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Criminalisation of Intentional Transmission of HIV/AIDS: The Tanzanian 'Paradox'

KADILU, MWAJUMA
LL.M, LL.B (Hons), UDSM,
Assistant Lecturer, Mzumbe University, Advocate of the High Court,
Research Scholar, P.G. Department of Legal Studies and Research,
Acharya Nagarjuna University, Nagarjuna Nagar 522 510, Guntur District, A.P. – India,
Email: mkadilu@mzumbe.ac.tz, mkadilu@yahoo.com

Abstract

This paper aims at making a critical examination on criminalisation of intentional transmission of HIV/AIDS where the main focus is on evidential challenges under the laws of Tanzania that render the criminalisation practically unrealistic. The challenges lie on how to prove intentional transmission of HIV/AIDS beyond reasonable doubt which is a required standard in all criminal cases. The paper reveals that HIV is scientifically proved not to be something specific and unique to every individual as it is the case with the DNA or fingerprints. Thus, it has been established that in Tanzania, it is almost impossible to prove beyond reasonable doubt that one person intentionally transmitted HIV/AIDS to another. Eventually, the author recommends that if the policy and lawmakers are concerned about preventing HIV transmission through penal laws, it is better to address the evidential challenges surrounding this matter first so as not to deal with the HIV problem to the expense of those who are already its victims.

Key Words: *HIV/AIDS, Criminalisation, Intentional Transmission.*

Introduction

"HIV" stands for Human Immunodeficiency Virus, which means the virus that causes AIDS. AIDS is the Acquired Immune Deficiency Syndrome, which is a condition characterized by a combination of signs and symptoms caused by HIV that attacks and weakens the body's immune system, making the inflicted individual susceptible to other life-threatening infections.[1] In fact, AIDS is a medical condition which indicates that someone is infected with HIV. Although it is possible to be infected with HIV without developing AIDS, in this paper, both HIV and AIDS will be treated together for the avoidance of doubt. The author makes a critical examination of the evidential challenges arising from proving the intentional transmission of HIV/AIDS in Tanzania.

It is a well settled legal principle both internationally and in Tanzania that for the accused person to be convicted of a particular offense, the prosecution must prove the charged offense beyond reasonable doubt.[2] This is the standard of proof in all criminal cases. Thus, prosecution for intentional transmission of HIV/AIDS is only viable where there is sufficient evidence for the prosecution to prove beyond reasonable doubt that the accused person intended to transmit the virus or he knowingly exposed another person to

[1] S. 3, HIV and AIDS (Prevention and Control) Act, No. 28 of 2008.
[2] S. 3(2) (a) Evidence Act, [Cap. 6 R.E. 2002], also the case of *Ahmad Omari v. R*, Court of Appeal of Tanzania at Mtwara, Criminal Appeal No. 154 of 2009, (unreported).

HIV/AIDS. While it has always been hard to try the mind of a person in order to realize his intention when he committed a certain offense, it is undisputed that for the accused person to be convicted of intentional transmission of HIV/AIDS, he must have known well in advance that he is infected with HIV/AIDS.

In the United Kingdom, for example, the prosecutors handling cases of HIV transmission have resorted to phylogenetic testing in proving HIV/AIDS cases. This test establishes a genetic relationship between the viruses with which each the complainant and the accused are infected in attempting to prove that the defendant was the source of the complainant's infection and to rule out other possible sources of infection.[3] The author analyses the manner in which such knowledge and intention can be proved beyond reasonable doubt while it is a reality that HIV is not something specific and unique to each person as it is the case with the DNA or fingerprints.

