

**REALISING BOTSWANA'S VISION
TO STOP HIV/AIDS BY 2016:
THE NEED FOR A PRAGMATIC APPROACH
TO PROVIDE CONDOMS IN PRISONS**



BONELA



The Botswana
Network on
Ethics, Law
and HIV/AIDS

REALISING BOTSWANA'S VISION TO STOP HIV/AIDS BY 2016: THE NEED FOR A PRAGMATIC APPROACH TO PROVIDE CONDOMS IN PRISONS

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ABBREVIATIONS

| | |
|---------|--|
| AD | Appellate Division |
| AIDS | Acquired Immune Deficiency Syndrome |
| Anor. | Another |
| ARVs | Anti-Retrovirals |
| BDF | Botswana Defence Force |
| BLR | Botswana Law Reports |
| BMLR | Butterworth's Medico-Legal Reports |
| BONASO | Botswana Network of AIDS Service Organizations |
| BONELA | Botswana Network on Ethics, Law and HIV/AIDS |
| BTV | Botswana Television |
| CA | Court of Appeal |
| CDC | Centers for Disease Control |
| CEDAW | Convention on the Elimination of All Forms of Discrimination Against Women |
| CESSA | Conference of Eastern, Southern and Central Africa |
| Doc. | Document |
| GA | General Assembly |
| HC | High Court |
| HCV | Hepatitis C Virus |
| HIV | Human Immuno-deficiency Virus |
| ILM | International Legal Materials |
| J. | Justice |
| KB | King's Bench |
| MMWR | Morbidity and Mortality Weekly Reports |
| MSM | Men who have Sex with Men |
| NACA | National AIDS Co-ordinating Agency |
| NSF | National Strategic Framework for HIV/AIDS 2003-2009 |
| NSWLR | New South Wales Law Reports |
| No. | Number |
| OAU | Organization of African Unity |
| Ors. | Others |
| OSISA | Open Society Initiative for Southern Africa |
| PMTCT | Prevention of Mother-to-Child Transmission |
| R. | Rex (The King) |
| Res. | Resolution |
| S. | Section |
| SADC | Southern African Development Community |
| SA | South African Law Reports |
| SALR | South African Law Reports |
| STD | Sexually Transmitted Disease |
| Supple. | Supplement |
| UBLJ | University of Botswana Law Journal |
| UN | United Nations |
| UNAIDS | Joint United Nations Programme on HIV/AIDS |
| UNGASS | United Nations General Assembly Special Session (on HIV/AIDS) |
| UNO | United Nations Organization |
| Vol. | Volume |
| WHO | World Health Organization |

SYNOPSIS

To consolidate its remarkable economic and other achievements, and to propel itself for greater attainments, Botswana has developed a national master-plan, Vision 2016: Towards Prosperity for All.¹ One of the aspirations of Vision 2016 is that there be no new HIV (Human Immuno-deficiency Virus) infections in Botswana by the year 2016, while there be adequate care and treatment for every person afflicted with AIDS (Acquired Immune Deficiency Syndrome)-related illnesses. As the Presidential Task Group puts it,

By the year 2016, the spread of the HIV (Human Immuno-deficiency Virus) will have stopped, so that there will be no new infections by the virus in that year.

If there is not at that time an affordable cure, all people who are suffering from AIDS related illness will have access to good quality treatment in the health facilities, community, or the workplace so that they can continue to live full and productive lives for as long as possible.²

Considering that Botswana is among the countries with the highest HIV prevalence in the world, the aspiration to eradicate HIV in the country by 2016 may readily appear as an unrealistic dream. Perhaps it is mere soul-lifting government propaganda, calculated to boost the spirits of a populace psychologically beleaguered and traumatised by a rampaging and seemingly out of control HIV/AIDS pandemic.

However, in attaining its present level of development since independence, Botswana has shown itself to be a redoubtable, focussed and resilient nation. This point can reasonably support an argument that attaining the goal of eradicating HIV by 2016 is not beyond the capacity of a country with such qualities, if proper measures are adopted.

This paper posits that in order to realise the Vision 2016 goal to stop HIV, effective means of treatment and prevention should be provided to all population groups in Botswana. It will emphasise the need to pay realistic attention to HIV/AIDS in the prisons in terms of provision of effective treatment and means of prevention, including condoms for prisoners who, due to their confinement, are more prone to HIV infection than unconfined members of society. Put concisely, the paper re-echoes the clarion call that protecting prisoners against HIV/AIDS amounts to protecting non-prisoners too, and the public as a whole. Along that line, the paper highlights that an important step in the march towards effective control of HIV/AIDS in Botswana is the effectual prevention of HIV/AIDS in prisons. This is attainable by providing prisoners with all means of prevention, including condoms.

¹ Presidential Task Group for a Long Term Vision for Botswana, *Vision 2016: Towards Prosperity for All*, (Gaborone: Presidential Task Group for a Long Term Vision for Botswana, 1997) (hereafter '*Vision 2016*').

² *Ibid.* at 9.

Among the general issues addressed in the paper are the unwholesome prison conditions that make prisoners more prone to HIV infection than unconfined members of society. The existing measures for the control of HIV/AIDS in Botswana prisons are scrutinised to determine how they can efficaciously curtail the spread of the disease in prisons. The paper will argue that the exclusion of condoms from prison-provided HIV-prevention measures creates an inimical gap which limits HIV/AIDS control in Botswana's prisons.

With that conclusion, the argument for giving prisoners access to condoms is intensified. While it is noted that providing condoms to prisoners as a preventive measure may seem unacceptable to many, Botswana's recognition of condoms as an effective means of preventing HIV transmission³ makes it imperative that prisoners have access to condoms, as do non-prisoner members of society. This need becomes particularly crucial in view of the unassailable evidence that voluntary and involuntary sex, occur among inmates of Botswana prisons, and that their sexual activities contribute to the spread of HIV.⁴ Furthermore, as an inextricable part of the society, prisoners interact with non-prisoners, sexually and otherwise, both during and after their prison terms. Leaving the prison population unprotected in any way against HIV is thus akin to creating an HIV generating house through which HIV may continuously spread in Botswana.

This paper notes that the duty to tackle HIV/AIDS in Botswana prisons is not the burden of the government alone. Citizens too have roles to play. The primary role of citizens is to appreciate that prisoners, notwithstanding their incarceration, are citizens and humans who retain certain basic rights that deserve protection. Put differently, there is a need to change the societal attitude that prison is a place of punishment where prisoners should experience maximum suffering and deprivation.⁵ If there is a positive attitude towards prisoners, members of the public can put pressure on the government to ensure that prisoners are kept in humane prison conditions and that prisoners' rights are respected. In the context of HIV/AIDS, respect for the right to health is particularly vital. On the other hand, hostile social attitudes or disinterestedness in prisoners' welfare may encourage or justify deplorable conditions and the neglect of prisoners by the government.⁶

In the specific context of Botswana, society has another role in tackling HIV/AIDS in prisons—that is, to develop tolerance, if not total acceptance, for people who manifest

³ Ministry of Health, AIDS/STD Unit, *Botswana National Policy on HIV/AIDS (Revised Version)*, approved and adopted by Government through Presidential Directive CAB:33/98, 23 September 1998 (hereinafter '*Botswana HIV/AIDS Policy*'), Clause 4.4, at 4.

⁴ K. Masetlhe, *HIV/AIDS Prevention in Botswana Prisons: What Could Be Done? The Prisoners' Perspectives and Policy Recommendations* (London: Department of Social Psychology, London School of Economics, 2002) 22.

⁵ See D.D. Ntanda Nsereko, 'The Prisoner and Human Rights' in K. Frimpong (ed.), *The Law, The Convict and the Prisons* (2nd Edition) (Proceedings of the Second Botswana Prisons Service Workshop held at the University of Botswana, Gaborone, 27 May-5 June 1985) (Gaborone: Associate Printers, 2005) 154-155.

⁶ See *ibid.* at 155.

different sexual inclinations, particularly homosexuality. As this paper shows, social disapproval of homosexuality has been identified to be at the root of the Botswana Government's inability to provide condoms to prisoners as a preventive measure. To elucidate, sex in prisons is largely man to man anal sex, thus constituting the criminal act of sodomy punishable under Botswana's Penal Code.⁷ This punitive law incapacitates the government from providing condoms to prisoners because so doing would seem to amount to indirect condoning, abetting or encouraging of the criminal act of sodomy.⁸ In the case of *Kanane v. The State*, the Botswana Court of Appeal held the inhibitive anti-sodomy criminal law to be constitutional.⁹ As can be inferred from some judicial comments in the case, the people's disapproval of homosexuality is a key factor that justifies the existence of the Penal Code's anti-sodomy laws. For clarity, the pertinent words of a judge in the case are hereby cited:

[T]here is no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires a decriminalisation of those practices, even to the extent of consensual acts by adult males in private... the time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private.¹⁰

The implication of the above statement is that until Botswana's people show some tolerance for homosexuality, the criminal law barrier militating against the provision of condoms in Botswana prisons is likely to remain intact. Consequently, a gap in the efforts to prevent the spread of HIV/AIDS in the prisons and the country is not being closed.

On another front, the paper examines the extent to which the Penal Code's anti-sodomy provisions *actually* constitute an obstacle to the Government. This paper thus confronts the official argument that the Penal Code's anti-sodomy provisions are immutable barriers to the provision of condoms in prisons. This writer posits that the Government has legal and legitimate grounds for bypassing or sidestepping the Penal Code to provide condoms in prisons. In light of the declaration of HIV/AIDS as a national emergency and the threat it poses to Botswana, the Government has legitimate grounds under the common-law principle of *necessity* to bypass both the Penal Code and homophobic social attitudes. The paper draws on the examples of some countries facing injection-driven HIV epidemics, which, notwithstanding the illegality of illicit drug use, provide sterile needles and syringes to drug users. These *harm reduction* approaches of some countries are invoked to buttress this paper's arguments.

⁷ Cap. 08:01, *Laws of Botswana* (Revised Edition, 2002). See K. Masethe, *supra* note 4 at 22-24.

⁸ See K. Masethe, *ibid.* at 17.

⁹ [2003] (2) Botswana Law Reports (BLR) 67 (Court of Appeal [CA]).

¹⁰ *Ibid.* at 80, para. A-H.

The central argument in this paper is the urgent need for effective means of HIV prevention, especially condoms, in Botswana prisons. It highlights that the failure to adopt an all-embracing preventive approach will be a serious drawback to Botswana's laudable efforts to curtail the HIV/AIDS crisis. According to the President, His Excellency Mr. Festus Mogae, this HIV/AIDS crisis "has cast a shadow over the future of our country".¹¹

¹¹ Republic of Botswana, *National Strategic Framework for HIV/AIDS 2003-2009* (Gaborone: Pyramid Publishing, 2003) (hereinafter '*National Strategic Framework for HIV/AIDS/NSF*') 1.

PART I: INTRODUCTION

1.1 THE HIV/AIDS CRISIS IN BOTSWANA AND THE NATIONAL RESPONSE

Botswana¹² became independent on September 30, 1966 and was among the 25 poorest and least developed countries in the world.¹³ The country's critical lack of physical and social infrastructure at the time of independence is perhaps best illustrated by the fact that it had barely one stretch of tarred road.¹⁴ From these quite bleak and seemingly hopeless circumstances, Botswana has emerged to become a relatively strong, even if yet to be fully appreciated, economic and socio-political force in Africa.¹⁵ It has matured into a country that holds, and can confidently flaunt, impressive credentials as a rare example of an economic and political success story, not only in Africa, but also in the world.

Botswana's achievements reflect on different fronts. In addition to being 'Africa's most successful democracy',¹⁶ coupled with remarkable political stability,¹⁷ the country has one of the highest literacy levels in Africa.¹⁸ Furthermore, unlike many African countries, Botswana has fared very well in terms of safeguarding the human rights of citizens; for example, in its 'Country Reports on Human Rights Practices', released on March 8, 2006, the United States Bureau of Democracy, Human Rights, and Labor, noted, "the [Botswana] government generally respected the human rights of its citizens".¹⁹ However, the most prominent hallmark of Botswana's post-independence development, arguably, is its economic growth.²⁰

Indisputably, good and visionary leadership has played important roles in Botswana's economic, political and other attainments. As a further reflection of its good leadership

¹² For a short history of Botswana see D.D. Ntanda Nsereko, *Constitutional Law in Botswana* (Gaborone: Pula Press, 2002) 17-24. For an overview of geographical and statistical information on Botswana see K. Masethe, *supra* note 4 at 1.

¹³ *Vision 2016, supra* note 1 at 14. C. Stegling, 'Botswana's HIV/AIDS Programme: A Model for SADC?', *From Disaster to Development? HIV and AIDS in Southern Africa, Development Update*, Vol. 5 No. 3 December 2005, 226 (SADC - Southern African Development Community).

¹⁴ E. Robert, 'Botswana, an Example of What Africa Offers', *Daily News*, Monday 15 January 2007, No. 8 at 6, quoting President Horst Koehler of Germany: "At independence, Botswana was among the 10 poorest countries in the world with very little in terms of infrastructure... *There was only a strip of tarred road and almost no secondary school...*". [emphasis added] See also *Vision 2016, ibid.* at 3.

¹⁵ *Vision 2016, ibid.* at 3, 14-25.

¹⁶ C.M. Fombad, 'The Separation of Powers and Constitutionalism in Africa: The Case of Botswana', *Boston College Third World Law Journal*, Vol. XXV No. 2 2005, 301-342 at 301.

¹⁷ *Vision 2016, supra* note 1 at 16-17, E. Robert, *supra* note 14 at 6.

¹⁸ C. Stegling, *supra* note 13 at 226.

¹⁹ The [United States of America] Bureau of Democracy, Human Rights, and Labor, 'Country Reports on Human Rights Practices -2005 Botswana', 8 March 2006 available online at <http://www.state.gov/g/drl/rls/hrrpt/2005/61555.htm> accessed on 12/12.2006 (hereafter Country Reports 2005 - Botswana)

²⁰ See K. Masethe, *supra* note 4 at 1: "Botswana's economic growth rate (averaging slightly in excess of 7% over the past two decades) has been the highest in the developing world". See also C. Stegling *supra* note 13 at 226: "Botswana gained independence in 1966 and was at the time among the 25 poorest and least developed countries in the world...This situation has changed dramatically in the past three decades and today Botswana has been classified by international institutions such as the World Bank, as a middle income country. Botswana has been a consistent net contributor to the World Bank over the last decade...".

the Botswana government has developed Vision 2016: Towards Prosperity for All, a national blueprint for greater economic and socio-political achievements. Based on the aspiration of Vision 2016, Botswana aims to become a country where there will be 'prosperity for all' when it celebrates 50 years of independence in 2016.

Disturbingly, however, HIV/AIDS seems poised to wipe out the hard-earned economic and other achievements of Botswana, and hinder it from realising the lofty goals of Vision 2016. The National AIDS Co-ordinating Agency (NACA) sums up the threat posed by HIV/AIDS in the following words: "Botswana faces formidable challenges from the [HIV] epidemic and these have negative implications for the future socio-economic development".²¹

The first case of HIV/AIDS in Botswana was reported in 1985. Since then, there has been a rise in the number of persons infected with the disease. As of 2000, more than one in four persons in Botswana aged between 15 and 49 years were estimated to be infected with HIV.²² The adult²³ prevalence rate at the end of 2003 was estimated at 37.3%, with the total number of infected adults standing at 190,000.²⁴ Additionally, 25,000 children under the age of 15 were living with HIV/AIDS.²⁵ Cumulatively, 33,000 adults and children were estimated to have died, creating a population of 120,000 orphans.²⁶ In 2004, estimates from the government of Botswana indicated that "17.1% of people aged 18 months and above in Botswana are HIV positive".²⁷ More directly, a 2005 source estimated that one out of five persons in Botswana was infected with HIV/AIDS out of a population of about 1.7 million.²⁸ UNAIDS in its 2006 report, notes that "at the end of 2005 Botswana's national HIV [adult] prevalence stood at 24.1%".²⁹ The total number of people living with HIV/AIDS at that time was estimated at 270,000, of whom 140,000 were women and 14,000 were children.³⁰ That year, 18,000 deaths of adults and children due to HIV/AIDS were recorded, while the population of children orphaned by AIDS was estimated at 120,000.³¹

It is true that the estimates of HIV prevalence rates in Botswana may vary or even be disputable;³² nonetheless, this variation does not gainsay the fact that HIV/AIDS is a

²¹ Republic of Botswana, Ministry of State President, National AIDS Co-ordinating Agency, *2005 Progress Report on the National Response to the UNGASS Declaration of Commitment on HIV/AIDS* (Gaborone: National AIDS Co-ordinating Agency, 2005) (hereinafter 'UNGASS Report' [United Nations General Assembly Special Sessions on HIV/AIDS Report]) 16.

