

# SO, WE SHUT THEM AWAY

THE FAILURES AND DANGERS OF THE CRIMINALIZATION OF HIV/AIDS

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## When “deliberate transmission” becomes a misnomer: A Case of HIV Criminalization in Zimbabwe<sup>1</sup>

*“In Zimbabwe, a 26-year-old woman from a township near Bulawayo was arrested last year for having unprotected sex with her lover... she was living with HIV. The crime of which she was convicted was ‘deliberately infecting another person’. Her lover however tested HIV negative. The woman was receiving antiretroviral therapy, so that is not entirely surprising. Before sentencing her, the court tried to get a further HIV test from the lover – even though he reportedly didn’t want to proceed with the charges at all. She was eventually sentenced to a suspended term of five years’ imprisonment. The threat of imprisonment, and the shame and ordeal of her conviction, will continue to hang over her. The statute under which she was convicted, s79 of the Zimbabwe Criminal Law (Codification and Reform) Act 23 of 2004, is an extraordinary piece of legislation. It doesn’t make it a crime merely for a person who knows that she has HIV to infect another. It makes it a crime for anyone who realises ‘that there is a real risk or possibility’ that she might have HIV, to do ‘anything’ that she realises involves a real risk or possibility of infecting another person with HIV’. In other words, though the crime is called ‘deliberate transmission of HIV’, this is a misnomer. You can commit this crime even if you do not transmit HIV. In fact, you can commit the crime even if you do not have HIV. Stranger upon strange, this statute offers a defence when a person really does have HIV... [where] if the other person knew this, and consented, then the accused is exempt. But, the way the statute is drafted, this defence can not apply where the*

*accused does not in fact have HIV, or does not know that she has HIV – by definition, in that case she cannot engage the informed consent defence by telling her partner she has HIV! In short, this law creates a crime not of effect and consequence, but of fear and possibility.”*

HIV/AIDS is currently the most devastating epidemic on the planet, and its destruction wreaks greater havoc and suffering in Southern Africa than anywhere else in the world. In 2016, Eastern and Southern Africa accounted for 43% of the global total of new HIV infections, on top of the 19.4 million people already living with HIV, over half of them women and girls.<sup>2</sup> Zimbabwe itself had 1.3 million people living with HIV, a 13.5% adult prevalence rate, with 40,000 new HIV infections and 30,000 AIDS-related deaths in 2016.<sup>3</sup> While infection rates have dropped in recent years, 74% of adults are now on antiretroviral treatment (89% were receiving any sort of treatment, 81% of whom were virally suppressed), and 75% of adults are aware of their HIV status, Zimbabwe retains the sixth highest prevalence of HIV in Sub-Saharan Africa.<sup>iii</sup> Furthermore, social issues, notably gender-based violence, remain pervasive throughout the state. In one survey, 17% of women said they believe their husband has the right to beat them if they refuse sex.<sup>iii</sup>

In an attempt to lessen the burden of HIV, Zimbabwe has adopted a few key provisions of HIV-specific criminal law. It is very broad and indiscriminate, prescribing sentences that can stretch as long as twenty years.<sup>i</sup> It even covers pregnant women who know or fear they may have HIV, if they give birth, breast-feed, or do anything that could be construed

as deliberate transmission, regardless of whether their baby was infected.<sup>i</sup> The language from The Zimbabwe Criminal Law (Codification and Reform) Act, Section 79, as referred to in the case study above, is the principal piece of criminalizing legislation.<sup>4</sup> The true danger is in its language that criminalizes risk alone, and the realization of that risk, which presents those offences as comparable to deliberate transmission. Thus, it leaves far too much room for discretion, and further burdens already vulnerable populations.

However, this tendency to criminalize HIV is not a new development limited to Zimbabwe, but is a long-enduring facet of the attempt to counter the HIV/AIDS epidemic as a whole. According to the HIV Justice Network, “HIV criminalisation describes the unjust application of the criminal law to people living with HIV based solely on their HIV status – either via HIV-specific criminal statutes, or by applying general criminal laws that allow for prosecution of unintentional HIV transmission, potential or perceived exposure to HIV where HIV was not transmitted, and/or non-disclosure of known HIV-positive status.”<sup>5</sup> In 2016, a new report showed that 72 states around the world have adopted legislation that criminalizes HIV, including 30 states in the United States.<sup>v</sup> Of these states, 61 have prosecuted individuals on the basis of non-disclosure, potential or perceived exposure, or unintentional transmission, using a mixture of specific HIV laws and general criminal or public health laws.<sup>v</sup> While there was no HIV criminalization as recently as 2000, now 30 Sub-Saharan African countries have broad criminal statutes incorporated into their HIV-laws, most of which also include provisions for protection and nondiscrimination along with compulsory testing and involuntary partner communication.<sup>v</sup> Other cases from places as different as the United States, Egypt, Singapore, and Sierra Leone highlight the fact that this criminalizing approach is not unique to Zimbabwe.