It has been realized that even in developed countries; prosecution of HIV/AIDS cases has not been systematic and has involved only isolated cases. This is likely to be even more apparent in less developed countries with limited prosecutorial resources because most transmissions come from people who do not know their HIV/AIDS status. Studies suggest that the greatest risk is in the period immediately following initial infections.[4] Moreover, a research conducted among people living with HIV in the United Kingdom found that highly publicized prosecutions were indeed stigmatizing, and perceived as undermining public health efforts to encourage voluntary testing and counseling and the promotion of disclosure of one's HIV status.[5]

Criminalisation of Intentional Transmission of HIV/AIDS under Tanzanian Laws

As stated earlier, the standard of proof in all criminal charges is higher than that in civil claims.[6] The rationale is that the accusations, if proved, affect the accused person's liberty, status and in some situations, it costs his entire life for instance in murder cases. As such, there is a legal saying that it is better to acquit 100 guilty persons than to convict one innocent person. The evidential challenges which arise from proving intentional transmission of HIV/AIDS beyond reasonable doubt has the implication that numerous guilty persons are likely to escape justice while some other innocent individuals may be convicted due to lack of effective legislation built on the practical difficulties in proving the intentional transmission of HIV/AIDS.

HIV transmission refers to the transfer of HIV from one infected person to an uninfected person, most commonly through sexual intercourse, blood transfusion, sharing of intravenous needles, during pregnancy or breastfeeding.[7] It includes the actual transfer of HIV from one person to another and exposure to HIV, which does not require the actual transmission of viruses.[8] Exposure to HIV is normally a result of

[3] NAM and National AIDS Trust (2007), "HIV Forensics: The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission". Available on-line at www.nat.org.uk, viewed on 20th October, 2015.

[4] Koopman J, et al. (1997), the Role of Early HIV Infection in the Spread of HIV through Populations. *Journal of Acquired Immune Deficiency Syndrome*; 14(3):249-258. This position is also supported by Weait M., (2007), Intimacy and Responsibility – The Criminalisation of HIV Transmission. Abingdon: Routledge-Cavendish; pg 35.

[5] Dodds C, Keogh P., (2006), Criminal Prosecutions for HIV Transmission: People Living with HIV Respond. *International Journal of STDs and AIDS*; 17:315-318.

[6] S. 3(2) (b) of Cap. 6 provides that in civil matters, including matrimonial causes, the standard of proof is on a preponderance of probability.

[7] Centre for Disease Control and Prevention (2010), HIV Transmission: Can HIV be Transmitted by being Spit on by an HIV Infected Person? http:// www.cdc.gov/hiv/resources/qa/transmission.htm, viewed on 18th May, 2015 and s. 3 of the Tanzanian Act, No. 28 of 2008.

[8] *Ibid*, Centre for Disease Control and Prevention (2010).

negligence or recklessness to comply with safe procedures and practices leading to spreading of HIV. Typical examples of the acts which may lead to exposure to HIV are such as the use of unsterilized needles or syringes, tattooing, body piercing, to mention a few.

In Ugandan for example, a nurse, while attempting to administer an injection to a 2 years child, accidentally pricked her finger with a needle. After bandaging her finger, she returned to administer the injection, apparently using the contaminated needle. Uncertain about whether the same needle was used, the child's mother became concerned about the possibility that her child had been exposed to HIV. After a test, it was found out that the nurse was HIV positive. She was arrested and charged with attempted murder, but in the course of her trial, the charge was revised where she was charged and convicted of criminal negligence.[9] This case shows a vivid example on how it is hard to prove intention in these types of cases even in other jurisdictions.

Globally, numerous efforts have been put in place to prevent and control the continuing widespread of HIV. States have employed two different approaches in responding to this problem. Some have created HIV – specific laws that criminalize HIV transmission while in others are using existing criminal laws to prosecute people for transmitting HIV or exposing others to HIV infection.[10] In West Africa for instance, criminalisation of HIV/AIDS has reached a new phase after the adoption of a "model law" on HIV crafted by West African parliamentarians with support and assistance from the Action for West Africa Region HIV/AIDS Project (AWARE HIV/AIDS).[11] This course has been followed by numerous African states such as Kenya, (the HIV and AIDS Prevention and Control Act, 2006); Sierra Leone, (the Prevention and Control of HIV and AIDS Act, 2007) and Tanzania, (the HIV and AIDS (Prevention and Control) Act, 2008).