²² K. Masetlhe, *supra* note 4 at 2.

²³ 'Adult' refers to persons between 15 and 49 years; 'children' refers to persons below 15 years.

²⁴ Joint United Nations Programme on HIV/AIDS/UNAIDS, *2004 Report on the Global AIDS Epidemic*, (Geneva: UNAIDS, 2004).

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ UNGASS Report, *supra* note 21 at 10.

²⁸ See 'A World Distorted by AIDS' *National Geographic* [Africa - Special Issue] September 2005, 72.

²⁹ UNAIDS/WHO (World Health Organization), *2006 Report on the Global AIDS Epidemic*, (Geneva: UNAIDS/WHO 2006), available online at http://www.who.int/hiv/facts/06_annex2_data_en.xls (accessed on 26 June 2006) (hereinafter 'UNAIDS/WHO 2006 report').

³⁰ *Ibid.*

³¹ *Ibid.*

³² K. Masetlhe, *supra* note 4 at 2.

crisis of serious concern for the country. That the government declared HIV/AIDS a national emergency underscores the seriousness of Botswana's HIV crisis.³³

The high rate of HIV/AIDS infection in Botswana has been attributed to various factors. These include mobility of the population.³⁴ Many Botswana³⁵ maintain dwellings in different parts of the country, between which they shuttle at different times; improved infrastructure has also made travelling to these different areas easy.³⁶ High levels of poverty and gender inequality also contribute to the high rate of HIV/AIDS.³⁷

HIV/AIDS has had devastating impacts at various levels in Botswana. Two such impacts are the significant increase in adult and infant mortality rates and the decrease in life expectancy.³⁸ On the economic front at a national level, HIV/AIDS has propelled an increase in government spending on HIV/AIDS control, while simultaneously contributing to a drop in government revenue through a reduction in productivity caused by absenteeism and loss of skilled workers to HIV/AIDS.³⁹ At individual and family levels, HIV/AIDS depletes savings and renders people unfit to work; in some cases, it leads people to quit jobs to take care of the sick.⁴⁰

The President of Botswana, His Excellency Mr. Festus Mogae, in an address to the United Nations General Assembly Special Session on HIV/AIDS, highlighted other vistas of the impact of HIV/AIDS in the following words:

HIV/AIDS poses a threat to global security, peace as well as sustained development through reversal of development gains that the world has achieved. If resolute and concerted action is not taken against the spread of HIV/AIDS, the human death toll and suffering that will be inflicted will be catastrophic. Furthermore, if the HIV/AIDS pandemic is not contained, it will accentuate disparities in living standards between developed and developing countries.⁴¹

In line with the above stated views of the President, Botswana, in its response to the HIV/AIDS pandemic, has been taking what can justly qualify as 'resolute and concerted'

³³ *UNGASS Report, supra* note 21 at 1, *National Strategic Framework for HIV/AIDS, supra* note 11 at 1.

³⁴ C. Stegling, *supra* note 13 at 229.

³⁵ Citizens of Botswana are called 'Batswana'. One citizen is a 'Motswana'.

³⁶ C. Stegling, *supra* note 13 at 229.

³⁷ *Ibid.* at 229-239.

³⁸ *UNGASS Report, supra* note 21 at 14.

³⁹ *Ibid.* at 15.

⁴⁰ *National Strategic Framework for HIV/AIDS, supra* note 11 at 15-16.

⁴¹ 'Transcript of the Address delivered to the United Nations General Assembly Special Session on HIV/AIDS by His Excellency Mr. Festus G. Mogae, President of the Republic of Botswana, 25 June 2001' in C. Stegling (ed.), *United Nations Special Session on HIV/AIDS, Botswana Civil Society Delegation Report* (Gaborone: Pyramid Publishing, 2002) at 14. For further comments on the impact of HIV/AIDS in Botswana, see also Botswana Delegation to the United Nations General Assembly Special Session on HIV/AIDS, 'An Overview of the HIV/AIDS Response to and Challenges in Botswana' in *UNGASS, Botswana Civil Society Delegation Report* at 5.

actions to contain the disease. In various ways, Botswana has been collaborating with other countries, international bodies and civil society to confront its HIV/AIDS crisis.⁴²

Some policy and other measures which the government of Botswana initiated at different times to combat HIV/AIDS are as follows:

- a. 1986- The Ministry of Health set up a programme under the Epidemiology Unit to screen blood and to ensure supply and use of disposable needles throughout the national health service
- b. 1987- Creation of Emergency Short Term Plan, 1987-1989
- c. Medium Term Plan 1, 1989-1993
- d. 1992- Establishment of the AIDS/STD Unit to coordinate the National AIDS Control Programme
- e. 1993- National AIDS Policy adopted through a Presidential Directive
- f. 1997- Establishment of the National AIDS Council chaired by the Minister of Health. Membership comprised of representatives of Government, civil society and private sector
- g. 1997- The Second Medium Term Plan for HIV/AIDS 1997-2002
- h. 1998- Formation of the Parliamentary Select Committee on HIV/AIDS
- i. 1999- Reorganisation of the National AIDS Council with the President becoming the Chairperson of the body⁴³
- j. 1999- Piloting of the Prevention of Mother-to-Child Transmission (PMTCT) programme
- k. 2000- Appointment of a Co-ordinator for the National AIDS Co-ordinating Agency
- l. 2002- Initiation of the provision of ARV treatment to citizens infected with HIV
- m. 2003- Adoption of the National Strategic Framework for HIV/AIDS 2003-2009

Apart from the various activities of the Government at the national level, there have also been sector-related policies and measures aimed at controlling HIV/AIDS in the specific contexts of various sectors.⁴⁴ Particularly relevant to this paper is the Botswana Prison HIV Policy.⁴⁵ Pertinent portions of the policy will be examined in subsequent parts of this paper.

Inevitably, the response to HIV/AIDS in Botswana has warranted enormous financial inputs. For instance, “the estimated total cost of the National Response is 12,615 billion

⁴² Botswana Delegation to UNGASS, in *UNGASS, Botswana Civil Society Delegation Report, ibid.* 6 -10; *National Strategic Framework for HIV/AIDS*, 18-19.

⁴³ Arguably, this is also an indication of how seriously the government takes the fight against HIV/AIDS.

⁴⁴ See *National Strategic Framework for HIV/AIDS*, *supra* note 11 at 65-67, 75-80.

⁴⁵ Botswana Prison Service, ‘Policy on HIV/AIDS/STD for Inmates’, *HIV/AIDS and Health Care Delivery Policies* (Gaborone: Botswana Prison Service), [undated document; hereinafter ‘Botswana Prison HIV/AIDS Policy’], at 17-29.

Pula⁴⁶. Under the 2007 budget, after the military, HIV/AIDS control got the highest allocation.⁴⁷

1.1.1 CONCERTED EFFORTS ON THE ONE HAND, EFFECTUAL MEASURES ON THE OTHER: HIV/AIDS CONTROL IN THE CONTEXT OF PRISONS

Urgent steps are needed to close all gaps in Botswana's battle against HIV/AIDS in view of the enormous impact and threat that the pandemic poses to the country. As the National AIDS Coordinating Agency solemnly observes, "time is running out, and what is needed to avert a national catastrophe is concerted, deliberate, and well-targeted action".⁴⁸ Generally, based on the national response, it cannot be denied that Botswana has taken and is taking the battle against HIV/AIDS very seriously. However, the battle against HIV/AIDS in Botswana goes beyond merely making strong and concerted efforts; more importantly, the efforts must be *effectual*—effectual in the sense that all gaps through which HIV/AIDS can thrive in Botswana are plugged. To adopt a military analogy, an army may make cogent and concerted efforts in defending a territory by deploying formidable troops and armaments at various fronts of the battle. Yet, the battle strategy and efforts may not be effectual if that army leaves an important front unsecured. As in the mythical scenario of the uncovered heel of *Achilles*,⁴⁹ the unsecured front may ultimately nullify all the cogent and concerted efforts taken on all other fronts.

It is along this axis that HIV/AIDS control policies and measures in Botswana prisons come into focus. The pertinent question is whether there are any gaps in the existing HIV/AIDS control measures in prisons that can hinder Botswana from fulfilling the vision of halting the rampage of the disease - Put analogically, whether policies and measures for HIV/AIDS control in prisons have openings that can be the 'Achilles' heel' of the concerted and resolute efforts of Botswana to halt the spread of HIV/AIDS.

In line with the appreciation of NACA for 'well-targeted' action,⁵⁰ one may reflect whether the existing measures are well-targeted *vis-à-vis* prisoners. Actions taken to control HIV/AIDS are not necessarily well-targeted simply because some basic or perfunctory measures are put in place to address HIV/AIDS in prisons. Rather, an action would be

⁴⁶ *National Strategic Framework for HIV/AIDS*, *supra* note 11 at 94. It should be noted that this estimate is for implementing the *National Strategic Framework 2003-2009*, not the amount that has gone into fighting the pandemic since it was discovered in 1985 (see *National Strategic Framework for HIV/AIDS*, *supra* note 11 at 93). It is also necessary to note that the estimated 12,615 billion Pula is not a final figure. As the National AIDS Coordinating Agency maintains, "this estimate is a composite of the total costs of present planned and proposed programmes for which data was available at the time of the exercise. It is important to note that there are programmes for which data is still expected, as well as programmes still at the proposal stage. As more data becomes available and gaps in the National Response are filled during implementation of the NSF, the total costs will change".

⁴⁷ A. Lute, 'BDF and AIDS Claim More of the Budget', *The Botswana Gazette*, 7-13 February 2007.

⁴⁸ *National Strategic Framework for HIV/AIDS*, *supra* note 11 at 22.

⁴⁹ See J. Hunter, 'Achilles' *Encyclopaedia Mythica* online at <http://www.pantheon.org/articles/a/achilles.html> accessed on 31/01/2007: "Thetis attempted to make her son [Achilles] immortal... she held the young Achilles by the heel and dipped him in the river Styx; everything the sacred waters touched became invulnerable, but the heel remained dry and therefore unprotected.... Paris (or Alexander), aided by Apollo, wounded Achilles in the heel with an arrow; Achilles died of the wound". [Emphasis added]

⁵⁰ *Supra* note 48.

well-targeted, where every measure necessary for HIV/AIDS treatment and prevention, including provision of condoms to prisoners, is taken in Botswana prisons.

Generally, due to unwholesome prison conditions, prisoners are more vulnerable to HIV/AIDS and other diseases than unconfined members of society.⁵¹ Studies conducted on Botswana prisons have also shown that, due to unsafe same-sex intercourse between men, overcrowding and harmful prison conditions generally, prisoners are more prone to HIV infection than are non-prisoners.⁵² Furthermore, as will be shown subsequently, the existing control measures do not seem to be effective or adequate in the management of HIV/AIDS in Botswana prisons. Aside from the existing control measures which are not well implemented due to various constraints,⁵³ it is government policy not to issue condoms to prisoners.⁵⁴

Set against this background, this paper examines existing policies and measures relating to the control of HIV/AIDS in Botswana prisons. The paper argues for a need to provide prisoners with effective access to HIV/AIDS treatment and all necessary means of prevention including condoms. The paper especially argues for the removal or bypassing⁵⁵ of legal or other barriers that obstruct the provision of condoms in prisons.

Substantively, the paper commences in Part II with an overview of the Botswana prison system from the historical and legal perspective. Part III discusses the Botswana HIV/AIDS crisis with a focus on the prison population. Among the issues addressed in this part are the vulnerability of prisoners to HIV/AIDS in Botswana and HIV/AIDS control measures in the prisons, with regard to treatment and means of preventing infection. The existing measures are appraised to identify the gaps that need to be filled. Building on Part III, Part IV examines the policy of forbidding condoms in Botswana prisons. The discussion is undertaken in the framework of human rights principles, international guidelines and the societal attitudes to prisoners and homosexuals. The public health implications of denying prisoners access to condoms are also examined. In this part,

⁵¹ G. Betteridge, 'Prisoners' Health and Human Rights in the HIV/AIDS Epidemic', *HIV/AIDS Policy & Law Review*, Vol. 9 No. 3 December 2004, 96.

⁵² K. Masetlhe, *supra* note 4 at 22-29, 42-46. While the Masetlhe study was published in 2002, other more recent and pertinent sources indicate that the prison conditions which make prisoners prone to HIV/AIDS are still largely unchanged. One can readily point at overcrowding, unsafe man-to-man sex and unhealthy conditions of prisons as examples - see Country Reports 2005/Botswana, *supra* note 19, Botswana Prison Service *Newsletter*, Vol. No. 36 June 2006 at 21 (hereinafter *Newsletter 2006*) and Botswana Prison Service *Annual Report 2004* at 3 (hereinafter *Annual Report 2004*) In that light, the facts of the Masetlhe study are still relevant in grounding discussions of Botswana prisons and vulnerability of prisoners to HIV/AIDS. Based on this reasoning, findings from the Masetlhe study largely form the sources of prison information for this paper.

⁵³ *Ibid.*

⁵⁴ *Botswana Prisons HIV Policies*, Clause 6.1 Part 2: 'Condoms shall not be issued to inmates whilst in prison'.

⁵⁵ As will be discussed later in this paper, the unlawfulness of sodomy under the Botswana Penal Code is the government's main reason for forbidding condoms in prisons. This paper calls for the repeal of this law. On another front, the paper argues that, proactively, the government can still dispense condoms despite this law, pending its reform. The paper draws analogical examples from the 'harm reduction' practices of countries facing drug injection - driven HIV/AIDS epidemics and how those countries dispense syringes for drug use in prisons and elsewhere, notwithstanding that illicit drug use remains unlawful in such countries.

anti-sodomy laws and societal attitudes about man to man sex are identified as the central barriers to the provision of condoms in Botswana prisons. Part V intensifies the calls for the provision of condoms in prisons. In line with this call, the paper argues for the removal of the barriers highlighted in Part IV. Part V advocates for a repeal or amendment of the Penal Code's anti-sodomy provisions and a change in social attitudes towards homophobia that seemingly strengthen the anti-sodomy laws. Appreciating the likely difficulties in eradicating the barriers, the paper, on another front, argues that, proactively, the government can still dispense condoms in the face of the barriers pending when the law is modified. In this respect, the paper draws analogical examples from the 'harm reduction' practices of countries facing drug injection-driven HIV/AIDS epidemics. It discusses how those countries dispense syringes for drug use in prisons notwithstanding that illicit drug use remains unlawful.⁵⁶ Put concisely, the paper maintains that the legal and social barriers are not so sacrosanct as to debar the government from providing condoms in prisons if it desires to do so. The paper rounds up in Part VI, echoing the need for condoms and all other necessary, effective and effectual means of prevention in Botswana in pursuit of the dream to eradicate HIV transmission in Botswana by 2016, as envisaged by Vision 2016, or at any other time.

⁵⁶ See generally, e.g. Open Society Initiative, *Harm Reduction Developments 2005, Countries with Injection - Driven HIV Epidemics* (New York: Open Society Initiative, 2005) 5-62. See also 'The Hindelbank Experiment: Access to Sterile Injection Equipment' in UNAIDS, *Prison and AIDS: UNAIDS Technical Update* (Geneva: UNAIDS, April 1997), 4.

PART II: THE BOTSWANA PRISON SYSTEM

2.1 AN OVERVIEW OF BOTSWANA PRISONS

The Botswana Prisons Act⁵⁷ defines a prisoner as ‘any person, whether convicted or not, under detention in a prison’; a ‘prison’ is defined as ‘any building, enclosure or place or any part thereof declared to be a prison or temporary prison under section 3 or 4 and includes an open prison’.⁵⁸ The statutory definition of prison in the Prisons Act is obviously intended for use in the context of the Act, hence it does not help much to explain the ordinary meaning of prison.⁵⁹

A prison is a place in which individuals are physically confined with a concomitant punitive deprivation or restriction of some personal rights or freedoms.⁶⁰ A prison may also be referred to as a penitentiary⁶¹ or correctional institution.⁶² Prisons, as components of the criminal justice system in different countries, are usually regulated by specific laws. In Botswana, the pivot of prison administration is the Prisons Act.

