



Legal rights and social wrongs: Sophia inaugural lecture

Baroness Helena Kennedy QC

Karen Brewer:

Ladies and Gentlemen

I am Karen Brewer, the Secretary General of the Commonwealth Magistrates' and Judges' Association, one of the co-hosts of today's lecture. I am also a member of the Public Affairs Committee of the Royal Commonwealth Society and it is my pleasure to welcome you on behalf of the Royal Commonwealth Society to the Commonwealth Club.

Both the CMJA and the RCS are registered charities. The CMJA aims to promote judicial independence and the good administration of justice and the RCS objectives are to promote international understanding of the Commonwealth and in particular the work of its people.

Underlining the work of both the RCS and the CMJA is the promotion of the Commonwealth fundamental values including the promotion of human rights and good governance around the Commonwealth.

According to the recent UNAIDS statistics for 2007 over 33 Million people in the world are living with HIV/AIDS. Two-Thirds of people living with AIDS are Commonwealth citizens. 60% of them are women, 60% are young people. Half of the children in the Commonwealth may never grow up beyond their fifth birthday. A quarter of our workforce could die in the next decade. Twelve million children in Africa are without parents because of HIV/AIDS and many are without basic care or education.

In 1999, the Commonwealth Heads of Government, meeting in Durban agreed in Paragraph 55 of their Communiqué to: "pledged personally to lead the fight against HIV/AIDS within their countries and internationally. They urged all sectors in government, international agencies and the private sector to co-operate in increased efforts to tackle the problem, with greater priority given to research into new methods of prevention, the development of an effective vaccine and effective ways of making affordable drugs for the treatment of HIV/AIDS accessible to the affected population. I believe that an understanding of the Commonwealth is the key to creating successful multi-cultural societies across the world.

At their most recent meeting in Kampala, Uganda in 2007, "Heads of Government reaffirmed their commitment to the attainment of the health related MDGs, especially improving maternal and child health; and



combating HIV/AIDS, malaria, tuberculosis and other diseases.” They urged implementation of the political declaration on HIV/AIDS adopted at the 2006 UN General Assembly High Level Meeting on HIV/AIDS.”

But how can this be achieved? To quote, Justice Edwin Cameron of South Africa: “Today one of the most pressing issues in the AIDS epidemic is the use of criminal statutes and criminal prosecutions against HIV transmission. Such laws are increasingly wide in their application and frightening in their effect. HIV is a virus, not a crime. That fact is elementary, and all important. Too often law makers and prosecutors overlook it.”

We are delighted to welcome you today and I would now like to pass you to Alice Welbourn, to introduce our key note speaker. Thank you.

Alice Welbourn:

Good afternoon Ladies and Gentlemen, and thank you very much Karen for your warm welcome. I'm going to tell you a little bit about Sophia. Sophia is the UK Chapter of the Global Coalition on Women and AIDS which is a UNAIDS initiative. We call ourselves Sophia because Sophia was the Greek goddess of knowledge and wisdom. And we may all of us know quite a lot about knowledge about HIV but it is such a chronic and complex tragedy that we also need to have a lot of wisdom around HIV and it's the combination of knowledge and wisdom that Sophia is about. Sophia is a network. We are not an organisation, we're a network, and we hope that you will all become members of the network.

We are here to raise awareness about the realities of HIV and AIDS, particularly in relation to women. And of course in relation to women, how that extends to the rest of society. Today we're especially glad to be co-hosting this event with the Royal Commonwealth Society, and with the Commonwealth Judges and Magistrates Association, because as Karen said, around 60 to 65% of all people with HIV in the world are Commonwealth citizens and around 72% of all women with HIV in the world are Commonwealth citizens. So there are strong links here between HIV, its history and its future, and the history and future of all the Commonwealth. And I think it's no coincidence, an interesting one but no coincidence, that a lot of the Commonwealth countries have similarity in their law-making traditions and also in their legal procedures.

AIDS is a funny business. Two or three years ago, we felt that we'd at last won the battle around scale-up of access to treatment, so that people could no longer feel that HIV was inevitably a death-sentence. People like me for instance, I've been living with HIV for about 20 years now, and I've been on the drugs that keep me healthy, happy, and productive since 2000. And it was really a Lazarus effect seeing that happen when the scale-up of drugs started to take place across Africa and beyond, and where economies could



get going again, workforces could get going again, families and communities could get going again. And we really felt that we'd won a huge battle there, where at last it seemed as though people realised that we people living with HIV do have enough responsibility to take our drugs regularly. Mind you, there's still only about 3 million of us on those drugs and about 9 million people need those drugs in the world, so that battle isn't finished yet. But we felt that we'd come a long way when the roll-out of those drugs started. So that was 2 or 3 years ago.

And then about a year ago, we felt that the next battle was emerging, and this was, for us working in relation to women particularly, we felt that this battle was about our concern about the fact that a lot of pregnant women were receiving drugs - while we're pregnant, while we're having babies - to make sure that our babies are born negative, which is so important to us, but then we were concerned to see that actually, the drugs then weren't being continued for many of these women once the baby was born safely, negative. And of course many of these babies are also contracting HIV through breast-feeding. And even negative babies need healthy mothers and happy mothers. So this was our huge concern a year ago and this was what we felt the real battle-field area was then. And of course it was also to do with, what about all the other women who aren't getting pregnant and aren't accessing any treatment services through ante-natal care? So that was our battle a year ago.

Helena Kennedy:

Alice, thank you very much indeed. It's wonderful to be here. And I should tell you Alice, that there have been occasions when I have been introduced as Helena Kennedy, the lawyer who represents women and other criminals. And the women always laugh.

