

Criminalization of HIV Transmission in Africa: Ubuntu/Botho Perspective

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Abstract

This paper evaluates two reasons often given for the criminalization of HIV and AIDS. The first justification is that criminalizing HIV exposure and transmission will act as a deterrent to both HIV positive and negative people. The second is that people who expose others to the risk of HIV infection ought to be punished because their actions are morally wrong. In response, the paper argues that these reasons fail to support the criminalization of HIV and AIDS transmission. In the end, the paper appeals to the African ethic of Ubuntu/Botho, to show that criminalization of HIV and AIDS fails to promote public health and respect for human persons especially those living with HIV and AIDS.

Introduction

Africa has the most serious HIV and AIDS prevalence globally. This observation is noted by UNAIDS' Fact Sheet (2019), according to which 20.6 million Africans live with HIV particularly in sub-Saharan Africa. Unfortunately, this prevalence still appears to be on the increase despite the many efforts by different African governments to curb the spread. Botswana has shown a positive and strong commitment in the fight against HIV and AIDS within the sub-Saharan region. For example, it paved the way for free universal antiretroviral (ARV) treatment since it was the first in the region to give them for free to people living with HIV. According to the National AIDS Coordinating Agency (NACA) (2014), the impact of these efforts is conspicuous and measurable in the sense that there is a significant decrease in new infections: from 18,000 in 2005 to 10,000 in 2010, and down to 8,500 in 2018. However, despite all these commendable efforts, Botswana remains one of the most affected countries because it has the fourth highest prevalence in the world after South Africa, Lesotho and Eswatini (UNAIDS 2017). This goes to show that Africa, particularly East and Southern Africa, still has a long way to go in the fight against HIV and AIDS.

It is indisputable that this dreadful reality raises a major public health concern and the need to be aggressive in interrogating the role played by the African continent in the fight against the pandemic. In response to this devastating reality, some countries adopted the criminalization of HIV transmission as a way of curbing the spread. According to the UNAIDS policy brief on

the criminalization of HIV (2008), the two key reasons often given for criminalizing HIV are: to punish harmful conduct by enacting criminal penalties, and to prevent HIV transmission by deterring or changing risk behaviors.

In this paper, I make a philosophical analysis of this development by looking into two justifications for criminalizing the transmission of HIV and AIDS. I argue and show that the rationale and justification for criminalization in this regard are not warranted. To this end, I start off by reviewing the status quo on HIV and AIDS in Africa with specific focus on East and Southern Africa as there is not enough space and time to cover the whole of Africa. I believe this will help us appreciate the aim of this paper and the need to create constant dialogue on appropriate and effective measures of fighting the pandemic. In what follows, I will then evaluate the justification for criminalization as one way of fighting the pandemic. Specifically, I examine the two main reasons often advanced for criminalization, namely, to punish harmful behavior and to deter risk behavior. With the use of the method of philosophical analysis, I show that these justifications are not warranted.

HIV & AIDS in Eastern and Southern Africa

According to the UNAIDS Fact Sheet (2019), HIV remains a major public health issue that has mostly affected Eastern and Southern Africa with about 20.6 million people living with HIV at the end of 2018. This region accounts for 45% of the world's HIV infections and 53% of people living with HIV globally. According to the UNAIDS Data Report (2018b), an estimated 800 000 people in the region are reported to have acquired HIV in 2018, and an estimated 380 000 recorded people died of AIDS-related infections. The report further highlights that countries that accounted for more than half of new infections and deaths from AIDS-related infections in 2017 include, Mozambique, South Africa and Tanzania. Undeniably, this is a very disturbing reality indeed. In a bid to address the situation, the global health community and leading governments have made significant scientific advances in understanding the nature of HIV, its prevention and treatment. For instance, the establishment of the prevention of mother-to-child transmission (PMTCT) has significantly enhanced the fight against HIV and AIDS in some of the African countries. Botswana, for example, has already made some progress in this respect because all 634 health facilities that provide maternal services across the country are now able to offer the PMTCT programme since 2014 (National AIDS Coordinating Agency 2014). In 2016, more than 95% of pregnant women living with HIV in Botswana received ARV treatment compared to 92% in the previous year (UNAIDS 2017). This is commendable when

compared with the USA and Western Europe. Furthermore, the discovery of antiretroviral drugs (ARV) has made the lives of those living with HIV a little bearable since they can control the virus and still live a healthy lifestyle. These examples demonstrate that some progress is being made to curb the prevalence of HIV.

