

The Limiting Role of Criminal Law in Minimizing the Spread of Hiv/Aids in Nigeria

LE RÔLE LIMITÉ DU DROIT PÉNAL À MINIMISER L'EXPANSION DU VIH / SIDA AU NIGERIA

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Abstract: The paper examines some of the reasons for the increase in the criminalization of human immunodeficiency virus (HIV) endangerment across the globe and whether or not these laws have had any significant impact on the spread of the disease. Rather than criminalizing HIV in Nigeria, the paper calls for such cases to be treated under the existing traditional criminal law or public health law offences of the State.

Key words: Criminal law; Nigeria; Prosecution; Human immunodeficiency virus (HIV); Acquired immunodeficiency syndrome (AIDS)

Résumé L'article examine plusieurs raisons de l'augmentation de la criminalisation liée au danger du virus de l'immunodéficience humaine (VIH) à travers le monde et tente de savoir si ces lois ont eu un impact significatif sur l'expansion de la maladie. Plutôt que de criminaliser le VIH au Nigeria, l'article demande de traiter certains cas dans le cadre des infractions du droit pénal traditionnel en vigueur ou du droit public de la santé de l'état.

Mots clés: Droit pénal; Nigeria; Poursuite; Virus de l'immunodéficience humaine (VIH); Syndrome d'immunodéficience acquise (SIDA)

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INTRODUCTION

The first official report on 'Acquired immunodeficiency syndrome (AIDS)' appeared in June 1981 among homosexuals in United States of America (AVERT; Centers for Disease Control and Prevention (CDC), 2001), and since then, it has continued to increase at an alarming rate. As at the end of 2008, about 33.4 million people were said to be living with HIV/AIDS worldwide- a figure which is more than 20% higher than the number in 2000, with a prevalence rate roughly threefold higher than in 1990 (UNAIDS *Report on the Global AIDS epidemic*, 2009). Of this figure, almost 22.4 million people are living with HIV in sub-Saharan Africa- a region already plagued by poverty and other diseases- 1.9 million more than in 2007 (UNAIDS *Report on the Global AIDS epidemic*, 2009). Considerable efforts have been made towards improving access to antiretroviral treatment in recent years. Nonetheless, about 1.4 million people in 2008 were reported to have lost their lives in sub-Saharan Africa as a result of HIV/AIDS related illness, almost three quarters (72%) of all AIDS deaths globally. The highest number of people infected with HIV appears to come from South Africa, with about 5.7 million people living with HIV (UNAIDS *Report on the Global AIDS epidemic*, 2009).

In Nigeria, the rate of infection is fast increasing. As at the end of 2007, about 2.6 million people are infected in Nigeria (AVERT). Also in 2007, approximately 170,000 people reportedly died from AIDS alone with average life expectancy declining significantly from 53.8 years for women and 52.6 years for men in 1991 to 46 for women and 47 for men in 2007 (AVERT). The irrational fear of being infected with HIV and the frustration as a result of the continuous spread of the pandemic despite increasing access to treatment coupled with its staggering impact on health, and on the social and economic stability of the country, has led to calls in several quarters for the enactment of laws to criminalize the reckless or deliberate or conduct capable of transmitting the virus. Such laws are now spreading across the globe through

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United States, Australia, Canada, Europe and now to Sub-Saharan Africa and Asia. For example, while in Tanzania, proof of wilful transmission leads to life imprisonment, in Benin, exposure to HIV even when transmission has not occurred is criminalized. Most of these laws are based on the African Model Law, created in September 2004 at a workshop by Action for West Africa Region in N'Djamena, Chad (HIV Verdict on a Virus). Since then, at least 15 African countries (Pearshouse, 2008, 5-6) including Guinea-Bissau, Benin, Mali, Niger, Togo and Sierra Leone have passed laws criminalizing HIV transmission and several others are proposing to enact similar laws. Statistics available showed that since the late 1980s in Canada, more than 90 people with HIV have been prosecuted, and about 70 convicted of criminal HIV exposure or transmission (Cameron, 2009). Countries like Austria, Sweden and Switzerland each had more than 30 prosecutions respectively for the transmission of HIV (Greater Network of People Living with HIV/AIDS, 2005). It is the belief of the proponents of this view that criminalization of HIV endangerment will help to minimize the spread of this epidemic, as it would, according to them, instil fears in the minds of the people to always adopt safer and healthier behaviour in their sexual and social lives. In order to prevent the misuse of coercive measures, minimize the negative effects on HIV prevention efforts and on access to care, treatment and support, it is important to have sound public policy in this area (Elliot, 2000, 66-67).

The paper shall examine the rationales for invoking criminal law, and whether these afford any justification for criminalizing HIV transmission in Nigeria. It shall further address some of the traditional criminal laws offences, and examine if they are adequate to deal with cases of HIV endangerment, and if not, whether there is need for a new HIV specific laws.

1. RATIONALES FOR CRIMINALIZATION

Various reasons have been proposed in support of adopting an HIV- specific statute that create a separate crime or increase the punishments for existing crimes (Mosiello, 1999; Markus, 1999; McArthur, 2009, 709). This sub-section shall examine these reasons with a view to determining if they are sufficient enough to justify the invocation of criminal sanctions being suggested.

In the first place, it has been argued that criminalization would serve as a deterrent to the culprit. One of the proponents of this view argued that in view of the myriad of contexts in which HIV/AIDS crimes are perpetuated in Nigeria, 'it is particularly crucial that sentencing should be strict enough to deter the convict and provide retributive solace for the victim. It is in this sense that criminal laws can help stem the tides of HIV/AIDS transmission' (Bassir). The argument though appeared sound, but is of questionable utility. Coercion is a crude tool of prohibiting HIV transmission in areas of highly complex, intimate private activity like sex or illicit drug use. The efficacy of the theory of general deterrence is, at best 'only a conjecture unsupported by any scientific evidence,' (Adeyemi, 1968, 255-256) and must be seen as 'a judicial exercise in self deception.' (Adeyemi, 1977) The same is also true as regards specific deterrent. In fact, assumptions about deterrence by the legislators and courts are so simplistic as to border on the verge of lack of full appreciation of the relationship between punishment and criminality (Adeyemi, 1990, 110). Such laws hardly deter people, but on the contrary often lead to increase of such prohibited act. For example, in Nigeria, studies on the offences of murder, armed robbery, and those of drugs and narcotic, have demonstrated clearly that no efficacy has been or can be shown for the operation of the death penalty for these offences (Adeyemi, 1991, 4). Apart from the fact that capital offence is contrary to international human rights obligations, the number of these offences has increased unabated. Thus, criminalization of HIV transmission will hardly have any deterrent effect in the face of stigma, discrimination, physical violence, poverty and others, meted to HIV infected persons who are seen as potential criminals in society.

