

ORIGINAL ARTICLE

Criminalising HIV Transmission

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ABSTRACT

Objective: This paper attempts to summarise the global state with regard to the criminalisation of Human Immunodeficiency Virus (HIV) transmission.

Method: A comprehensive analysis of both global and Zambian publications, legislation and case laws was conducted.

Results: Proponents of criminalisation of HIV transmission argue that criminalization would serve as a deterrent to the culprit and others to engage in prohibited conduct in future while the opponents argue that there are no well-founded evidences that criminalization of HIV transmission will lead to a reduction in new infections.

Conclusion: The onus is on the government and other institutions to critically look at the positive and negative aspects of criminalization of HIV in so far as the legal approach to the fight against the pandemic is concerned. A combination of effective evidence-based approaches should be adopted to expand targeted efforts in preventing new HIV infections in Zambia.

INTRODUCTION

HIV is transmitted in a number of ways with the most common transmission being through unprotected heterosexual sex. Zambia's current HIV prevalence rate is estimated at 14.3% in the adult population of 15-49 years.¹

The transmission of HIV could also be intentional, reckless or accidental. It could also be due to negligence. Though many countries have specific offences relating to the exposure or transmission of HIV, it has been argued that these offences have little impact on

the spread of the virus. Therefore, it is viewed that criminalization of HIV transmission has not had a positive impact in the reduction of HIV transmissions. It is stated that the majority of transmissions occur when the infected person is unaware of his or her own infection. In some incidences, an infected person could be aware of their status, and despite this knowledge, willfully and intentionally sets out to infect another person out of ill will or other malicious reason. If transmission occurs as a result of sexual intercourse between an HIV positive and HIV negative person and the negative person is not informed about the status of the other person, this would be regarded as reckless or intentional transmission or recklessness if a high risk of infection was obvious and the perpetrator did not do anything to prevent the transmission..

OBJECTIVES

This paper discusses the pros and cons of criminalizing intentional infection of HIV. It provides insights and forethoughts about what constitutes criminalization in a global scenario, as well as its impact on the spread of new HIV infections. Some statutes that are used to criminalize certain acts will be analyzed to see how they are used in HIV related cases. The paper also looks at the Zambian law to see if there are such statutes used or can be used in the fight against HIV infections. It is hoped that this will provide an evidence-informed approaches that have been proven to reduce HIV transmission while protecting the human rights and liberties both of those living with HIV and those who are not HIV-infected in Zambia.

METHODOLOGY

The objective of this discussion paper is to provide a review of the criminalisation of HIV transmission across the globe. In doing so literature on various laws and issues surrounding the discussion topics were reviewed. Based

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on the literature, both proponents and opponents for criminalisation of HIV transmission are presented.

Data for the paper were drawn from a range of sources which include:

- ◆ International human rights instruments, such as the Joint United Nations Programme on HIV/AIDS (UNAIDS)
- ◆ National legislation and case law
- ◆ Prosecution Guidance such as that for England
- ◆ Available empirical research data, such as the Global Network of People Living with HIV/AIDS (GNP+) Global Criminalisation Scan
- ◆ Policy output and publications from HIV/AIDS non-governmental organisations (NGOs)
- ◆ Academic research

The immergence of laws to proscribe intentional transmission of HIV infections

Available literature show that since 1987, when prosecutions were first initiated and HIV-specific criminal statutes enacted in the United States, increasing numbers of countries around the world have applied existing criminal laws and/or created HIV-specific criminal statutes to prosecute people living with HIV who have, or are believed to have, put others at risk of acquiring HIV.²