However, despite all these efforts, many people living with HIV or those at the risk of HIV infection, particularly in low and middle-income countries, still don't have access to proper care, prevention, and treatment. What is even more devastating is the fact that, HIV and AIDS still has no cure. What then, one may ask, is Africa doing to contain the spread of this pandemic? One measure has been the criminalization of HIV transmission. In the following sections, we briefly look into what criminalization entails before we evaluate its justification.

Criminalization

According to the UNAIDS Policy Brief (2008), criminalization of HIV transmission involves the application of criminal law by the government through the legislature and the judiciary on those who transmit or expose others to HIV infection. This process can take two different forms. In the first instance, the accused person is prosecuted through the already existing criminal laws such as those that exist under the Penal Code or the Public Health Act. For example, some States in the USA have assumed such criminal laws to prosecute those who engage in sexual behaviour without disclosing their HIV-positive status to their prospective sex partners, (Galletly, Difranceisco, and Pinkerton 2009; Galletly and Pinkerton 2006). A typical example here is that of an HIV-positive woman in Georgia who was sentenced to 8 years in prison for not disclosing her HIV status even though two witnesses testified at court that her sexual partner was well aware of her HIV positive status. In another case, an HIV positive man in Texas is serving a 35-year sentence in prison for spitting at a police officer. In Canada they also have the same laws where transmitting or exposing others to the risk of HIV through unprotected sex is considered a criminal offense (Merninod 2009).

The second form of criminalization employs legislation that has been specifically designed and targeted at people who intentionally transmit HIV. For example, there is the N'Djamena Model Law on HIV and AIDS which was developed by several West and Central African countries in September 2004 with the hope that the law will provide grounds for endorsing HIV and AIDS legislation across west and central Africa (Eba 2015; Pearshouse 2007). Some African countries that adopted this Model Law include Mali, Sierra Leone, Togo, Benin and Guinea

Bissau. In sub-Saharan Africa, countries Zimbabwe, Kenya, Malawi, and Mozambique have domesticated HIV-specific provisions in laws to curb the spread of HIV and AIDS.

In Zimbabwe, (the first African country to create an HIV-specific offence in 1996), they have a criminal law which states that,

“any person who (a) knowing that he or she is infected with HIV, or (b) realizing that there is a risk or possibility that he or she is infected with HIV; intentionally does anything or permits the doing of anything which he or she knows will infect or does anything which he or she realizes involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV”(Zimbabwe Criminal and Penal Law 2004).

Since 2015, there has been an increase in prosecution related to HIV transmission across sub Saharan Africa and so far, 30 countries in the region have passed laws criminalizing HIV transmission. Having highlighted what criminalization entails, we shall move on to look at the two strongest arguments often given in support for criminalization.

Rationale for Criminalization

Many reasons have been tabled in support of criminalizing the transmission of HIV (Markus 1999; McArthur 2009; Mosiello 1998). However, we shall confine ourselves to only two of these reasons due to time and space constraints.

(a) Deterrence

Proponents of criminalization claim that prosecuting people who engage in sexual behaviour without disclosing their HIV-positive status to their prospective sex partners will act as a deterrent to both HIV positive and negative people. In other words, if laws that criminalize HIV transmission are endorsed, then this will instil fear in people thereby discouraging people to engage in risky sexual behaviour (UNAIDS 2018a). Further support for this justification arose from the realization that violent sexual acts lead to continued spread of HIV. The argument here, as Mesika (2012) observes, is that sexual abusers tend to treat their victims in the most horrible manner and place them at the risk of contracting a devastating disease. As a result, HIV criminalization advocates propose that perpetrators should face greater consequences of their actions. By coupling the risk of an HIV-related criminal prosecution with a rape prosecution, lawmakers hope that both HIV transmission and violence against women can be deterred. The Canadian Supreme Court explains deterrence succinctly as follows,