Usually, prisoners are convicted offenders sentenced to terms of imprisonment as legal penalties for crimes. However, not only convicted criminals are incarcerated in prisons; a suspect who has been charged, is likely to be charged or is undergoing trial may also be held on remand in prison if he or she has been denied bail or been unable to satisfy the conditions of bail granted. Building on the legal principle that an accused is innocent until proved guilty,⁶³ it can be concluded that innocent people are also confined in prisons. Similarly, persons perceived as ‘enemies of the state’ can also be incarcerated in prisons. This practice has created groups of prisoners known as ‘political prisoners’, ‘prisoners of state’ and ‘prisoners of conscience’.⁶⁴ In situations of conflict too, captured enemies can be incarcerated in prisons as ‘prisoners of war’.⁶⁵

In view of prisons accommodating both classes of criminal offenders and non-criminal offenders, a prison would seem to be better defined as ‘a place for the confinement of persons in lawful detention, *especially persons convicted of crimes*’.⁶⁶ This definition quite tallies with the statutory definition as contained in the Prisons Act.

⁵⁷ Cap 21: 3 *The Laws of Botswana* (Revised Edition, 2002).

⁵⁸ Section 2.

⁵⁹ Section 3 provides: “The Minister may, by order published in the Gazette, declare any building, enclosure or place or any part thereof to be a prison”. Section 4 provides: “The Commissioner may, by order published in the Gazette, with the approval of the Minister, declare any building, enclosure or place or any part thereof to be a temporary prison for the detention of such number of prisoners as the Commissioner may, with the approval of the Minister, determine”.

⁶⁰ C. Soanes and A. Stevenson (eds.), *Concise Oxford English Dictionary* (11th Edition, Revised), (Oxford: Oxford University Press, 2006) 1141 together with R.G. Caldwell, *Criminology* (2nd Edition), (New York: The Ronald Press Company, 1965) 460-461, 490-491.

⁶¹ C. Soanes and A. Stevenson, *ibid.* at 1060.

⁶² See R.G. Caldwell, *supra* note 60 at 490.

⁶³ See section 10 (2) (a) of the *Constitution of Botswana* (hereinafter the ‘*Botswana Constitution*’ or the ‘*Constitution*’ as the context may warrant).

⁶⁴ See C. Soanes and A. Stevenson, *supra* note 60 at 1142.

⁶⁵ *Ibid.*

⁶⁶ *The Free Dictionary* by Farlex, available online at <http://www.thefreedictionary.com/prison> accessed on 21/11/2006. [emphasis added]

A proper analysis of a prison and prisoner is important in view of the theme of this paper. The underlying objective of the work is to emphasise the need to safeguard the rights of prisoners and uphold them in the access to HIV/AIDS treatment and means of prevention, including condoms. As will be shown subsequently, a pervading societal impression is that prisoners deserve to suffer for their deeds, and prison is thus perceived as a place of punishment. The earlier explanation that not all persons in prison are guilty offenders is thus pertinent in highlighting that an attitude of 'let prisoners suffer' may inevitably translate to unjustly punishing 'innocent prisoners' who find themselves in prisons for reasons other than criminal conviction.⁶⁷

While any forcible confinement, in ordinary language, may qualify as imprisonment, the imprisonment envisaged in the scope of this work is *lawful* imprisonment. 'Lawful', in this context, connotes that the prisoners are confined in government-controlled prisons based on relevant laws, and the prisons are under the supervision of government agents. Put simply, prisoners are in prison under the custody of the recognised government, according to the relevant laws of the land. Essentially, the issue of whether an imprisonment is *just* or *unjust* is another issue that is not within the immediate focus of this paper.

2.2 BRIEF HISTORY OF THE BOTSWANA PRISON SYSTEM

Incarceration of humans in some ways, and for a variety of reasons, has existed in human society since the very early stages of human development. According to a commentator, "As soon as men had learned the way to build in stone, as in Egypt, or with bricks, as in Mesopotamia, when kings had many-towered fortresses, and the great barons, castles on the crags, there would be cells and dungeons in the citadels".⁶⁸

The present prison system existing in Botswana has its origin in the country's colonial relationship with Britain. The English-style prison system⁶⁹ was introduced into the British Protectorate of Bechuanaland, present-day Botswana, as a component of the colonial administrative and legal systems when the territory came under British colonial rule as a Protectorate in 1885.⁷⁰ Generally, pre-colonial traditional Botswana society neither adopted imprisonment nor maintained prisons as measures of criminal sanctions. Traditional criminal sanctions ranged from 'thrashing' to fines of cattle, retaliation and death penalty in some situations.⁷¹

⁶⁷ See generally *Bell v. Wolfish* 441 US 520 (1979).

⁶⁸ R.G. Caldwell *supra* note 62 at 490.

⁶⁹ It may not be possible to fix the exact date when the adoption of imprisonment as a punitive measure started in England. It appears, though, that the process had begun to take firm root around the middle of the sixteenth century. Around the twelfth century in England, the criminal justice system was becoming better co-ordinated under the control of the monarch. See *ibid* at 491.

⁷⁰ See L. Ramokhua, 'A History of the Prisons Service in Botswana' in K. Frimpong, *supra* note 5 at 97.

⁷¹ *Ibid*. See also generally I. Schapera, *A Handbook of Tswana Law and Custom* (Hamburg: International African Institute, 1994) 46-50 and 258-278.

At the early stages of Botswana's prison system, convicts, or 'native prisoners', as they were called, were confined in 'forts' manned by soldiers. The prisoners were, however, under the direct control and care of the police, not the soldiers.⁷² While some prisoners were kept in 'forts', others, perceived as dangerous, were sent to Cape Colony in South Africa to serve their sentences. This practice was in effect until about 1942.⁷³

At different times, lock-up prisons were constructed in Botswana. The first was commissioned in 1892 and located in 'Gaberones', as the present capital city of Gaborone was then known.⁷⁴ By about 1936, the number of prisons in Botswana had increased to eleven.⁷⁵ In the mid-1980s the number had further increased to eighteen.⁷⁶ There are now 23 prisons spread across the country, which include separate prisons for women, first offenders and boys.⁷⁷

Various statutory laws have regulated the activities and operations of prisons in Botswana since the introduction of the prison system into the country. The first prison-oriented statute was the Convict Stations Prisons Management Act of 1888.⁷⁸ Between 1901 and 1937 a series of subsidiary legislation, named Prisons Regulations evolved from the 1888 Act.⁷⁹ It would seem that, gradually, the Prisons Regulations overshadowed the Act with regard to administration of prisons in Botswana. Consequently, the regulations, especially those of 1937, became the pivot of prison management in the country.⁸⁰

The Prisons Regulations of 1937 was in force with a series of amendments until the enactment of the Prisons Act⁸¹ of 1964, from which emanated Prisons Regulations⁸² of 1965. The 1964 act was in force until its replacement by the Prisons Act of 1979, which is currently in place. The current Prisons Act seeks to "provide for the modernization of the [Botswana] Prisons Service and generally for the bringing up to date and rationalization of the law governing prisons and prisoners and for matters connected therewith".⁸³

Botswana has twenty three prisons⁸⁴ harbouring a total number of between 6,203 and 6,259 inmates.⁸⁵ The prisons are administered by the Botswana Prisons Service, which is under the control of the Ministry of Labour and Home Affairs.⁸⁶ The organisation, with its headquarters in the capital city of Gaborone, is headed by a Commissioner of Prisons. The Prisons Service is statutorily created and has a mandate to ensure the effective operations of all the prisons.⁸⁷

⁷² L. Ramokhua, *ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ E.M. Lenong, 'The Prisons Service in Botswana in Mid - 1980's' in K. Frimpong, *supra* note 70.

⁷⁷ Botswana Prison Service *Annual Report 2004* at 22.

⁷⁸ *Convict Stations Prisons Management Act No. 23, Laws of the Cape Colony of South Africa 1888.*

⁷⁹ L. Ramokhua, *supra* note 16 at 98.

⁸⁰ *Ibid.*

⁸¹ *Prisons Act No. 41 Laws of Botswana 1964.*

⁸² *Prisons Regulations L.N. 37 Laws of Botswana 1965.*

⁸³ Introductory note to the *Prisons Act.*

⁸⁴ See *Newsletter 2006 supra* n. 52 at 21, and *Annual Report 2004, supra* n. 52 at 22.

⁸⁵ *Newsletter 2006, ibid.* at 21.

⁸⁶ See e.g. section 2, 4 & 9 of the *Prisons Act* in relation to the controlling influence of 'the Minister'.

⁸⁷ See generally sections 5, 7, 24, 26 and 28 of the *Prisons Act.*

PART III: HIV/AIDS AND THE PRISON POPULATION IN BOTSWANA

Prisoners are in prison as punishment, not *for* punishment, disease and suffering.⁸⁸ Therefore, a person's loss of the right to liberty through prison confinement should not have harmful effects on the health of such a person. Contracting a disease in prison is definitely not a component of any prisoner's sentence. However, the conditions of prisons across the world are such that prisoners tend to be exposed to diseases and sufferings. Domestic and international human rights laws vest in prisoners an inalienable right to health, among others. Hence, prisoners manifestly have a right *not* to contract disease while incarcerated. The right of prisoners to be protected against disease is particularly important in the context of HIV/AIDS, based on its devastating and potentially fatal impacts, especially in developing countries. The issue of the rights of prisoners to healthy AIDS-free lives and the extent to which these are safeguarded by Botswana authorities is the subject examined in this part. This analysis starts by examining the vulnerability of prisoners to HIV and the factors responsible for this vulnerability in Botswana prisons.

3.1 VULNERABILITY OF PRISONERS TO HIV/AIDS IN BOTSWANA

Around the world, prisoners have long been identified to be particularly vulnerable to HIV and other serious diseases.⁸⁹ In Botswana too, studies have shown, for example, that the prevalence of HIV/AIDS and tuberculosis tends to be higher among prisoners than non-prisoners.⁹⁰ Studies have equally shown that due to certain factors, prison inmates in Botswana are particularly susceptible to HIV.⁹¹ At the end of 2005, 72 prisoners had reportedly died in confinement, primarily from HIV/AIDS-related illnesses.⁹²

There is no mandatory HIV testing of inmates in Botswana prisons.⁹³ It is therefore difficult to determine the number of prisoners living with HIV/AIDS, or the number of prisoners who get infected in prison confinement, because some who manifest symptoms of full-blown AIDS may have been infected before their incarceration.⁹⁴ Notwithstanding this uncertainty, the exposure and vulnerability of prisoners to HIV/AIDS in confinement is beyond dispute. It is therefore important that Botswana authorities put in place effective measures to facilitate access to treatment for prisoners infected with HIV and make

⁸⁸ See H. Reyes, 'Health and Human Rights in Prisons', available online at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList302/AAC9DBC9B9954AEAC1256B> accessed on 24/10/2005, at 2 of 7.

⁸⁹ R. Jurgens and G. Betteridge, 'Prisoners who Inject Drugs: Public Health and Human Rights Imperatives', *Health and Human Rights*, Vol. 8 No. 2 Summer 1997, 47-72 at 47.

⁹⁰ See E.A. Wand *et al.*, Centers for Disease Control (CDC) MMWR Weekly (Morbidity and Mortality Weekly Reports) 28 March 2003/52 (12); 250 -252; C. Bakgethisi *et al.*, *Tuberculosis Screening at a Refugees Settlement Camp in Botswana, 2002/2003*, First National HIV/AIDS/STI/Other Related Infectious Diseases Research Conference, Gaborone, Botswana, abstract MB11-7, 2003; M. Notha, *Rapid Tuberculosis Assessment in a Prison System — Gaborone, 2002*, First National HIV/AIDS/STI/Other Related Infectious Diseases Research Conference, Gaborone, Botswana, abstract MB11-8, 2003.

⁹¹ K. Masetlhe, *supra* note 4 at 22-33; Country Reports 2005 - Botswana, *supra* note 19.

⁹² Country Reports 2005 – Botswana, *ibid.*

⁹³ J.D.M. Orebotshe, 'HIV/AIDS Pandemic in African Prisons: A Case of Botswana Prisons', Paper Presentation at the 5th CESA Conference (Conference of Eastern, Southern and Central Africa) 4 - 7 September 2001: Windhoek, Namibia, 4.

⁹⁴ *Ibid.*

available means of prevention to protect other prisoners from HIV infection. There are very strong reasons why prisoners deserve to be protected against HIV/AIDS. The primary reason is that prisoners are in prison as punishment for their crime, not to be infected with HIV/AIDS or any other deleterious disease. Secondly, prisoners interact with the public in various ways and there can be transmission of HIV from prisoners to members of the public. In that context, protection of prisoners against HIV amounts to protecting the public too.⁹⁵

The question of whether any control measure is effective depends on how efficiently the measure can solve or address the problem at stake. To understand whether Botswana is taking pragmatic measures to tackle the problem of HIV/AIDS in prison would entail a comparative examination of the factors that make prisoners vulnerable to HIV infection and the measures being adopted to confront HIV/AIDS in prisons.

Generally, the causes of HIV/AIDS in Botswana prisons are similar to the causes of the disease in prisons around the world.⁹⁶ Studies have shown that the causes of HIV/AIDS in Botswana prisons are mainly with regard to Men who have Sex with Men (MSM) and the sharing of tattooing needles.⁹⁷ Injection of drugs does not appear to be prevalent in Botswana prisons and there is no evidence that this is contributory in any significant way to HIV infection in prison confinement.⁹⁸ Prison congestion and poor conditions have also been identified as catalysts in making prisoners vulnerable to HIV.⁹⁹

Notwithstanding official denial or pretence about the non-existence of man-to-man sex in prisons,¹⁰⁰ there is incontrovertible evidence that this practice occurs in prison and it constitutes a potent risk to the spread of HIV.¹⁰¹ Man-to-man sex in prisons could either be voluntary or involuntary. At greater risk of involuntary sex are young boys who may be lured into the act with gifts by older or more experienced prisoners; at times, outright violence could be used to rape the young prisoners.¹⁰²

⁹⁵ H. Reyes, *supra* note 88 at 1-2.

⁹⁶ K. Masethe, *supra* note 4 at 22. For the causes of exposure to HIV/AIDS in prisons around the world, see H. Reyes, *supra* note 88 at 2. See also R. Jurgens and G. Betteridge, *supra* note 89 at 49-51 and O. Simooya and N. Sanjobo, 'Responding to the Challenge of HIV/AIDS Behind Bars - The In But Free Project in Zambia' *KIT Information and Library Services* available on line at <http://www.kit.nl/ILS/exchange_content/html/2005-1_responding_to_the_chall.asp?ILS/ex...> accessed on 6/5/2006 at 1 of 5.

⁹⁷ K. Masethe, *supra* note 4 at 22-33, 40-45.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.* at 25-28.

¹⁰⁰ *Ibid.* at 41: "In spite of the overwhelming evidence that sex does take place in prison and that it poses a serious threat to the spread of HIV, the Commissioner [of Prisons] insisted on being given hard evidence by the prisoners before any action could be taken... The Commissioner's reaction of denial to the problem, is sadly reported to be quite common amongst leaders of correctional institutions throughout the world".

¹⁰¹ *Ibid.* at 40-42. See J.D.M. Orebotse, *supra* note 93 at 3. The author, then Botswana's Commissioner of Prisons, referring to a study on HIV/AIDS in Botswana prisons, stated, "A study conducted in Botswana Prisons - Semelamela and Mugabe (1991), revealed that homosexual practices do exist in prisons"; J. Ballse, 'Prisons Sex, Lies and Cover Ups', *Botswana Guardian*, Friday 28 February 2003, 4: "Ex-prisoner reveals shocking details of how officials cover up sodomy and rape in Botswana prisons"; See E. Moitlhoki, 'Unkind Cut, Prisoner Wards Off 'Rapist' with a Razor Blade', *The Voice*, Friday 9 June 2006, 4. According to the opening line of the story, "A Gaborone prisons inmate who attacked his cellmate with a razor blade to protect himself from being raped has been charged with unlawful wounding". Country Reports 2005 - Botswana, *supra* note 19, *Botswana Prison HIV/AIDS Policy*, p. 18 clause 1.2.