Such laws are now spreading across the world through United States, Australia, Canada, Europe and now to Sub-Saharan Africa and Asia. For instance HIV specific criminal statutes are found in 37 of the 50 United States of America, in Africa 27 countries have them, in Asia and Pacific 13, Latin America 11 and Europe 9.² For example, while in Tanzania, proof of willful transmission leads to life imprisonment, in Benin, exposure to HIV even when transmission has not occurred is criminalized. Most of these laws are based on the African Model Law, created in September 2004 at a workshop by Action for West Africa Region (AWARE) in N'Djamena, Chad.³ Since then, a number of African countries including Guinea-Bissau, Benin, Mali, Niger, Togo and Sierra Leone have passed laws criminalizing HIV transmission and several others are proposing to enact similar laws.⁴ While in Sub-Saharan Africa, countries such as D.R Congo, Uganda, Kenya, Tanzania, Zimbabwe, Mozambique and Malawi^{5,6}

have all domesticated HIV-specific provisions in laws in the fight against transmission of HIV and AIDS.

In Zambia, there are no HIV specific laws but the Penal Code, Chapter 87 of the Laws of Zambia has criminalized negligent acts likely to spread infections. Section 183 of the Penal Code states that any person who unlawfully or negligently does any act which is, and which one knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, is guilty of a misdemeanor. Although this law could also be applicable to the intentional transmission of HIV through deliberately withholding the information of one's status, interviews conducted with certain eminent lawyers in Zambia indicate that the law has not be applied to HIV.⁷

Proponents of criminalizing intentional transmission

One of the reasons advanced by the proponents for criminalization of HIV transmission is that it would serve as a deterrent to the culprit and others to engage in prohibited conduct in future.⁸ Once a convict is sentenced, this would provide retributive solace for the victim. They are also of the view that criminalization will bring about incapacitation. It is argued that with the absence of a cure for HIV and AIDS, justice must be sought by incriminating the offender.⁹ Others submit that criminalization of those who willfully transmit HIV can provide the offender with the opportunity of rehabilitation to change their behaviour to avoid harming others in future.¹⁰ The proponents further contend that by criminalizing intentional spread of HIV, there is promoting public health and morality as well as safeguarding the rights and health of vulnerable women and children.¹¹ It should be noted that prevention of HIV transmission should be the single most important objective in the use of coercive measures such as criminal law in the fight against the pandemic.¹⁰

According to McArthur,¹² in some states and jurisdictions where general criminal laws are employed in HIV related cases, reference is made to criminal law offences during arbitration such as assault with a dangerous or deadly weapon, murder, manslaughter, common nuisance, endangering the life and health of the public, criminal negligence, causing bodily harm and many others.

It follows from the above that apart from merely applying general criminal law in prosecuting cases involving

intentional transmission of the virus, many nations have justified the need to enact HIV specific laws. This is premised on the belief that unlike traditional penal codes, HIV specific statutes do not require proof of harm, causation or state of mind. What is material is that the accused engaged in the prohibited act without informing his/her sexual partner of his/her HIV status.¹² In addition, such HIV-specific laws will not only serve as a deterrent to those who transmit the disease to others with full knowledge of their HIV positive status, but will also minimize the risk of unfair or inconsistent judgments common in the use of existing criminal law offences.¹³ With these HIV specific laws, engaging in any risk behaviours such as consensual sex, biting, spitting and other body fluids, assault, sex work, consensual sharing of drug injecting equipment, donating blood, falling pregnant, breastfeeding a baby when one is HIV positive among others, may render them liable to prosecution for intent of transmission of the virus to others.¹

In Sub-Saharan Africa, Zimbabwe has the *Criminal Law*¹⁵ which provides that 'any person who (a) knowing that he or she is infected with HIV, or (b) realizing that there is a risk or possibility that he or she is infected with HIV; intentionally does anything or permits the doing of anything which he or she knows will infect, or does anything which he or she realizes involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV'.³

In Botswana, the Penal Code Amendment Act¹⁶, section 184 makes it an offence to unlawfully or negligently perform any act which any person knows or believes could spread a disease which is dangerous to life. The Act has gone on to stipulate longer jail terms for rapist who are HIV positive and are aware of their HIV status during the commission of the offence.