“[criminal] law provides a needed measure of protection in the form of deterrence and reflects society’s abhorrence of the self centered recklessness

and the callous insensitivity of the actions of the respondent and those who have acted in a similar manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever-present reality [...] The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances. The Criminal Code does have a role to play. Through deterrence it will protect and serve to encourage honesty, frankness and safer sexual practices” (R. v. Cuerrier 1996, 142)

At first sight, this way of thinking about deterrence sounds convincing but it is of questionable utility upon thorough reflection. It seems that the rationale behind deterrence was based on a false assumption that, it would promote public health or morality by dissuading people from transmitting HIV: “Criminal statutes are effective to deter individuals from engaging in HIV transmitting behaviour [...] There is a social objective to prevent conduct likely to spread HIV in order to prevent further transmission of HIV to uninfected persons [...]” (Hermann 1990, 352–53). Thus, advocates of criminalization assume that by punishing those responsible, the threat of incarceration will act as a deterrent.

On the contrary, there is no clear evidence to support this assumption – “that laws regulating the sexual conduct of people living with HIV change behaviour in a positive way” (Global Commission on HIV and the Law 2012). This view is further supported by Oluduro (2011) who avers that assumptions about deterrence are hardly effective because on the contrary, they often lead to an increase of that which one is trying to prohibit which, in this case, is HIV transmission. The inefficacy of deterrence laws becomes vividly clear when we consider the history of criminal prosecution. As observed in our everyday life, laws that were intended to deter prostitution, sodomy and transmission of syphilis have been ineffective in averting those behaviours.

Likewise, laws relating to murder and armed robbery have also been unsuccessful in preventing crime despite the fear of the death penalty. For example, Botswana has for some time, been executing inmates who had been sentenced to death with the most the recent execution carried out on the 21st January 2020. Despite these laws, people still murder other people. In fact, Radelet and Lacork (2009) provide empirical research to the effect that capital punishment has no deterrent effect. According to their study, 88% of the world’s leading criminologists are of the view that the death penalty does not deter murder. If anything, these laws seem to contribute in some way to the continued and increasing number of murders in countries where the convicted face capital punishment. The latter may be contrary to international human rights

obligation, but it is nowhere close to deterring people from committing the most atrocious crimes. Similarly, it is unlikely that criminalization of HIV transmission will have any deterrent effect in the face of stigma, discrimination, physical violence, and poverty. The UNAIDS Policy Brief (2008) also supports this view because it reports that there is no data showing that criminalization will achieve either criminal justice or prevent HIV transmission.

According to Yang et al. (2018: 1175), the justification for criminalizing HIV transmission on grounds of deterrence is particularly weak because it fails to consider scientific evidence on HIV transmission and prevention. To support this view, he gives an example of the many Americans who live with HIV and who "...have achieved viral suppression which is proven to reduce if not eliminate transmission risk". Similarly, Jurgens et al. (2009) maintains the that there is no scientific evidence to support the claim that criminal prosecution can deter conduct that poses a risk of HIV transmission. This view has been shared extensively by other scholars (S. C. Burris et al. 2006; Lazzarini, Bray, and Burns 2002). Based on these arguments, there is no justification for imposing criminal laws on HIV transmission.