Secondly, it has been contended that criminalization will bring about incapacitation of the offender. In other words, sending such a person to terms of imprisonment will prevent him/her from inflicting harm on others who are uninfected. This may not be totally true in view of the fact that high-risk behaviour in form of unprotected sex, sharing needles etc are on the increase in prison among the inmates, without access to information that can prevent the transmission of HIV (Grover, 2010; Gostin, 1989, 1056). This is coupled with the fact that majority of prisons in Nigeria lack adequate health care facilities for prisoners that are HIV positive. An imprisoned HIV positive offender who commits an assault (biting), or who still engage in high risk behaviour on a fellow uninfected prisoner or a prison official is still inflicting harm on persons who are uninfected. Besides, in countries where conjugal visits are allowed, and where prisoners are permitted to go on weekend leave to their homes subject to good behaviour, it therefore implies that outsiders too may not be safe from the activities of such HIV positive prisoner, and this will ultimately render the practical value of incapacitation counterproductive.

In addition, it has been argued that criminalization will serve the purpose of retribution. In the Zimbabwe's case of *S v. Nzara* (2001 JOL 8529 ZH), the accused was charged with the crime of sodomy. It was alleged that between 15 and 17 of December 1999 at a house in Glen-Norah, the accused unlawfully and intentionally and against the order of nature had sexual intercourse *per anum* with one Z, a minor aged four-and-half years on diverse occasions. He pleaded not guilty and after a long trial, he was found guilty of the crime charged and he was referred to the High Court for sentence. It is

important to note that the issue of the accused's HIV status arose when, during the trial, the accused asked if the child had a sexually transmitted disease similar to the one he was suffering from. This prompted the Magistrate with the accused's consent and the consent of the minor child's parents to order that the accused and the minor child both be examined or tested for HIV. The accused person confirmed in court that he was indeed examined. Blood samples were taken from him and they were analysed. The results of the tests were that the accused was found to be HIV positive and the minor child was also found to be HIV positive. In the view of the learned trial judge, Chinhengo, the courts must impose a punishment which is retributive in nature. Retributive because with the absence of a cure for HIV/AIDS, the accused has procured that the minor child will not only suffer during whatever remains of his natural life, but also that he still eventually die from HIV/AIDS. The accused was sentenced to 20 years' imprisonment.

However, the argument that criminalization will serve a retribution purpose can only hold sway where the conduct of the person is so morally reprehensible and utterly despicable that it merits been punished severely by the State through the use of criminal sanctions as shown in *Nzara's* case . In this wise, there must be *actus reus* and *mens rea* for there to be punishment. But most often, majority of people infected with the epidemic may not be aware of their infection, and hence no guilty mind. As at November 2007, it was estimated that more than one-quarter of people infected with HIV in Canada were unaware of their infection (Canadian HIV/AIDS Legal Network, 2008). As noted by Richard Elliot, not every moral wrong should be defined as a crime, and so, only a small subset of cases of HIV transmission could justifiably be criminalized on the basis that such conduct deserved been dealt with severely (Elliot, 2000, 67).

Finally, the argument that criminalization can lead to rehabilitation of the offender, may not be wholly true. The purpose of imprisonment as a means of rehabilitating the prisoners, and bringing about positive behavioural change, and preventing the spread of HIV is defeated as a result of the high-risk behaviour like sex, injection of drugs etc which are on the increase in prison environment and unchecked by authorities concerned. Long term of imprisonment of HIV positive prisoners may lead to prisonization. Prisonization has been defined as 'the continuous and systematic destruction of the psyche in consequence of the experience of imprisonment, and the adoption of new attitudes and ways of behaving which are not only unsuited to life in outside world but which frequently make it impossible for the individual to act successfully in any normal role.' (Morris and Morris; Adeyemi, 1999, 211). In addition, criminal law may not be able to achieve the objective of rehabilitating the offenders as most of them are not intentionally trying to infect others (Stein, 2004, 194). This will only make the prisoners more dangerous to the society than ever before, and hence, further spread of HIV. Imprisonment therefore, is less likely than counseling and social support to change behaviour in the community (UNAIDS Handbook for Legislators on HIV/AIDS, 1999, 51).

1.1 The Place of Traditional Criminal Law Offences in HIV-Related Cases

In many jurisdictions, existing criminal law offences such as murder, assault or assault with a dangerous or deadly weapon, manslaughter, common nuisance endangering the life and health of the public, failure to discharge a 'legal duty,' criminal negligence causing bodily harm, and others have been employed in some HIV-related cases. Persons living with HIV infection have been convicted for some of these offences, even when there are some of these conducts that have not been scientifically confirmed as been capable of posing a serious risk of transmission (Burris, 2007, 486-487). Such conducts includes spitting (*Weeks v. Scott*, 55 F. 3d 1059 (5th Cir, 1995); *Weeks v. State*, 8345, W. 2d 559 (Tx. ct. App. 1992)), biting (*Weeks v. State, Supra; Lynn v. State*, 687 So. 2d 39, 42 (Fla. Dist. Ct. App. 1997), where the HIV positive person stabbed a victim with a syringe which may not have HIV (*State v. Caine*, 652 So. 2d 611 (La. Ct. App.), Writ denied, 661 So. 2d 1358 (La. 1995), etc.

The following are few instances where the traditional criminal law offences have been employed in HIV-related cases in some jurisdictions (Centre for the Right of Health (CRH), (2001), AIDS Law, Legal and Ethical Issues Raised by HIV/AIDS- Annotated Bibliography, 2005).

In *R v. Wentzell* (File No. CR. 10888, December 8, 1999, N.S. Co. Ct.), a criminal decision which borders on the issue of transmission of HIV, Wentzell pleaded guilty of criminal negligence causing bodily harm (section 221 of the Criminal Code of Canada. He was aware of his infection, and had been advised to desist from having an unprotected sex. In defiance of this advice, he was sentenced to 3 years imprisonment with a recommendation that he receive all the necessary treatment and counseling.

Also, in September 2000, Jean-Roch Lefrancois, a 28 years old HIV positive prisoner was charged with an offence of attempted murder and aggravated assault, for spitting blood at two prison guards at a detention centre in Quebec City during an altercation, where one of the guards was struck by the spittle on her shoulder. He pleaded guilty to two counts of uttering threats, at a pre-hearing conference held on 8th August, 2000. In the ensuing trial, he was convicted on the two counts of attempted murder and two counts of assault causing bodily harm (Court File No. 200-01-033376-983 Court of Québec, Québec City).