The Tanzania National Policy on HIV-AIDS provides that in order to curb the high rate of HIV infection in the society, the Penal Code would be amended to uphold criminal penalties against those who deliberately infect others.[12] This provision of the policy implies that the control of intentional transmission of HIV/AIDS would be achieved by using the existing penal laws. Although there are no HIV-related criminal offences in the Penal Code, existing offences such as assault causing bodily harm could be used to prosecute the individuals who intentionally transmit HIV/AIDS to others.

If a person attempts to do bodily harm to another, regardless of the means, the existing laws should apply. This view is also shared with other researchers who have found out that enacting specific laws criminalizing HIV exposure or transmission is generally an unjust and ineffective public policy.[13] They state that an obvious exception involves cases where individuals purposely or maliciously transmit HIV with the intent to harm others. In these rare cases, existing criminal laws rather than new, HIV-specific laws can and should be used.[14] However, this is not the case in Tanzania. Without any review of the National Policy on HIV/AIDS, which would state the compelling reasons that the penal legislation could

[9] *www.bbc.com/news/world-africa-27468741/* Ugandan court sentences a nurse to three years in prison for negligence over the potential infection of a two-year-old boy with HIV; viewed on 19 May, 2015.
[10] Lazzarini Z, *Et al*, (2002), Evaluating the Impact of Criminal Laws on HIV Risk Behavior. *Journal of Law, Medicine & Ethics.*; 30(2):239-253. Available at SSRN: http://ssrn.com/abstract=321782, viewed on 3/12/2015.
[11] Scott Burris, et al, (2008), Stigma, Ethics and Policy: A Response to Bayer. Journal of Social Sciences and Medicine, Vol. 67, p. 473, *Temple University Legal Studies Research Paper No. 2008 - 74.* Available at SSRN: http//ssrn.com. Viewed on 4/12/2015.
[12] Para. 6.6, Tanzania National Policy on HIV-AIDS, 2001.
[13] Ralf Jürgens, et al, (2009); Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission, *Journal of Reproductive Health Matters, Vol. 17, No.34, pp 163-172, November, 2009,* obtained from http//papers.ssrn.com/sol3/papers.cfm, viewed on 12.10.2015.
[14] *Ibid.*

not suffice the need, a specific law for prevention and control of HIV/AIDS was enacted in 2008, the HIV and AIDS (Prevention and Control) Act, 2008.

The 2008 legislation contains provisions for criminalisation of intentional transmission of HIV. On one hand, this law represents a step forward in the national response to HIV/AIDS, especially by prohibiting discrimination against people living with HIV/AIDS and by establishing a legal framework for a coordinated, multi-sectoral HIV response. On the other hand, criminalisation of HIV transmission has created complex legal challenges which need to be addressed specifically for the HIV and AIDS (Prevention and Control) Act to achieve the intended goals which include prevention, treatment, care, support and control of HIV/AIDS.[15] One such challenge relates to the evidential aspect of proving the offence of intentional transmission of HIV and its implications to the criminal justice framework in Tanzania.

Proof of Intentional Transmission of HIV/AIDS and the Risk of Miscarriage of Justice

It has been stated earlier that the HIV and AIDS (Prevention and Control) Act of Tanzania defines 'HIV transmission' as the transfer of HIV from one infected person to an uninfected person, most commonly through sexual intercourse, blood transfusion, sharing of intravenous needles, during pregnancy or breastfeeding.[16] Under section 47, this Act creates an offence of intentional transmission of HIV/AIDS and which is punishable by imprisonment for a term of up to ten years. The law punishes even the acts which are not blameworthy. It is inconceivable that a pregnant woman can intentionally transmit HIV/AIDS to her unborn child or do so during breastfeeding. This provision contradicts the general principles of criminal responsibility which requires that for an offence to be committed, a wrongful act or omission must be accompanied by a guilty mind, that is, *mens rea*. If the legislators intended that the offence of intentional transmission of HIV/AIDS under Act No. 28 of 2008 should not require proof of *mens rea* as it is the case in strict liability offences, the same could have featured expressly in the said Act. Globally, in this era of human rights, offences that do not require proof of guilty mind have become very uncommon and rarely created by statutes.

