



International Community of Women Living with HIV/AIDS (ICW)

FACT SHEET

CRIMINALIZATION OF HIV EXPOSURE AND TRANSMISSION

“We cannot make criminals out of positive people struggling to survive in the face of lack of access to treatment, care, and support and we cannot do this in the name of good public health policy,” Lillian Mworeko, Regional Coordinator, ICW East Africa Office.

“Criminalizing transmission of HIV will undermine the progress we have made to end stigma and discrimination against people living with HIV and AIDS” Beri Hull, Global Advocacy Officer, ICW.

CRIMINALIZATION OF HIV

HIV positive women risk being turned into criminals and being further stigmatized by a new trend in laws that criminalizes exposure and transmission of HIV.

- Criminalization of HIV transmission refers to the application of criminal law to prosecute HIV transmission or exposure to the virus.
- Laws that criminalize the exposure or transmission of HIV might specifically seek to punish individuals for exposure or transmission of HIV or can be a general criminal statute used to prosecute individuals with HIV.

WHY CRIMINALIZATION OF HIV IS BAD FOR WOMEN

GENDER INEQUALITY IN THE JUSTICE SYSTEM

Due to patriarchal laws and courts, existing gender inequality, and gendered societal norms, laws purportedly intended to benefit women can often harm women. Implementation of criminalization of HIV transmission and exposure laws must be understood in the context of a legal system rooted in patriarchy and potentially leading to negative outcomes for women.

- ***Patriarchal Courts and Laws***
 - Women are vulnerable to contracting HIV/AIDS in part due to laws that enshrine women’s inequalities including but not limited to inheritance laws, property rights, and violence against women (including rape and marital rape). Economic dependency inspired by these laws can lead to women’s inability to disclose their status to partners and in turn be prosecuted for knowingly transmitting HIV (even when the woman contracted HIV from her partner).
 - Economic dependence and lack of legal literacy means that women may respond to violence or a fear of violence, abandonment, or mistreatment differently than men. In interpreting laws, courts often do not take into account these nuances of women’s lives—instead judging women’s actions by the perception of how a “reasonable man” might act.
 - Men tend to have greater legal literacy that can result in lopsided access to “justice”.
 - Judges, lawyers, and laws often favour and believe men’s perspectives over women’s perspectives.
 - Women’s experiences, particularly around violence, are often belittled in courtroom settings.

CRIMINALIZATION INCREASES STIGMA AND DISCRIMINATION

- Criminalization of HIV increases stigma and discrimination for HIV positive women because it fuels the idea that women and girls are vectors for or should be blamed for HIV transmission.
- Inflammatory newspaper articles and related media frenzy adds to the hysteria and unfounded notion that HIV positive individuals are purposefully attempting to infect other people with HIV.
- Stigma and discrimination affects the ability of HIV positive women to access quality services. “Enacted stigma”, or stigma associated with experiences of discrimination and “felt stigma” or the “shame associated with a potentially stigmatizing condition and the fear of being discriminated against”¹ work in tandem to create health services that are stigmatizing and violate the sexual and reproductive health rights of women.

TURNING MOTHERS INTO CRIMINALS: CRIMINALIZATION OF MOTHER TO CHILD TRANSMISSION

- Some countries have gone so far as to criminalize “harm to the fetus/child” by the mother. In many countries this language has been defined broadly enough so that if an HIV positive woman gets pregnant the state of being pregnant could become a crime. Under these laws, breastfeeding would also be penalized.
- The criminalization of mothers for HIV transmission and exposure serves to further increase stigma for positive women who want to have children or who are pregnant, by blaming women for transmission of HIV from mother child – some laws go so far as stipulating that harm to the fetus constitutes a



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- crime. Yet if governments could guarantee voluntary counselling and testing for all expectant mothers, along with medicines that prevent mother to child transmission, the risk of “vertical” transmission would be below 2%.
- Criminalization of mother to child transmission places the blame of HIV transmission solely on the mother.
- Criminalization of mother to child transmission also explicitly discriminates on the basis of sex as only women can give birth.

REMOVING THE CARETAKER

- Women and girls are often the primary caretakers when family members fall ill.
- Imprisoning caretakers will lead to untended children and orphans with the added stigma of an imprisoned mother, the burden of care will most likely be carried by girls whose education and personal well-being will suffer.
- Putting mothers in jail also undermines efforts to decrease the number of orphans and vulnerable children and HIV positive children. Further, children are more likely to die from AIDS-related illness due to their own increased vulnerability to contracting HIV and being unable to access necessary care, treatment, and support.

TARGETING MARGINALIZED GROUPS

- Criminalization of HIV transmission provides another route for governments to criminalize groups already marginalized by the law and persecuted by the state including sex workers, injecting drug users, MSM, and members of the lesbian, gay, bisexual and transgender communities.
- Many times the individuals arrested and prosecuted are working directly with other vulnerable communities to reduce risk of HIV transmission.

ROUTINE ANTE-NATAL TESTING PLACES WOMEN AT A HIGHER RISK OF PROSECUTION FOR CRIMINAL HIV TRANSMISSION

- There is a trend towards “Opt-out” or “Provider-Initiated Counselling and” testing. This model largely allows for providers to offer HIV testing as a routine set of tests—individuals would be told they are being tested for HIV and allowed to opt-out. Opt-out testing has taken particular hold in antenatal clinics, where women are frequently given a mandatory test for HIV when they are in labour or go for antenatal care.
- Because of opt-out testing at antenatal clinics, women are more likely to know their status and therefore women are more likely to be accused of “knowing” transmission of HIV even where unsafe for a woman to disclose or where a woman contracted HIV from her partner. This reality could result in disproportionate targeting and prosecuting of women for the spread of HIV.

CRIMINALIZATION OF HIV/AIDS CONTRIBUTES TO ONGOING HUMAN RIGHTS VIOLATIONS OF HIV POSITIVE WOMEN’S RIGHTS

The criminalization of HIV contributes to setbacks in the realization of many rights and acts as a violation of rights specifically the right to non-discrimination, the right to health, and the right of individuals to due process in the justice system. These rights are protected by various treaties including the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women.

“As an HIV positive woman I am outraged that anyone be put through this ordeal and that judicial systems are prepared to enact laws that violate our rights in this way and in circumstances that are tainted by stigma and discrimination.” Fiona Pettitt, ICW Activist.

ⁱ Maluwa M, Aggleton P, Parker R. HIV and AIDS-Related Stigma, Discrimination, and Human Rights: A Critical Overview. Health and Human Rights. 2002; 6 (1): 1-20.