In addition, in June 2000, Eric Maisonneuve was charged with one count offence of aggravated sexual assault for having sex with a woman without disclosing his HIV positive status for her. Though the woman was not infected, the

accused who had a previous criminal record was sentenced to 3 years imprisonment on 20 October, 2000 (*R v. Maisonneuve*, Court File No. 550-01-003220-995, Québec Provincial Court).

In *R v. Sumner* (1989) 73 CR (3d) 32, 99 AR 29, 69, 69 Alta. L.R (2d) 303), the accused, who engaged in having unprotected sex after been aware of his HIV infection, pleaded guilty to a charge under section 180 of the Canadian Criminal Code which provides for 'common nuisance endangering the life and health of the public.' He was sentenced to 1 year imprisonment with 3 years probation. His appeal against the sentence was dismissed.

Furthermore, in *R v. Thornton* (1991) 3 C.R (4th) 381, 10 R (3d) 480), the accused donated blood knowing that he was HIV positive infected. It was held that his conduct amount to failure to discharge a 'legal duty' under section 180 (2) of the Criminal Code, and that donating blood that one is aware to be HIV infected to the Red Cross clearly constitutes a breach of such duty. He was sentenced to 15 months imprisonment. His appeal to the Supreme Court of Canada failed.

In *United States v. Schoolfield* (40 M.J 132 (CMA. 1994), Cert. denied, 115 S. Ct. 1162 1995), an HIV positive soldier who had engaged in unprotected sexual intercourse without warning his partner was held by the Court of Military Appeals to have committed an assault tantamount to 'pointing a loaded gun at a victim.'

In addition, in *R v. Ssenyonga* (1992, 73 C.C.C (3d) 216, Ont. Ct. Prov. Div.), the accused was charged with a number of offences, including aggravated assault, criminal negligence, administering noxious bodily fluid, and nuisance endangering the life of another. He engaged in having an unprotected sexual intercourse with a number of women when he was HIV infected, thus resulting in transmission of HIV to three women. During the preliminary enquiry, the accused who was discharged on some of the charges was ordered to stand trial on the counts of criminal negligence causing bodily harm and aggravated sexual assault.

In *R v. Lesieur* (Québec Superior Ct., Distr. of Québec, Docket No.. 200-01-008541), the accused who was imprisoned at Donnacona Maximum Security Institution in March 1992 assaulted penitentiary staff trying to restrain him in his cell. The accused who was aware of his HIV infection tried to bite the staff. He sprayed the staff with his blood, saying that he would by this method contaminate them with HIV and kills them. He was charged with a number of offences including attempted murder. He was found not guilty of attempted murder, but guilty on charges of assaulting a peace officer, uttering threats to cause death or serious bodily harm, and assault causing bodily harm. He was sentenced to 4 years imprisonment.

And in *R v. Johnston* (1998, O.J. No. 1889, Ontario District Court), the first case in which the HIV status of an accused was taken into account as a mitigating factor in sentencing him, the court recommended that the sentence be served in a correctional centre where the accused would have access to treatment for control of his HIV related disease.

In the South African case of *Snoti v. S* (2007, JOL 19383, Case No: CA 197 / 2006), the appellant, a 29 year old man, was charged as accused one with the rape of complainant, a nine-year-old with whom he shared a bedroom in someone else's house. He was sentenced to life imprisonment because the court *a quo* did not find substantial and compelling circumstances to impose a sentence less than the statutory minimum. Apart from the age of the complainant, another aggravating factor had been that the appellant was HIV positive and knew it. It was held that the fact that the appellant was aware that he was HIV positive at the time when he committed the offence placed this case within the worst category of rape cases. The court was not persuaded that the fortuitous circumstance of the complainant's HIV negative status had any bearing on the appellant's moral blameworthiness. The appeal against the sentence was dismissed.

There exists in the Nigerian Criminal and Penal Code some criminal law offences, such as murder and attempted murder under sections 316, 320 Criminal Code and sections 220, 221 Penal Code of the Penal Code, manslaughter under sections 317 and 224 of the Criminal and Penal Codes respectively, rape and unnatural and indecent offences against person as contained in sections 357, 360, 214-231 of the Criminal Code and sections 282, 283, 284, 285 of the Penal Code, assault or criminal force under section 352 Criminal Code and sections 262-264 of the Penal Code, causing hurt by act endangering life or personal safety of others under section 248 of the Penal Code, negligent conduct causing danger to person under section 196 of the Penal Code, and such other offences relating to public nuisance and dangerous acts. In fact, some provisions under our Public Health Laws are also important in this direction. For example, section 30(a) of the Public Health Act, Cap 541, 1990 of the Laws of Federation of Nigeria provides for a fine or a term of imprisonment for any person who while suffering from an infectious diseases or being in charge of any person so suffering does an act or a thing which tends to the spread of the disease (section 23, Public Health Law of Ondo State, vol. v, Cap. 102, 1978). The Act in section 2 defines 'infectious disease' in relation to human beings, to mean plague, cholera, yellow fever, small pox, cerebrospinal meningitis, diphtheria, scarlet fever, typhoid, and sleeping sickness, and includes a disease of an infectious or contagious nature which the Minister may by notice declare to be an infectious disease within the definition of an infectious disease as define under the Act. It is submitted that these sections may be applied in relation to the transmission of HIV. Thus, rather than enacting an HIV specific offences in Nigeria, it is preferable for such cases to be treated under the existing criminal law offences or public health law offences of the State.

However, the existing criminal law offences may not be appropriate in all cases for dealing with HIV endangerment for a number of reasons. These include the evidentiary problems relating to proof of a criminal transmission of HIV. For example, the unique nature of the pandemic- such as long period of incubation- may lead to difficulty of proves of causation and fault in certain cases (Malera, 2007, 50). Also, that the acts involved in the transmission may not easily satisfy the ingredients of existing crimes and the defence of consent usually poses challenges to prosecution in cases of consensual sex between people (Malera, 2007, 50; Mosiello, 1999, 604-605; Markus, 1999, 582-586; Gostin, 1989, 1627; Wolf & Vezina, 2004, 842). Even though the existing criminal law offences or public health laws may not be perfectly appropriate in some few cases, the criminal law's application to HIV transmission should on such occasions be shaped by prosecutorial initiative and judicial interpretation of other traditional criminal law offences in response to specific complaints (Elliot, 2000, 70). Leaves can be borrowed from other jurisdictions, whose decisions are discussed above.