I just want to start by thanking the Sophia Forum for inviting me to give this inaugural lecture, I'm really greatly honoured. I'm a great admirer of the work that's been done by the Forum in HIV/AIDS, both here in Britain and through its association and relationship with the Global Collation on Women and AIDS. I think that its reach is very important and that it is playing a vital role here, in Britain as an advocacy group. I'm trying to make sure that that issue of AIDS awareness and HIV awareness is really still kept alive and I think that we've gone off the boil on it.

I also want to thank the Royal Commonwealth Society and the Commonwealth Magistrates and Judges' Association because sharing knowledge and best practice is one of the best ways to, of course, save lives and to ensure that there are proper resourcing and proper attitudes to this whole issue. Both the Royal Commonwealth Society and the Commonwealth Magistrates and Judges' Association really do exist to strengthen bonds between nations and to create opportunities for people to come together to



find solutions to some of the great problems that are facing our world. And of course, they do it, particularly the Judges and Magistrates' Association, around justice issues. It's very important that as lawyers and as judges that there are opportunities for people to come together to really share best practice, and to have conversations that wouldn't otherwise take place.

Now, I also want to thank CAFOD because I understand that CAFOD was one of the supporting organizations that has made today possible. And again, a great organization, a great NGO, doing very important work.

Now, it was interesting that this morning I opened up the paper and there amongst the press coverage's, 'Sharp rise in heterosexual HIV cases'. The start of a new campaign to try to spread the word about HIV and about the fact that you can live, as Alice has said, with HIV and that we have to make sure that people understand and know much more about the virus. But what the piece is saying is that the number of people infected with HIV acquired through heterosexual contact in the UK has almost doubled in the last four years. Figures issued yesterday show that there were 960 new diagnoses in the last year in 2007, compared with 540 in 2003. And of course, it's right that the bulk of those new cases, new infections diagnosed in this country last year were acquired abroad and the sharp increase contracted in the UK has taken them from one in ten to almost one in four of all heterosexual cases.

So there are important issues in amongst all of this, but I wanted to really approach it from a different angle. You've heard already about the staggering fact that 65 percent of all the people around the world with HIV are Commonwealth citizens. That's largely because, of course, we're talking here about Africa and Asia in places where the virus has spread particularly wildly. But the statistic is particularly high for women. 72 percent of all women with HIV are from the Commonwealth. And it's right that we should try to seek solutions together because what we do know, is that contagious viruses and diseases don't know any borders. It's like birds of passage, they travel across communities, across society, across classes and, across the genders.

So many of the issues are the same wherever we live, and many of those affecting women and girls have insufficient visibility. What we now know is that the spread of HIV to women is currently increasing more rapidly than it is to men. 60% of new transmissions worldwide are to women. 75% of all young people with HIV are young women. And so it really raises that question of why this should be? Why is it that women are becoming infected?

I just want us to go back a little bit in time to a bit of work that I did in the early 90s, it wasn't related to HIV/AIDS. I wrote a book then which was about women in the criminal justice system and I called it 'Eve was framed'. And the book was a critique of the failures to provide justice for women within our courts because the courts failed to understand the reality of women's lives. And the book's starting point was really about the ways in which black letter

law had been created by men with men in mind. And it wasn't some conspiracy of men in long wigs in smoke-filled rooms, to do down the female gender. It was just the reality of our world that law was created by judges, through judgments in the court and our system of common law. It is shared all around the Commonwealth. It involves the creation of precedent, and it was men who were in the business of making those precedents, making those decisions in the higher courts, and they do it here and they do it in the Commonwealth too.

And through the other mechanisms for the creation of law of course, is the legislation, parliament. And the absence of women in significant numbers in our parliament until very recently, and in our parliaments - plural - has meant that women's voices were rarely heard in the creation of law, in statute form in parliaments. And the third way in which law is made is the contribution that is made by the academy, by the universities wherein legal thinking is done, and which is often drawn upon by judges when they're considering their judgments and when the law commission is considering their advice to parliament on the creation of new law. And again, at professorial level where reputation meant that you would be listened to, there was a significant absence of women. And so the judiciary, parliament and the professorial ranks were very much male dominated and so the legal subject, as an actor, was always configured as male.

And until very recently, you know, we smile about it now but the man on the Clapham omnibus was the person whose views were the test of reasonableness in the courts. My argument, which was then deemed to be incredibly radical but now has entered the mainstream was that a female perspective was missing largely. Even where we had the trickle of women into senior positions, by then, the hegemony of law meant that they very often approached the issues in precisely the same way as their male colleagues. This was because their fewness in number meant that their thinking and way of seeing had often been to adopt the ideas and perspectives of their male colleagues. And so as a result, we saw the creation of law which often didn't reflect the reality of women's lives. You've heard and you know the arguments and discussions that there were around all of those things. Like 'provocation law' and the business of domestic violence where there was a failure to understand why it was that women might stay within relationships.

But as a result of law reflecting and mirroring our society, myths and stereotypes and deeply entrenched ideas about what constituted good womanhood, blighted decision-making in the courts. And so women who committed crimes were often judged as having offended more than the criminal laws because in addition to the law being breached they were also deemed to have broken society's rules too. The rules are the unspoken rules about what is expected of good women. So women as victims of crime too were subjected to those judgments. They were blamed for what was happening to them – why didn't you say no more clearly? - was the cross-



examination in rape cases. Why were you wearing a mini-skirt? Why did you go out late at night? Why were you there at that club in the first place? If he hit you - it would be asked in domestic violence cases - why didn't you leave? It was as though fault lay with the women for their own situation.