It is alleged that the push to apply criminal law to HIV exposure and transmission is driven by the wish to respond to serious concerns about the ongoing rapid spread of HIV in many countries, coupled with what is perceived to be a failure of existing HIV prevention efforts.[17] This concern is genuine and it is true that the issue must be urgently addressed but a closer analysis of the complex issues raised by criminalisation of HIV transmission reveals that such reaction may be falling short of legality and reality.[18] According to the Danish Network of AIDS NGOs, (HIV/AIDS and the International Human Rights Treaty Bodies, 2005-2010), implementation of the human rights conventions are an essential component of effective responses to HIV and AIDS. Protection and promotion of human rights can be helpful in strengthening national responses to HIV. The author of this paper is of the firm view that criminalisation of intentional transmission of HIV/AIDS will not reduce the transmission of this endemic, rather, it constitutes a ground for increased human rights violations against persons living with and affected by HIV. This view is based on the fact that intentional transmission of HIV/AIDS requires that one must be aware of his/her HIV status. At the same time, the 2008 Act makes HIV/AIDS testing a voluntary act and that one's HIV/AIDS

[15] Long title to Act No. 28, 2008.
[16] *Ibid*, section 3.
[17] Open Society Institute (OSI), *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 1st December 2008, available at: http://www.refworld.org/docid/4cd951762.html [accessed 11 January 2015].
[18] Uganda Network on Law, Ethics and HIV/AIDS: Punitive Law and Policy on HIV; A Delicious Platter with a Bit of Poison: Posted by Super user on 28th June, 2014 at www.uganet.org/index.php/15-front.

results must remain confidential[19] except in few situations stipulated under section 18 of the Act. Therefore, where the accused person has opted not to undergo HIV testing, he cannot be said to have transmitted HIV/AIDS intentionally since at the time of transmission he was not aware that he was HIV positive. Proof of intentional transmission will mean the apparent violation of the right to voluntary testing and confidentiality of HIV testing results which are the human rights of the accused person and which cannot be repaired in case the offence is not proved afterwards.

Despite all these legal complexities, no in-depth and specific analyses have been made about the evidential challenges which arise in proving the intentional transmission of HIV/AIDS in Tanzania. Existing literature on this aspect has been based primarily on the justification for criminalizing transmission of HIV/AIDS and its implications on public health policy. Only a few studies from other jurisdictions such as the United Kingdom have pointed out the hardship of proving transmission of HIV/AIDS from one person to another. It is to fill this gap that a critical examination on criminalisation of intentional transmission of HIV/AIDS with emphasis on the evidential challenges under the laws of Tanzania is attempted through this study.

Establishing that the accused person was aware of his HIV infection at the time of the offence, proving who infected who and showing without doubt that the complainant had no previous infection at the time of the alleged transmission, may pose serious challenges during prosecution of the accused person. The person who first learns of his status as HIV-positive may be accused of having "brought" the virus into the relationship, though it may not be clear as to who was first infected. Depending on the circumstances, it may also not be clear that it was the accused, rather than someone else, who actually infected the complainant. There is the potential for miscarriages of justice as a result of such criminal prosecutions or else turning the criminalisation itself an absurdity or paradox. Furthermore, even if a person living with HIV is not ultimately convicted, irreparable damage may be done to individuals caught up in the investigation and prosecution that is driven by unfounded accusations.[20]

There is no doubt that there are various categories of HIV, but it is interesting to note that no individual person has a monopoly right over any type of HIV. As such, one kind of HIV may be shared by millions of persons concurrently. Taking into consideration also that a person may be infected with HIV today but take numerous years before any symptoms of AIDS show up, it is almost impossible to establish that such person had no HIV before or immediately after the act which is complained of as a source of HIV to him or her.