1.2 HIV Specific Legislations in the World of AIDS

As a result of perceived feelings that the existing criminal law may not be appropriate or effective in all cases, some countries have resorted to enacting some specific criminal laws offences for knowingly or intentionally spreading HIV. For example, as at May 2005, twenty four States in United States of America have laws that specifically punish HIV exposure as a separate crime (Wolf & Vezina, 2005). The statutes vary from one State to another in their details. It ranges from prohibitions against the intentional transmission of HIV to another, to more detailed statutes that attempt to define the precise conduct that is criminalized (Webber, 2000, 41). The reason for the enactment of these statutes on the State level arose as a result of US Congress's requirement in the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990 (Pub. L No. 101-381, 104 Stat. 576) that the award of certain federal funds to States is conditional upon the State's certification that their laws are adequate to prosecute any HIV-positive person who knowingly engages in activities posing a risk of HIV infection.

In Nigeria, there is no national law criminalizing HIV endangerment. However, some States in Nigeria have provisions on HIV endangerment in some of their laws enacted to curtail the spread of HIV/AIDS. For instance, Enugu State was the first State to pass an Anti-Discrimination and Protection law 2005 (Law No. 2) to protect the People living with HIV/AIDS (PLWHA). Section 12 (1) thereof makes it a criminal offence for someone 'with established knowledge of his/her positive status to willfully and intentionally expose someone else or transmit the virus to another person, or engage in such behaviour or practices that are considered to put others at risk of HIV infection.' Section 12 (7) recognizes consent as a defence to this offence, but however forecloses consent as a defence 'for willful or intentional transmission or exposure to HIV infection if such consent was not "informed" by the disclosure of the status of the HIV positive individual to the consenting party.' In 2007, the Lagos State government enacted a law for the protection of PLWHA (Law No 17). Section 18 (1) of the law provides that 'any person who willfully or knowingly endangers other persons by infecting them with the AIDS virus, commits an offence and shall be liable on conviction to a fine not exceeding Two Hundred Thousand Naira only (N200,000) or imprisonment not exceeding ten years (10 years) or both fine and imprisonment.' In spite of these laws, there has not been any prosecution of persons in Nigeria for deliberate or willful transmission of HIV.

Suffice it to say that in some of these countries, legislation punishes endangerment without any actual infection on the ground that when public health measure aimed at changing behaviour fail, then the intervention of the criminal law as a last resort should not have to wait until infection occurs (UNAIDS Handbook for Legislators on HIV/AIDS, 1999). Analyzing the importance of HIV specific legislation, Dalton pointed out that the HIV specific statutes, unlike traditional penal laws, do not require proof of either 'harm,' 'causation,' or 'state of mind,' and that what is material is that the accused engaged in the prohibited act without informing his sexual partner of his HIV status (Dalton). She further argued that such statutes provide a clearer warning of what constitutes a crime. There is also the believe that enacting HIV specific criminal offence will not only serve as deterrent to those who knowingly communicate the disease but also reduce the risk of unfair or inconsistent judgments inherent in the use of the existing criminal law offences.

No doubt, there may be some rare, occasional and exceptional situations where criminal law may be used to deal with transmission of HIV. Such situations may include a charge of rape or where an individual is aware of his HIV status but chooses to engage in conduct likely to cause dangers to others. That is, intentional, deliberate, purposeful and malicious transmission of HIV. For example, the sexual behavior of Darnell 'Bossman' McGee prompted Missouri law makers to expand its State's law on HIV to include reckless behavior (Flock). Being aware of his HIV positive status, McGee had unprotected sex with more than 100 women (Stein, 2004). Also, Nushawn Williams, who despite his knowledge of his HIV positive status allegedly had unprotected sex with- 48 women and girls, 13 of whom were later confirmed to be HIV positive (McArthur, 2009; Gegax, 1997; Shriver, 2001).

It is however sad to note that in some of these situations, States do not often made clear the delineation between intentional and unintentional transmission (Grover, 2010). For example, section 79 (1) of the Zimbabwe Criminal Law (Codification and Reform) Act No. 23, 2004, provides that 'any person who (a) knowing that he or she is infected with HIV; or (b) realising that there is a real 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.' The implication of this is that an HIV-negative person can even commit a crime, based merely on the realization that 'there is a real risk or possibility' of him having HIV (Cameron E. *et al.*, 2008). A 26 year old woman was prosecuted in Zimbabwe under this law and sentenced to a suspended term of 5 years' imprisonment for having unprotected sex while HIV-positive, despite the fact that her 'victim' tested HIV negative (Cameron E. *et al.*, 2008). Criminal law may not be the best weapon to use in dealing with the issue of transmission of HIV. In countries where their legislatures have passed HIV specific legislations, there is no evidence that such offences have made any significant impact on the spread of the disease, or advance the public health goals. Besides, in the enforcement of such laws, the law enforcement may be arbitrary, as attention of prosecutors will likely be on members of vulnerable groups who are of interest to authorities for diverse reasons, and may be subjected to intrusive policing practices (UNAIDS Handbook for Legislators on HIV/AIDS, 1999). It is submitted that the existing traditional law offences are enough to prosecute the action rather than the virus. There is therefore no need to single out HIV/AIDS from other serious communicable diseases as that would further aggravate the situations of PLWHA.

2. RIGHTS OF INDIVIDUAL AND THE RIGHTS OF THE COMMUNITY

One of the fundamental issues that need to be addressed is the notion of an inevitable conflict between the rights of the community and that of the individual infected with the HIV. Those who believe in this notion often sees HIV policies as one where there is need to choose between the rights of the infected individual and the public health. The more compelling interest is often said to be that of the public health, thus leading to all sorts of harsh and punitive measures that are abusive of the rights of individual who are infected with the disease (Hamblin, 1994). According to Hamblin, this notion is premised on the false assumption that in the HIV epidemic world, there are two distinct groups- 'us' and 'them.' (Hamblin, 1994) In other words, presuming that there is a group of people infected with HIV ('them' or 'other') and there is the rest of the community whose own personal behaviour does not place them at risk, who would therefore normally be untouched by the epidemic, and who have a 'right' to be protected from the actions of 'others.' (Hamblin, 1994). This assumption is not only false but also dangerous as it fosters discrimination, stigmatization, condemnation, prejudice and jeopardizes the cooperation needed to collectively fight the epidemic. As noted by Kofi Annan: 'We cannot deal with AIDS by . . . making out it is their fault . . . Let no one imagine that we can protect ourselves by building barriers between them and us. For in the ruthless world of AIDS, there is no "us" and "them."' (Annan, 2001)

There is no 'them' it is only 'us,' as every one of us will be affected in one way or another by the epidemic. Our family members, religious association members, club members, and generally those we love and cherish may be infected. The sad effect is the large number of children who become orphans following the death of their parents by HIV, and who we have to provide appropriate counseling and psychosocial support and ensure that they have the basic necessities of life on an equal basis with other children. Therefore, the fact that a policy has the tendency to improve public health does not justify the use of every possible means to achieve such end as in most cases; coercive or punitive policies will harm rather than enhance public health (Gostin & Mann, 1994). Public health and human rights ought to be in harmony with each other for the betterment of the society.