¹⁰² K. Masethe, *ibid.* at 23-24, 40-42; see E. Moitlhoki, *ibid.*

Needle sharing in the course of tattooing also contributes to the spread of HIV/AIDS.¹⁰³ As is typical among prisoners around the world, prisoners in Botswana also engage in tattooing. Deprived of conventional tattooing equipment in prison confinement, inmates quite ingeniously improvise. For piercing the body, inmates in Botswana reportedly use sewing needles or sharpened pieces of wire; for the colouring, they use soot from burnt tyres, shoe polish or ballpoint ink.¹⁰⁴ Tattooing necessarily entails piercing of the body and the consequential contact of the piercing tool with blood. Because prisoners share needles or wire that may not be properly sterilised due to prison restrictions, there is a risk of transmission of HIV-tainted blood from one prisoner to another.

While man-to-man sex and tattooing are the identified primary causes of HIV spread in Botswana prisons, some other factors also contribute to it indirectly. These can be described as secondary or ancillary causes, and include prison congestion, unhygienic or unhealthy prison facilities and outbreak of violence among inmates.¹⁰⁵ All these secondary factors can be broadly classified under the generic heading of 'unwholesome prison conditions'.

With regard to the fact of congestion of prisons in Botswana, a June 2006 report indicated that 6,203 inmates occupy prisons meant to harbour a maximum number of 3,910 prisoners.¹⁰⁶ Due to overcrowding, juveniles occasionally are kept with adults and pre-trial detainees and convicts are also held together.¹⁰⁷ In situations where juveniles are confined with adult convicts, there is the risk that the young prisoners could be sexually abused.¹⁰⁸ Also, confinement of prisoners in congested prison cells in an environment where tuberculosis is rife makes inmates susceptible to tuberculosis, making the spread of this disease yet another issue. There is increasing association of tuberculosis with HIV/AIDS,¹⁰⁹ and proof that many people with tuberculosis are also infected with HIV.

A lack or inadequacy of toilet and other facilities constitute serious problems for prisoners. Sanitary facilities frequently break down. Some cells have one toilet each, while others do not have any.¹¹⁰ Where there are toilets, they are overwhelmed due to overcrowding; a number of prisoners have exceeded the maximum capacities of the cells, and by extension the facilities. Where cells have no toilets, the practice is to put buckets in cells for prisoners to urinate and defecate; it should not be difficult to imagine the health hazards posed by these measures in congested cells.¹¹¹

Outbreak of violence is a common feature of prison life around the world¹¹² and Botswana prisons are no exception. There are reports of bloody violence between inmates.¹¹³

¹⁰³ K. Masetlhe, *ibid.* at 24 - 25 and 42.

¹⁰⁴ *Ibid.* at 25.

¹⁰⁵ *Ibid.* at 25-28, 42 -44, H. Reyes, *supra* note 88 at 2, E. Moitlhoki, *supra* note 101.

¹⁰⁶ Botswana Prison Service, *supra* note 52 at 21. Country Reports 2005 - Botswana, *supra* note 19. See also Botswana Prison Service *Annual Report 2004*, 3.

¹⁰⁷ Country Reports 2005 - Botswana, *ibid.*

¹⁰⁸ See K. Masetlhe, *supra* note 4 at 24.

¹⁰⁹ *Botswana Prison HIV/AIDS Policy*, 25 clause 13.1.

¹¹⁰ *Ibid.* at 24.

¹¹¹ *Ibid.*

¹¹² H. Reyes, *supra* note 88 at 2.

¹¹³ See e.g. E. Moitlhoki, *supra* note 101.

These reports confirm the possibility of unprotected contact with HIV-infected human blood through exposure to open wounds in the course of prison violence. Though mistreatment of prisoners by prison officials is illegal, there have been reported incidents of guards abusing inmates.¹¹⁴

From the foregoing analysis, it can be inferred that unwholesome conditions which serve as potential catalysts to HIV spread exist in Botswana prisons. Corroborating existing research findings on prison conditions in Botswana,¹¹⁵ a mid-2006 report qualifies the conditions of prisons in Botswana as 'poor and possibly life threatening'.¹¹⁶

The unwholesome prison conditions in Botswana appear to be long standing. In 1998, following visits by the Ombudsman to some prisons, the Ombudsman Report noted, "the current prison system is bedevilled with problems most of which required urgent attention".¹¹⁷ That report highlighted overcrowding and threats to health, due to HIV/AIDS and tuberculosis, as serious problems in the prisons visited. The report additionally noted that the precarious health situations in those prisons were compounded by inadequate healthcare facilities in the prisons, as sick prisoners were sleeping on the floor in some sick bays.¹¹⁸

It is not the case that the Botswana Prisons Service, and by extension, the Botswana government have been unconcerned about the problem of HIV/AIDS and the propelling factors in prisons. The authorities have been taking various measures to confront the problem. An examination of the existing measures is undertaken in the following section.

3.2 HIV/AIDS CONTROL MEASURES IN BOTSWANA PRISONS

As previously noted, the centre-point of prison management in Botswana is the Prisons Act, augmented by the subsidiary Prison Regulations. The Botswana Prison HIV/AIDS Policy, in tandem with the National AIDS Policy, is the centre-point of the HIV/AIDS control mechanism of the prisons. It needs to be noted however, that neither the Prison HIV/AIDS Policy nor the National AIDS Policy on its own has the effect of law.¹¹⁹ In that light, operation of the policies is subject to the provisions of the Prisons Act and Prison Regulations, which, in turn, are subject to the provisions of the Botswana Constitution. Thus, from a legal perspective, HIV/AIDS control measures in Botswana prisons would be considered as set within the framework of the laws and policies earlier referred to.

The measures for controlling HIV/AIDS in Botswana prisons can be examined under the headings of care and treatment for prisoners infected with HIV, and measures to prevent the spread of the disease among inmates. Having earlier discussed the primary

¹¹⁴ Country Reports 2005 - Botswana, *supra* note 19.

¹¹⁵ The research findings referred to here are those of K. Masethe, *supra* note 4.

¹¹⁶ Country Reports 2005 - Botswana, *supra* note 19.

¹¹⁷ 'Prisons Conditions Appalling', Republic of Botswana *Daily News Archive*, 14 July 2000, available online at http://www.gov.bw/cgi-bin/news.cgi?d=20000714&i=Prison_conditions_appalling accessed on 21/11/2006.

¹¹⁸ *Ibid.*

¹¹⁹ See the case of *Botswana Building Society v. Rapula Jimson*, Court of Appeal, Civil Appeal No. 37 of 2003 (unreported).

and secondary causes of HIV/AIDS in the prisons, the following discussion focuses on how effectively the existing measures address this problem.

3.2.1 PROVISION OF HIV/AIDS CARE AND TREATMENT FOR PRISONERS

The Prisons Act does not have provisions that expressly and specifically relate to the provision of HIV treatment and care to prisoners. The provisions in the Act, which relate to healthcare of prisoners, are contained in parts vii and viii of the Act, respectively.¹²⁰ The essence of the provisions is to ensure that prisoners receive prompt and appropriate medical treatment at all times. However, the Prison HIV/AIDS Policy augments provisions of the Prisons Act by making specific provision for HIV/AIDS treatment in prisons.

The policy's provisions on HIV/AIDS and treatment of infected prisoners mainly fall under the sections relating to 'Management of HIV Infected Persons' and 'Care and Support for those with HIV/AIDS'.¹²¹ The tone and intent of Botswana's HIV/AIDS care and treatment regime for infected prisoners can be inferred from a reading of clause 11.1 together with clause 12.1 of the Prison HIV/AIDS Policy. Generally, principles on the management of persons infected with HIV/AIDS as applying to non-prisoners are to be followed with the aim of enabling infected prisoners to live a normal life as much as possible.¹²² Seeming to build on this, clause 12.1 prescribes the provision of "good quality care for those with HIV/AIDS in prison which will be no less than the one provided in the general community".

In line with the guarantee of *equivalent access* of prisoners to treatment,¹²³ prisoners, based on government policy, are entitled to prophylactic and therapeutic treatment for HIV/AIDS and related illnesses in Botswana. The prison health service provides treatment according to standards existing in the larger society.¹²⁴ Among others, HIV/AIDS care and treatment are to be dispensed without compromising the rights of infected prisoners to confidentiality¹²⁵ and non-discrimination.¹²⁶

Truly, in terms of the policy's provisions, Botswana has an impressive arrangement for the treatment and care of prisoners infected with HIV/AIDS. This factor leads to the question of practical implementation of the policy provisions.

¹²⁰ See generally, sections 56-63 together with section 76 of the Prisons Act.

¹²¹ *Botswana Prison HIV/AIDS Policy*, clause 11 and clause 12 respectively, 24-25.

¹²² *Ibid.*, clause 11.1.

¹²³ For an explanation of what amounts to equivalent access to treatment in the context of prisoners, see the case of *Van Biljon and Ors. v. Minister of Correctional Services and Ors.* (1997) 50 Butterworth's Medico-Legal Reports (BMLR) 206, High Court (Cape of Good Hope Provincial Division).

¹²⁴ *Botswana Prison HIV/AIDS Policy*, clause 12.5

¹²⁵ *Ibid.* clause 10.1: "General principles of confidentiality regarding patient ailment shall be observed in HIV/AIDS cases".

¹²⁶ *Ibid.* clause 11.1 - 2 "General principles on management of HIV/AIDS persons shall be observed... Segregation, isolation or restriction shall not be imposed on the inmates. They shall have liberty to work in industry workshops, kitchens or wherever their services shall be needed. They shall also have access to recreational and educational facilities". See also clause 11.3-6, clause 12.4,5,6,7.

Based on reports, the practical implementation of HIV/AIDS treatment and care for prisoners do not match the theoretical policy postulations.¹²⁷ There are reports of stigmatisation of infected prisoners by prison officers and fellow inmates.¹²⁸ There are also reports of various defects in procedures and practice of HIV/AIDS care and treatment in the prisons. Largely, care of infected prisoners does not seem to enjoy priority. According to findings, “health of inmates was relegated to security in particular in the maximum security prison...health officers did not care much about the health of inmates”.¹²⁹ In such situations, prisoners have had to care for fellow inmates suffering from AIDS and related illnesses, without the benefit of standard protective gear, medical apparatus, and, ostensibly, professional training.¹³⁰ Inevitably, caring for their sick fellow inmates means that prisoners come into physical contact with the AIDS patients; in the absence of protective gear and training, there is a significant risk of exposure to HIV infection.

Delay or failure on the part of the officers in dispensing HIV/AIDS medication has also been identified as a serious problem in Botswana prisons.¹³¹ There have been reports of prison officers forgetting to issue medication to prisoners; consequently, prisoners miss their doses. With the necessity for strict compliance with medical prescriptions in the use of HIV/AIDS medications, lapses in the dispensation of medication pose a serious threat to the effective treatment of HIV/AIDS in Botswana prisons. Generally, the flaws in the care and treatment processes in prisons, especially that of prisoner exposure through unprotected contact with AIDS patients while caring for them, pose a serious threat to the efforts to curtail the spread of HIV/AIDS in prisons and the country at large.

3.2.2 MEASURES FOR THE PREVENTION OF HIV/AIDS TRANSMISSION IN BOTSWANA PRISONS

As in the case of HIV/AIDS treatment, neither the Prisons Act nor Prison Regulations makes explicit provision for the prevention of HIV/AIDS transmission in prisons. However, some existing rules made for the maintenance of discipline, security and order in the prisons have a bearing on HIV prevention. As will be shown below, the relevance of these rules in HIV/AIDS prevention is that in their drive to prevent violent and criminal conduct among prisoners and prison officers, the rules aim to deter or avert some of the primary and secondary sources of HIV/AIDS in prison.

In addition to the relevant general rules in the Prisons Act and Prison Regulations, the Prison HIV/AIDS Policy has specific provisions for the prevention of HIV transmission. Apart from the policy and statutory provisions, the Botswana authorities have also been adopting proactive measures such as the early release of prisoners, which, as a measure of reducing prison congestion, also touches upon the prevention of HIV. The

¹²⁷ See K. Masetlhe, *supra* note 4 at 28-33, 46-48.

¹²⁸ *Ibid.* at 28-29.

¹²⁹ *Ibid.* at 31.

¹³⁰ *Ibid.* at 32.

¹³¹ *Ibid.* at 33 - HIV/AIDS medications are dispensed by prison officers to infected prisoners.

combined operation and effects of the statutory and policy provisions, together with the proactive measures, are examined below.

As a way of decongesting prisons, there has evolved a method of conditional early release of prisoners under the arrangement of 'Extra Mural Labour'.¹³² A number of prisoners have been released under this arrangement at different periods.¹³³ It however appears that Botswana needs to look beyond extra mural labour to address prison congestion, as overcrowding remains a prominent feature of the prison system. As the Botswana Prisons Service observes in one of its 2006 reports, "the overcrowding situation in our prison is worsening with the population currently standing at 6203 against the authorised capacity of 3910..."¹³⁴

A different set of rules exists to motivate good conduct among prisoners.¹³⁵ With violators open to sanctions, it is expected that the rules would dissuade the occurrence of sodomy, violent acts by prisoners against fellow prisoners or such other misconduct that makes prisoners vulnerable to HIV transmission. Similarly, prison officials are forbidden from mistreating prisoners. There are channels for prisoners to report and seek redress for abuses by prison officers; there are procedures for investigation of such abuses and imposition of sanctions against errant officers. The Prisons Service, by means of its staff disciplinary code, strives to maintain high standards of discipline among its officers. According to the Botswana Prisons Service Annual Report of 2004, violators have been arraigned at different times with some facing stiff sanctions, suggesting strict enforcement of the code.¹³⁶ Summing up, the existence of rules aimed at extracting good behaviour on the part of prisoners and prison officers ought to eradicate conduct that contributes to HIV spread in prison. As shown earlier, violence and other offences do occur in prisons, notwithstanding the rules.

Set against the background of the existing prison rules, the Prison HIV/AIDS Policy provides some measures for the prevention of HIV/AIDS. Central to the prevention drive is health education for prisoners as a means of attaining behaviour change and abstaining from high-risk sexual and other behaviours.¹³⁷ To enable the HIV/AIDS prevention education to have maximum effect, prisoners are educated as soon as they are admitted into prison. For good effect, HIV/AIDS education materials, specific to prison environments, are used to teach the prisoners.¹³⁸ As part of their HIV/AIDS education curriculum, prisoners are sensitised on the link between sexually transmitted diseases (STDs) and HIV infection; as a practical corollary, prisoners must have easy access to medical treatment for STDs.¹³⁹

¹³² *Botswana Prison Service Annual Report 2004*, 26-27. See also *Botswana Prison HIV/AIDS Policy*, 27 clause 16.1, 16.2.

¹³³ *Ibid.* See also Country Reports 2005 - Botswana, *supra* note 19.

¹³⁴ *Newsletter 2006 supra* note 52, at 21.

¹³⁵ See Part XIII of the *Prisons Act*.

¹³⁶ See generally, Parts IV and V of the *Prisons Act*. See also *Annual Report 2004, supra* note 52, at 27.

¹³⁷ *Botswana Prison HIV/AIDS Policy*, 20 clause 5.1.

¹³⁸ *Ibid.* clauses 5.6 and 5.7.

¹³⁹ *Ibid.* clause 7.1, 7.2.

Along with health education, the policy makes provision for the protection of prisoners against HIV-stained body fluids. Disinfectants are to be available for use in prisons. Ostensibly referring to the practice of tattooing among prisoners, the Prison HIV/AIDS Policy enjoins prison authorities to discourage prisoners from engaging in acts that involve the sharing of sharp instruments.¹⁴⁰

Around the world, behavioural change through the provision of health information and education has been a major strategic drive in the efforts to control HIV/AIDS spread.¹⁴¹ It is therefore not unreasonable for the Botswana Prison Service to concentrate on this strategy as the principal tool of curtailing the spread of HIV in prisons. Moreover, it can be assumed that once prisoners are educated about the consequences and modes of contracting HIV/AIDS they would desist from high-risk behaviours.