(b) Punish Harmful Conduct

Advocates for the criminalization of HIV transmission believe that people who expose others to the risk of HIV infection ought to be punished because their actions are morally wrong. In other words, if one knows that one is HIV positive, and one acts with the intent to transmit HIV, and does go on to transmit it, then one's mental state, behaviour and the resulting harm justifies punishment. However, as Jurgens et al. (2009, 164) observe, it is unusual to come across such cases of malicious acts in the context of HIV;

“...most people who transmit HIV either do so not knowing they are infected and not knowing they are transmitting HIV, or because they fear that to reveal their HIV status will result in violence, discrimination, rejection by family and friends, and other abuses based on their HIV status”

For such exceptional cases, advocates of decriminalization agree that existing laws – against assault, homicide and causing bodily harm, or allowing intervention where a person is spreading communicable diseases (UNAIDS 2008) – can and should be used instead of defining new HIV specific laws such as the N’Djamera model of West and Central Africa. According to the Global Commission on HIV and the Law (2012) passing such specific HIV laws is not justifiable in the sense that it violates international human rights standards. Even Guideline 4, in the International Guidelines on HIV and Human Rights, requires states to confirm that their criminal laws “are not misused in the context of HIV and AIDS or targeted

against vulnerable groups” (OHCHR and UNAIDS 2006). In addition, there is evidence which suggests that most people living with HIV and who are in fact aware of their status take steps to prevent transmitting HIV to others (Bunnell et al. 2006; Marks et al. 2005).

However, this does not mean that individuals should forget their moral obligation to protect others. There are prospects that some individuals may willingly become malicious by causing harm through HIV transmission. Admittedly, if there is clear evidence of transmission liability, we cannot deny that a person who was previously not infected is now infected with HIV. Also, we cannot deny that such an individual has been harmed. Under such circumstances, it may be argued that criminal law is warranted. Clearly, such an application of criminal law is limited but it fits in well with recommendations from various policy documents and articles such as the UNAIDS policy brief on the *Criminalization of HIV Transmission* (2008); the Amnesty International in their Health and Human Rights Policy Paper particularly on *Criminalization of HIV*(2008); Burris and Cameron (2008).

In cases where infection is not caused by intentional transmission, criminal prosecution is not justified. The UNAIDS policy brief on criminalization of HIV gives a good example;

“...the criminal law is not appropriately applied where a person has disclosed his or her HIV-positive status to a partner (who is able to consent freely to sex); where that partner is already aware through some other means that the person is HIV-positive; or where the HIV-positive person takes steps to reduce the risk of HIV transmission (e.g. by using condoms or otherwise practicing safer sex by avoiding higher risk activities)” (2008: 03).

In cases such as the above, there is no intentional transmission of HIV and it would be unfounded to prosecute people on such basis because there is no carelessness. If anything, such prosecutions would only work against efforts aimed at preventing HIV that include voluntary HIV testing, voluntary disclosure and encouraging safer sexual practices.

However, one major problem with punishing harmful conduct in the context of HIV is over-criminalization which, according to Simpson-Bey (2017), may be understood as the process of imposing unbalanced penalties with no relation to the culpability of the wrong doer. Weait (2011) observes that in Zimbabwe, criminalization extends even to those who suspect themselves of being HIV positive but with no proper diagnosis. Oluduro (2011:180) emphasises this idea when he highlights that according to Zimbabwe’s criminal law,

“any person who, knowing that he or she is infected with HIV or realizing that there is a risk or possibility that he or she is infected with HIV: intentionally does anything or permits the doing of anything which he or she knows will

infect, or does anything which he or she realises involves a real risk or possibility of infecting another person with HIV, shall be guilty of deliberate transmission of HIV”

What this excerpt seems to suggest is that an HIV negative person can be charged with a crime on the grounds that, there is a possibility of him being HIV positive (Cameron et.al 2008). However, is such an understanding of the law even justifiable? It does not seem so and there have been many other cases of people being unjustly criminalised. For example, we can cite a case of a woman who faced prosecution under the above law in Zimbabwe and served a suspended term of 5 years imprisonment for engaging in unprotected sex while HIV positive although her partner tested HIV negative. Weait (2011: 24) gives further examples of over criminalization such as the case of “the Democratic Republic of Congo where they have not only HIV specific legislation, but indirect criminalization via legislation aimed at combating sexual violence and violence against children; and in the Central African Republic the law criminalises those who do not know their HIV positive status and may be imposed retrospectively.” With these considerations, to be sure, criminalization of HIV transmission is unwarranted. As we draw near towards the conclusion, we can even consider criminalization of HIV transmission in the context of *Ubuntu/botho* to further show that it is unjustified.