A look at the manner of the spread of the disease shows that the individual is at the centre point. As sexual contact is one of the primary means of spreading the disease, the decision made by such individual about his/her lives will determine to a large extent the spread of HIV in a community and or nation where he lives. Such individual's life is further shaped by the society in which he or she lives. For example, in Africa, women's vulnerability to HIV/AIDS emerges from an intersection of poverty with culture, since African women are more likely to be subjected to social and cultural norms that lead to their having no say in matters affecting or touching on their sexual relations (Albertyn, 2000). A decision as regards sexual relations is believed to lie with men. As noted by Klugman:

If a husband initiates sex, his wife may not refuse him; the same applies in relationships outside of marriage. This makes it impossible for women to protect themselves from HIV/AIDS by initiating non-penetrative sex...or insisting on fidelity or condom use. Women are...also products of this culture and may themselves have internalized ideas of manhood that make it appropriate for men to have many partners and to manage sexual relations while they accept their partner's dominance and remain faithful (Klugman, 2000).

The economic situation may resort in women bartering sex for survival in the form of sex work, for job, promotion in their place of work, for marks in institutions of higher learning, for permits etc. Most of these sexual encounters are usually unprotected because women risk loss of economic support from men by insisting on safer sex (Klugman, 2000). Also, there are certain cultural practices that are risky and capable of transmitting HIV. For example, in Zambia, South Africa (among the Zulu) and Zimbabwe and some parts of Nigeria, there is the practice of the levirate or 'marriage by inheritance' (Mswela, 2009), that is, inheritance of a wife by the deceased husband's brother. By culture, the widowed woman is supposed to be the brother's wife. Thus, where the deceased husband died of AIDS, and the woman is already

infected, there is the likelihood that the brother who inherited the widow will begin to transmit the pandemic to his other wives. Also, in some parts of Malawi, initiation rites entail adolescent girls being secluded for training to be a wife, and such training includes the girls having sex with an anonymous man selected from the community (Jackson, 2002).

Furthermore, it has been observed that some traditional healers engaged in some risky practices that could lead to transmission of HIV. For example, some of them use their mouth to suck the blood of their patients, use unsterilized blades or instrument (often subsequently used on more than one patients) for scarification, and other risky practices. While a study carried out in Botswana by Chipfakacha in 1997 (Chipfakacha, 1997; Peltzer, 2006) revealed that some traditional healers uses mouth for sucking blood, Peters, *et al* (Peltzer, 2006; Immananagha *et al.*, 2004) in their research in 2004 in Nigeria reported from Nigerian patients who had visited traditional healers that 77% got incisions made with unsterilized blades. Worst still, herbal concoctions were then rubbed into these bleeding skins with unprotected fingers (Peltzer, 2006). The intersection of economic (poverty), cultural (wife inheritance), and sexual violence on women by men makes it difficult for individual to bring about the necessary changes that can reduce the spread of the disease.

Sexual violence against women also increases their vulnerability to HIV/AIDS. They are subjected to sexual violence in their workplace, schools, family, health facility, during strife or war time. Another dimension to it is that women, particularly children are daily been raped by older men. Of recent, child rape has been on the increase in Nigeria. In the first six months of 2008, the Nigerian Police in Kano, the commercial centre of Northern Nigeria, allegedly recorded 54 cases of child rape and made 60 related arrests (IRIN News). The situation is not different in other parts of Nigeria. Apart from the fact that these fuels women vulnerability to the pandemic, it also violates their rights to health, life, privacy, human dignity, freedom from degrading and inhuman treatment which are all guaranteed under the various international human rights instruments, including the African Charter (Durojaye). Worst still, provisions of some laws in Nigeria encourage violence against women in the hands of their partners. A perfect example is the provision of section 55 of the Nigerian Penal Code as applicable in the Northern Nigeria which permits the husband to cane his wife for the purpose of correcting her. This kind of laws makes women to be totally submissive to men, unable to control their husbands' sexual behavior and thus render them to be unable to negotiate for safer sex with their partners or refuse unprotected sexual intercourse for fear of being physically assaulted or divorced (Mann, 1994). Women are thus exposed to HIV infection particularly in the hands of unfaithful husbands.

It follows from the above that everyone is affected and must therefore support each individual in the community in measures to combat the disease (Hamblin, 1994). It is a joint and shared responsibility, and all hands must be on deck in order to be able to deal with HIV.

It would be an exercise in futility enacting laws to abandon sex, inject drug use, engage in commercial sex, or homosexual activities. This will not work, as history is littered with countries that have legislated upon such acts without any success. Many of such laws have been repealed in some of these countries. For example, a law criminalizing homosexuality enacted several years back in Russian Federation was repealed in 1992. In *Toonan v. Australia*, the Human Rights Committee in Australia found that laws which criminalized private homosexual acts between consenting adults breach the right to privacy of the parties. In their opinion, '...the criminalization of homosexual practices cannot be considered a reasonable means or appropriate measure to achieve the aim of preventing the spread of HIV/AIDS...by driving underground many of the people at risk of infection. ...It would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention.' (Communication No. 488/1991). The Committee also noted that the term 'sex' in Article 26 of the Covenant which prohibits discrimination on various grounds includes 'sexual orientation.'

Criminalizing sex work on the basis of morality will impede the efforts to prevent the spread of HIV/AIDS, as it would certainly drive people in that industry underground. The women in particular need to realize that laws criminalizing sex work may not achieve much. In the opinion of M. Neave:

The real purpose of laws which punish prostitutes is to reinforce male values about sex, uphold double standard, and discipline and divide women by treating some as respectable wives and others as whores. Women need to stand up against this process, and recognize that they, as well as their stigmatized sisters are affected by laws which criminalize those who sell sexual services (Neave, 1998).

Such coercive measures may not achieve the desired results. To prevent the disease, such punitive measures should be reviewed. The government must embark on preventive educational campaigns on HIV/AIDS which education should take into consideration the mode of contact and how it can be avoided. There must be mandatory regulations for ensuring the correct and consistent use of condoms in prostitution, economic empowerment of women by introducing other income generating programmes in forms of training and loans, so as to divert them from sex industry, distribution of health educational materials containing information on safe sex, safe needle use and other relevant information that can lead to behavioural changes.