Studies have however indicated that the implementation of this strategy faces some practical difficulties in Botswana prisons. Significant numbers of prisoners remain uneducated about HIV/AIDS and means of protecting themselves against the disease; others have hazy and uncertain knowledge of the disease.¹⁴² There are factors to account for the inadequate HIV/AIDS education among prisoners.¹⁴³ Firstly, the inequality in the relationships between prisoners and prison officers is apt to put pressure on the flow of communication between the two sides. Secondly, some of the prison officers, saddled with the responsibility of educating the prisoners, are themselves not adequately trained on health and HIV/AIDS; others do not have acumen and skill to properly disseminate HIV/AIDS knowledge to prisoners. Thirdly, it is difficult for some prison officers to balance the HIV/AIDS education of prisoners with their workload of maintaining security in the prisons; in such cases, health education is liable to be neglected for the 'more pressing' responsibility of maintaining security.

In totality, it seems that the measures of preventing HIV/AIDS in Botswana prisons leave room to doubt their collective efficacy. A further appraisal of these measures is made below.

3.2.3 HIV/AIDS CONTROL MEASURES IN BOTSWANA PRISONS: AN APPRAISAL

From the analysis of HIV/AIDS control measures in Botswana prisons set out above, it can be inferred that there are gaps in existing measures to provide care and treatment and to prevention of the spread of HIV. Put more directly, the existing control measures are not likely to effectually control and prevent the spread of HIV/AIDS in Botswana prisons, and by the same token in the country as a whole.

In addressing the gaps, some measures have been recommended. These include

¹⁴⁰ *Ibid.* 22 clause 8.2.

¹⁴¹ See generally, S.B. Odunsi, *Global Security, Human Rights, Public Health and Military Policies on HIV/AIDS: Nigeria as a Case Study - A thesis submitted in conformity with the requirements for the degree of Master of Laws (LL.M.), Graduate Department of the Faculty of Law, University of Toronto (Toronto: Faculty of Law, University of Toronto, 2005).*

¹⁴² K. Masethe, *supra* note 4 at 29 and 34.

¹⁴³ *Ibid.* at 34-35.

increasing the level of HIV/AIDS awareness amongst prison officers and inmates, improving the hygienic and other living conditions of prisons, easing overcrowding in prisons, protecting young boys from older inmates and providing of condoms for inmates.¹⁴⁴ The recommendations deserve some scrutiny.

Apart from the provision of condoms, recommended measures to seal the gaps are, in one form or another, already included in the prisons' fight against HIV/AIDS; as previously shown, their impact on curtailing the spread of HIV/AIDS is somewhat debatable. The recommendations to ease prison congestion and to improve the level of HIV/AIDS awareness illustrate this limited impact to some extent. For example, by easing overcrowding, prison authorities would indeed reduce congestion, but prisoners would not cease to encounter one another. Manifestly, such a measure would have little if any direct impact on tattooing or man-to-man sex as these practices seem to be primarily propelled by factors other than prison congestion.¹⁴⁵ It is therefore questionable whether easing the overcrowding in prisons would have any impact on the prevention of HIV/AIDS through tattooing or man-to-man sex. Increase in the level of HIV/AIDS awareness while no doubt an important tool, still raises the question of whether and to what extent knowledge of high-risk behaviours for HIV infection actually deters prisoners from engaging in unsafe conduct. As previously stated, such knowledge does not necessarily seem to have deterred people from engaging in high-risk behaviour, sexual or otherwise. Moreover as stated above, one of the main difficulties in relation to education and awareness is their effective implementation.

Based on the above discourse, it is crucial that Botswana looks beyond the existing measures in the quest to curtail HIV/AIDS spread in the prisons. It is suggested that pragmatic measures that would have direct bearing on the identified main causes of HIV/AIDS in Botswana prisons should be adopted. In the context, this paper recommends urgent implementation of the two following measures:

- a. The provision of bleach for sterilising tattooing equipment in prison, or in the alternative, giving prisoners access to sterile tattooing tools. As an additional measure, prisoners should be adequately educated on the use of bleach or the provided tools, whichever is applicable. The provision of either bleach or untainted tattooing tools would be a shield against HIV transmission via needle sharing for tattooing purposes in prisons.
- b. The provision of condoms to be used by prisoners who engage in man-to-man sex. As a protective sheath, condoms would be a shield against the intermingling of body fluids and thus a means of preventing HIV transmission through unsafe prison sex.

The provision of sterilising bleach or safe tattooing equipment in prison should not be

¹⁴⁴ *Ibid.* at 33-39, 55-59.

¹⁴⁵ H. Reyes, *supra* note 88 at 2. "The tedious prison environment - lack of occupation of mind and body and plain boredom - lead to accumulated frustrations and tensions. This environment leads the way to high-risk activities, such as use of drugs, sexual activities between men, tattooing and other "blood brotherhood" style activities".

a difficult measure. Tattooing is not an inherently illegal activity and the practice falls within the framework of a person's right to exercise control over his/her body within prescribed constitutional limits.

However, the provision of condoms to prisoners has been a more contentious and complex issue. The complexity revolves round the illegality of sodomy in Botswana, based on the provision of section 164 of the Penal Code and the unfriendly social attitudes towards homosexuality. Man-to-man sex perpetrated in prison, basically amounts to engaging in an outlawed and socially unacceptable practice. As will be discussed in detail later, the illegality and social disapproval of sodomy and homosexuality inform the policy decisions to forbid the provision of condoms to prisoners.

The lack of access to condoms for prisoners is a major gap that needs to be sealed in the drive to curtail the spread of HIV in Botswana prisons. Depriving prisoners of access to condoms raises fundamental issues of both human rights and public health. Prisoners' access to condoms is examined in detail in the following part from the perspectives of human rights and public health, respectively.

PART IV: HIV/AIDS PREVENTION: PRISONERS' LACK OF ACCESS TO CONDOMS

The Prison HIV/AIDS Policy expressly forbids the provision of condoms to prisoners. This prohibition arguably, is discriminatory. The illegality of sodomy and the social disapproval of homosexuality affect non-prisoners as well as prisoners; yet, neither the National AIDS Policy, nor any other policy provides that non-prisoners who engage in man-to-man sex should not have access to condoms. The selective prohibition, applying only to prisoners, calls for some reflection. There are important reasons why prisoners should have access to condoms as do non-prisoners. Against this background, this paper examines the human rights and public health necessities and justifications for giving prisoners access to condoms. Among other issues, the human rights of prisoners as guaranteed under the Botswana Constitution and international human rights law, supported by various international guidelines and declarations, come into focus. Seeing as the discriminatory prohibition of condoms in prisons may have roots in the societal perception of prisoners as persons without rights, the unfriendly and unsympathetic social attitudes to prisoners' welfare are also analyzed. The discriminatory policy of prohibiting condoms in prisons will be examined first.

4.1 HUMAN RIGHTS PERSPECTIVE

4.1.1 DISCRIMINATORY POLICY OF RESTRICTING PRISONERS' ACCESS TO CONDOMS

In Botswana and beyond, the use of condoms has been recognized and encouraged as a means of preventing the spread of HIV/AIDS.¹⁴⁶ Studies on the situation of HIV/AIDS in Botswana's prisons have similarly established the usefulness and public health benefits of giving prisoners access to condoms as a means of curtailing the spread of HIV/AIDS in the prisons.¹⁴⁷ Correspondingly, it becomes necessary that the Prisons Service should urgently give prisoners access to condoms. This position is based on two grounds. One, eradication of man-to-man sex in prison has proven to be a difficult task, not only in Botswana but also in other parts of the world.¹⁴⁸ Consequently, it is reasonable to reduce the risk of HIV infection through unsafe prison sex, by facilitating an atmosphere where it can be 'played safe'; in other words, by providing condoms. Secondly, unlike other measures that have remote or indirect bearing on HIV spread, condoms, as shields to the exchange of body fluids in the course of sex, have a direct bearing on preventing HIV transmission. In this sense, condoms are an important tool in controlling HIV transmission in the course of man-to-man sex, a principal cause of HIV spread in Botswana prisons.

It bears reiterating that notwithstanding the acknowledged benefit of condoms in HIV prevention, it is the official policy of the Botswana government to deprive prisoners

¹⁴⁶ *Botswana HIV/AIDS Policy*, Clause 4.4, at 4.

¹⁴⁷ K. Masethe, *supra* note 4 at 35, 48, 56-57.

¹⁴⁸ *Ibid.* O. Simooya and N. Sanjobo, *supra* note 96.

access to condoms. Inferably, the rationale for the policy is the illegality of sodomy and social disapproval of homosexuality.¹⁴⁹ It is true that penetrative same-gender sex is prohibited under section 164 of the Penal Code. Similarly, it cannot be denied that there are Batswana who disapprove of homosexuality. However, in the absence of any empirical evidence, it remains debatable whether it is *all* Batswana, and if not all, what proportion of Batswana disapprove of homosexuality.

Irrefutably, the anti-sodomy law and sentiments apply to *all* persons that engage in the act, not only to *prisoners* engaging in the act. Nonetheless, as a matter of policy, condoms are not forbidden to non-prisoner homosexuals or heterosexual men who engage in sex with men. Hence, one must question the discriminatory policy of denying prisoners access to condoms on the grounds of illegality of sodomy and social disapproval of homosexuality, which apply to prisoners and non-prisoners alike. It would appear that the discriminatory restriction of condoms to prisoners is connected to the widespread perception of prisoners as persons devoid of all rights due to penal incarceration. In view of its relevance to the discourse, societal attitudes to and perceptions of prisoners are examined in the following section.

4.1.2 SOCIETAL ATTITUDES TO PRISONERS

On the face of it, the government would seem to be solely responsible for the unwholesome prison conditions of overcrowded cells and unhygienic sanitary situations among others, as discussed earlier. However, the unsatisfactory prison conditions in Botswana and other countries go beyond the seeming apathy and disinterestedness of governments in the welfare of prisoners. While not seeking to exonerate the government which has the primary responsibility as the custodian of prisoners, the indifference and unsympathetic attitudes of society to the interests and welfare of prisoners equally contribute to the harsh conditions prisoners face and their occasional violent reactions.¹⁵⁰

According to a commentator,

*A prisoner is potentially in worse condition than the slave, because the slave is the property of someone whose interest is to keep his property in serviceable condition, whereas the prisoner is owned by nobody, unless it be the State which is ultimately responsible for his imprisonment.*¹⁵¹

¹⁴⁹ See K. Masethe, *supra* note 4 at 48: "The Commissioner [of Prisons] regarded the issue of condoms as: 'tricky, irritating and a non-starter *since sodomy is an offence in the Penal Code*". [Emphasis added] See also J.D.M. Orebotshe, *supra* note 93 at 4: "In agreement with the 1991 study, Batswana generally hate the type of sexual intercourse whereby a penis is introduced into the anus. The dirt/feecal matter within the anus disgusts them".

¹⁵⁰ R. Cadwell, *supra* note 62 at 546: "According to the Committee on Riots of the American Prison Association, the basic causes of prison riots may be listed as follows: 1. Inadequate financial support and official and *public indifference*...". [Emphasis added]

¹⁵¹ K. Ruch, 'Introduction to the 1929 Everyman Edition of John Howard's *The State of the Prisons in England and Wales*' - adapted from British Medical Association, *Medicine Betrayed, The Participation of Doctors in Human Rights Abuses* (London: Zed Books Ltd., 1998) 119. [Emphasis added]

While this statement from 1929 may seem outdated, it still largely captures the situation of prisoners around the world today. Prisoners are perceived as social outcasts with little or no rights. It thus seems legitimate to subject them to deprivations. Moreover, having committed crimes, they could be regarded as having voluntarily surrendered their rights.¹⁵² Against this background, prisons tend to be viewed as places of punishment where prisoners ought to agonise for their crimes against their victims in particular and society in general.¹⁵³ Prison conditions in that context ought to be as harsh as possible. As a member of the Botswana public reportedly reasoned, “only harsh repressive conditions will help the criminal to learn that prison is not a holiday resort”.¹⁵⁴ Hence, it would seem that deplorable conditions in prisons, are not only acceptable but also deemed commensurate for prisoners’ crimes.¹⁵⁵

Low esteem of prisoners has a long history. For example, in the United States up to the 1970s, the legal position, as established by case law, was that a prisoner was a ‘slave of the state’.¹⁵⁶ Even if the legal status of prisoners is not so demeaning any more, the widespread perception that they are ‘rightless’ persons subsists. To compound the hostile social attitude and cruel prison conditions, the courts, in general, have not been eager to confront issues relating to policies and administration of prisons.¹⁵⁷ The judicial disinclination could be attributed to some reasons. To begin, the administration of prisons lies with the executive arm of government through the enabling laws made by the legislature. Therefore, the doctrine of *separation of powers*¹⁵⁸ precludes the courts, as the judicial arm, from meddling in the affairs of other arms of government.¹⁵⁹ An assertion of the High Court of Australia in the 1995 case of *Prisoners A-XX v. State of New South Wales*¹⁶⁰ illustrates this point. In rationalising its unwillingness to overturn a policy restricting condoms in prisons, the court noted that a judicial review of an issue entailing ‘political considerations’ would lead to passing of ‘political power from the parliament and the electorate to the courts’.¹⁶¹ Similarly, the function of the courts should be limited to adjudication and disposition of cases concerning offenders; it should not extend to the supervision of the executive’s treatment of convicted offenders in prisons.¹⁶² The courts also believed that lack of practical experience in prison administration would make it difficult for them to adjudge the administrative decisions of

¹⁵² J. Norberry, ‘HIV/AIDS, Prisons and the Law’, *Trends & Issues in Crime and Criminal Justice*, Australian Institute of Criminology, August 1991.

¹⁵³ See generally e.g. H. Reyes, *supra* note 88.

¹⁵⁴ S.A. Motheto, ‘Are Prisons Holiday Resorts for Criminals?’, Letter to the Editor, *The Daily News* (Gaborone), 4 February 1985. [adapted from D.D. Ntanda Nsereko *supra* note 5 at 153]

¹⁵⁵ *Ibid.*

¹⁵⁶ See *Ruffin v. Commonwealth* (1871) 62 Va. 790. See also J. Norberry, *supra* note 152.

¹⁵⁷ J. Norberry, *ibid.*

¹⁵⁸ For a discussion of separation of powers see D.D. Ntanda Nsereko, *Constitutional Law in Botswana*, *supra* note 12 at 63-67; see also generally C.M. Fombad, *supra* note 16.

¹⁵⁹ *Ibid.*: “Judicial intervention in prisons has been regarded as interference with the executive arm of government”. See also *Bell v. Wolfish* *supra* note 67 at 545-548, 551, 555, 562; *Rhodes v. Chapman* 452 US 337 (1981) 347, 351-352.

¹⁶⁰ 38 New South Wales Law Reports (NSWLR) 622.

¹⁶¹ *Ibid.*

¹⁶² See *Cruz v. Beto* 405 US 319 (1972) 321: “courts sit *not to supervise prisons* but to enforce the constitutional rights of all ‘persons’, which include prisoners. *We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations*”. [Emphasis added]

prison administrators.¹⁶³ Furthermore, the courts have expressed concern that granting enforceable rights to prisoners could open up the floodgates of unmeritorious litigation. Consequently, if prisoners could summarily seek judicial review of prison administrative actions, the discipline and security of prisons are likely to be undermined.¹⁶⁴ On another note the low esteem for prisoners among members of the public seems to extend to the judicial realm too. This point is reflected in the judicial inclination to regard prisoners' complaints as lacking credibility, and also the inclination to accept the statements of prison authorities as inherently credible.¹⁶⁵

To sum up, judicial attitudes and public indifference or hostility seem to collude in the marginalisation of prisoners. Under that canopy, prison administrators tend to assume unfettered latitude to administer prisons and treat prisoners as they deem fit. With the social perception of prisoners as persons without rights, it seems logical that they are not perceived as equal to non-prisoners, a reasoning that seems to rationalise depriving them of more than their liberty. This mentality, arguably, plays out in the discriminatory prohibition of condoms in Botswana prisons. To some people, the provision of condoms to prisoners may seem to be an unwarranted indulgence for convicts who ought to be undergoing penitence for their iniquities. Prison in that context should be a purgatory, not a hot-bed for the perpetration of sinful activities, such as man-to-man sex for which condoms are required. A former Commissioner for Prisons in Botswana seemed to reason in line with the preceding scenario in the following declaration:

Many HIV/AIDS activists come to the conclusion that condoms in prisons for inmates could be an answer to the escalation of HIV infections...The contending view of this paper is that prisons also known as "Correction/ Rehabilitation institutions" should be seen to implement their "Mission". Which this paper believes is to change the attitudes of inmates towards self care. On release inmates are to come out different persons from when they entered prisons...This paper therefore concludes by urging all concerned take up their arms to fight all external influences as how prisons health/ AIDS policies should be. Let us strengthen our research to improve on the "correction" we profess to be giving to inmates.¹⁶⁶

Generally, denying prisoners access to condoms and keeping prisons in unwholesome conditions raise the issue of human rights violations. Prisoners, notwithstanding their imprisonment, retain certain basic rights which prison authorities are bound to protect, respect and fulfil. This situation was underscored in the South African case of *Minister of Justice v. Hofmeyr*¹⁶⁷ (1993) where the South African Supreme Court noted, "The prisoner retains all his personal rights save those abridged or proscribed by law ...". The rights retained by prisoners include the right to health, which encompasses a right not to contract or right to be protected against HIV/AIDS transmission in prison custody. Set against this backdrop, the right of access to condoms as an HIV preventive measure

¹⁶³ J. Norberry *supra* note 152.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ J.D.M. Orebotse, *supra* note 93 at 7.