In theory, criminalization seems like an appropriate deter-<sup>4</sup> “Zimbabwe.” Global Criminalization Scan. September 9, 2015. Accessed December 4, 2017. <http://criminalisation.gnpplus.net/country/zimbabwe>.<sup>5</sup> “NEW REPORT SHOWS HIV CRIMINALISATION IS A GROWING, GLOBAL CONCERN BUT ADVOCATES ARE FIGHTING BACK.” HIV Justice Network. May 10, 2016. Accessed December 4, 2017. <http://www.hivjustice.net/news/new-report-shows-hiv-criminalisation-is-growing-global-problem-but-advocates-are-fighting-back/>.

rent response to help quell the epidemic and to limit its proliferation. Two of the most commonly cited reasons for criminalizing HIV transmission include punishing harmful conduct and preventing HIV transmission by deterring or changing risk behaviors.<sup>6</sup> The first rationale is reasonable, for if someone acted with the intent to transmit HIV, out of malice, their punishment is absolutely justified. Yet, the vast majority of these cases do not fall under those specific circumstances, and rather fall under cases where there are other compounding factors which must be considered to understand how the punishment is being applied, and whether it is being applied justly or indiscriminately. The preventative intention of the criminal statutes is a noble attempt to try to protect the population at large, particularly women and girls who are already vulnerable. However, this idea that criminal penalties should be imposed against those who risk passing on the virus as a result of their negligence or recklessness, to promote behavior change, actually has ripple effects that impede other methods of prevention, testing, and treatment for HIV, and inhibit proper public health practices more than they help to limit the spread of the virus. Governments want to send the right message to disincentive risky behaviors, but in doing so they defy legal standards of legality, causality, and proportionality, while placing a heavier burden on already stigmatized populations, and through this mismanagement of justice impeding broader public health initiatives to counter the virus.

The criminalization of HIV is flawed at its core because it relies on moral judgementalism to encourage behavior change, a method that has been proven to fail and to actually degrade efforts to achieve tangible improvements in the rate of HIV transmission. These arguments, put forth by people such as Michael McDermott, attempt to villainize and alienate people in order to justify and protect themselves, placing blame and ostracizing those who are truly the victims, the infected.<sup>7</sup> This judgementalism is the

<sup>1</sup> Burris, Scott, Edwin Cameron, and Michaela Clayton. “HIV is a virus, not a crime: ten reasons against criminal statutes and criminal prosecutions.” *Journal of the International AIDS Society* 11, no. 7 (December 1, 2008). Accessed December 3, 2017. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2635346/pdf/1758-2652-11-7.pdf>.

<sup>2</sup> “FACT SHEET – WORLD AIDS DAY 2017.” UNAIDS. 2016. Accessed December 4, 2017. [http://www.unaids.org/sites/default/files/media\\_asset/UNAIDS\\_FactSheet\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/UNAIDS_FactSheet_en.pdf).

<sup>3</sup> “HIV and AIDS in Zimbabwe.” AVERT: Around the World. October 16, 2017. Accessed December 4, 2017. <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/zimbabwe>.

<sup>6</sup> “Policy Brief: Criminalization of HIV Transmission.” UNAIDS. August 2008. Accessed December 4, 2017. [http://www.unaids.org/sites/default/files/media\\_asset/jc1601\\_policy\\_brief\\_criminalization\\_long\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/jc1601_policy_brief_criminalization_long_en.pdf).  
<sup>7</sup> McDermott, J. Michael. “Is AIDS God’s Punishment?” *Homiletic and Pastoral Review*: 32, 50-58. Accessed December 4, 2017.

root source of stigma, and it serves to overly simplify the problem at hand by placing the entirety of the blame on the victim, rather than acknowledging the larger forms of inequality and structural violence which were likely also conspiring against them. The language of innocence and guilt is not helpful when addressing HIV, as it precludes us from descending into the particular nuances of the situation, and judging it based on their entire picture.<sup>8</sup> It is a coping mechanism, and the fact that it has snuck its way into codification in criminal law is a despicable reflection of how we care for our fellow human beings, and especially those who are infected, and in need of aid and support.