Apart from slowing the rate of transmission of the epidemic, the above measures also have advantages of increasing the social cohesion in the community, encouraging behavioural changes necessary to impede the spread of the diseases and generally achieving the public health objectives.

3. WILL CRIMINALIZATION OF HIV INFECTION BRING SUCCESS?

This sub-section addresses the question of whether criminalization of HIV endangerment will be able to achieve its objectives.

a. Ignorance of the defendants: Looking at criminal law as the main legal mechanism for dealing with the disease involves fundamentally wrong assumption that deliberate, reckless or malicious spreading of HIV is the main problem (Hamblin, 1994). But the reverse is the case. The vast majority of cases of the transmission of the epidemic occur at a time when the infected person is unaware of his infection. It will be unfair to prosecute or incarcerate a person who is ignorant of his HIV status as at the time of engaging in the conduct that led to the transmission. Even, in some situations where a person suspects that he is HIV positive, such a person may not be able to resist the urge of engaging in conduct that may lead to the spread of the disease as a result of societal demands or expectations. For example, a woman who suspects that she is HIV positive may find it difficult to resist the pressure from her family to remarry, even where such is likely to lead to the spread of the disease to the unsuspecting husband. Punitive laws in this regards may not bring about any success in changing these societal pressures. Counseling will be more effective and cheaper than penal sanctions.

b. Technical and Overbroad Nature of HIV Specific statutes: Some of the laws contain provisions that are problematic and arguably harmful to public health. For example, Article 36 of the N'Djamena Model Law 2004 creates an offence of 'wilful transmission.' It provides that 'Any person who is guilty of wilful transmission of HIV shall be sanctioned with ... [penalty].' Article 1 defines 'Wilful transmission' very broadly to mean, 'transmission of HIV through any means by a person with full knowledge of his/her HIV/AIDS status to another person.' It is important to know that 'HIV transmission' can occur 'through sexual intercourse, blood transfusion or the sharing of intravenous needles, skin piercing instruments or through mother-to-child.' This definition is so wide that it could include criminal prosecution of those who use condom, or those who disclose their HIV status and even including transmission from mother-to-child. Section 21 of Sierra Leone Prevention and Control of HIV and AIDS Act, 2007 makes it an offence for HIV positive mothers to transmit the pandemic to their babies through mother-to-child. Thus, 'wilful transmission through any means' creates a grey area when it comes to enforcement (HIV Verdict; Canadian HIV/AIDS Legal Network, 2007). The criminalisation of mother-to-child or vertical transmission has a grave implication in the fight against HIV. The fear of being prosecuted if found to be HIV positive could discourage pregnant women from visiting health care professionals thus rendering efforts at reducing the pandemic fruitless. The resort to unskilled health carers by pregnant women not only violate their reproductive health rights but can also lead to an increase in maternal morbidity and mortality (Malera, 2007). This could encourage abortions, since the only option left for an HIV positive woman is to engage in terminating the pregnancy or having the child and face criminal liability (Shriver, 2001). In countries like Nigeria where abortion is illegal except to save a woman's life (Sudhinaraset, 2008; WHO, 2007), it could lead to such women resorting to unsafe abortions. This clearly violates their reproductive rights and by implication, their right to life.

c. Poor access to medicine: In some countries, lack of access to antiretroviral drugs for the prevention of mother-to-child transmission (PMTCT) may be use as a ground for prosecuting a woman for transmitting HIV virus to her child even though such laws fails to recognise the difficulties she might be facing in accessing them. Some of these problems include 'the proximity of the services, the cost and opportunity of accessing them, the quality of the services available, as well as the potential stigma or discrimination she may face (or fears) if she is HIV-positive.' (HIV Verdict). For example, section 21 (1) of the Sierra Leone's Prevention and Control of HIV and AIDS Act of 2007, requires a person with HIV and who is aware of being infected to 'take all reasonable measures and precautions to prevent the transmission of HIV to others and in the case of a pregnant woman, the foetus'. The law which fails to specify what amounts to 'reasonable measures' stipulates an imprisonment for up to seven years or a fine of 5 million leones (US \$1,426) for breach of this provision. This onerous duty is placed even on a pregnant woman 'in a context where medicines that can reduce or prevent transmission are not always made available and where many people do not have control over all aspects of their sexual life.' (Cameron, 2009)

d. Problem of Proof: Criminalization of HIV endangerment will lead to problems of proof of the element of the offence such as physical element (*actus reus*) and the mental element (*mens rea*), foreseeability (the accused knowing that the act he is contemplating is criminal), causality (that the accused conduct or act did infect the victim, and not that the victim was infected from another source) and consent (Csete, 2009). What happens where preventive measures are used, like where the accused used condom, and it breaks, thus leading to infection of the other partner. Should that not constitute a defence? Should consent not constitute a defence? After all, criminal responsibility is usually based on the individual's capacity to make voluntary and intentional choices for acts which he or she understands the significance of (UNAIDS Handbook for Legislators on HIV/AIDS, 1999). As noted by Matthew Wait: 'The science (phylogenetic analysis) simply

is not good enough to determine the source, route or timing of transmission. Even where the defendant and victim have the same HIV sub-type it is impossible, in the absence of other compelling evidence, to be sure that the defendant is guilty as charged. There has been a number of cases in which people have pleaded guilty having been confronted with such scientific evidence and there can be no certainty that they were rightly convicted. The potential for miscarriages of justice is great.' Weait, 2008). These are some of the reasons for questioning criminalization of HIV endangerment.

Again recent scientific research reveals that under specific conditions, a person living with HIV may in fact not be able to sexually transmit the virus. In early 2008, a consensus statement from the Swiss Federal AIDS Commission stated that 'HIV-positive individuals who are on effective antiretroviral therapy [this includes having an undetectable viral load for at least 6 months, being adherent to treatment and being under medical supervision] and do not have any other sexually transmitted infections (STIs) cannot sexually transmit HIV.' (Vernazza P. *et al.*, 2008). This obviously has a serious implication for criminal law. Thus, prosecuting a person simply because he has HIV virus in his body under this circumstance becomes unfair.

e. Selective Prosecution: Criminalizing transmission of HIV, may in practice, amount to selective prosecution (Elliott, 2000) of those who are already alienated and marginalized by the society. Singling out HIV/AIDS from other serious and communicable diseases for prosecution is a reflection of the fears, prejudices and bias surrounding the disease (Axam *et al.*, 1999). These could also taint sentencing for HIV exposure, which has always been longer than those for comparable crimes (Wolf & Vezina, 2004).