¹⁶⁷ See also *Price v. Johnston* 334 US 266 (1948) at 285, *Cruz v. Beto* *supra* note 162.

would be a component of prisoners' right to health.

The extent and content of prisoners' rights in Botswana is best determined by reference to relevant domestic legislation, international human rights treaties and international guidelines or declarations applicable in the country. As will be shown later, the right to health is not constitutionally guaranteed in Botswana. The legal basis to the acclaimed rights of prisoners to have access to condoms must therefore be questioned. To put this question in proper perspective, the right to health in Botswana, with emphasis on the perspective of prisons, will be undertaken in the following section. As a prelude to this, there will be a brief analysis of the general scope of the entitlement of prisoners to basic rights.

4.1.3 EXAMINATION OF THE SCOPE OF PRISONERS' HUMAN RIGHTS IN BOTSWANA

At the domestic level, the primary starting point in determining the scope of the rights enjoyed by prisoners in Botswana is the country's Constitution.

Indisputably, penal incarceration leads to the curtailment of the rights of prisoners to some extent.¹⁶⁸ Apart from the rights to personal liberty and freedom of movement, which are primarily struck down by imprisonment, some other rights of prisoners can also be curtailed for the prevention of crime or for prison security.¹⁶⁹ It is, however, required that any encroachment on prisoners' rights must be necessary and proportionate to the security or other legitimate goal which the prisons' authorities seek to attain.¹⁷⁰ Thus, apart from situations where the Botswana Constitution directly or indirectly permits encroachment on prisoners' rights, prisoners are entitled to all the rights available to non-prisoners as guaranteed under the Constitution.¹⁷¹ Section 3 of the Constitution alludes to this in declaring, "...every person in Botswana is entitled to the fundamental rights and freedoms of the individual",¹⁷² without any discrimination, subject to respect for the rights and freedoms of others and for the public interest. Botswana Courts, in confirmation of this position, have upheld the constitutional rights of prisoners in cases such as *Mauwe & Anor. v. The Attorney-General & Anor.*,¹⁷³ and *Kobedi v. The State.*¹⁷⁴

¹⁶⁸ See e.g. section 5(1) and 14(2) of the Constitution of Botswana. See also *Hudson v. Palmer* 468 US 517 (1984) 526, *Block v. Rutherford* 468 US 576 (1984), *Turner v. Safley* 482 US 78 (1987), *Price v. Johnston*, *ibid.* at 285.

¹⁶⁹ See section 69 together with section 9 of the *Constitution* with respect to the right to privacy; see also section 70 of the *Prison Act* together with section 8 of the *Constitution* relating to the right to own and hold property.

¹⁷⁰ *Turner v. Safley*, *supra* note 168.

¹⁷¹ For the guaranteed constitutional rights, see Chapter II (sections 4-15) of the *Botswana Constitution*.

¹⁷² Emphasis added. See also D.D. Ntanda Nsereko, *Constitutional Law in Botswana*, *supra* note 12, 266.

¹⁷³ [1999] (1) BLR 275 (High Court [HC]) - In this case, the court upheld the right of a death-row convict to discuss in privacy with his lawyer outside the hearing range of prison officials.

¹⁷⁴ [2005] (2) BLR 76 (CA) - In this case, the court upheld the right of a death-row convict to exercise all legal options open to him in seeking review of his death sentence or presidential clemency, before he can be executed. This is an extension of a prisoner's basic right of access to court. On application of the convict, the court stayed his (the prisoner's) execution until he had exhausted all legal options open to him in seeking review of his death sentence or presidential clemency.

Apart from the Constitution, prisoners are also entitled to the protection of basic rights by virtue of certain international human rights treaties to which Botswana is a party. Among the particularly relevant human rights treaties are the International Covenant on Civil and Political Rights ('Political Covenant'),¹⁷⁵ the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('Convention against Torture')¹⁷⁶ and the African Charter on Human and Peoples' Rights ('African Charter').¹⁷⁷ Article 10 of the Political Covenant particularly highlights the need to protect the rights of prisoners; it provides, "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". While not all the relevant human rights treaties make such express reference to prisoners, they remain relevant and applicable in their all-embracing reference to 'humans' which logically include prisoners.

It needs to be reiterated here that the right of prisoners to have condoms for HIV prevention is rooted in their generic right to health. The right to condoms in prison will therefore be based within the framework of the Botswana Constitution, international human rights treaties and relevant international guidelines.

4.1.4 PRISONERS' ACCESS TO CONDOMS AS A COMPONENT OF THE RIGHT TO HEALTH: THE POSITIONS OF THE BOTSWANA CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS LAW

In the absence of a cure, HIV/AIDS control efforts have centred on the treatment and care of persons infected with HIV together with the prevention of further spread of the disease. Basically, HIV/AIDS is a health condition and by the same token a health issue. The Botswana government, like all other governments, needs to adopt effective prophylactic and preventive health care measures in controlling HIV/AIDS. These measures, to be truly effective, must reach various sections of the society, especially groups particularly vulnerable to HIV/AIDS, such as prisoners.

The guarantee of the right to health as an enforceable right has been a primary mechanism for ensuring that governments take appropriate measures to protect, respect and fulfil the right of citizens to good health. According to the World Health Organisation, "health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity".¹⁷⁸ Inferring from this widely accepted definition of health, one may conclude that the right of access to condoms manifestly

¹⁷⁵ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976, in accordance with Article 49 available online at www.ohchr.org/english/law/pdf/ccpr.pdf - accessed on 25/07/2006.

¹⁷⁶ G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force 26 June 1987.

¹⁷⁷ *African [Banjul] Charter on Human and Peoples Rights*, adopted 27 June 1981, Organization of African Unity (OAU) Doc. CAB/LEG/67/3 rev. 5, 21 International Legal Materials (ILM) 58 (1982), entered into force 21 Oct. 1986.

¹⁷⁸ Preamble to the *Constitution* of the World Health Organization as adopted by the International Health Conference, New York, 19 June - 22 July 1946; signed on 22 July 1946 by the representatives of 61 States (Official Records of the World Health Organization, no. 2, 100) and entered into force on 7 April 1948.

falls within the purview of the right to health. A condom, as a means of preventing HIV transmission, is an important tool for ensuring physical and mental well-being, through avoidance of HIV/AIDS infection. For prisoners, the right to health and condoms, or the right to ensure their physical and mental well-being, translates into the right to be protected against contracting HIV/AIDS infection through voluntary or involuntary sexual intercourse in prison confinement. Denial of access to condoms for prisoners under the Prison HIV/AIDS Policy is a transgression of the right to health of prisoners.

The right to health is not guaranteed under the Botswana Constitution. However this does not mean that the Botswana government is absolved of legal responsibility to take effective healthcare measures to protect citizens from HIV/AIDS infection. Notwithstanding the Botswana Constitution's silence on the right to health, it is contended that the government still carries the legal burden to safeguard the right to health through other normative sources which are examined below.

By virtue of the principle of *pactum sunt servanda*, Botswana is bound by international treaties to which it is a party and as such what can be enforced against her by other state parties to the treaties. Put simply, Botswana is legally obliged to carry out the terms and contents of any international treaty to which it is a party. One such treaty is the African Charter on Human and Peoples' Rights.¹⁷⁹ Article 16 obligates Botswana and other state parties to safeguard the health rights of citizens. The Botswana Court of Appeal, the highest court in the country, has unambiguously established and emphasised the binding effect of the African Charter on Botswana in the case of *Attorney General v. Unity Dow*.¹⁸⁰ Aguda J. A. noted in that case:

We have a written Constitution, and if there are two possible ways of interpreting that Constitution or any of the laws enacted under it, one of which obliges our country to act contrary to its international undertakings and the other obliges our country to conform with such undertaking, the courts should give their authority to the latter.¹⁸¹

While that statement was made in the context of Botswana's obligation under the African Charter to eliminate or shun gender discrimination, it cannot be disputed that the statement applies to the treaty as a whole, thus encompassing the right to health. In a nutshell, as a party to the African Charter, Botswana has an inherent legal duty to safeguard the right to health of citizens, including prisoners, as enshrined in that treaty.

Further, customary international law is a component of Botswana's common law.¹⁸² Thus, Botswana may still be bound by the content of treaties to which it is not a party where such treaties have evolved to become components of customary international law, and

¹⁷⁹ Parties to the *African Charter* available online at http://www.achpr.org/english/info/index_ratifications_en.html accessed 25/07/2006

¹⁸⁰ *Attorney General v. Unity Dow* (1992) BLR 119.

¹⁸¹ *Ibid.* at 169.

¹⁸² D.D. Ntanda Nsereko, *supra* note 12 at 44.

by that token, a part of Botswana's common law.¹⁸³ Among others, the provisions of such 'customary international law' treaties may be used as landmarks in mapping the scope of Botswana's constitutional duties, *vis-à-vis* the rights of citizens. This scenario was illustrated by the reference to the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')¹⁸⁴ in the case of *Attorney General v. Unity Dow*.¹⁸⁵ Notwithstanding that Botswana was not a party to CEDAW, the Court of Appeal noted in the case that, "a Court in this country is obliged to look at a convention of this nature which has created an international regime when called upon to interpret a provision of the Constitution which is so much in doubt to see whether that Constitution permits discrimination against women".¹⁸⁶

From this standpoint, the replication of the right to health in other international human rights treaties, notably the International Covenant on Economic and Social Rights,¹⁸⁷ along with the African Charter on Human and Peoples' Rights, is a strong indication of the emphasis which the global community now places on the health of the people. Admittedly, it is debatable whether obligatory provision of health care has assumed a level of customary international law, as to bind Botswana or any other country. Yet, the emphasis laid on the right to health by its inclusion in various treaties, together with the strong voices of several international bodies amplifying its importance, is a compelling reason for Botswana to honour its treaty obligation to safeguard its citizens' right to health under the African Charter. In looking at the judicial positions in *Attorney General v. Unity Dow*, it can be reasonably projected that when courts are to decide on the applicability of the right to health, in view of the constitutional silence, they would be disposed to compel Botswana to protect the right to health. It is further suggested that the courts would have a stronger inclination to safeguard the right to health when it relates to HIV/AIDS, due to the devastating impacts of the disease in Botswana and other countries in sub-Saharan Africa.

"Prisoners are in prison as punishment and not *for* punishment", is a common cliché.¹⁸⁸ Consequently, as earlier noted, prisoners are only deprived of the right to personal liberty or such other rights as may be affected by the stipulated conditions relating to their imprisonment.¹⁸⁹ Subject to that, prisoners are equally entitled to, and ought to be provided with, the benefits given to non-prisoner members of society. Building on this, prisoners should be afforded the right of access to condoms for the prevention of HIV/AIDS, as is given to non-prisoners. Based on the argument of the applicability of the right to health in Botswana, taking into account the country's treaty obligations under the African Charter, it may further be argued that restricting prisoners' access to condoms is a violation of their right to health.

¹⁸³ See *West Rand Central Gold Mining Co. Ltd v. R.* (1905) 2 King's Bench (KB) 391 particularly at 406 - 407.

¹⁸⁴ United Nations, New York, 1979 34 UN GAOR Suppl. (No. 21) (A/34/46) at 193, UN Doc. A/Res/34/180 (hereinafter 'Women's Convention').

¹⁸⁵ *Supra* note 180.

¹⁸⁶ *Attorney General v. Unity Dow, ibid.* at 170 per Aguda J.A.

¹⁸⁷ Article 12. Botswana is not a party to this treaty.

¹⁸⁸ See H. Reyes, *supra* note 88 at 1.

¹⁸⁹ See generally *Minister of Justice v. Hofmeyr* [1993] (3) South African Law Reports (SA) 131 (A) at 141 per Hoexter J.A.: "The prisoner retains all his personal rights save those abridged or proscribed by law ... the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation, but also by reference to his inviolable common-law rights"; see also *Morant v. Roos and Bateman* (1912) Appellate Division (AD) 92 at 122 per Innes J., and H. Reyes, *ibid.*

4.1.5 OTHER HUMAN RIGHTS PRINCIPLES AND INTERNATIONAL GUIDELINES TOUCHING ON PRISONERS' ACCESS TO CONDOMS

Apart from the right to health, the issue of prisoners' access to condoms can also be grounded in other rights guaranteed under the Botswana Constitution such as the rights to equality, privacy and life.¹⁹⁰

The right to equality dictates that prisoners and non-prisoners should be treated equally in terms of access to condoms for HIV/AIDS prevention. Put more directly, prisoners should not be denied access to condoms while the non-prisoner populations enjoy unfettered access. It is true that section 15 of the Constitution does not include 'prisoner status' among the forbidden grounds of discrimination. However, given the judicial disposition to expand the frontiers of constitutional rights, as noted in the *Attorney General v. Unity Dow* case, it is doubtful the courts would selectively permit constitutional discrimination; allowance of such discrimination is even more unlikely given the global yearning for just and humane treatment of prisoners.¹⁹¹

The right to privacy dictates that prisoners are entitled to privacy in respect of their sexual inclinations or orientation.¹⁹² Therefore, it can be argued that criminalising man-to-man sex in prison confinements amounts to encroaching on prisoners' right to sexual privacy. To further deny prisoners access to safe sex, based on the operation of such a law, is another level of transgression.

Though Botswana, as earlier mentioned, is making significant strides in securing access to HIV/AIDS treatment for prisoners in the country, it seems that not every prisoner has access to free HIV/AIDS medication. Free or government-sponsored Anti-Retrovirals (ARVs) are available only for citizens of Botswana.¹⁹³ Based on this policy, it can be assumed that non-citizen prisoners are not entitled to government-issued ARVs.¹⁹⁴ Moreover, such class of prisoners may not have the means or the support to procure life prolonging ARVs.¹⁹⁵ For the class of prisoners lacking access to ARVs, HIV/AIDS infection in unwholesome prison conditions may literally amount to a slow and traumatizing death.¹⁹⁶ In this context, depriving prisoners of a means of preventing HIV/AIDS infection in prison, can arguably translate into an indirect violation of their right to life. Here it becomes even more important that inmates have access to condoms to prevent HIV infection.

¹⁹⁰ See sections 4, 9 and 15 of the *Constitution of Botswana*.

¹⁹¹ See e.g. *Basic Principles for the Treatment of Prisoners*, adopted and proclaimed by General Assembly (GA) resolution 45/111 of 14 December 1990.

¹⁹² See the case of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* [1999] (3) SA 173-191.

¹⁹³ See C.M. Fombad, 'Children and Informed Consent to HIV/AIDS Testing and Treatment in Botswana', 2 *University of Botswana Law Journal* (UBLJ) (2005) 35.

¹⁹⁴ Non-citizens of Botswana constitute about 14% of the total prison population - see *Annual Report 2004*, *supra* note 52 at 24.

¹⁹⁵ See generally A. Hassim, 'Overview of Treatment Access in the SADC Region', *Development Update*, *supra* note 13 at 209-224; see also notes 119-122 and accompanying texts.

¹⁹⁶ 'ZAMBIA: Agencies step in to address HIV/AIDS in Prisons', available online at <http://www.irinnews.org/report.asp?ReportID=48909> accessed on 21/06/2006.

