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# Vertical HIV transmission should be excluded from criminal prosecution

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**Abstract:** *Prevention of mother-to-child transmission of HIV (PMTCT) is an important part of global and national responses to HIV and AIDS. In recent years, many countries have adopted laws to criminalise HIV transmission and exposure. Many of these laws are broadly written and have provisions that enable criminal prosecution of vertical transmission in some circumstances. Even if prosecutions have not yet materialised, the use of these laws against HIV-positive pregnant women could compound the stigma already faced by them and have a chilling effect on women's utilisation of prevention of mother-to-child transmission programmes. Although criminal laws targeting HIV transmission have often been proposed and adopted with the intent of protecting women, such laws may disadvantage women instead. Criminal laws on HIV transmission and exposure should be reviewed and revised to ensure that vertical transmission is explicitly excluded as an object of criminal prosecution. Scaling up PMTCT services and ensuring that they are affordable, accessible, welcoming and of good quality is the most effective strategy for reducing vertical transmission of HIV and should be the primary strategy in all countries.* ©2009 Reproductive Health Matters. All rights reserved.

**Keywords:** pregnancy-related HIV transmission, prevention of mother-to-child transmission of HIV, criminalisation, law and policy, human rights

MOTHER-TO-CHILD or vertical transmission of HIV can occur during pregnancy, labour and delivery, or breastfeeding. Without prophylaxis, between 20 and 25% of babies born to HIV-positive women will be infected with HIV.[1] As a result, prevention of vertical transmission has become a critical component of national and global responses to HIV. Women living with HIV have the right to enjoy the benefits of scientific progress and the health services that enable them to reduce the risk of transmitting HIV to their children.[2] They also have the right, like all women, to become pregnant, to control the number and spacing of their children,[3] and to marry and found a family.[4] In addition to their HIV prevention impact, services to prevent vertical transmission are an obvious if under-used vehicle for realising the integration of reproductive health and HIV/AIDS programmes, which is a public health goal in many countries and a recommendation of the World Health Organization (WHO).[5]

Recent jurisprudential and legislative developments in a number of countries may threaten the utilisation of vertical transmission prevention services and the rights of HIV-positive women. Certain criminal and HIV-related statutes contain provisions that could criminalise vertical transmission; in other words, the potential now exists for a woman to face serious criminal charges and be imprisoned for exposing her fetus or infant to HIV. This article examines laws that may criminalise

vertical transmission of HIV, considers several reported cases of prosecutions related to vertical transmission, and makes recommendations for alternatives to criminalisation.

The evidence informing this article is derived from a search of published literature using LexisNexis, Google Scholar and PubMed, press reports of cases, and reports of the Canadian HIV/AIDS Legal Network and the Global Network of People Living with AIDS (GNP+), organisations that follow developments in HIV and criminal law.[6–8] The issue of criminalisation of HIV is a difficult one on which to gather reports of judicial decisions and cases. Not all countries maintain public records of cases, and cases settled without a trial may not leave a record. Case records are more readily obtained in countries of the global North. Documented evidence of the nature, trends and impact of these cases is urgently needed in order to inform public policy in this area, which is developing rapidly.

This article examines the potential for women to face criminal charges related to vertical transmission under laws that criminalise HIV exposure or transmission. To date, few women have faced such charges. Many of the statutes that make these charges possible are only a few years old and may not yet have been applied for that reason. However, the existence of these laws on the statute books is of serious concern. The criminal law is generally reserved for behaviours considered extremely harmful and repugnant. Application of criminal law to vertical transmission merits careful scrutiny. Prosecutions risk violating women's rights. Public awareness of these laws and their eventual application may have a chilling effect on vertical transmission programmes and contribute to the stigma and discrimination women living with HIV already face in relation to childbearing. This article seeks to raise concerns before prosecutions are widespread, so that their worst consequences might still be averted.