In Zambia, the *Anti-Gender-Based Violence Act*,¹⁷ has criminalised various forms of sexual abuse which includes sexual contact by a person aware of being infected with HIV or any other sexually transmitted infection with another person without that other person being given prior information of the infection.

Countries with HIV specific laws are of the belief that such laws will reduce the spread of the virus, many People Living with HIV and AIDS (PLHIV) have been imprisoned for infecting others with HIV intentionally. The GNP⁷ report that in 24 countries over 600 people

have been convicted under HIV specific or general criminal laws, with the majority of these from North America. For instance, in 2008, in Texas, USA, a mentally ill HIV positive man had spat at a police officer during an arrest, he was sentenced to 35 years, though HIV-AIDS cannot be transmitted by spitting. Although many have been convicted for transmitting HIV, one question still goes unanswered. Are there any tangible evidence to prove that the criminalization of HIV transmission results into reduced new HIV infections?

Opponents of criminalization of HIV transmission

Contrary to proponents of criminalization of HIV transmission, available literature also suggests that there are no well founded evidences that criminalization of HIV transmission will lead to a reduction in new infections.¹⁸ While criminal law is not just the best weapon in dealing with HIV, there is no one country with HIV specific laws where such offences have made any significant positive impact on the reduction of the spread of the disease or advance public health goals.³ More so, the UNAIDS¹⁹ Policy Brief reports that there is no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission.

It is believed that this application rather undermines public health and human rights.¹⁸ The application of criminal law in HIV transmission it is argued would result in people not going for voluntary HIV testing for fear of being found positive and attracting criminal charges if their partner also tested positive. It is also feared people suspected of being positive would be arrested by force without their consent.

The Global commission on HIV and the Law¹⁰ submit that there is no evidence whatsoever that laws regulating sexual conduct of PLWHA change behaviour in a positive way. Even so, due to societal demands, a person who suspects having the virus may find it difficult to resist the pressure from the family to marry, even when such action is likely to lead to the spread of HIV to the spouse.

Admittedly, laws criminalizing HIV transmission often bring about problems of proof for those who engage in consensual sex or share needles during drug use. In a situation where neither partner knows their HIV status, it is a special challenge particularly in resource-limited settings to determine who infected whom. . This could

lead to unfair trial of the accused in that these laws are often arbitrary and disproportionately applied to those who are considered inherently criminal by virtue of their HIV positive status.²⁰ For example, in some countries exposure to HIV even when transmission has not taken place is criminalized.⁵ Therefore, criminalization breeds stigmatization, condemnation and prejudice.¹⁷

According to a report that was written in consultation with various international bodies concerned with criminalisation of HIV, the following reasons were given against criminalisation of HIV:²¹

1. Criminalizing HIV transmission is justified only when individuals purposely or maliciously transmit HIV with the intent to harm others. In these rare cases, existing criminal laws can and should be used, rather than passing HIV-specific laws.
2. Applying criminal law to HIV exposure or transmission does not reduce the spread of HIV.
3. Applying criminal law to HIV exposure or transmission undermines HIV prevention efforts
4. Applying criminal law to HIV exposure or transmission promotes fear and stigma
5. Instead of providing justice to women, applying criminal law to HIV exposure or transmission endangers and further oppresses them.
6. Laws criminalizing HIV exposure and transmission are drafted and applied too broadly, and often punish behaviour that is not blameworthy.
7. Laws criminalizing HIV exposure and transmission are often applied unfairly, selectively and ineffectively
8. Laws criminalizing HIV exposure and transmission ignore the real challenges of HIV prevention
9. Rather than introducing laws criminalizing HIV exposure and transmission, legislators must reform laws that stand in the way of HIV prevention and treatment
10. Human rights responses to HIV are most effective

To criminalize or not to criminalize HIV transmission?