Now much of this understanding about law's failure has now entered the mainstream. But in 2003 I revisited the book in order to update it because it's used now widely in sociology group degrees and women's studies and in law, as being one of those works that helps young women going into education at a higher level to understand the nature of how our society functions. And so I went back to it in 2003 and I found that of course, quite a lot had happened. We've seen a much larger number of women going into the judiciary, women going into the parliament, we have better training of judges - one of the things that I have been calling for, for over twenty years - better protection of victims in the courts, and so on. But while things happened, not enough had actually really changed. The myths and stereotypes which operated were still operating in insidious ways, to the detriment of women. The unequal status of women is still a handicap, which is one of the reasons why we've seen the doubling of women in prison in the last 15 years.

Now, you may be asking, what's all this got to do with HIV and AIDS? And I recite this as a background to you, to this subject that we're looking at today. I think this issue is suffused in just the same way with double standards, with mythology, with discrimination. And all of it is routed in women's inequality and the failure of institutions, like law, like health systems, like governments, to take an adequate account of that continuing inequality. And so inequality is the main reason why women are being increasingly infected with HIV/AIDS.

HIV has often been associated with behaviours that may be considered socially and morally unacceptable. You know all of this, the issue of sex work, sex outside of marriage, sex with multiple partners, sex between men, the injecting of drugs. And all of those things, of course then carry with them the stigma that we've been having to deal with around this issue. This single fact, fuelled with high levels of ignorance, denial, fear and intolerance, maintain the social stigma which is attached to HIV infection even still. And people living with the virus are frequently subject to discrimination. Let's not pretend that doesn't continue. Many have been thrown out of jobs and homes, many have been rejected by family and friends, and some have been killed because of their HIV status. And the psychological as well as the physiological toll is often unbearable.

Now the British Red Cross survey; we often think we're getting it cracked here in Britain and it's really in Africa and Asia that real problems exist. But the British Red Cross did a survey of attitudes amongst young people aged between 14 and 25, and they found that 1 in 7 said that they would not remain friends with a person diagnosed as HIV positive. Also, 1 in 5 said that they



would not care for a family member who was suffering from HIV. Now, it tells us something about the levels of ignorance.

The people most at risk of infection are of course people who have known discrimination and prejudice for centuries: Un-empowered women who wouldn't dare to ask their husbands to wear a condom, who just know that they cannot make the ask. Homosexuals and bisexuals who in 41 former British colonies are still pariahs conducting secret and risk-filled liaisons, marrying because it's the requirement in terms of social standing and the requirement by family. And of course the risks then that they have to take, and the risks that they pass on to their partners - men and women, if they're bisexual or if they're having to live a double life. Sex workers, always a despised social group forced to satisfy often violent and demanding punters. Drug addicts so anxious for the next fix that desperation can wipe out any caution. 90% of British people do not understand how HIV is transmitted, according to research.

Even those who think they're reasonably well-informed will not really understand. A friend who has worked on HIV/AIDS issues in an American women's prison described how back in the early 90s, HIV prisoners were treated like pariahs within the prison system, with demands from other inmates that they be removed from communal facilities. That they had to keep and wash their own cutlery, and plates, that they be excluded from the toilets and the shower rooms. And it was only when some of the more informed prisoners started education programmes within the prison for the other inmates, to just basically do basic work on education, that a support network was set up within the prison and sanity returned. In British prisons, of which I have a lot of experience, I can tell you, the issue is dealt with by really just maintaining secrecy. But women prisoners live in constant fear of their status being discovered. And again, it's because of the fear that they will be isolated, by other prisoners and indeed by prison officers.

Why are the numbers of women with HIV figures rising and why do I see that inequality is a central issue for them? Even still, women think that they are not at risk if they do not fall into the classic categories of sex-worker, drug user or person who has multiple sexual partners. If they're not in one of those categories they just don't think that this is going to happen to them. They imagine that it is only the other kind of woman who gets infected. Women themselves have absorbed judgmental stereotypes. And women themselves are often very hard on other women. Assuming that those who acquired HIV status must have behaved in ways that brought that punishment upon them. Women are the ones who are blamed, and like my biblical Eve, that I put into the title of my book, the woman is seen as the cause of heterosexual male infection. Either because a promiscuous woman caused the infection, or because - and I've heard this said - a wife must have been failing to satisfy her husband, for her to have driven him into the arms of others.

The same belief system as I've described, pervading criminal trials and we would see it often that it would be women on juries often, either in rape cases or in domestic violence cases, would often make the toughest judges of their own gender. In fact, frequently, the woman becoming infected has only had one sexual partner or has been faithful for years to her husband, but not reciprocated with his own fidelity. And because the man has had unprotected sex with someone else, unbeknownst to the woman, she's unlikely to even consider the use of a condom. And of course it can be many years before a diagnosis is made. The husband may feel that the sudden use of a condom, if he were to ask for it, is going to alert his wife to his unfaithfulness. And so whatever his anxieties about having exposed himself to risk, he will run the additional risk of saying nothing to his wife. And negotiating those sensitive issues around sex and sexual activity is hard in the most equal of relationships, but particularly hard where the status of women is low. Then it becomes almost impossible. Women do not feel that they can ask and do not feel that they can insist upon the protection of a prophylactic. And to introduce blame and moral opprobrium and to introduce the criminal law into this area only exacerbates the problems.

But this, of course, is precisely what happens. Condemnation is everywhere. I know that it has become unpopular to ever give any mention nowadays to the word patriarchy, but I think it's important that we remember it because of course, patriarchy gave us a way of understanding the way in which our societies had all developed. It's a system of power relations and it's a system of power relations by which it was possible for men to dominate women, and history has shown that patriarchy is the most basic form of oppression within human society. Of course, we know there are lots of other oppressions around race, around class, around many other issues, but the reason why women have suffered oppression is because of the physiological and the psychological differences between the genders. And it's long, it's ancient, it's old, and of course modern societies are trying to eliminate the discrimination that exists against women but we still have some way to go.