Moreover, anti-HIV laws of most countries require that the accused person must have knowledge that he or she is HIV-positive at the time of the alleged transmission for him or her to be criminally liable for the act complained of. This can be inferred from the wording of the provisions of such laws which use phrases like, "any person who *intentionally*…" or any person who *willfully*.[21] Criminal liability can only be imposed whether for transmission of or exposure to HIV/AIDS; in the event that the accused person actually knew that he or she has HIV. A person cannot be considered to have acted with intent or criminal recklessness in the absence of this positive knowledge. To extend the criminal law beyond those with diagnosed infection, for example, to those who think they may be infected, or even further to those that it is felt ought to know they are infected, may cast the net of criminal law far too broadly.[22]

[19] S. 15 and 16, Act No. 28, 2008.
[20] UNAIDS/UNDP, (2007), International Consultation on the Criminalization of HIV Transmission, Geneva: Switzerland.
[21] For example s. 47 of Act No. 28, 2008 of Tanzania.
[22] UNAIDS/UNDP, 2007, *loc. cit*.

The initial stages of HIV infection are sometimes without symptoms for periods usually exceeding one year.[23] A person who engages in sexual activity or donates blood during this time may therefore have no reasonable basis upon which to suspect that he or she is transmitting a virus. As such, intentional transmission of HIV/AIDS can only be realistic if a person has been tested for HIV, and knows his positive status. In fact, one of the measures to combat HIV/AIDS is to encourage voluntary testing and disclosure of one's HIV status. With criminalisation of HIV transmission, testing for HIV/AIDS means moving closer to criminal liability because lack of knowledge of infection acts as a defense for intentional transmission. Speaking about the potential harms of criminalising HIV/AIDS, Rama **Valayden**, Attorney General and Minister of Justice and Human Rights, Republic of Mauritius, stated as follows:

"Legislators in Mauritius decided not to criminalize exposure to HIV or even HIV transmission. Legislators realized that legislation criminalizing HIV exposure and/or transmission would not be able to withstand a constitutional challenge, because of the difficulties with proof, the likely vagueness of the definition of exposure, and the risk of selective prosecution. The main reason for not criminalizing HIV transmission was, however, the concern about the detrimental impacts on public health and the conviction that it would not serve any preventive purposes. Criminalisation would have created more problems than solving them. Therefore, Mauritius decided to put its resources where they are most likely to have a positive impact on reducing the spread of HIV: increased funding for HIV testing and counseling and for evidence-informed prevention measures."[24]

The Presumption of Innocence and Criminalisation of Intentional Transmission of HIV/AIDS in Tanzania

Presumption of innocence is the most important legal principle which is to the effect that every person is presumed innocent until the contrary is established. In Tanzania, presumption of innocence is a constitutional right under article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977. The law regards with great care the rights of individuals and unless the statute restricts those rights in language beyond reasonable doubt, such rights should be left untouched.[25] The Universal Declaration of Human Rights, 1948 enshrines the presumption of innocence under its article 11(1) where it provides that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Likewise, the International Covenant on Civil and Political Rights (ICCPR), 1966 stipulates under article 14 (2) that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Thus, in any criminal trial, the starting point is that the accused person is innocent. This innocence has to be contradicted beyond reasonable doubt by using evidence and the applicable law for the accused person to be declared guilty of the offence as charged. The accused person needs not to prove that he is innocent for this is obligation of the prosecution side. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove the existence of those facts. This principle is based on the Latin phrase, "*incumbit probation qui dicit, non qui negat,*" that is, the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it.[26]

[23] Chinese Medical Journal, 2006: Vol. 19 No. 119: Guidelines for Diagnosis and Treatment of HIV/AIDS in China, pp. 1589-1608 www.who.int.hiv/pub/china_art.pdf Accessed on 4/12/2015.
[24] Quoted from UNAIDS/UNDP, 2007, *op. cit.* pg. 9.
[25] MC Roberts, J. in *Nanalal Damodar Kanji v. Tanga Township Authority,* [H.M. High Court of Tanganyika] (1940), 1 TLR 239.
[26] Maugham, L.J., in *Liversidge v. Anderson* [1942] AC, 206.