At times, the law does monitor and regulate individual behavior, showing adherence to certain values and trying to bring out the best in society. However, there is a stark difference between laws that attempt to regulate behavior as it affects the general population, and paternalistic laws which assume they know what is best for the entire population, without particularity. There is a difference between allowing for lawless autonomy and attempting to regulate how individuals choose to live their own lives, and these laws, in selectively targeting already vulnerable populations, seem to be contributing the scapegoating of those groups, further ostracizing them and placing barriers to care. Allowing for the criminalization of HIV is effectively allowing for the criminalization of suffering, and is saying that those who have contracted HIV deserve it, by singling them out as the ones at fault. This is an unproductive attempt to curtail transmission, simply making people less likely to want to face that ostracization, and more likely to avoid treatment. It truncates the question of cause, obscures the real issues, prevents the discussion of the important particularities of the situation, and therefore impedes productive interventions which could actually combat the epidemic.

In this particular case and for the Zimbabwean laws in particular, this idea of judgementalism comes further into focus because the tangible threats criminalized by the law do not

<sup>8</sup> Martin, Leonard M., C.Ss.R. "I Fed You With Milk": Missionary Morals in Brazil in a Time of AIDS." In *Catholic Ethicists on HIV/AIDS Prevention*, 128-35. New York, NY: The Continuum International Publishing Group Inc, 2005.

truly amount to more than being infected, in and of itself. The woman from Bulawayo did not infect her partner, they were having consensual sex, she was on antiretroviral therapy (ART), and her partner wanted to drop the charges. Still, she was made to go through the whole criminal proceeding, because she simply had the risk of infecting another person, even though they both had informed consent and had accepted that risk by entering into a relationship with one another. This shows the paternalism involved regardless of the particular parties, and the court's willingness to place all of the blame on the victim, who now has a double burden as she is already infected with HIV. Even though she never actually went to jail, and was given a suspended sentence, the case is clear about how her conviction will hang over her, and how that stigmatization will burden and challenge her in all other aspects of her life, from personal, to educational, to occupational. She was only allowed release, on suspension, because her lover's second test came back negative, and even then the trial was repeatedly postponed, hanging over her. Many other cases involve individuals who actually are sent to prison, (including one where a man's saliva was called a "deadly weapon")<sup>9</sup> so her case highlights the absurdity of these laws. She was prosecuted not for actually causing harm, but for being infected in the first place.

It is important to consider the precautionary principle here, and whether the magnitude of the epidemic justifies such violation of personal liberties and human rights. There is a question to be answered about whether the given proceedings and the requirements for prosecution are too harsh, and whether the law has the right to restrict such consensual individual behavior, especially when doing so is causing stress and harm to the parties without showing that it is producing any additional public health benefits. Some experts have said that it was actually a good thing that public health officials were not given free reign at the start of the epidemic, to punish those infected through quarantine or other more extreme means, because that would have driven the entire epidemic underground, where it would evade inter-

<sup>9</sup> Kovach, Gretel C. "Prison for Man With H.I.V. Who Spit on a Police Officer." *The New York Times*. May 16, 2008. Accessed January 20, 2018. <http://www.nytimes.com/2008/05/16/us/16spit.html>.

vention and flourish dangerously below the surface, garnering more stigma and becoming unapproachable by public health.<sup>10</sup> There are times when such measures are more justified, not because the outcome they produce is greater, but when they are the only interventions available and they act with a respect for some human rights, in a way that suspends civil liberties without violating any individuals. However, HIV is an emergent case that has other alternatives that respect human rights, which could be pursued as an alternative.

The unfair, irregular application of HIV-specific law is a substantive issue of criminalization, for by criminalizing intent law enforcement is vulnerable to natural biases, which further stigmatize infected populations. This placement of blame compounds the evil rather than serving to limit its spread. Most people do take precautions to avoid spreading the virus, and this can prove their intentionality to acquit them in a criminal case. Other individuals who do not take these precautions likely do so because they already have inadequate access to care, information, or the agency to pursue safer behaviors as a result of being structurally marginalized. These groups may include sex workers, men who have sex with men, injection drug users, and women. Since the establishment of who transmitted HIV to who is often nearly impossible to tell, even with phylogenetic testing that looks at the relatedness of the virus samples, testimony usually is the only evidence to determine guilt. In such cases, people may be found guilty in error, and almost always, the person who is already marginalized, already more likely to be biased against be it for race, gender, class, or anything, will be found as the guilty party.