Women are still the main carers and home-makers around the world and are often financially dependent. And as a result, they are usually at the bottom of the queue in the family's priorities in accessing, for example, antiretroviral drugs where there is a requirement to pay. And so then, of course, the male breadwinner will lay a prior claim, as of course will the children in the family because that is what she would choose. And so it's often women who miss out on medication and as a result many are dying. They are also not active in the public domain in the way that men are and their voices are not heard as clearly in making their claim on resources or accessing support. Health is often sought too late because of their sense of isolation and the way in which family structures operate to maintain that silence and the stigma that surrounds this issue.



Around the world, 62 million girls of school age do not attend school and all the research shows that girls who have little education are much more vulnerable to HIV. And of course, there are multiple factors at work here and we can't say that that is the absolute link. But it is important for us to know that as soon as women become empowered through education, they are less susceptible to the social pressures that lead to infection.

I have just returned from Ethiopia where I was involved with work on women's mortality and one of the central problems there is the continuance of child marriage and it's true in other parts of the world too. It's true, in fact, even here in Britain about the early start of sexual activity. Underage marriage is supposed to be unlawful in Ethiopia and other countries. Girls as young as 11 and 12 are being married by the village priests, by the imam, by others, to boys and men. Boys who are 17 / 18, men who are much older who've often already experienced sex with sex workers or with other infected persons.

And the girls that I was seeing in Ethiopia had often undergone female circumcision, also something that is apparently outlawed but which continues apace. The rationale behind female circumcision is to ensure that women remain virgins. What we know with the continuation of child marriage, is that upon marriage the girls are passed to the family of the man and, of course, sex is very painful if you have been infibulated. It often feels like a very brutal experience to these women, involving penetration of the vagina, which has already been stitched. An immature vagina is very susceptible to tears and infection. And so it is, that HIV readily spreads. And soon, of course, the child bride is pregnant and the child body of these girls is often unready for birth, and long labours lead to fistula, infant death, haemorrhaging, serious damage to the women and often female mortality. And it's no wonder that maternal mortality is so high and it's no wonder that marital sex is often so wretched an experience. And so rather than an expression of intimacy, for many of the girls it is about endurance.

The majority of women who've become involved in sex work here as elsewhere do so because life has offered no better way of surviving. Many women take to the streets, and this was certainly true in Ethiopia and it's certainly true as I've travelled with the British Council, I would often go to women's organisations to see what work was being done, as with this organisation, and the story was always the same about women taking to prostitution because they'd been rejected by their families and by their communities because they'd failed social norms. They were suffering from poverty or that they'd failed to provide for their husbands and children in ways which were considered to be the right way. They'd failed to be satisfactory daughters because they'd brought dishonour on their families because they had become pregnant outside of marriage or because they were considered to be promiscuous. If they weren't compliant wives, if they failed to produce children, breaking the rules or the expectations in some way would often lead to women being rejected. And women who were raped would often be



rejected by their very own families. And so that whole business of honour and appropriateness has blighted women's lives everywhere, and it's very important to remember that every sex worker who has HIV has been infected by somebody else, and usually clients who refuse to have protected sex.

Now, I am very good friends with Edwin Cameron, the judge who you've heard already quoted. I'm also a very good friend of the Australian judge Justice Michael Kirby. Both of them, very senior judges who have spoken out on this issue eloquently and so persuasively. It is a regret that we haven't had something done by a senior judge here in Britain in quite the same way. But my friend Michael Kirby, the Australian judge, tells the very depressing story of the outbreak in Edinburgh in 1497 of a suspected venereal disease. And it was given the name 'Grandgor's distemper' and the city records describe how the sickness was believed to have been brought from the New World. We always think this is always about things foreign. And it was assumed that it was because of Columbus' trips abroad that he'd brought this thing back, or his sailors had, and it was claimed that it was first reported after the siege of Naples and that somehow this was the way in which the disease had been brought and that it would progress through Europe with great speed because it was a contagion.

And the King of Scotland and the grandees of his council issued a proclamation, as it was not very differently to the ones we're seeing now lets put a small bug into the people living with HIV so that we know when they're coming and we can have a siren call when they come into our midst. But in exactly the same way, first of all they decided they had to be exiled and banished to an island off the coast of Scotland and anyone who didn't comply with the royal command was branded, and that's what we're hearing described, in fact, when we're talking about people having some kind of thing put into their flesh. People in Scotland at that time had a hot iron placed against their cheek so that they could be identified as carriers. And Michael Kirby says 'panic, alarm, banishment, cruelty, public stigmatisation, law- the melancholy companions of epidemics'.

And here we are, not only in a new century but in a new millennium and we still do the same things. Our responses are not so very different. And of course, the same kind of stigma is still dire. When governments are faced with public panics and their citizens are overcome with fear, they often reach for legislation. They see it as a panacea, as a way, and we've seen it around terrorism, and those are the cases that I'm currently very engaged with. And so much of that hysteria has led to legislation which is of a highly questionable nature. Around the world there has been this increasing trend which we've heard mentioned, towards the criminalisation of the transmission of HIV. And since exposure to HIV infection may lead to AIDS, the claim is that it's therefore life-threatening, and it's a legitimate purpose of law to endeavour to protect individuals, communities and the nation. But of course, what we all know and people who are best advisors on all of this, people who are

themselves HIV, people who work in the organisations with people who are HIV in status, will tell you that in fact it is counter-productive. Because what it does is that it makes people fearful of coming forward for diagnosis, for testing, and in fact is more likely to drive this underground. And it just, in our own mindset, creates a sense of this being something bad, and that is the thing that is so pernicious about criminalisation. And so, we really do have to examine the way in which the criminal law is being used.