In criminal law, where the accused person is charged with an offence requiring a specific intention, such intention must specifically be proved. Intentional transmission of HIV/AIDS is an example of such cases. Simply intention means that a person has directed his will towards achieving the prohibited result or towards performing the prohibited act. This result or act is his goal.[27] Moreover, in the administration of criminal justice, it has always been hard to prove intention because it is something that remains in the heart and mind of the accused person. For example, in the case of *Brazila v. R.* (1968) H.C.D. n. 309, the accused person was a messenger employed by the Bukoba District Council who, at the time of the offense, he was in charge of the prisoners held at the primary court. He let two prisoners out of their cells and ordered them to wash their clothes while he left for a walk. The prisoners escaped. He was charged with an offense of aiding the prisoners to escape from a lawful custody. The court held that the word 'aid' imports an element of positive assistance and an intention of helping the prisoners to escape. The accused was only found to be extremely negligent and careless.

In cases requiring intention, in order to secure a conviction, usually the courts demand something higher than mere negligence or recklessness. For instance, in the case of *Gordon v. R.* (1972) H.C. n. 39, the appellant was summarily convicted of contempt of court for failing to turn up in court to answer the summons to give evidence. He claimed that he was in the toilet at the material time. The court held that this offence requires proof of intention and that the appellant's explanations negated any intentional disrespect.

The element of fault as a required element of criminal liability rests upon the moral and ethical view that only persons who are deserving of blame ought to be punished. Criminalisation of intentional transmission of HIV/AIDS in Tanzania seeks to punish even persons whose acts are not blameworthy. For example, when a pregnant woman transmits HIV/AIDS to her unborn child, it is inconceivable that she intended and desired such consequences. The law does not compel any person to test for HIV/AIDS as doing so would violate a well settled human rights principle of voluntary testing. Where knowledge of infection is lacking, a person cannot be said to have transmitted HIV/AIDS intentionally.

Sections 47 and 48, Act No. 28, 2008 of the HIV/AIDS (Prevention and Control) Act provides that any person who intentionally transmits HIV to another person or breaches any provisions which relate to safe procedures and practices leading to spreading of HIV commits an offence. Therefore, in Tanzanian, both exposure to HIV/AIDS and the actual transmission of HIV/AIDS are criminalized. This is a big step backward to the efforts for eradication of this endemic as it conflicts with the global efforts to encourage voluntary testing for HIV/AIDS and confidentiality of one's HIV status. The act of criminalizing HIV may result in the use of confidential health records as evidence of the defendant's knowledge of his HIV status. The UN Human Rights Committee noted that "… the criminalisation of HIV cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS…by driving underground many of the people at risk of infection… would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention."[28]

Criminalisation of HIV impairs the government's policy for enacting this law as stated by the then Minister of Health and Social Welfare of Tanzania that one of the purposes for enacting the HIV/AIDS (Prevention and Control) Act is to eliminate discrimination which hinders efforts to combat HIV/AIDS and to promote voluntary HIV testing.[29] The worry on how to prove intentional transmission of HIV/AIDS was evident among the members of parliament during the parliamentary debates on enactment of this legislation. For instance, during the parliamentary debate, Hon. Lucy F. Owenya observed as follows:

[27] Snyman, C.R., (2002),*Criminal law*, 4th Ed, Butterworths, Durban.
[28] UNAIDS, (2006) International Guidelines on HIV/AIDS and Human Rights, (Consolidated Version), obtained from Geneva, pg. 92, www.unaids.org, viewed on 12/10/2015.
[29] The United Republic of Tanzania, Parliamentary Debates (Hansard), National Assembly Official Report (3rd Meeting), Sat on 31st January, 2008, pg. 37.

