

Overview of criminalisation laws in Africa

Johannesburg, February 2018

Michaela Clayton ARASA

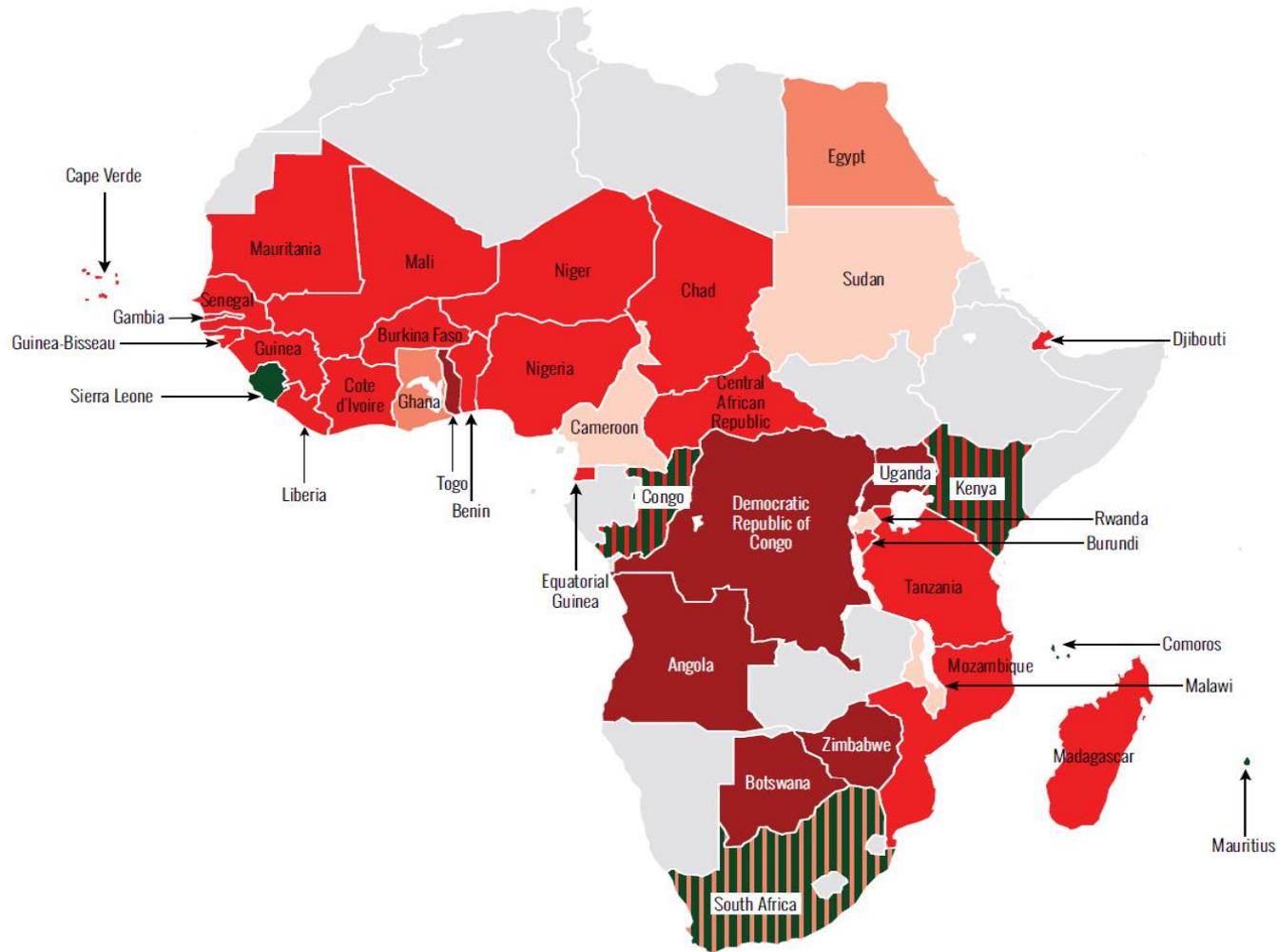
HIV criminalisation – A threat to our response to AIDS

“HIV criminalisation makes it more difficult for those at risk of HIV to access testing and prevention. There is simply no evidence that it works. It undermines the remarkable scientific advances and proven public health strategies that open the path to vanquishing AIDS by 2030.”

Justice Edwin Cameron, Constitutional Court of South Africa

An epidemic of laws

- Several countries in Africa have adopted or are in process of considering the adoption of HIV specific laws which do criminalise transmission
- Good intentions - Bad policy. Often have overbroad transmission provisions; does not reduce HIV infection; renders women more vulnerable; undermines other prevention efforts (e.g. testing) and contributes to stigma



- HIV-specific criminal laws, reported arrests/prosecutions
- HIV-specific criminal laws, no reported prosecutions
- Reported arrests/prosecutions using general laws
- HIV-specific criminal laws proposed
- Improved legal environment for criminalisation
- No reported HIV-specific criminal laws or arrests/prosecutions, or no data

Understanding the calls for HIV criminalisation

- High rates of rape and sexual violence
- Challenges in ending new HIV infections
- Society disapproval of “blameworthy acts”
- Promise of criminal law: Retribution, incapacitation, deterrence, rehabilitation

Re-considering HIV criminalisation: Key scientific and medical developments

- **Harm of HIV transmission**
 - HIV infection as a chronic, manageable health condition
- **Risk of HIV infection**
 - 96% effectiveness of ART in reducing risk of HIV transmission (HTPN 052)
- **Proof of HIV transmission**
 - Better understanding of **merits and limitations** of phylogenetic evidence and other scientific methods of proof in context of HIV
- **Evidence of negative public health impact of HIV criminalisation**

Taking steps forward...