Criminalization is founded in stigma, and it serves to exacerbate vulnerabilities and discrimination for already marginalized populations. It is even more deeply founded in the moralism discussed above, particularly in relation to HIV's sexual transmission. The People Living with HIV Stigma Index measures this discrimination in 65 countries, and in

<sup>10</sup> Bayer, Ronald, and Amy L. Fairchild. "The Genesis of Public Health Ethics." *Bioethics* 18, no. 6 (2004). Accessed December 4, 2017.

22 states, over 10% of people living with HIV reported that they had been denied healthcare, or denied employment.<sup>11</sup> This proves that stigma and discrimination result in real, tangible losses to quality of life, and the threat of criminalization or the weight of convictions only add to that burden of being stigmatized as a result of one's HIV diagnosis. A different case found that individuals reporting high levels of stigma were over four times more likely to have poor access to care.<sup>12</sup> In another 2015 survey in over 70 countries, in 35% of countries with available data, over 50% of people reported having discriminatory attitudes towards people with HIV.<sup>13</sup> Be that a result of misinformation, moral judgementalism, or something, else, the cause does not deny the fact that such stigma is a reality for those living with HIV, one that criminalization only exacerbates. In Sub-Saharan Africa, as with the woman from Bulawayo, heterosexual sex is the main route of infection, and so it is infidelity and sex work which are most often associated with the stigma of HIV. As Michel Sidibé, Executive Director of UNAIDS said, "Whenever AIDS has won, stigma, shame, distrust, discrimination and apathy was on its side." Criminalization is simply governmental stigmatization of people living with HIV, but it serves the same effect. It goes further when it locks people away in prison, or even deports them, sometimes to places where they cannot receive care.

The ones who are oppressed and endangered the most from this stigma are women and girls, the very ones whom the criminal laws are attempting to protect. In Africa in particular, women are far more likely to know their HIV status because they get tested at ante-natal healthcare sites. Therefore, when it comes to criminal cases, it is assumed that they are the ones who ought to know their status, and they are prosecuted as a result. Oftentimes, they will not have disclosed their status for fear of abandonment, making them even more susceptible to conviction under criminal law. Especially in places such as Zimbabwe,

<sup>11</sup> "Global AIDS Update 2016." UNAIDS. 2016. Accessed December 4, 2017. [http://www.unaids.org/sites/default/files/media\\_asset/global-AIDS-update-2016\\_en.pdf](http://www.unaids.org/sites/default/files/media_asset/global-AIDS-update-2016_en.pdf).

<sup>12</sup> Sayles, Jennifer N. et al. "The Association of Stigma with Self-Reported Access to Medical Care and Antiretroviral Therapy Adherence in Persons Living with HIV/AIDS." *Journal of General Internal Medicine* 24.10 (2009): 1101-1108. PMC. Web. 4 Dec. 2017.

<sup>13</sup> "HIV Stigma and Discrimination." AVERT: Social Issues. August 29, 2017. Accessed December 4, 2017. <https://www.avert.org/professionals/hiv-social-issues/stigma-discrimination>.

where, as was discussed earlier, so many women consider domestic violence to be the norm, and lack the negotiating power to advocate for their own sexual health within their relationships, women are often subject to the will of men and traditional patriarchal systems. This makes them even more vulnerable to HIV, as they will often be deterred from seeking treatment, prevention, and care services.<sup>14</sup> For example, women in South Africa avoided a clinical trial that could help prevent them from becoming infected with HIV because they were afraid the gels and pills would mistakenly have them be identified as having HIV, and subject them to discrimination.<sup>xii</sup> Ultimately, this fear led them to adapt more risky behaviors.

Criminalization of HIV also does not protect women and girls in that it ignores the larger problems of coercion, abuse, and violence which lie at the root of their vulnerability and suffering.<sup>xiii</sup> The better way to protect women is not putting a band aid on a bullet hole by attempting to punish the men who infect them, but by enacting and enforcing laws to protect them from sexual violence, discrimination based on gender and HIV status, and inequalities in employment, education, property, custody, and more.<sup>vi</sup> As Mark Miller enunciated in a different case, simple fixes, like that of a condom or in this case, criminalization, will only obscure the larger problems at play.<sup>15</sup> Criminalizing the virus only puts a disincentive on the effect, where criminalization of these more systemic behaviors could create a larger change in society that alleviates not only the burden of infection, but of inequality. Perhaps then, women such as the lady from Bulawayo would not be targeted by law enforcement in the first place.