f. False sense of security: Using criminal law to deal with a group of people perceived to be potential carriers of HIV may create a false sense of security, especially among the rest of the community that are believed to be HIV negative by the simple belief that criminal law would prevent HIV-positive person from infecting them. This group may use this as an excuse for not taking preventive measures to protect themselves or other members of the community from infection (Closen, *et al.*, 1994; Burris, 2007). Criminal sanction will give a sense of false protection and the result is the silent spread of the epidemic.

g. Loss of economic support and Drain on the nations' economy: What benefits does the conviction and imprisonment serve to the wife and children of the man incarcerated for infecting the wife? What the wife or children get from it is the loss of economic support, as the man in African set up, is seeing as the breadwinner of the family. And to the country, imprisonment lacks any efficacy as a deterrent, or a reformative instrument. The sum of money being spent on each prisoner by the Nigerian government is far in excess of what it actually earned for each citizen (Adeyemi, 1990). This is not good for the economy. Nigerian government should look for alternatives to punitive measures in curbing HIV transmission, since the World community has globally accepted that:

Crime prevention and criminal justice should be considered in the context of economic development, political system, social and cultural values and social change, as well as in the context of the new international economic order. The criminal justice system should be fully responsive to the diversity of political, economic and social systems and to the constantly evolving conditions of society (Adeyemi, 1990).

4. CRIMINALIZATION OF HIV TRANSMISSION AND ITS IMPLICATIONS ON HUMAN RIGHTS IN NIGERIA

Criminalization of HIV infection could have serious implications on several human rights. It is capable of breaching the rights to privacy of both the accused (HIV positive person) and the victim. The right to privacy in Nigeria is provided for under section 37 of the 1999 Constitution of the Federal Republic of Nigeria. It provides that: 'The privacy of citizens, their homes, correspondence, telephone conversation and telegraphic communications is hereby guaranteed and protected.' This right is so fundamental that Article 12 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December, 1948 proclaims: 'No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the laws against such interference or attacks.' (ICCPR, Art. 17).

It is submitted that the right to privacy of an HIV infected person may not be adequately guaranteed where HIV endangerment is criminalized. During criminal prosecutions, the court may order that the sexual histories and medical information or records of both the accused and the victim be disclosed by the physician. In such a situation, the privacy of the individual must give way, without the physician breaching the duty of confidentiality imposed on him. (Lazzarini, *et al.*, 2002; Mann, 1994). Search warrants or subpoena may be issued in order to get more evidence, particularly the past sexual partners of the victim as possible sources of leads. The orders of the court restraining the media from reporting the identity of the individual may be difficult to enforce. As noted by Mann, *et al.*, the misuse of information about HIV infection status of an individual has led to violation of several rights: 'restrictions of the right to work and to education; violations of the right to marry and found a family; attacks upon honor and reputation; limitations of freedom of movement; arbitrary detention or exile; and even cruel, inhuman or degrading treatment.' (Mann, 1994)

The right to privacy of the HIV infected person is further violated in some countries like United States of America which requires sex offenders to be tested for HIV, either before or after conviction. Courts have in most cases approved the testing of those charged with or convicted of sexual offences (People v. Frausto, 42 Cal. Rptr. 2d 540 (Ct. App. 1995); People v. Doe, 642 NYS. 2d 996 (Nassan County Ct. 1996); State v. Superior Ct, 930 p. 2d 488 (Ariz. Ct App. 1996)). The courts have also approved the testing of those charged with or convicted of unauthorized possession of syringes (People v. C.S.; 583 N.E 2d 726 (Ill. App Ct. 1991), appeal denied, 602 N.E 2d 641 (Ill, 1992)). Compulsory HIV testing of a person accused or convicted of sexual assault may not benefit the victim, nor offer any protection to the society against the ravages of the virus, but is rather an expensive programme capable of diverting the resources of government from effective prevention measures. Such laws, where they exist, should be repealed and replaced with laws that provide sexual assault or rape survivors with free counseling, testing and treatment (UNAIDS, Canadian HIV/AIDS Legal Network, 1998), which are capable of generating long-term benefits.

Again, criminalization is stigmatizing. It adds to the burden of the vulnerable groups already treated as outsiders by the society, and impedes HIV prevention and care programmes. For instance, HIV-positive women bear a double burden: they are infected and they are women, and in many communities, being socially ostracized, marginalized, and even killed are very real potential consequences of exposing one's HIV status (Gupta, 2000; Ahmed, *et al.*, 2009; Csete, 2009). In Botswana, HIV positive women are publicly being portrayed as 'suicide bombers.' (Csete, 2009). Examples abound around the world of physical violence and victimization meted out to people with (or believed to have) HIV/AIDS. They are segregated in schools and hospitals, refused employment, denied the right to marry and form a family (*Mr. X v. Hospital Y Authority* (1998) 8 SCC 296), rejected by their community, and may even be killed because of their seropositive status. In December 1999, young communities volunteer, Ms Gugu Dlamini, was stoned and beaten to death by neighbours in her township near Durban, South Africa after she had declared her HIV status on World AIDS Day (UNAIDS, World AIDS Campaign 2002-2003, 2002). The fear of these, forced the people infected with the disease to go underground, and uncooperative in implementing public health measures for AIDS control.

Criminalization further infringed on the right of HIV positive person to a sex life and the right to found a family. The right to marry and to found a family covers the right of 'men and women of full age, without any limitation due to race, nationality or religion, ...to marry and to found a family,' to be 'entitled to equal rights as to marriage, during marriage and at its dissolution,' and to protection by society and the State of the family as 'the natural and fundamental group unit of the society.' (Art. 16, UDHR 1948). It is therefore clear that the right of the people living with HIV/AIDS is infringed upon by mandatory testing of sex offenders, or the requirement of 'AIDS-free certificates' as condition precedent to the grant of marriage licences. PLWHA should be able to contract marriages, and engage in sexual relations whose nature poses no threat or risk of infection to their sexual partners (UNAIDS HIV/AIDS and Human Rights International Guidelines, 1998).

Criminalization of the spread of HIV infection may not bring about the desired success of minimizing the spread of the disease. Such approaches, which may seem politically attractive at first glance as they give the impression that something is being done, do little to stop the epidemic and may even make it worse (Piot, 2000).