In this country, the law has been used 14 times to prosecute wilful transmission of disease. But in fact, in the criminal law, as many of you will know, there has to be a mental element. It's not just that the act itself, in doing something, involves a crime, there has to be an intention to commit the crime. If you do something by accident, then of course, it's not deemed criminal. But added to the intentional is this idea of recklessness. And so the use of the notion of reckless transmission is the thing that has led to most of these convictions and these cases that have gone before the court.

There's a very interesting book that has been written on this subject by Michael Wheat, who is a senior lecturer in law at Birkbeck College. I was very grateful to him because he had sent it to me and it was so interesting, his analysis of how the courts work, and it was like going back in time, to the work that I had done around rape cases; the way in which into the court room comes all those attitudes, all those underlying prejudices, whether it's in the voices of lawyers as they cross-examine, whether it's in the judgements of judges as they pass sentence, or one suspects within the jury room too. And, Michael Wheat, in that book lays out those cases with particular interest in one particular case, which is the case of Festein Penzany, where he had the transcript of the evidence that was given, and it really does show those undercurrents which can be so poisonous to the well of justice.

Of the 14 cases, it's interesting that the majority of those cases involve heterosexual sex. Only 2 homosexual men have been prosecuted. Of the 14, only 2 women have been prosecuted, but of the remainder, 6 were foreign men, and the majority of those, refugee, asylum seeking men. And it is in that awful alchemy of race and sex, that often the worst things happen in the courtroom. The idea that it is black men who are introducing disease into the country; the idea that somehow they are interfering with our women. And for the women, what was so interesting, was that one was a young Welsh woman. She was not named because she was still under 21, and she had had a relationship with the man to whom she had transmitted HIV for a year, and she wanted to have a baby with him. They were living together, and she described how when she was diagnosed she was so fearful that she was going to lose him. She couldn't bring herself to utter the words to him that she may have infected him. And so into this come all those things of fear, of loss, of denial, as there is in any kind of relationships. And she ended up, of course, getting 2 years youth custody as a punishment and her partner testified against her.

The woman who is named, and you may have seen the case because it got a lot of coverage, was a woman called Sarah Porter, she pleaded guilty. In fact she came to the attention of police not because there was a complaint by a man who discovered he was HIV and had been infected by her, but he had gone to the police about something else in relation to her. It was subsequent to that that it was discovered that she was HIV and so the police put out a call to any men who'd had sexual congress with her to come forward and to give information to them so that they could prosecute her. And the AIDS agencies and the HIV support groups and so on were absolutely appalled at this way in which it was actually speculative and was also seeking out complaints against her. And you would really have to see the cuttings of the coverage that she received. It was just appalling. You know, it has these Ruth Ellis elements in it as this woman was described as 'pure evil', 'a bitter blonde who contaminated men', 'a heartless blonde man-eater' was the Daily Express, and of course, she was a single parent who'd had a number of different boyfriends, and who was as despairing as any of the men with whom she'd had relationships when she'd discovered she was HIV. But the idea that you end up reducing the spread by that kind of case being brought before the courts is, in my view, just a delusion. And in looking at the case that Michael Wheat concentrates on in his book, which is called 'Intimacy and Responsibilities', looking at that case that he concentrates on, what you hear time and time again are the descriptions of relationships. The descriptions of people still not embracing the possibility that you can live with HIV, the failures and ignorance about the nature of HIV. And of course, the continuing belief that somehow if you're in a relationship, once it has passed that early stage, that you feel comfortable and therefore you move on to having condom-free sexual contact because you just might not mind having a baby, and the thought that the person which whom you're having the relationship might be HIV probably doesn't even enter anybody's head.

Are there occasions on which it would be appropriate to prosecute? Well we have law on the statute books here in Britain already which can deal with that. Section 20 of the Defence against the Person Act, a very ancient law, a 19th Century law, has been used. There could be occasions on which it would be appropriate because someone had intentionally gone out wanting to infect people. But that's not the stories that you see in the cases when you examine them. But what you do see is hideous discrimination and ignorance present in the courtroom, so that even our lawyers and judges just do not adequately understand the nature of HIV. But it is interesting that in making his argument that criminalisation is inappropriate; Michael Wheat goes back to the idea that aren't we all responsible for ourselves? And if someone is entering into a sexual relationship and not taking control and insisting on the use of a condom, isn't that, therefore, the acceptance of a risk? All I would say, in response to that, is having been someone who's acted for women so often; I think you have to inject into that the inequality that exists between men



and women, the fact that for many women there is still that feeling of not being able to make that, as a demand.

That sense in which there is not, even though the sexual act should be seen as something that involves two people, consensually, participating in intimacy, very often it isn't quite like that. And so the reality is that every case has to be looked at with some care, but in my view there should be a reluctance to prosecute except in the exceptional circumstance in which someone has failed to obtain real, informed consent, where someone has really, deliberately, gone about the business of having sexual relations without a care for the consequences and has deliberately infected. But I think those cases are rare and I didn't see them amongst the cases that Michael has written about in his book.

Another element has emerged though, in the prosecution of these cases, and one is the way in which the state, on the basis that they are concerned with public policy, has been prepared to interfere with privacy and interfere with epidemiological studies. I was the Chair of the Human Genetics Commission for 8 years, and one of the cases that particularly concerned us was that in Scotland an HIV piece of research was done in one of the Scottish prisons. Everyone was given anonymity and injecting drug users participated, many of the men in the prison took part in it, they were themselves given information if they wanted it, about the result of their tests, but they were guaranteed anonymity. And that anonymity was, in fact, not respected when a criminal complaint was made, and the Crown, wanting to determine whether he had been tested at a particular time, and would have known, de-encrypted this epidemiological study. Now, the consequences of that for research on all manner of things to do with health is very serious and certainly has meant that men in prison are now very reluctant to take part in any health survey and research because they don't believe that their privacy will be respected. And so, I think that we haven't thought through some of the long term consequences of going down this criminalisation route.