Another question is whether individual physicians should have the autonomy to decide whether they disclose a patient's HIV status to their partner on an individual basis. This debate over individual primacy versus public good is a

14 "10 Reasons Why Criminalization of HIV Exposure or Transmission Harms Women." 2009. Accessed December 4, 2017. <http://www.athenetwork.org/assets/files/10%20Reasons%20Why%20Criminalization%20Harms%20Women/10%20Reasons%20Why%20Criminalisation%20Harms%20Women.pdf>.  
15 Miller, Mark, C.Ss.R. "Unmaking a Hidden Epidemic Among First Nation Communities in Canada." In *Catholic Ethicists on HIV/AIDS Prevention*, 84-91. New York, NY: The Continuum International Publishing Group Inc, 2005.

question of professional integrity,<sup>16</sup> but also of moral necessity when silence is kept.<sup>17</sup> The issue of mandated reporting is a moral question, but it is also a practical one, which must be considered in concert with its effects on overall treatment. Many people, especially women in male-dominated cultures, like Zimbabwe, would be very hesitant to seek out testing, and with it ante-natal care and the like, if they knew their status may be disclosed. Here, counselling must be employed in order to try to ensure that partners are honest with each other without it being mandated by law.

All of these factors contribute to a culture of silence that deliberately harms public health objectives and hides the evidence-based solutions necessary for HIV treatment, as a result of fear of stigmatization and criminal suits. The repercussions people could face under criminal law create too much fear, and they would rather be ignorant of their status and risk infection than risk the consequences that could come if they do have the virus, know about it, and no longer have that defense to use in a criminal suit. Criminalization is "a blatant disinducement to testing" making people so afraid to do the rational thing and come forward.<sup>i</sup> In the end, what is needed is not more disincentives for risky behaviors, but more access to treatment for the marginalized who lack it, and who therefore keep spreading the virus.<sup>i</sup> HIV is a manageable disease, and while it must be prevented, that must not be through the further stigmatization and suffering of those who are already afflicted. Furthermore, when the end result of criminalization is imprisonment, it leads infected individuals to settings where they have far less access to treatment, and are left neglected and vulnerable.<sup>18</sup> This consideration of the end result of criminalization may shed light on how it is not at all an effective strategy for achieving good public health outcomes in the fight against the HIV epidemic. The real lives, reasonable fears, and behavior of infected **persons must be taken into account.**

16 Higueroa, Jose Carlos Bermejo. "A Spaniard Resists Disclosing His HIV Status to His Girlfriend." In *Catholic Ethicists on HIV/AIDS Prevention*. New York, NY: The Continuum International Publishing Group Inc, 2005.  
17 Rojas, Orlando Navarro. "Women's and Children's Risks of Contracting HIV in Costa Rica." In *Catholic Ethicists on HIV/AIDS Prevention*. New York, NY: The Continuum International Publishing Group Inc, 2005.  
18 "Prisoners Most Neglected by Global HIV Response." *Dispatches: Criminalization Drives Global Rise in HIV Infections*. July 18, 2016. Accessed December 4, 2017. <https://www.hrw.org/news/2016/07/18/dispatches-criminalization-drives-global-rise-hiv-infections>.

In the end, criminalization is an ineffective strategy for combatting the spread of the HIV epidemic. People often transmit the virus very soon after they are infected themselves, and therefore they have no way of knowing they should become more risk-averse. Antibodies can take up to three months to become evident in tests, meaning that in reality, criminal law has no substance to prosecute, and just adds to a culture of fear.<sup>19</sup> The laws are so poorly drafted that their clarity and evidentiary burdens should not hold up under normal standards of law, and they therefore lack the specificity needed to be effective legislation.<sup>i</sup> As UN-AIDS reports, "There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining health and human rights."<sup>i</sup> There is a difference between criminal sentencing

19 Fauci AS and Clifford LH (2001) "Human immunodeficiency virus (HIV) disease: AIDS and related disorders", p. 1852-1913. In Braunwald E, Fauci AS, Kasper DL, Hauser SL, Longo DL, and Jameson JL (eds.), *Harrison's principles of internal medicine*, 15th international ed. New York: McGraw-Hill Companies, Inc.

and civil litigation, and criminal punishment is certainly not the answer public health demands.

Only by reinvigorating the fight against HIV with this consideration of human rights can public health effectively analyze and attack the epidemic. Criminalization fundamentally infringes upon human dignity, placing blame over human life, and it does so in a way that does not at all accomplish its objectives of changing behavior for the better, but rather changes it for the worse. Criminalization serves to make the infected hide, and buries the epidemic under the surface, making couples dishonest with each other and individuals unwilling to seek treatment. Through education and sensitization about the realities of the epidemic and those who are suffering, a radical new empathy can be employed to guide a human rights approach to prevention. Then, a court would respect the situation of the woman from Bulawayo, and her and her partner's decision as consenting adults. Then, society may break away from paternalism to craft more effective