policies, financing, and program implementation. These findings, together with the research on HIV/AIDS legislation, will be published in a final report in 2003.

<sup>3</sup> Joint UNAIDS Programme on HIV/AIDS and World Health Organization. *AIDS Epidemic Update: December 2002*. Geneva: Joint UNAIDS Programme on HIV/AIDS and World Health Organization, 2002, at 16 ([www.unaids.org/worldaidsday/2002/press/update/epiupdate\\_en.pdf](http://www.unaids.org/worldaidsday/2002/press/update/epiupdate_en.pdf)).

<sup>4</sup> See UN Department of Social and Economic Affairs – Populations Division. *Years of life lost to AIDS: twenty countries with the highest HIV prevalence, 2000-2005* ([www.un.org/esa/population/publications/aidswallchart/chart2.jpg](http://www.un.org/esa/population/publications/aidswallchart/chart2.jpg)).

<sup>5</sup> P Aggleton, R Parker. *A Conceptual Framework and Basis for Action: HIV/AIDS Stigma and Discrimination* UNAIDS Best Practice Collection. Geneva: Joint United Nations Programme on HIV/AIDS, 2002, at 12-13 ([www.unaids.org/publications/documents/human/WACframework-English.pdf](http://www.unaids.org/publications/documents/human/WACframework-English.pdf)).

<sup>6</sup> *Supra*, note 1 at para 58.

<sup>7</sup> A Armstrong et al. *Uncovering Reality: Excavating Women's Rights in African Family Law*. Women and Law in Southern Africa Research Trust, Working Paper No 7, 1993, at 9-10.

<sup>8</sup> JC Bekker (ed). *Seymour's Customary Law in Southern Africa*, 5<sup>th</sup> edition, Cape Town: Juta, 1989, at 11.

<sup>9</sup> M Pieterse. *Beyond the reach of law? HIV, African culture and customary law*. *Tydskrif van die Suid Afrikaanse Reg* 2000; 3: 428-441.

<sup>10</sup> M Heywood. *A Human Rights Approach to AIDS Prevention at Work: The Southern African Development Community's Code on HIV/AIDS and Employment*. UNAIDS Best Practice Collection. Geneva: Joint United Nations Programme on HIV/AIDS, 2000, at 11 ([www.unaids.org/publications/documents/human/law/Brochure\\_SADC.pdf](http://www.unaids.org/publications/documents/human/law/Brochure_SADC.pdf)).

<sup>11</sup> For example, participants at a workshop entitled

"Human Rights and HIV/AIDS: Is Access to Treatment Changing the Context?" emphasized the importance of customary law and protested against suggestions to disregard or undervalue its role. The workshop was held in Windhoek on 25-26 October 2002 and was attended by delegates from the study group as well from Zambia, Angola, Namibia, and Malawi.

<sup>12</sup> The author travelled to Lesotho, Botswana, Zimbabwe, and Mozambique to conduct interviews with AIDS service organizations; non-governmental organizations, and community-based organizations involved with gender issues, human rights, legal work, public health, and HIV/AIDS; and national AIDS council structures and government. She also corresponded with contacts in Swaziland.

<sup>13</sup> See section 2 (b) of the Botswana Medical Council (Professional Conduct) (Amendment) Regulations of 1999. The term "communicable disease" is used in the provisions and has been interpreted to specifically include HIV/AIDS.

<sup>14</sup> See section 3 of the Penal Code (Amendment) Act (Act No 5 of 1998).

<sup>15</sup> Section 164 of the Penal Code (Chapter 08:01).

<sup>16</sup> Case No CRAF 94 of 95.

<sup>17</sup> Section 156 of the Penal Code.

<sup>18</sup> Work is currently underway on a domestic violence bill entitled *The Protection from Domestic Violence Bill*.

<sup>19</sup> P Lettuka et al. *Maintenance in Lesotho*. 2<sup>nd</sup> ed. Women and Law in Southern Africa Research Trust, 1997, at 4-5.

<sup>20</sup> Section 7(2) of Act No 55 of 1998. No employer may ask a job applicant or a current employee to take an HIV test at any time, except if the employer has applied to the Labour Court for permission for such testing, and it has been granted.

<sup>21</sup> Section 6(1).

<sup>22</sup> Act No 105 of 1997.

<sup>23</sup> Act No 85 of 1997.

<sup>24</sup> Act No 131 of 1998.

<sup>25</sup> Act No 4 of 2000.

<sup>26</sup> At the time of writing, the Equality Review Committee had not yet released its report.

<sup>27</sup> Act No 116 of 1990.

<sup>28</sup> Act No 27 of 1996.

<sup>29</sup> Section 16 of the Sexual Offence Act (Act No 8 of 2001).

<sup>30</sup> Richard Elliott argues that use of the criminal law with regard to HIV/AIDS may give rise to the following problems: People with HIV/AIDS are seen as "potential criminals"; the law may deter people from finding out their own HIV status; it may compromise the confidential relationship that should exist in pre- and post-test counselling between the counsellor and the client, and create a false sense of security among people who may think they are HIV-negative. See R Elliott. *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*. UNAIDS Best Practice Collection. Geneva: Joint United Nations Programme on HIV/AIDS, June 2002 ([www.unaids.org/publications/documents/human/JC733-CriminalLaw-E.pdf](http://www.unaids.org/publications/documents/human/JC733-CriminalLaw-E.pdf)).