Challenging the (overly broad) criminalisation of HIV non-disclosure, exposure and transmission

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Overview

- HIV criminalisation globally and in Africa
- Defining HIV criminalisation
- Evolution of concerns against HIV criminalisation – From public health to human rights
- Normative challenges of litigating HIV criminalisation
- Using UNAIDS guidance note to identify challenges in HIV criminalisation laws
- Reflecting on key cases (Jacintha on Kenya)
- Way forward
- Example of key materials
Global situation on criminalisation of HIV

Source: GNP+ & HJN, 2013
Defining overly broad HIV criminalisation

- Unjust application of the criminal law to people living with HIV based solely on their HIV status.
- Uses HIV-specific criminal statutes, or other criminal law.
- To prosecute unintentional HIV transmission, exposure to HIV where HIV was not transmitted, or mere non-disclosure of known HIV-positive status.
- Laws and prosecutions that ignore best available scientific evidence about HIV.
- Laws and prosecution that fails to uphold the principles of legal and judicial fairness (including principles of legality, foreseeability, intent, causality, proportionality and proof).
Criticisms against HIV criminalisation – From public health concerns…

- Criminalisation does not reduce the spread of HIV
- Criminalisation undermine the response to HIV
- Criminalisation promote fear and stigma
- Criminalisation disproportionately harms women
- Criminalisation takes attention away from real HIV prevention challenges.
Criticisms against HIV criminalisation – …to human rights challenges

- Emphasis on challenging laws and prosecutions that ignore best available scientific evidence about HIV (risk, harm, defences, proof)
- Focus on principles of legal and judicial fairness (including principles of legality, foreseeability, intent, causality, proportionality and proof).
- Selective application and other human rights issues.
Normative challenges of litigating HIV criminalisation

- Variety of specific criminal provisions (HIV Act, Sexual Offences Act, Public Health Act, Penal Code)
- Over-criminalisation
- Prosecution based on existing criminal law provisions (assault, poisoning, attempted murder, etc)
The UNAIDS Guidance note: A tool for challenging overly broad HIV criminalisation laws and prosecutions

- limit criminal liability to cases of intentional HIV transmission (negligent or reckless transmission should not be criminalised);
- no criminal liability in case of mere non-disclosure or exposure where transmission has not occurred;
- no criminal liability in cases involving condom use;
- no criminal liability where the person living with HIV has low viral or is on effective treatment;
- no criminal liability when the person did not know his or her HIV status; and
- no criminal liability in case of disclosure of HIV status prior to sexual act
## Applying the elements of the UNAIDS guidance note to HIV laws in sub-Saharan Africa

<table>
<thead>
<tr>
<th>Country</th>
<th>Criminalises HIV non-disclosure</th>
<th>Criminalises HIV exposure</th>
<th>Criminalises HIV transmission</th>
<th>Limited to Intentional acts</th>
<th>Negligent or reckless acts</th>
<th>Applicable to MTCT</th>
<th>Elements that exclude criminal liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Angola (Arts 14 &amp; 15)</td>
<td>Yes (art 14)</td>
<td>No</td>
<td>Yes (Article 15(1))</td>
<td>Yes (Article 15(1))</td>
<td>Yes (art 15(2))</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Burkina Faso (Arts 20, 22 &amp; 26)</td>
<td>Yes (art 20)</td>
<td>No</td>
<td>Yes (art 22)</td>
<td>Yes (art 22)</td>
<td>No</td>
<td>Yes (art 22)</td>
<td>No</td>
</tr>
<tr>
<td>Sierra Leone (secs 37(1) &amp; 37(2))</td>
<td>No</td>
<td>No</td>
<td>Yes (sec 37(1))</td>
<td>Yes (sec 37(1))</td>
<td>No</td>
<td>Yes. Sec 37(2)(b)</td>
<td>Yes. Sec 37(2)(e)</td>
</tr>
<tr>
<td>Tanzania (sec 47)</td>
<td>No</td>
<td>No</td>
<td>Yes. Sec 47</td>
<td>Yes. Sec 47</td>
<td>No</td>
<td>Yes. Sec 37(2)(d)</td>
<td>Yes. Sec 37(2)(a)</td>
</tr>
<tr>
<td>Uganda (secs 41 &amp; 43)</td>
<td>No</td>
<td>Yes (sec 41)</td>
<td>Yes (sec 43)</td>
<td>Yes (sec 43)</td>
<td>No</td>
<td>Yes (secs 41 &amp; 43)</td>
<td>No.</td>
</tr>
</tbody>
</table>
Reviewing cases challenging HIV criminalisation

- In the USA: Supreme Court of Missouri, *State of Missouri v S.F.*, No. SC94923, 2016
- In Canada: Supreme Court of Canada, *R. v. Mabior*, 2012, SCC 47
- In Africa:
Way forward: Issues for consideration by lawyers and litigants on HIV criminalisation

- Carefully identify legal provision(s) to challenge
- Arguments against criminalisation to combine public health and human rights
- Finding strategic approaches in countries that do not have specific prosecution (i.e., defending those unfairly prosecuted vs. constitutional challenges)
- Beyond litigation
  - Prosecutorial guidelines (England & Wales)
  - Supporting advocacy for law reform (Sierra Leone, Mozambique, Senegal, Guinea, Togo, Cote d’Ivoire)
  - Working with medical and health practitioners
Key materials and resources

• UNAIDS guidance note 2013
• Aids Law Project v Attorney General & 3 others 2015
• Canadian HIV AIDS legal network, Resources for lawyers, http://www.aidslaw.ca/site/our-work/criminalization/
Thank You!