Apart from the principles of international and domestic human rights law, several international documents, in the form of *standards* and *guidelines*, have also evolved; these instruments may serve as yardsticks for countries addressing HIV/AIDS, the conditions of prisons and treatment of prisoners, and other human rights issues. The documents, mostly products of international unifying organizations such as the World Health Organisation and the United Nations Organization (UNO), illuminate the human rights treaties; they equally underscore the human rights responsibility of governments to prisoners and the need to honour the obligation of safeguarding the right to health and other human rights of prisoners. Most pertinent among such documents are Basic Principles for the Treatment of Prisoners,¹⁹⁷ Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment¹⁹⁸ and Standard Minimum Rules for the Treatment of Prisoners. Others are Recommendation No. R (98)7 of the Committee of Ministers to Member States Concerning the Ethical and Organisational Aspects of Health Care in Prison, World Health Organization Guidelines on HIV Infection and AIDS in Prisons (1993) ('WHO Guidelines')¹⁹⁹ and the International Guidelines on HIV/AIDS and Human Rights ('International Guidelines').²⁰⁰ It should, however, be noted that as the instruments are not treaties, they do not have the legal effect of international treaties, and thus are not *legally* binding on Botswana or any other country. Nonetheless, every country that subscribes to the ideals and values of such international bodies and international co-operation, generally has a compelling moral duty to comply with the guidelines.²⁰¹ This duty is more pressing when the documents in question essentially emphasise subsisting legal duties obligated by the countries under legally binding treaties.

Most relevant to this paper, because of their specific focus on HIV/AIDS in prisons, are the WHO Guidelines and the International Guidelines. The latter provide:

Prison authorities should take all necessary measures, including adequate staffing, effective surveillance and appropriate disciplinary measures, to protect prisoners from rape, sexual violence and coercion. *Prison authorities should also provide prisoners (and prison staff, as appropriate) with access to HIV-related prevention information, education, voluntary testing and counseling, means of prevention (condoms, bleach and clean injection equipment).*²⁰²

Inter alia, the WHO Guidelines provide, "[a]ll prisoners have the right to receive health care, including preventive measures, equivalent to that available in the community without discrimination, in particular with respect to their legal status or nationality".²⁰³

¹⁹⁷ Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

¹⁹⁸ Adopted by General Assembly resolution 43/173 of 9 December 1988.

¹⁹⁹ WHO/GPA/DIR/93.3.

²⁰⁰ *International Guidelines on HIV/AIDS and Human Rights*. United Nations Commission on Human Rights (UNCHR) resolution 1997/33, UN Doc. E/CN.4/1997/150 (1997).

²⁰¹ See *West Rand Central Gold Mining Co. Ltd v. R.* [1905] (2) KB 391 particularly at 406-407.

²⁰² *International Guidelines*, *supra* note 200 para. 29(e).

²⁰³ *WHO Guidelines*, Clause 1 A. (General Principles). [emphasis added]

The WHO Guidelines further provide:

The role of condoms in preventing HIV transmission should also be explained. Since penetrative sexual intercourse occurs in prison, even if prohibited, *condoms should be made available to prisoners throughout their period of detention*. They should also be made available prior to any form of leave or release.²⁰⁴

4.2 PROVISION OF CONDOMS IN PRISONS AND THE CURTAILMENT OF HIV SPREAD: PUBLIC HEALTH PERSPECTIVE

It is now undisputed that man-to-man sex occurs in Botswana prisons and is contributory to HIV transmission. This fact warrants the need for prisoners to be given effective treatment and effective means of prevention. These two goals actually constitute the arrow-head of the Botswana Prisons Service's drive to control HIV/AIDS in prisons.²⁰⁵ In preceding discussions, this paper sought to show that the prohibition of condoms constitutes a gap in the quest of the Botswana prison authorities to control HIV/AIDS spread among prisoners and the nation as a whole. It has also been shown that prohibition of condoms in prisons raises, among others, a question of violation of the rights of prisoners to health. Apart from the human rights impact, there is a public health dimension to the issue. The public health perspective further raises some questions about Botswana's commitment to halting the spread of HIV/AIDS by 2016 or at any other time.

As in other parts of the world, there is constant interaction between prisoners and non-prisoners, both within the prison community and outside the prison community.²⁰⁶ As depicted by a former Botswana Prisons Service Commissioner, "Prisoners and prison officers move in and out of prison everyday. Most prisoners are in for only short sentences, some spend several periods there, returning to the outside world each time after release".²⁰⁷ Thus, to reiterate, apart from the obligations of human rights law and international guidelines, public health requirements demand that prisoners are given access to condoms as means of averting HIV/AIDS transmission through seemingly inevitable man-to-man sex in prisons. Protecting prisoners against HIV/AIDS translates to protecting the whole society, of which the prison population constitutes an inextricable component. Public health protection in terms of HIV in prisons inevitably dovetails into protecting and promoting the health of inmates, staff, visitors, prisoners' relatives and by extension, the whole community; it also reduces and/or averts morbidity and mortality.²⁰⁸ Along this line of reasoning it is imperative that Botswana urgently reviews its policy of forbidding condoms in prisons.

²⁰⁴ *Ibid.*

²⁰⁵ See *Botswana Prison HIV/AIDS Policy*, *supra* note 45, clause 4.1.

²⁰⁶ See H. Reyes, *supra* note 88 at 1.

²⁰⁷ J.D.M. Orebotse, *supra* note 93 at 2. See also H. Reyes, *ibid.*

²⁰⁸ H. Reyes, *ibid.* at 1-2.

The factors accountable for the prohibition of condoms in Botswana prisons have been identified as the criminalisation of sodomy and social disapproval of homosexuality. Undeniably, these are formidable factors, touching on fundamental legal, religious, cultural and social issues in Botswana. It is thus not strange that they are at the epicentre of the government's argument for keeping condoms out of prisons. While recognising that the factors are germane, it is important to question whether they are sacrosanct; in other words, should they be permitted to vitiate Botswana's efforts to halt the rampage of a devastating HIV/AIDS pandemic? The sustainability of the argument that the anti-sodomy law and homophobic attitudes are barriers to providing condoms in prison, demands critical examination.

PART V: REMOVING THE BARRIERS TO PRISONERS' RIGHT OF ACCESS TO CONDOMS

In the National Strategic Framework 2003-2009, the Botswana National AIDS Co-ordinating Agency declared (at page 11):

Botswana is at a critical crossroads. To halt and eventually reverse the destructive tide of the [HIV/AIDS] epidemic requires a more dynamic, determined and radical response. To do anything less may well spell disaster.

Though NACA made the declaration in a different context, the statement is especially relevant to the issue of prisoners' access to condoms and the need for realistic decisions in the battle against HIV/AIDS. The central issue is to choose either rigid sanctification of anti-sodomy laws and social attitudes, or lifting the siege of HIV/AIDS on Botswana by allowing prisoners to have access to condoms. This matter is examined in this part, starting with a brief historical and legal analysis of the two interlinked legal and social barriers to the provision of condoms in prison.

5.1 MAN TO MAN SEX: INTERPLAY OF LAW AND SOCIAL ATTITUDE IN BOTSWANA

In the case of *Kanane v. The State*,²⁰⁹ Justice Tebbut, speaking for the Botswana Court of Appeal maintained:

[T]here is no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires a decriminalisation of those practices, even to the extent of consensual acts by adult males in private... the time has not yet arrived to decriminalise homosexual practices even between consenting adult males in private.²¹⁰

As will be shown below, by that declaration, the legal and social barriers to the provision of condoms in Botswana prisons were manifestly reinforced. As the highest court in the country, the position of the Botswana Court of Appeal is the ultimate law. This case involved a constitutional challenge to the provision of section 164 of the Penal Code, which is the normative basis of the unlawfulness of man-to-man sex in Botswana. Put in the specific context of this paper, section 164 is the root of the prohibition of condoms in prisons.

Prior to its amendment in 1998, section 164 of the Penal Code provided:

Any person who-

- (a) has carnal knowledge of any person against the order of nature;
- (b) has carnal knowledge of an animal; or

²⁰⁹ *Supra* note 9.

²¹⁰ *Ibid.* at 80.

- (c) permits a *male person*²¹¹ to have carnal knowledge of him or her against the order of nature, is guilty of an offence and is liable to imprisonment for a term not exceeding seven years.

Following an amendment in 1998 the section was modified by replacing the words 'male person' with '*any other person*'.²¹² Obviously, in broadening the scope, the legislature tangentially defused any probable challenge of gender discrimination against the Penal Code provisions.²¹³

Having identified criminalisation of man-to-man sexual intercourse as a key obstacle to the provision of condoms in Botswana prisons, an apparent solution would be the repeal or amendment of the restrictive laws. Free of the legal straitjacket, the government would be able to provide condoms as preventive measures to prisoners. Considering the impact of HIV/AIDS in Botswana, it is reasonable to expect that Parliament, as the law making arm of the state, would readily strike down the legal barrier for the sake of curtailing further spread of the disease. In the event that Parliament is unwilling or unduly reluctant to take this step, the court, as the 'last hope of the common man' could do so to clear the roadblock and pave the way for condoms in prisons. The neighbouring Republic of South Africa provides an example for the Botswana judiciary in this regard, as it was the court in that country that struck down the anti-homosexuality law in the case of *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others*.²¹⁴

Botswana's National Parliament and the Judiciary have had opportunity to review the anti-sodomy laws and rather than remove the laws, both organs have opted to reinvigorate them. The Parliament fortified the laws in the 1998 amendment, while the Court of Appeal, in the case of *Kanane v. The State*,²¹⁵ also strengthened the laws. In doing so, the Court not only upheld them as constitutional but also affirmed that they were not in violation of the human rights of persons wishing to engage in penetrative man-to-man sex, or 'sex against the order of nature'.

Justice Tebbut's statement, for the Botswana Court of Appeal,²¹⁶ highlighted the interplay between law and social attitude to obstruct the provision of condoms in prisons.²¹⁷ First, the Court's judgment implies that anti-homosexuality sentiment in Botswana has been legally validated and affirmed; this is inferable from the statement that the people's attitude to homosexuality forbids decriminalisation of sodomy. Second, in validating anti-homosexuality attitudes, the statement suggests that decriminalisation of sodomy alone

²¹¹ Emphasis added.

²¹² Emphasis added.

²¹³ A constitutional challenge of gender discrimination was actually raised against section 164(c) of the Penal Code in the case of *Kanane v. The State*, *supra* note 9.

²¹⁴ *Supra* note 192. This case can be described as the judicial nail on the coffin of anti-homosexual practices in South Africa. Judicial pronouncements in earlier cases had largely neutralized the act. See *S. v. M.* [1990] (2) SACR 509, *S. v. H.* [1995] (1) SA 120 (C) and *S. v. Kampher* [1997] (4) SA 460 (C).

²¹⁵ *Supra* note 9.

²¹⁶ Note 210 and accompanying text.

²¹⁷ "There is no evidence that *the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practices by gay men and women requires a decriminalisation of those practices*". [emphasis added] - see note 210 and accompanying text.

would solve the problem of condoms for prisoners. However, if a new legal order were to be meaningful, the anti-sodomy attitude of the people would have to be changed. Decriminalisation without an accompanying change in social attitudes could end up frustrating practical implementation of a new order.

Since the *Kanane* decision in 2003, there appears to have been no invitation to Botswana's judiciary to pronounce on the constitutionality of sodomy. Consequently, sodomy remains unlawful, standing as a formidable barrier to provision of condoms as preventive measures in prisons. For HIV/AIDS control, notwithstanding existing international guidelines, treaties and the like, the government²¹⁸ of Botswana maintains it is incapacitated from providing condoms as preventive measures to prisoners. 'Incapacitated' is used instead of 'unwilling', because in the face of Botswana's legal position and social attitude, it would appear inappropriate for a democratically elected government to violate the law or defy public opinion, particularly one entrenched in or propelled by cultural and religious values opposed to homosexuality. A commentator captures the issue:

It is...important to understand the nature and dynamics of the behavior of government entities, acting within the context of specific political, economic, and social conditions, and also the nature and dynamics of power relations prevailing in a particular country. No government can afford to disregard the politically articulated wishes or positions of powerful groups or segments of its population who might want to maintain religious and customary laws.²¹⁹

Against the foregoing background, it cannot be denied that the Botswana government has genuine reasons or arguments grounded in the prevailing law and homophobic social attitudes.²²⁰

This scenario reminds us of the need to remove the anti-sodomy criminal law and change homophobic social attitudes if the government is to be empowered to provide condoms in prisons. To a large extent, public attitude seems to be the core issue that needs addressing in order to pave the way for condoms in prisons. The pertinent question then is when, or how soon, can these barriers be removed? It appears that efforts to break down the barriers would meet strong opposition and a battle that may be unduly drawn

²¹⁸ 'Government' in this context, refers to the Executive arm which has the primary duty of implementing HIV/AIDS control programmes, managing the prisons as well as executing other state programmes.

²¹⁹ A.A. An-Naim, 'State Responsibility Under International Human Rights Law to Change Religious and Customary Laws', in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, (Philadelphia: University of Pennsylvania Press, 1994), 169.

²²⁰ This argument is more plausible because the President of Botswana has been reported to advocate a tolerant attitude to homosexuals, unlike the situation in some other African countries where political leaders displayed undisguised hostility to homosexuality (see e.g. Mask Admin 'Botswana President: 'Don't be judgmental on homosexuals', available online at <http://www.mask.org.za/article.php?cat=&id=105> accessed on 09/06/2006. See generally also Human Rights Watch and The International Gay and Lesbian Human Rights Commission, *More Than A Name: State-Sponsored Homophobia and Its Consequences in Southern Africa* (New York: Human Rights Watch, 2003) 1-5). It can be assumed that with a leadership that is not inherently hostile to citizens of diverse sexual inclinations, there should not be reluctance to provide condoms to prisoners if there are no inhibiting elements like the legal barriers or social attitudes.

out. Some public responses to Botswana's civil society efforts to effect change indicate that removing the barriers may not be an easy task. The following example serves as an illustration:

Subject: RE: Condoms for Prisons?

This is to register my displeasure with you for suggesting that condoms should be provided for prisoners in Prisons. I was totally behind you in urging the responsible authorities to enact a law that will prohibit discrimination against people with HIV AIDS by employers and I still support in that regard. But am totally against provision of condoms to prisoners. First we need to know whether you guys are for homosexuality. That should be the starting point. I am not a Christian but am against homosexuality. If its happening in Prisons we must put pressure on responsible authorities to stop it, not to open a full season for it by providing condoms.²²¹

On a different note, research has shown that the clamour or the craving for decriminalisation of sodomy and provision of condoms in prisons does not appear to enjoy widespread support among prisoners, the primary beneficiaries of the efforts.²²² This lack of support could be a drawback for the campaign to decriminalise sodomy and ensure access to condoms in prison, as it could be argued that without prisoner support there is no justification to force the measures on them. However, that argument overlooks the need to balance the interests of the prisoners in opposition against the interests of those in support of condoms in prison, as well as the interests of the overall public. The seriousness of HIV/AIDS in Botswana dictates that no viable measure should be held back because of opposition from some quarters. In that light, the opposition of some inmates to condoms does not negate the importance of condoms in controlling HIV/AIDS in prison. In view of such opposition it would be best to implement the measure, allowing all concerned parties to make personal choices regarding the use of condoms.

HIV/AIDS activists have been spearheading the complex battle for prisoners' access to condoms in Botswana. In view of the controversy around this issue, it is a battle that activists need to approach with tact. As previously noted, public opinion is a crucial element in the battle. Activists should thus involve the public in their efforts. Public education and awareness activities around sexual rights should be intensified, particularly at the grassroots level, in order to stimulate acceptance of people's right to engage in sexual activity, which is deemed unconventional. Such efforts are particularly crucial in the light of the nation's Vision 2016, which strongly emphasises that "an

²²¹ E-mail dated and addressed to The Botswana Network on Ethics Law and HIV/AIDS at bonela@botsnet.bw. The Botswana Network on Ethics, Law and HIV/AIDS (BONELA) is a civil society organisation engaged in HIV/AIDS and human rights activities, which include support of the provision of condoms for prisoners. In furtherance of its 'condoms in prisons' project, the Director of BONELA had a television interview aired on Botswana Television (BTV) on or about 27 December 2006, in which she touched on the need for prisoners to have access to effective means of prevention, including condoms. This reaction was sent to the organisation shortly after the interview. Ostensibly, it was a protest against the Director's television interview.

²²² K. Masetlhe, *supra* note 4 at 35, 52, 56.

atmosphere of tolerance towards minorities or groupings who do not share the attitude or behaviour of the mainstream is necessary in any well-ordered community".²²³ As the previously quoted 'protest'²²⁴ indicates, some people, due to ignorance, may initially find it difficult to grasp the need for prisoners' access to condoms, in view of prevailing social norms. Such education can have the effect of opening minds to progressive attitudes towards homosexuality and provision of condoms in prisons. Supportive comments from prominent members in society are rich resources which should be pragmatically deployed in the quest to achieve attitude change.