"Mr. Deputy Speaker, section 47 speaks about intentional transmission. Here I am a bit confused because how do we recognize intentional transmission? When the complainant alleges that he has been intentionally infected with HIV/AIDS, how do we know that he did not have infections before? We understand completely that you may be tested for HIV/AIDS today, but there is what we call window period. My HIV/AIDS results today do not necessarily mean that I am HIV negative because there is window period which may take up to six months. In such circumstances, how do we determine? How many times will we test in order to conclude that this person has been infected and he had no infections before; probably he used another person to test whether he is infected or not."[30] (*Translation from Kiswahili to English is mine*).

The author of this paper does not dispute the fact that people deserve justice where they have been intentionally exposed to HIV/AIDS, but efficient mechanisms need to be put in place to ensure that conviction and sentence go to those who deserve.

Reading the long title of the HIV/AIDS (Prevention and Control) Act, one may reasonably expect that such legislation strives to achieve *inter alia,* the prevention and control of HIV and AIDS. It is commendable that there are established legal and institutional frameworks towards that end, but the problem arises under section 47 which criminalizes the intentional transmission of HIV. It provides that,

"*Any person who intentionally transmits HIV to another person commits an offence, and on conviction, shall be liable to imprisonment to a term of not less than five years and not exceeding ten years*."

Section 48(1) of the HIV/AIDS (Prevention and Control) Act provides that any person who breaches any provisions relating to safe procedures and practices leading to spreading of HIV commits an offence and on conviction, if he is an individual, he becomes liable to a fine of not less than two hundred thousand shillings but not exceeding five hundred thousand shillings or imprisonment to a term of not less than three months but not exceeding six months. In case of a health care facility, it becomes liable to a fine of not less than three million shillings but not exceeding five million shillings.

Generally, these provisions have a negative impact on prevention and control of HIV. As pointed out earlier, by necessary implication, intentional transmission of HIV requires one's own knowledge of his HIV status. In proceedings for intentional transmission, before proving intention of the accused person, it will be important first to prove that he knew he was infected with HIV. In the absence of knowledge of infection, intention cannot be proved; hence, it becomes a defense on part of the accused person that he could not intentionally transmit HIV and AIDS to another person while he did not know that he was himself infected. The HIV and AIDS (Prevention and Control) Act, No. 28 of 2008 is now in force vide the Government Notice (G.N.) No. 394 of 19th December, 2008 which declares the 1st January, 2009 as a commencement date of this Act, but there is little prospect that it will achieve the intended goals in providing for the prevention, treatment, care, support and control of HIV/AIDS in Tanzania.

Conclusion

Criminalisation of intentional transmission of HIV/AIDS; neither promotes the prevention of HIV/AIDS nor controls the spread of this epidemic in Tanzania. Again, it is not an appropriate way of dealing with HIV/AIDS because its evidential challenges leave a lot to be desired and fall below the required standard of proof in criminal cases. The author of this paper conclude that it is almost impossible in Tanzania to prove beyond reasonable doubt that one person has intentionally transmitted HIV/AIDS to another person. The basis for this conclusion is the findings, which have revealed two evidential complexities regarding this matter.

[30] *Ibid.*

Firstly, having provisions of the law which provide for voluntary testing of HIV/AIDS and right to confidentiality of one's HIV/AIDS status, (Part IV and V, Act No. 28 of 2008), most Tanzanians do not know whether they are infected with HIV or not. Knowledge of one's HIV/AIDS status being a matter of fact, not law, lack of it could be considered as a partial defense to afford the accused person a lenient punishment. Otherwise, it cannot be established with certainty that the complainant had no previous infections before the act complained of transmitting HIV/AIDS to him. Secondly, given the fact that HIV is not something specific and unique to each individual like the DNA and fingerprints, it cannot be proved beyond reasonable doubt that the HIV, which the complainant is alleging to have been intentionally transmitted have come from a particular person against whom the allegations are leveled.