While it may seem justified that criminalization laws should be used where there is deliberate or reckless transmission of HIV, or any communicable disease which can lead to serious injury or death,²² criminalization can hinder access to care and support as people with the virus will be reluctant to come out for the fear of possible

criminal prosecution.²³ This could be the reason that some countries have not criminalized HIV infection. To this end, those entrusted with the responsibility to make laws that curb the irrational spread of HIV must be aware that enacting laws protecting the rights and liberties of PLWHA will promote a conducive social environment that can ensure behavioural change of those affected, promote counseling and testing as well as help achieve public health goals.

Elliot⁸ further argues that it is not clear that incapacitation, retribution and deterrence through imprisonment of the offenders will make any significant impact and contribution to preventing HIV transmission. For example, there is no guarantee that the incarcerated individual will not spread HIV to other inmates in prison, through homosexuality and other means.¹¹ This is because resorting to criminal law as a policy response to the fight against HIV/AIDS is limited.

Therefore, arresting HIV-positive people for seeking pleasure and intimacy may be a defeatist and cynical response to the failure of nations to confront the HIV epidemic. As noted at the outset of this paper, governments must focus on expanding evidence-informed approaches and strategies that have been proven to reduce HIV transmission while upholding the human rights of every person regardless of their HIV status.⁸

Human rights approach and the way forward

Given the current scenario on the high rates of HIV transmission as well as stigma attached to HIV, a Human Rights approach is needed to deal with the issue of criminalisation of HIV transmission. Human rights emphasize the dignity of individuals- including the sexual freedom and provide the conditions in which they can make healthy, responsible and safe choices about their health and their lives. Criminalization of HIV exposure and transmission threatens rights responses to HIV that empower people to avoid HIV infection or live successfully with HIV. These conditions include the right to full and accurate information, right to access ART, right to HIV prevention, and to the right to make responsible choices about intimate behaviors such as consensual sex and reproduction.

Only when rights such as these are met, individuals are able to make informed decisions and have access to the services that empower them to act on these decisions, it is

only then the spread of HIV be effectively reduced. In contrast, except in cases where individuals specifically intend to do harm, criminalizing HIV exposure or transmission cannot be justified because it does not empower people to avoid HIV infection, thus endangering both public health and human rights.

In 2013, Joint United Nations Programme on HIV and AIDS (UNAIDS) published an updated guidance to limit the overly broad use of criminal laws to regulate and punish people living with HIV who are accused of HIV non-disclosure, exposure and/or transmission. There are three main principles behind the guidance. The use of criminal law in relation to HIV should:

1. be guided by the best available scientific and medical evidence relating to HIV,
2. uphold the principles of legal and judicial fairness (including key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof), and
3. protect the human rights of those involved in criminal law cases.

The guidance also suggests detailed considerations on: the assessment of harm caused by HIV, the assessment of the risk of HIV transmission, the assessment of the mental capability of the person accused, the determination of defences to prosecution, the assessment of elements of proof, the determination of penalties following conviction for HIV non-disclosure.

CONCLUSION

Exposure and transmission of HIV seem to be criminalised across the globe to different degrees.²⁴ Criminalization of intentional transmission of HIV in Zambia can be effected through Chapter 87 of Penal Code or the *Anti-Gender-Based Violence Act*¹⁷, which has criminalized various forms of sexual abuse including HIV transmission. However, HIV specific laws may be necessary in a few cases but should not be encouraged.

There is, however, no evidence to suggest that there is a correlation between the use of criminal law and low prevalence. On the contrary, advocates believe that it contributes to the stigmatisation of people with HIV, undermines the notion that HIV prevention is a responsibility that is shared between HIV-negative and HIV-positive people, and discourages people from testing for HIV.

The onus then is on the government and other institutions to critically look at the positive and negative aspects of criminalization of HIV in so far as the legal approach to the fight against the pandemic is concerned. A combination of effective evidence-based approaches should be adopted to expand targeted efforts in preventing new HIV infections in Zambia.

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