5. WHAT SHOULD THE ROLE OF LAW BE IN NIGERIA?

Rather than embark on punitive laws, the focus should be on protective and supportive laws which protect and support the rights and interests of those affected by HIV/AIDS. As observed in paragraph 13 of the Declaration of Commitment on HIV/AIDS, adopted by the United Nations General Assembly Special Session on HIV/AIDS in June 2001, stigma, silence, discrimination and denial, as well as lack of confidentiality, undermine prevention, care and treatment efforts and increase the impact of the epidemic on individuals, families, communities and Nations. In South Africa, it is reported that 'because of the stigma associated with HIV infection, most people living with HIV/AIDS are reluctant to declare their status to orthodox doctors. Rather they prefer to visit traditional healers.' (The News, 2005). The situation is not different in Nigeria. Criminalization of HIV transmission will ultimately undermine access to care and support as people with the virus will be reluctant to come out for the fear of possible criminal prosecution later.

Indeed, the effectiveness of HIV exposure statutes has been questioned in several countries. For example, in the United States, it was found that each of the HIV related crimes for which the defendants were charged was already criminal regardless of their HIV status and more than 70 percent of those charged 'committed their HIV related illegal act in the course of a sex crime, an assault, or an act of prostitution.' (Lazzarini, 2004; Stein, 2004). This is coupled with the fact that 'nearly a quarter of the cases involved spitting, biting, or scratching, which poses a very remote risk of transmission.' (Lazzarini, 2004; Gostin, 1989). This implies that HIV specific statutes are rather superfluous as most of the criminal behaviours can simply be dealt with under the traditional criminal laws. Thus, applying criminal law in matters of public health requires a lot of caution by the lawmakers because of the sensitive nature of the subject. The Nigerian legislators should not be too hasty in their approach. Falk Moore offers this word of caution against hasty legislative responses to matters affecting the society:

One of the most usual ways in which centralized government invade the social fields within their boundaries is by means of legislation. But innovative legislation or other attempts to direct change often fail to achieve their intended purposes; and even when they succeed wholly or partially, they frequently carry with them unplanned and unexpected consequences. This is because new laws are thrust upon going social arrangements in which there are complexes of binding obligations already in existence (Moore, 1978).

The following limiting principles in criminalizing an act or conduct, outlined by Walker (Walker, 1987; Allen, 2001), may serve as a guide to Nigerian government in determining whether to criminalize HIV endangerment. Walker divided these principles into moral and pragmatic limits.

Moral limits include:

- a. Prohibitions should not be included in criminal law for the sole purpose of ensuring that breaches of them are visited with retributive punishment.
- b. The criminal law should not be used where measures involving less suffering are as effective or almost as effective in reducing the frequency of the conduct in question.
- c. The criminal law should not include prohibitions whose by-products are more harmful than the conduct which they are intended to discourage.
- d. The criminal law should not be used for the purpose of compelling people to act in their own best interests.

Pragmatic Limits include:

- e. The criminal law should not include prohibitions which do not have strong public support.
- f. A prohibition should not be included in the criminal code if only a small percentage of infringements of it could be proved against infringers.

Applying these principles to the calls by people for the amendment of the Nigerian criminal statutes to create an HIV-specific offence, it would be realized, may not be necessary. The traditional criminal law offences and the public health legislations are adequate in limited circumstances where the transmission of HIV may constitute criminal offence. Occasional extreme case of dangerous behavior can be dealt with by public health officials as a public health problem under public health laws (Burris, 2007).

Nigerian government should as a matter of urgency enact, strengthen or enforce, as appropriate, legislation, regulations and other measures to eliminate all forms of discrimination against and to ensure the full enjoyment of all human rights and fundamental freedoms by people living with HIV/AIDS and members of vulnerable groups, in particular to ensure their access to, *inter-alia*, education, inheritance, employment, health care, social and health services, prevention, support and treatment, information and legal protection, while respecting their privacy and confidentiality; and develop strategies to combat stigma and social exclusion connected with the epidemic (UN Declaration of Commitment on HIV/AIDS, para. 58, 2001).

Laws protecting the rights and fundamental freedoms of people living with HIV/AIDS will promote an enabling environment that will ensure behavioural change of those affected, promote voluntary testing and counseling, and help to achieve the public health goals relative to HIV/AIDS.

There is also the need to change some of the unwholesome socio-cultural values and practices in Nigeria that promotes the spread of the disease, such as wife inheritance, multiple concurrent partners, among others. Policies should be directed at promoting equal status of women in marriage, inheritance, employment, access to credit and protecting women against violence (Burris). This can be done by reviewing all anti-discrimination laws, and by educating the people through seminars, symposia and rallies to change these unwholesome practices.

Also, there is need for Nigerian government to strengthen the laws on sexual violence against women and children generally, most especially, the law against rape by imposing a stiffer penalty on the culprits. The agencies responsible for enforcement of these laws should also be adequately empowered to be able to enforce these laws. In this direction, government should improve criminal justice system in the areas of investigating and prosecuting sexual offences against women and children (UNAIDS Policy Brief, 2008).

CONCLUSION

Each of the usual rationales for using criminal law- retribution, incapacitation, and deterrence- appear ill-suited to deal with the pandemic (Gostin, 1989). The UN Special Rapporteur, Anand Grover, recently notes that 'criminal laws that explicitly regulate the sexual conduct of people living with HIV have not been shown to significantly impact on sexual conduct, nor do they have a normative effect in moderating risk behaviours.' (Grover, 2010; Lazzarini, 2004). Thus, rather than criminalizing HIV endangerment in Nigeria, it is better to review and reform the criminal laws to ensure that

they are in conformity with international and regional human rights standards, and are not misused in the context of HIV/AIDS or targeted at vulnerable groups. Explaining why Mauritius decided not to criminalize HIV endangerment, Rama Valayden, Attorney General and Minister of Justice and Human Rights of the Republic of Mauritius, 2007 stated that:

‘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 detrimental impacts on public health and the conviction that it would not serve any preventive purposes. Criminalization 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 (Valayden; Jürgens, 2008).

Also sounding a warning on placing too much faith on criminal law in the fight against HIV pandemic, Holland stated that: ‘It is trite to say that law cannot be a panacea for all social ills. Before invoking the rough instrument of the criminal law, we must be sure it will have some impact on the problem at hand. We must also be satisfied that, on the balance, the use of the criminal law will not be counterproductive and that it will do more harm than good.’ (Holland; Chirawu). Criminalization of HIV is a strange and a blunt weapon in the long fight to combat HIV. New criminalization statutes on HIV transmission in Nigeria will obviously not achieve the objectives of criminal law in the contexts of HIV/AIDS. Given the present situation, prevention is the most feasible approach to reversing the epidemic- lacking a vaccine and with treatment unaffordable or inaccessible to most people who need it (UNFPA, 2002). Government should focus on ways to prevent the epidemic through education and adequate funding of the health sector, particularly ‘when HIV has become more treatable.’ (McArthur, 2009).

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