Recommendations

Eventually, this paper recommends that if the policy and lawmakers are concerned about preventing HIV transmission, it is better to address the evidential challenges surrounding this matter first to avoid dealing with the HIV problem to the expense of those who are already its victims. It is not disputed that the law has some effect on modifying the behaviour of some criminal individuals, but there is no scientific evidence that it works effectively with regard to the behaviours that transmit HIV, hence, the impact of criminalizing HIV/AIDS on the efforts to combat it is likely to yield more negative results than otherwise.

While in developed countries the number of criminal prosecutions has been small compared to the total number of people living with HIV, cases have regularly resulted in sensational media coverage, including the negative portrayal of people living with HIV as "vectors of disease."[31] As aforesaid, the situation is not expected to be better in developing countries like Tanzania. Widening the scope of criminal law to HIV cases is likely to result in more prosecutions, leading to more discrimination, spreading of misinformation about HIV, and creation of a false sense of security that the law can protect people from HIV. Criminalisation of intentional transmission of HIV/AIDS sends out the message that people living with HIV are responsible for the spread of HIV and others are victims or potential victims.[32] Criminalisation leads to more stigmas which in turn will lead to more transmission because it will discourage disclosure and openness about HIV/AIDS. It creates the potential environment for miscarriages of justice as a result of such criminal prosecutions.

In some jurisdictions, such as the UK, the phylogenetic test is used to prove cases of HIV/AIDS. This is technical evidence which is not available in resource-poor countries like Tanzania and has limitations which are not well understood by police officers, prosecutors, defense lawyers, courts or by people living with HIV. Phylogenetic analysis can only provide an estimate of the relatedness of the samples and cannot on its own answer the critical questions: whether the virus in the complainant is the same as that in the accused; who infected who; when the infection occurred; or whether the complainant and accused were both infected by third parties with similar strains of HIV. [33] These limitations, combined with a little technical understanding on the part of the actors in the justice system, may result into miscarriage of justice. Some writers are of the view that in some cases, the results of phylogenetic analysis have been misused; with overstated claims as to its conclusiveness in "proving" beyond reasonable doubt the guilt of the accused.[34]

[31] Dodds, C., et al, 2009, Responses to Criminal Prosecutions for HIV Transmission Among Gay Men with HIV in England and Wales, *Reproductive Health Matters, Vol. 17, No. 34, pp. 135-145, November 2009*.
[32] *Ibid*, pg. 143.
[33] UNAIDS/UNDP, (2007), International Consultation on the Criminalization of HIV Transmission, Geneva: Switzerland, pg. 10.
[34] *Ibid.*

The author recommends that Tanzania may still resort to the existing penal laws to prevent and control HIV/AIDS epidemic. Offenses such as assault causing grievous bodily harm may be well utilized in punishing transmission of HIV/AIDS in circumstances which would otherwise be termed as intentional transmission. In the alternative, the author recommend the HIV/AIDS (Prevention and Control) Act of 2008 to be amended in its section 47 by deleting the word "intentionally" and substitute it with the words "negligence or recklessness". This will help in proving HIV/AIDS transmission without getting into the hardship of proving intention. As it has been shown, in numerous cases requiring proof of intention, the court ended up with finding out negligence or recklessness instead of intention. This sends a message to the legislators that the offences which need specific proof of intention have to be reconsidered as it has become hard to prove such intentions. Such hardship together with other evidential challenges discussed in this paper would hinder the law on HIV/AIDS from achieving its objectives because proof of intention is an essential requirement to find convictions of the accused persons.

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