It is important that dimensions beyond human rights perspectives be highlighted in the discussion on condoms in prison. Along these lines, the public health dimension of giving prisoners effective preventive measures, including the provision of condoms, should be particularly underscored. Put simply, the fact needs to be stressed that protecting prisoners against HIV/AIDS amounts to protecting all of Botswana against HIV/AIDS and its devastating consequences. Furthermore, civil society groups should use their relatively cordial relationship with the government to pragmatically nudge decision makers in the desired direction. Legitimate lobbying and convincing arguments, delivered in an atmosphere of mutual respect and understanding, can motivate some key government officials to take the campaign for condoms in prisons to the point of change.

In this writer's view, confrontational methodology, such as court actions may not be advisable as primary weapons in the pursuit of prisoners' access to condoms in Botswana under the present legal dispensation. While this does not amount to saying that litigation cannot be useful, the suggestion is that such measures should only be employed as a last resort. Given the present position of law, as evidenced by the judicial validation of the anti-sodomy laws in the case of *Kanane v. The State*, the chances of successful litigation is uncertain. Litigation may end up reinforcing instead of reversing the existing legal order.

For an effective drive, it is important that civil society groups are able to present a cohesive and unified front. Here, ideological differences can arise, especially between religious or church NGOs and non-religious NGOs. With the promotion of condoms for same-sex intercourse being the central issue in the prison campaigns, some organisations may be reluctant to support the cause, due to their religious or ideological leanings. Ideological differences, however, should not provoke some groups to initiate their own campaigns in which they undermine the efforts of organisations supporting condoms in prisons. Disagreements or divisions within civil society would be inimical to the drive. Should some members of civil society find it difficult to agree on certain issues, there should be mutual respect and accommodation of objectives. In the event of ideological discord, the congregation of civil society organisations²²⁵ should strive to reach workable compromises and a level of understanding that would prevent any sort of inimical cacophony among them.

²²³ *Vision 2016*, at 60.

²²⁴ *Supra* note 221.

²²⁵ E.g. The Botswana Network of AIDS Service Organisations (BONASO).

No matter how efficiently and doggedly the campaigns to change social attitudes or anti-sodomy laws in Botswana are pursued, it is most likely that some time will elapse before the desired goals are reached. While it is relatively easy to amend legislation within a prescribed time, social attitudes entrenched in cultural, moral and religious beliefs may take generations to change. Moreover, the Botswana Court of Appeal authoritatively stated as recently as 2003 that “the time has not yet arrived to decriminalise homosexual practices [in Botswana]”,²²⁶ without giving any indication when the time will arrive. This raises the question of whether effective control of HIV/AIDS can or should wait until that uncertain time when the law on sodomy in Botswana will be changed or the people will have accepted homosexuality as a normal way of life. Conceivably, this question has been answered by different government bodies in their positions that the Botswana HIV/AIDS situation deserves extremely urgent attention and thus cannot wait for some uncertain time in the future. For example the National AIDS Coordinating Agency warns that ‘time is running out’ and there is need to avert a national catastrophe.²²⁷ To underscore the urgency in the battle against HIV/AIDS, NACA, in the National Strategic Framework, has set 2009, two years from now, as the timeframe when there should be no more new HIV infections in Botswana.²²⁸

To meet the timeframe, the government needs to urgently block all avenues through which HIV can be transmitted. The provision of condoms in prisons is a necessary and urgent means to block one particular avenue of HIV transmission. Therefore, it becomes necessary for the government to circumvent the prohibitive barriers rather than wait for a time when such barriers give way, whether due to the pressure of civil society or other causes.

5.2 BYPASSING THE CRIMINAL LAW AND SOCIAL ATTITUDES ON SODOMY: THE COMMON LAW PRINCIPLE OF NECESSITY AND ‘HARM REDUCTION’ TECHNIQUES OF OTHER COUNTRIES

At times, a vision may appear to be an illusion until it is accomplished. It is important that Botswana’s vision to eradicate HIV infection by 2009, according to the National Strategic Framework, or by 2016 as envisioned by Vision 2016, should not be perceived as unattainable. As maintained throughout this paper, realising the dream of stopping HIV transmission entails sealing all avenues through which HIV can spread. By extension, this entails making condoms accessible to prisoners for protection against HIV infection in the course of man-to-man sex. It was suggested earlier that the Botswana government bypass the legal barriers hindering the provision of condoms in prison. It is hereby argued that the government of Botswana has legal and moral justification to bypass or transgress the provision of section 164 of the Penal Code for the purpose of controlling HIV/AIDS. The argument is based on the Common Law principle of *necessity*, which applies in Botswana.

²²⁶ See note 210 and accompanying text. [emphasis added]

²²⁷ *National Strategic Framework*, *supra* note 11 at 22.

²²⁸ *Ibid.* ‘National Vision: No New Infections of HIV in the Country by 2009’.

The justification for the principle of necessity is encapsulated in the Latin phrase, *neccesitas non habet legem*, meaning 'necessity knows no law'.²²⁹ Generally, necessity connotes that ordinarily unlawful measures could be legally justified to safeguard the common good, so long as the measures are taken either to prevent the occurrence of a detrimental situation or for the common good of society. Explained simply, what is ordinarily unlawful, legitimate necessity can make lawful. Metaphorically, the justification of necessity can be expressed as doing or embracing one evil to forestall a greater evil.

The invasion of the private rights of others may possibly be justified and defended on the grounds of necessity. Thus to destroy property in the path of a conflagration to halt it, or to enter on property and damage it in time of war, may be justified as for the common good... *The test is whether there was reasonable necessity for doing the act done in the circumstances existing at the time.*²³⁰

The government's application of this principle in order to overcome law and social attitudes that pose obstacles hindering it from providing condoms in prisons could hardly be disputed; the government would have every cover under *necessity* to provide condoms despite the Penal Code anti-sodomy provisions or social attitude. Given the devastating impact and looming threat of HIV/AIDS on Botswana, *necessity* can be justified in light of the extreme urgency to entirely stop the spread of HIV in the country. As various government agencies have emphasized, HIV/AIDS literally poses a threat to the existence and future of Botswana, a situation that warrants upgrading the disease to a level of national emergency.²³¹

It is important to note that other countries have already adopted the *principle of necessity* or circumvented laws in pragmatic efforts to control HIV/AIDS in prisons. Some countries facing injection-driven HIV epidemics have had to bypass their laws criminalising illicit drug use, to provide syringes for safe drug injection in prisons as a means of HIV control.²³² These measures have been enacted in spite of arguments by prison authorities; they argue that the provision of syringes not only creates safety concerns but also amounts to condoning drug use, an illegal act, in prison.²³³ According to a report on injection-driven epidemics, these realistic measures have not led to an increase in prison drug use, but have rather led to a reduction in the number of new HIV infections among prisoners.²³⁴ The Interim Director of Hindelbank Penitentiaries for Women in Switzerland, where this approach has been adopted, gave a realistic summation of the approach in the following words:

²²⁹ L. Rutherford and S. Bone, *Osborn's Concise Dictionary* (8th Edition) (London: Sweet and Maxwell, 1993) 226.

²³⁰ *Ibid.* [emphasis added] See also the case of *Cresswell v. Sirl* [1948] (1) KB 241.

²³¹ *National Strategic Framework*, *supra* note 11 at 1.

²³² See generally Open Society Institute, *Harm Reduction Developments 2005, Countries with Injection - Driven HIV Epidemics* (New York: Prestone Printing Co. Inc., 2006). See also R. Jurgens and G. Betteridge, *supra* note 89 at 61-62.

²³³ R. Jurgens and G. Betteridge, *ibid.* at 65.

²³⁴ *Ibid.* at 66.

...the transmission of HIV or any other serious disease cannot be tolerated. Given that all we can do is to restrict, not suppress, the entry of drugs, we feel it is our responsibility to at least provide sterile syringes to inmates. The ambiguity of our mandate leads to a contradiction that we have to live with.²³⁵

It is noteworthy that this realistic approach of bypassing inhibitive laws for the purpose of controlling HIV/AIDS is not only limited to the liberal or supposedly indulgent countries of Europe or North America. Iran, where governance is based on strict, conservative religious principles, offers an example that a pragmatic approach in the drive to curtail HIV/AIDS cuts across ideological or religious divides. In Iran, needles, syringes and other drug paraphernalia are provided to drug users as HIV prevention measures; drug-using inmates are no exception. More remarkably, to remove potential barriers to the implementation of the policy, the country's judiciary took a bold step to clarify the interface between criminal intent and genuine desire to control HIV/AIDS. For clarity and emphasis, it is considered necessary to reproduce the relevant directive of the Head of the Iranian Judiciary in this regard:

Executive Order to All Judicial Authorities Nationwide

....Interventions that have been supported by the Ministry of Health and Medical Education include provision of needles, syringes, and other materials used by drug addicts and AIDS patients, as well methadone maintenance treatment programs as a means of combating HIV and hepatitis infections among those addicted to drugs.

According to the Ministry, some judicial authorities have regarded such interventions as the abetting of crime, and so subject to punitive action... [This attitude] unintentionally impeded[es] the implementation of health and treatment programs aimed at preventing and combating the transmission of dangerous diseases.

Therefore, this is to remind judges at all courts of justice and prosecutors' offices throughout the country that since a major element of abetting crime is verification of malicious intent, *the said interventions are clearly void of malicious intent and rather motivated by the will to fulfill the mission of protecting society from the spread of deadly contagious diseases such as AIDS and hepatitis. Judicial authorities should...not unfairly characterize service providers as facilitating criminal abuse of narcotics*, and must not impede implementation of such needed and fruitful programs.

Ayahtollah Seyed Mahmood Hashemi Sharoudi
*Head of the Judiciary*²³⁶

²³⁵ Adapted from Jurgens and Betteridge, *ibid.* at 67.

²³⁶ *Ibid.* at 42.

The Iranian Judiciary's position that the provision of materials to facilitate safe drug injection does not amount to abetting crime, can be analogically related to the provision of condoms in prisons for those who engage in the unlawful act of sodomy. The question then arises around the government of Botswana's intent in providing condoms in prisons. Would they have a *criminal intent* to abet sodomy, or a humane and honourable intent to release Botswana from the fatal clutches of a debilitating HIV/AIDS pandemic? Through inference from the directive of the Iranian Judiciary stated above, this paper submits that the provision of condoms in prison cannot reasonably be viewed as abetting the crime of sodomy in Botswana.

The Iranian example teaches Botswana that inhibitive laws or social attitudes should not be permitted to frustrate noble visions to stop the spread of HIV. Furthermore, the dynamic step of the Iranian judiciary in seeking to elucidate the legitimacy of the approach is an important indicator of the role which the Botswana Judiciary can play in resolving the tension between application of law and pragmatic HIV/AIDS control measures.

Perhaps, there may be some arguments that Botswana and Iran operate different legal and political systems and therefore, the Iranian judicial attitude is of little or no relevance to Botswana. Such an argument, in this writer's view, has more academic than practical value; the conglomeration of *actus reus* (criminal act or omission) and *mens rea* (criminal intent), which is a requirement for criminal culpability in Botswana,²³⁷ is manifestly the same as in Iran, as can be inferred from the judicial directive.²³⁸ Moreover, such academic exercises are unhelpful to the urgent need and efforts to effectively control HIV/AIDS in Botswana.

Botswana needs to emulate the position of other countries which have courageously and realistically refused to be bogged down by legal technicalities in the battle against HIV/AIDS. The need for Botswana to give prisoners access to condoms deserves urgent attention. All stakeholders should join in calling for the courageous steps necessary to push back the deadly invasion and siege of HIV/AIDS.

²³⁷ See K. Frimpong and A.M. Smith, *The Criminal Law in Botswana* (Cape Town: Juta & Co., 1992) 12-19.

²³⁸ "...a major element of abetting crime is verification of malicious intent, *the said interventions are clearly void of malicious intent*".

PART VI: CONCLUSION

Botswana is in a race against time to stop the ravages of HIV/AIDS. This paper has sought to establish the imperativeness of making all means of prevention, including condoms, as accessible to prisoners as to non-prisoners. Leaving the prison population without all-embracing protection poses a potent threat to Botswana's effort to stop the spread of HIV/AIDS.

Consequently, the tension between the provision of condoms in prisons and homophobic laws and attitudes deserves a pragmatic approach. That being said, the promotion of health in prisons, whether through prevention or treatment, must be balanced against security, discipline and the correctional goals of rehabilitating prisoners. However, the health and welfare of prisoners tend to be secondary to prison needs for security and effective restraining of inmates; societal perceptions of prisons principally as places of punishment may explain this prioritization.²³⁹ In Botswana, the issue of providing condoms to prisoners is framed in this setting. Seemingly creating another complication, the Penal Code criminalises man-to-man sex for which prisoners would require condoms. Thus a situation is created in which law, homophobic social attitudes and societal apathy to prisoners operate against the provision of condoms in prisons. Consequently, one could ostensibly argue that providing prisoners with condoms would amount to condoning the unlawful act of sodomy while simultaneously threatening the efforts to reform prisoners.²⁴⁰

This paper has shown that providing condoms in prisons for HIV prevention does not amount to encouraging, condoning or abetting the criminal act of sodomy in Botswana prisons. Neither can it in any way threaten prison safety and security. Furthermore, it is questionable whether providing condoms will open the floodgates for homosexual practices. For example, as previously noted, provision of sterile needles in the prisons of some countries has not led to an increase in the number of drug users, but rather to a decrease in the number of drug users who contract HIV.²⁴¹ Giving prisoners access to condoms would protect them, as well as prison staff and the public, against HIV. Put differently, the protection of prisoners against HIV will benefit not only prisoners, but also those who come in contact with the prisoners, including the public. Primarily, this measure will protect the health of prisoners, whose criminal activity does not warrant their HIV infection. Furthermore, a lower prevalence of HIV infection in prisons corresponds to a lower rate of HIV exposure among prison staff²⁴² Because of the inevitable points of contact between prisoners and members of the public, the protection of prisoners against HIV infection ultimately amounts to protecting the whole public against HIV. As a former head of the Botswana Prisons Service aptly noted, "Globally, prisons are not [a] closed off world. Prisoners and prison officers move in and out of prison everyday. Most prisoners are in for only short sentences, some spend several periods there, returning to the outside world each time after release".²⁴³

²³⁹ See K. Masetlhe, *supra* note 4 at 31-32.

²⁴⁰ J.D.M. Orebotse, *supra* note 93 at 7.

²⁴¹ See note 235.

²⁴² R. Jurgens and G. Betteridge, *supra* note 89 at 65-66.

²⁴³ J.D.M. Orebotse, *supra* note 93 at 2.

It is unrealistic to pursue an ideal of a Botswana prison free of the unlawful act of sodomy or any other factors contributing to HIV spread; available facts strongly indicate that this goal is essentially unattainable. In that context, there is need to elect between two supposedly 'evil' situations: appear to *condone* man-to-man sex or explicitly *condone* the spread of HIV by failing to provide condoms. Making condoms available in prisons amounts to a realistic acknowledgment of man-to-man sex in Botswana prisons and the consequent need to minimise risks of HIV infection. To adopt the words of Jurgen and Betteridge, "on the other hand, refusing to make condoms and bleach or sterile needles available to inmates, knowing that activities likely to transmit HIV (and HCV) are prevalent in prisons, could be seen as condoning the spread of HIV (and HCV) among prisoners and to the community at large".²⁴⁴

The National Strategic Framework has come to a forlorn realisation of the depth of Botswana's HIV/AIDS crisis and the need for 'a more dynamic, determined and radical response' to avert disaster.²⁴⁵ Some countries have already shown the way in their radical and dynamic responses by shunning legal and social clogs to pragmatically control HIV/AIDS both within and beyond the confines of prisons. In Botswana, a radical and dynamic choice must be made between condoning man-to-man sex or fostering the spread of HIV/AIDS. The realisation of Botswana's vision to stop new HIV/AIDS infections by 2016 rests, in part, on this choice.

²⁴⁴ R. Jurgens and G. Betteridge, *supra* note 89 at 67.

²⁴⁵ *National Strategic Framework*, *supra* note 11 at 11.

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