***Ubuntu/botho* and Criminalization of HIV transmission**

Ubuntu/botho is a term that derives from different Bantu speaking people of Sub-Saharan Africa. In Zulu and Sotho-Tswana it is an equivalent of the English word ‘person’. In the same way, *botho* can therefore be translated as ‘personhood’ but its significance is far greater than that. As an African principle of morality, *Ubuntu/botho* is usually used to define how individuals and communities should interact based on the aphorism that, ‘*motho ke motho ka batho*’ literally translated, ‘a person is a person through other persons’ (Taylor 2014). The literal translation does not fully capture the significance as understood within the African context, but the full meaning is that a person is a person, because of, with and through other persons (Gaie 2007). *Ubuntu/botho* is an integral part of African ethics that comprises a broader African reality enshrined in African humanism, communalism and personhood.

Gaie (2007) suggests that whatever is inconsistent with *ubuntu/botho* is morally wrong and as such, we cannot have any moral reasons to justify it. In our evaluation, we have established that criminalization of HIV transmission hinders people from going for voluntary testing for fear of testing and attracting criminal charges if their partner also tested positive. This hindrance renders criminalization unjustifiable because instead of promoting public health and

respect for human persons, it is doing the opposite. Certainly, it is *ubuntu/botho* to promote public health and respect for human persons. Failure to do so suggests that one does not value the wellbeing of other people. It is from this point of view that criminalization is inconsistent with *ubuntu/botho*, hence morally wrong.

The position proposed in this section is not immune to possible objections. For instance, one may argue that the argument overlooks the fact that transmission of HIV is, in fact, not *ubuntu/botho* in that by transmitting the virus, one's action does not treat the other person who is being infected as significant. As such, one might conclude that the use of *ubuntu/botho* to substantiate the argument is defeating the purpose of the argument. In response, however, it should be noted and emphasised that our argument throughout this paper is directed towards situations apart from *intentional* HIV transmission. In the latter, transmission is certainly not *ubuntu/botho* because one who transmits the virus presupposes that the one who is being infected is not important. Such an individual fails to recognise that the very same act of infecting another with HIV is, in fact, a moment of definition where the person who infects another acknowledges that he is what he is because of, with and through the person being infected – a criminal.

As much as this objection sounds strong, it does not, however, go further to enhance our thinking or reflection about what Africa needs to do going forward in the fight against the pandemic. We cannot deny the fact that thousands of Africans are perishing daily due to this scourge. Admittedly, much work has been done on *botho* and HIV (Gaie 2007;Mmolai S. Koketso 2011;Tarkang, E. E., Pencille, L. B., and Komesuor, J 2018) but little, if any, has been done specifically on the issue of *ubuntu/botho* and HIV criminalization. As a theory that guides morality, *ubuntu/botho* is still applicable even after one is infected with HIV since its principles can help prevent further transmission. In fact, one can be bold and claim that had all Africans embraced *ubuntu/botho*, there probably would not be so many people dying of HIV and AIDS.

Conclusion

In this paper, we have sought to show that reasons often given in support of criminalising HIV transmission are not warranted. More specifically, we considered reasons that emphasise two functions of criminal law, namely, deterrence and retribution. Regarding the first, we were able to show that it is rooted on a false assumption that, it would promote public health or morality by deterring people from transmitting HIV. In particular, it has been shown that there is no scientific evidence to support the view that criminal law or the threat thereof, can discourage

behaviour that poses a risk of HIV transmission. Judged against the aim of punishing harm, HIV specific criminal law tends to fall into the problem of overcriminalization. The one major challenge with the overly broad application of criminal sanctions to HIV transmission is the birth to stigma and discrimination against people living with HIV and AIDS. Consequently, this contributes negatively to efforts aimed at curbing the prevalence of HIV. In the end, we employed the African ethic of *ubuntu/botho* to further show that the two reasons for criminalization are not morally justified in that they fail to promote public health and morality.

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