But it's not just in the criminal courts that we see hostile attitudes. Colleagues of mine involved in asylum cases say that a diagnosis of HIV status can become a particular stumbling block when they're presenting cases. The culture of disbelief that exists within the Home Office within the Immigration Service is further inflated when HIV becomes an element. There is often an unspoken blaming of the victim, even where she's been subjected to rape and she's seeking sanctuary after very serious persecution. The immediate suspicion is that the claim for asylum based on persecution is that it is bogus and that it is manufactured to secure Western treatment, using antiretrovirals that are not available at home. And so, this is one of the problems that the lawyers in my chambers talk about frequently; that once it's an element, it really is problematic to overcome it. There is also evidence of poor treatment of women and their children in detention centres; either while they're awaiting deportation or when they've first arrived and before they've been allocated a



place. The Home Office maintains that women who've been here and who've been receiving medical treatment will be able to avail themselves of the same kind of medical treatment back home, once they're deported, and it's often not the truth. The fact that some people back in their country of origin can avail themselves of antiretrovirals is absolutely no guarantee that it will be available to someone being deported from here, and probably less likely.

And in reality, the most effective laws that we can offer to combat the spread of HIV is Human Rights law. And what is paramount is that we protect those living with HIV/AIDS from discrimination, and discrimination is still rife. It's always important, I always think, to remind ourselves of why human rights came into existence. Of course, the first wave of human rights was back in the eighteenth century and became the thinking and the ideology behind the American and French Revolutions, and in America became part of their Constitution, but the second wave of rights came after the Second World War and it's important to remind ourselves why. It was because, after the Holocaust and the shock of that attempt to exterminate people, it forced a re-think of law and forced us to accept that sometimes persecution doesn't just come from the state. It can come from your next-door neighbour, and that lawyers and judges can play their part in that persecution. As indeed they did in Germany, claiming that all they were doing was administering the law and that's what lawyers and judges are supposed to do, isn't it? And so it was felt that some kind of new order had to be created, and the star in the creation of all that was one of my heroines, Eleanor Roosevelt, who held the first drafting meeting in her flat in Washington Square in New York in February 1947.

And that meeting was very interesting because it was a very eclectic gathering of people. There was a Stalinist from Soviet Russia, there was a Confucian Chinese representative of China, there was a Lebanese Christian, there was a Muslim, there was an academic lawyer from Canada, there was a Brazilian Catholic. There was a spread of people with different belief systems and what they found when they looked for and discussed this; they said well, can you create global law that can stop this kind of thing happening - the victimisation of groups of people - for whatever reason? And what they said was well we can't create global law because law comes out of the fertile soil of individual cultures in different nations and are therefore different. But what you can do is you can create a template of values against which every legal system can be tested. And in doing this and going through this process, they looked for what values are shared by everybody, whatever their religion or non-religion, whatever their world view. And what was accepted was that everybody knows what it is to be persecuted, everybody knows what it is to have their life threatened and put in danger, everybody knows what it feels like to be tortured. Everybody knows what it's like to be discriminated against and to know that you're not equal. Everybody knows what it can be like to be denied a proper family life, to be denied the things that we have written into the Universal Declaration of Human Rights.



And so, it isn't about creating global law, it's about creating a set of global values and the list of those rights is familiar to all of you. The right to life, the right to family life, the right to privacy, the right not to be tortured, the right to live free of discrimination. And those are the principles that I think we have to draw constantly into our daily round, in our relationships, man to woman, whatever our relationships are, whether they're of our own gender or of the opposite sex, whatever. In our relationships with our neighbours, in our relationships with the people with whom we work, human rights should be suffusing those relationships.

And so, the way in which we should be approaching all of this is always through that prism. So, when the question is asked 'Should HIV women be entitled to fertility treatment?' the answer is Yes. 'Should they be able to hold down jobs in nurseries and schools and in the health service?' and the answer is Yes. 'Should they be entitled to asylum if they've been persecuted?' and the answer is Yes. And in fact, it may be that one of the reasons that they were being persecuted was because they were HIV. The best vaccine for all of this is knowledge and the best way to prevent the transmission of HIV is behaviour modification and it has to be built on knowing more about how this can happen. And to create a much higher level of awareness amongst the public without inducing panic. And so it means that we all have to become advocates. We all have to become spokespersons about this, and we all have to also know that inequalities, those ugly things about feeling alienated from the other, are the things that feed into the stigma.

When women are educated and empowered and independent, they are able to take control of their lives, and much more able to say No. They're much more able to leave abusive relationships and they're much more able to say 'Only with a condom'. That's about fundamental Human Rights, and that's what I wanted to talk to you about today. And so, I want to thank you for coming and for listening, and I want to pay special tribute to Alice, who stood up and said she's HIV, she lives with it, and she is a wonderful woman advocate for the things that I've been talking about. And so, I want to say to all of you, when we leave here today, we have to be talking about this message, into all of our organisations, into the workplace, wherever we are. The word has to go out that this is about Human Rights. Thank you.

Karen:

Thank you very much Helena, for that wonderful presentation. I'm sure that it has stimulated people's minds. We've got about ten minutes and Helena has kindly agreed to answer questions for about ten minutes, so if you have a question, can you put your hand up and before you ask your question can you state your name and, where appropriate, the organisation you come from.



Thank you.

