

The impact of HIV Criminalization on Women

SARAI CHISALA-TEMPELHOFF (WLA)

Gender Inequalities and HIV

HIV is gendered.

Women are the first to know their status. Women and young girls continue to be disproportionately affected by HIV around the world, but particularly in sub-Saharan Africa.

Financial disparities and intimate partner violence in relationships often hinder a woman's ability to negotiate condom use and protect herself from HIV.

Gender inequality in education and restricted social autonomy among women is directly linked to lower access to sexual health services, including HIV testing and treatment.

Women still experience significant inequality before the law – especially in matters of divorce, family relations, access to and ownership of land.

Harmful cultural practices can pose a risk of transmission for women and girls, but also many of these practices further entrench gender inequalities and encourage violence against women and girls.

Women experience extreme levels of poverty, food insecurity, violence.

Women who experience violence are at a higher risk of HIV, women with HIV are at a higher risk of violence.

Asking the “woman” question

If we are going to legislate HIV and AIDS then we need to have a very clear and representative figure at the centre of the debate.

- So who are we drafting these laws for (be it to protect or prevent)?
- Who is the face of HIV and AIDS in Africa?

Although the language of proposed HIV legislation tends to be gender neutral, the realities of the pandemic result in a complete feminization of HIV criminalization.

Often these legislative measures are posited as being protective of women and unborn children, and as an important measure to prevent the spread of HIV. But we cannot legislate a cure.

The “woman question” requires us to interrogate all HIV specific provisions for the implications on the lived experiences of women and especially women living with HIV.

It also demands that we [as lawyers] critically rethink what is and is not “reasonable” conduct, expectations, understanding and beliefs when it comes to HIV and AIDS.

Think about the “reasonable” woman on the local minibus/taxi/matatu

As opposed to the *The Man on the Clapham Omnibus*, who to a [common law] lawyer, is synonymous with the pinnacle of reason in humanity: an ordinary London transit rider as representative of all rational thought and action. In this case I guess he would be a man who is stepping off the Clapham omnibus, all reasonable and such, but who also just happens to be living with HIV.

There is so much knowledge about HIV, transmission, testing, treatment and adherence, viral loads and so on. Decisions about what constitutes criminal conduct in the context of HIV **must** build on these facts.

Most importantly there is a need to ensure that women’s voices, particularly the voices of women living with HIV, are deliberately incorporated in the law-making process if we keep developing HIV specific legislation.

Impact of HIV Criminalization on Women

So-called legislative HIV management efforts often have the effect of infantilizing, criminalizing, stigmatizing and potentially victimizing women – particularly women who are already living with HIV.

Rather than being protective and preventive, such laws are paternalistic positing women as both victims and vectors of HIV.

Criminalization demonizes and infantilizes women, they are painted as carriers of the disease but also as potentially careless and callous mothers; and women of loose morals.

This in countries where a significant percentage of women are married before the age of 18, and it is within these relationships (oftentimes violent relationships and a product of harmful cultural practices) that they either become infected or learn of their infection. In this manner, lives that are already filled with violence are suddenly even more fraught with danger.

“Before you care about the baby in my womb, I care about this baby”

Discriminatory criminalization laws disproportionately affect women, who they are more likely to be tested and know their status through antenatal care.

They are the first to “know” their status – which is at the core of non-disclosure/exposure/transmission provisions.



“Before you care about the baby in my womb, I care about this baby”

The truth is that most women WANT to protect their babies, they want to have their babies born HIV free, the WANT to live.

Attaching a criminal sanction or coercive requirement does not promote a healthier outcome for the woman and her baby, rather it devalues the life of the mother living with HIV in favour of a baby born HIV-free.

Protect the health and wellbeing of the mother to ensure improved outcomes for the health and wellbeing of her child.

Beyond criminalization

There are clear public health implications to a pandemic such as HIV and AIDS and the role that the government opts to play in the management of the pandemic has a severe impact on the course of the disease.

Legislation can be used to set out the manner in which issues such as voluntary counselling and testing; partner notification; medical care and treatment of AIDS related illnesses; and, epidemiological surveillance amongst other things are handled.

Criminalization risks destroying many of the gains that we have made by creating criminals out of those most vulnerable to this terrible disease. If knowing your status creates a potential criminal out of you then people will avoid “knowing” their status at all costs.

We need to be clear that reducing the spread of HIV by reducing stigma and persecuting persons living with HIV cannot coexist, we cannot do both.

“... where HIV/AIDS travels along the fault lines of society it reveals these deeper structures of power and provides the opportunity to challenge them. It reveals the importance of **empowering** women across their lives in order for a sustainable and effective response to HIV/AIDS.” (Anderson: 2009)