Legislation that restrict HIV criminalisation

ACT

Supplement to the Sierra Leone Gazette Vol. CXLII, No. 69
dated 3rd November, 2011

SIGNED this 14th day of September, 2011.

DR. ERNEST BAI KOROMA,
President.

LS



No. 11

2011

Sierra Leone

The National HIV and AIDS Commission Act, 2011.

Short title.

Being an Act to establish the National HIV and AIDS Commission to be responsible for making policies for the prevention, management and control of HIV and AIDS, to provide for the treatment, counselling, support and care of persons infected with, affected by or at risk of HIV and AIDS and for other related matters.

PART VIII—TRANSMISSION OF HIV

Prevention of transmission of HIV.

37. (1) A person who wilfully transmits HIV to another person commits an offence and is liable on conviction to a fine not less than twenty million Leones or to a term of imprisonment not less than five years or to both the fine and imprisonment.

(2) No person commits an offence under subsection (1) where the transmission of HIV or exposure to the risk of HIV infection arises out of or relates to—

- (a) an act that poses no significant risk of HIV;
- (a) an act that poses no significant risk of HIV;
- (b) a person living with HIV who is unaware of his HIV infection at the time of the offence;
- (c) a person living with HIV who lacked understanding of how HIV is transmitted at the time of the alleged offence;
- (d) a person living with HIV who practiced safe sex including the use of condoms;
- (e) a person living with HIV who disclosed his HIV positive status to the sexual partner or other person before any act posing a significant risk of transmission;
- (f) a situation in which the sexual partner or other person is in some other way aware of the person's HIV-positive status;
- (g) a person living with HIV who did not disclose his HIV status because of a well-founded fear of serious harm by the other person or the possibility of transmission of HIV from a woman to her child before or during the birth of the child or through breast feeding of a child.

HIV criminalisation declared unconstitutional



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NUMBER 97 OF 2010

AIDS LAW PROJECT.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

VIHDA ASSOCIATION.....INTERESTED PARTY

CENTER FOR REPRODUCTIVE RIGHTS.....AMICUS CURIAE

JUDGEMENT

Introduction

1. This Petition was instituted by AIDS Law Project which described itself as a registered Non-Governmental Organisation carrying on its activities within the Republic of Kenya.

2. The 1st Respondent, The Hon. Attorney General, is sued in its capacity the Legal representative of the Government of Kenya and principal legal adviser of the said Government in accordance with Article 156(4) of the Constitution while the 2nd Respondent, Director of Public Prosecutions, is sued in his capacity and under powers exercised by it by virtue of his office under Article 157(6) and 157(11) of the Constitution.

“It is our view and we so hold that section 24 of the HIV and AIDS Prevention and Control Act, No. 14 of 2006 does not meet the principle of legality which is a component of the rule of law. The said section is vague and overbroad and lacks certainty especially with respect to the term “sexual contact”... To retain that provision in the statute books would lead to an undesirable situation of the retention of legislation that provides for vague criminal offences which leave it to the court's subjective assessment whether the defendant is to be convicted or acquitted.”

High Court of Kenya, 18 March
2015

Motion on HIV Criminalisation in SADC Member States

- Motion moved by Hon. Duma Boko of Botswana and seconded by Hon. Dr. Emamam Immam of South Africa was unanimously adopted in Nov 2015.
 - Reaffirmed the obligations on SADC Member States to respect, protect, fulfill and promote human rights in all endeavours undertaken for the prevention and treatment of HIV;
 - Reiterated the critical role of Parliamentarians in enacting laws that support evidence-based HIV prevention and treatment interventions that conform with regional and international human rights frameworks; and
 - Called on Member States to consider rescinding and reviewing punitive laws specific to the prosecution of HIV transmission, exposure and non-disclosure.

Malawi

- January 2017 Malawi High Court, *EL v the Republic*
- “criminal law should not be applied to cases where there is no significant risk of transmission or where the person did not know that he/she was HIV [positive], did not understand how HIV is transmitted, did not disclose his or her HIV-positive status because of fear of violence or other serious negative consequences. Legal systems should ensure their ... application of general criminal laws to HIV transmission is consistent with their international human rights obligations.”

Malawi

HIV Draft HIV and AIDS (Prevention and Management) Bill, 2017

- S 42 HIV exposure
- S43 Intentional transmission
- S44 Reckless or negligent transmission
- ALL REMOVED



Source: UNAIDS/D. Kim/Korea