Question 1:

My name is Fiona and I am from the International Community of Women Living with AIDS and I sit on the steering committee of Sophia. I am also HIV positive and was diagnosed in the early '90s. I think something that's become apparent to me over the years is that we seem to be stepping back in time when there were huge wrongs committed against people living with HIV. This is now increasing and getting worse instead of changing and getting better. And Helena I used to work at the Central Criminal Court for about 20 years and I remember the times then in the late '80s when we had the first witness that was living with HIV and there was a huge panic about whether the Bible should be burnt after he had been sworn in and so I am distressed to hear that things haven't moved forward (Helena: and the putting on of gloves in order to pass things to people and unbelievable things used to happen it was terrible)

You rightly said and its something that ICW and many positive women, positive people agree with is that Criminal Law isn't the way forward. It's counterproductive and it also creates huge injustice against people living with HIV. I was wondering, in your book "Just Law" you referred to a case that wasn't related to HIV, it was a young women who you defended in Bangladesh and you were talking there about restorative justice and mediation, and I wondered what role you saw that playing within the criminal justice system.

Question 2:

My name is Margret Owen and I represent Widows for Peace and Democracy. I am just so glad to be here, thank you Helena for everything you said because one of the most ignored areas of women with HIV is widowhood. In many Commonwealth countries and all over the world women who are widowed through AIDS carry multiple stigmas. Because of all the stigma of widowhood itself they are often denied any rights to inheritance to land and they are actually forced into prostitution, their children are forced onto the streets, they have to sell their children, send their children into early marriage. I'm just so glad to meet Sophia and hope that we can actually through Widows for Peace and Democracy join that global coalition because it is one of the most scandalously neglected areas. What happens to widows who are often accused, they are accused of witchcraft, they are accused of killing their husbands, they are often stoned to death, beaten and then they are forced into prostitution and their children are forced into early marriages, which also spreads AIDS, thank you.

Question 3:

My name is David Gordon McClyde and I am from the Foreign and Commonwealth Office. In my last posting I was High Commissioner in Papua New Guinea where I was a strong advocate for leadership and a whole lot of other things in the HIV/AIDS field, which is an extremely serious problem there because of the cultural setting. I was wondering what priorities the Baroness would set governments in terms of what we should be doing vis-à-vis other commonwealth governments particularly in the third world commonwealth.

Question 4:

Hello my name is Anton Kerr and I work for the International HIV/AIDS Alliance. The Alliance supports marginalized groups in communities across several countries particularly sex workers and injected drug users, men who have sex with men, so it is very inspiring to hear your talk. I wonder what your views are on there seem to be two key opportunities that we have because there has been an erosion of the human rights approach particularly to HIV. And two of the key actors, well one of the key actors in undermining the human rights approach has been the US, so where we sit supporting communities and civil society on key institutions like the Global Fund and UNAIDS, the US has undermined human rights language and the edicts that went out from US funding in relation to programmes that they support stop programmes even being to talk about human rights and women in one sentence and so it really undermines the kind of work that takes place. So with the new administration there seems to be a key opportunity and I just wondered what ideas you had on what we can do given that the new administration wants to embrace and make up with the world, what can we push to reinvigorate human rights. And the other issue is around the commonwealth. The Commonwealth is quite a latent and fairly unproductive institution but there are potentials to create change and was wondering if you had any ideas of how we can push coordinated change and changing laws, discriminatory laws, and updating constitutions so that human rights is better appreciated

Helena:

I love the idea that you have raised this issue of restorative justice because when you look at the cases that come before the courts, it is right that those who testify in those cases and give statements to the police are usually at that time feeling very complicated sets of emotions and often anger and bitterness towards the person that transmitted the HIV to them is one of the things they feel. They feel a huge amount of resentment and often rage. Of course the criminal courts are very unsatisfactory places to deal with those heightened emotions and actually restorative justice is one of the best ways of dealing



often with that sort of process that is not about punishment but where someone can place their sense of betrayal where they feel that they were betrayed.

For the women in the cases that we looked at, they often felt that there was a level of trust that was obviously abused and so I think that there could be better processes and I am a great believer in the restorative justice steps that we can take on that. I think that it is a difficult one and there would have to be very sophisticated people who manage that process and I am not sure that currently within our judiciary we have people with the skills but I think that there are people who could have those skills and I think that often there are better ways of dealing with the anger, the sense of betrayal and so on than using the criminal process which never deals with it well, so thank you for raising that because I hadn't actually put my mind to that and I now will so I am grateful.

I want to deal with the case that Margaret brought up. Margaret it is very good to see you and I know the wonderful work that you do. I too have travelled in Africa and have met with women and women who have been brought to prostitution, where a lot of the terrible things around the law is that for women in Africa inheritance is seriously problematic because often although they have been very much involved in the land and the cultivation of the land very often as soon as their husband dies one of his brothers or someone within the tribe will actually take over the land and the women will be ejected from it. Women will often tell you terrible stories of the turn that life took once they lost their husband.

So I again think that the importance is information, letting people know those stories, letting people understand and as far as I'm concerned as a lawyer one of the things that I always wanted to do when I was with the British Council is that ones links with lawyers similar legal systems that we can be talking again about inheritance laws, not just about criminal law and its not just about immigration or asylum law, other areas of law can make a difference in peoples lives and one of those is about property and inheritance and so on. And the proper rights that there should be vested in women if we want to talk about equality then inheritance law should be one of them.

Can I then take us onto the business of the colleague working at the Foreign and Commonwealth Office in Papua New Guinea. I mean setting priorities I am probably not the right person to talk to about that. But I would have thought that one of the major things is to again engage in a discussion which is about human rights and which is about education about the position of women and the whole business of how homosexuality is treated. I am sure that all of that is part and parcel of the problems that there are in Papua New Guinea. And I just think that we have to, there is always this business about sensitivity, that the UK telling other people how to conduct their governments and so forth but I do think that we have to keep going back to the fact that the



Universal Declaration of Human Rights is not something that was made without everyone participating in the product and that these are values in which Papua New Guinea I'm sure share too and that is respect for the other and how that can take on a reality. I just think education is the heart of this, it has to be and that has to be the major thing and I hope money is put in by our country and with the NGO support to actually do work on education.

Can I just turn to the business of the United States. Oh poor old Obama, I feel so sorry for him that he has so much on his shoulders. If there ever is a guy that really one's heart goes out to. It's a thrilling moment because you're absolutely right and it's not just in relation to all those things around. Uganda is one of those places that usually sticks out to me. Uganda was leading the way in dealing with the whole business of HIV/AIDS. In fact that was one of the great things we used to do within the British Council, which really flew below the radar. But what I was very proud of was that instead of it being Britain going out and telling folk how to do things, we did a different thing which was we brought people who had become experts in Uganda, community groups, support groups, people working in prison around HIV/AIDS we got them to come from Uganda to South Africa to work in a prison in South Africa, just outside of Durban. So much better that Africa is having that conversation and it was all moving on and then of course the whole Bush administrations way of dealing with this has absolutely had a devastating effect on Uganda.

I just think that Obama having a knowledge and understanding of Kenya must know how important it's going to be for him to be addressing some of this stuff and to lift those horrible embargoes that were created around their aid agenda for the United States. So I'm sure that he will change policy on all of this. I'm sure that with having Hilary in there if she becomes Secretary of State, again it will be one of the areas where I think that you will really see some difference. As for us in the Commonwealth coordinating change, I think there is a very real role to be played here. And I am not sure that we make enough use of that common wealth as a way of coming together. One of the things that has come out of my looking at this is that I want far more work to be done between lawyers and judges, that it is on agendas at conferences, this is never on the agenda. We should be making sure that it is on agendas for discussion right in there in the midst of it.

Karen:

Perhaps I can come in on that particular point. The HIV/AIDS has been on the agenda of the lawyers and the judges' conferences but perhaps not on the law ministers and the attorney generals, and the commonwealth leaders have agreed to commit themselves to implementing human rights and ratifying the human rights convention, but it is always the implementation that is the

problem. And I think we should be encouraging, and you said something about what can the Foreign Office do, they should be encouraging fellow Commonwealth countries to sign, ratify, and implement the human rights conventions in accordance to all the commonwealth declarations they have agreed to. I'll take about three more questions.

Question 5:

Nick Partridge from the Terrence Higgins Trust. Firstly I think that it is a real reminder of how much all of us need to celebrate the 60th anniversary of the Universal Declaration of Human Rights over the next two weeks and to support it over the next 60 years. I've got two quick questions for you. Ten years ago the Home Office consulted on a draft new violence bill which would have clarified the distinction between reckless and intentional transmission and brought up to date the Offence Against the Person Act from 1862 and a range of other violence issues. It did not get parliamentary time, do you think that we should be lobbying and arguing for a revision. Secondly focusing on those cases that come to court in the UK we wholly understate the impact of this on the lives of people with HIV, in particular the actions of the police in investigating complaints.

We know at Terrence Higgins Trust of well over 100 cases which haven't come to court but which have lasted for months and absolutely ruined the lives of those being investigated the question that comes is what can we be doing to work with the police to increase their understanding of the limitations of the law and how they should be best approaching the complaints that are being made to them.

Helena:

I am going to come right in on that because the first thing was that there is no doubt that the Offence against the Persons Act really is a 19th century piece of legislation that really needs to be revisited and the Law Commission has done work on it and there was a moment where it looked as though it might happen and then of course it got buried in the concrete wash of other legislation. I would like to see that revisited and I think that we all should be heard on it but what we don't want to see is some special offence made in relation to HIV.

With regard to the police, I actually think with the new Director of Public Prosecutions, I can tell you all that he was in my chambers and he is a good man and has come from a human rights background. And I think that it is a moment where the Terrence Higgins Trust should step right in there and say we would like the opportunity to meet with you to talk to you about whether criminalization is a useful thing to be happening in this area and whether the police with their great heavy boots should be investigating these things at all or can there be some other way of when people make a complaint and are in that anger that I have been describing, a way in which one can try to deal with



that differently and I think that the Terrence Higgins Trust should be taking an initiative on this. He has just taken on the job and see if you can persuade him, he is a good person to talk with police about what the right processes are.

Karen:

We're running over time a little bit. But I will take one more question. Please keep it very short and we will wrap up.

Question 6:

Ann Smith from CAFOD. A number of points have come out about the role of the UK government in influence on the judiciary here and in other countries and I am concerned that the UK government has recently through DFID published its new HIV strategy which rolls all of its response into basically strengthening health infrastructures and health services internationally. My whole concern around that is that it becomes a way of closing down the wider arguments that development agencies would make around poverty, gender inequality, poor legislation, all of those arguments get lost out of the commitment by the UK government that is about strengthening health infrastructures. I'm glad you encouraged THT to lobby the judiciary here on the injustices there. My question is how does the UK government sound up and denounce injustices of criminalization in the international forum and influence in the way it can lobby for change while its policy is all about health and health infrastructure. I am just concerned about the silence.

Helena:

I was not conscious that it is so heavily concentrated on health and that there isn't enough discussion around the human rights issues. I think that this is one of those areas where again NGOs should be lobbying the Secretary of State on this and certainly when I see him I will have my own word in his ear about this. But I hadn't been aware that that was the case. I think that it's about us having to lobby. And before we wind up this thing, there is the big picture and then there is here in Britain and the ignorance in our own schools is just unbelievable. There isn't one of us that couldn't in our own local community volunteer to go into the secondary school and talk a bit about why this is important and what people need to know and so forth. And really just bring it back home to people, because if you ask around, I have teenage kids and if you ask around HIV is not in their heads at all, it's kind of slid away and we need to bring it back onto the agenda.

26 November 2008