## Prevention of vertical transmission of HIV

Since it was shown in 1994 that vertical transmission of HIV could be prevented with antiretroviral treatment, there was great hope that it would decline rapidly, especially in Africa. However, the Joint United Nations Programme on HIV/AIDS (UNAIDS) estimated in 2008 that only about one-third of HIV-positive pregnant women in the world had access to antiretrovirals for PMTCT.[9] Behind this figure lie regional disparities. Some 22% of women in East, South and Southeast Asia, 11% in West Africa, and 43% in eastern and southern Africa had access to antiretrovirals for PMTCT, compared to 71% in Europe and Central Asia.[12]

There remain many obstacles to universal access to PMTCT services, as many health systems do not make these services universally available. Existing services may not be accessible, affordable or inviting,[10] and are impeded in many places by stigma and fear, especially women's fear of the consequences of being known to be HIV-positive.[11] Prevention of vertical transmission is most effective when women not only consent to the measures designed to reduce the risk of HIV transmission to the child, but also feel empowered to disclose their HIV-positive status to sexual partners and act to prevent new sexual transmission or reinfection. A 2004 WHO-supported review of 17 studies from Asia and Africa concluded that in many locations, a large percentage of women feared violence, abandonment and accusations of infidelity if they told their family members or sexual partners that they were HIV-positive.[12] The current HIV testing guidelines of WHO thus recognise pregnant women as a group vulnerable to adverse consequences of disclosure of HIV-positive status.[13]

## Criminalisation of HIV exposure and non-vertical transmission*

In 1998, the United Nations offered the following guidance on criminal law and HIV transmission:

*Criminal and/or public health legislation should not include specific offences against the deliberate and intentional transmission of HIV but rather should apply general criminal offences to these exceptional cases. Such application should ensure that the elements of foreseeability, intent,*

*In some countries (e.g. the United Kingdom), actual transmission of HIV is required for a criminal offence to be established, but in other countries (e.g. Canada), the criminal offence requires only exposure to the virus, not transmission. UNAIDS recommends that criminal prosecutions only be brought when actual transmission has taken place.

*causality and consent are clearly and legally established to support a guilty verdict and/or harsher penalties.*[14]

Since that time, however, numerous laws criminalising HIV transmission and/or exposure have been adopted around the world.[15] More than 30 countries have enacted HIV specific laws to criminalise HIV transmission or exposure, and at least 25 others have applied existing criminal provisions (not HIV-specific) to HIV transmission.[16] Many of these laws are problematic with respect to key concepts in criminal law, such as intent. *Mens rea,* or the mental element of a crime, is established in criminal law by levels of fault such as "intentionality", "recklessness" or "negligence". The fault element is required to demonstrate a criminal act. Interpretation of fault is usually not straightforward in cases of HIV transmission. That is, is having unprotected sex an expression of the intention to transmit HIV, or is it reckless or negligent behaviour, short of intentional transmission? Can fault be established merely because a person is infected by someone who is HIV-positive? Or does fault follow only when the HIV-positive person knew himself or herself to be HIV-positive (or where the person "might reasonably have known" he or she was HIV-positive)?

The focus of HIV-specific criminal laws is predominately on sexual transmission, and they are being used to prosecute people living with HIV who engage in consensual sex. People living with HIV have also faced criminal prosecution in relation to biting, spitting and scratching, despite the extreme unlikelihood of HIV transmission in such circumstances.[17] Since about 2000, there has been a marked upswing in the criminalisation of HIV exposure or transmission globally.[18]

Some of these criminal laws have been passed with the express intent of protecting women from male sex partners who know that they have HIV but fail to disclose their HIV status before having sex.[18] As has been noted by UNAIDS, however, women may in fact be at greater risk of prosecution because they are more likely to be tested for HIV and know their status than are their male partners.[19] Moreover, these laws do nothing to address all of the factors that perpetuate women's vulnerability to HIV, including gender-based violence, harmful traditional practices, and social and economic gender inequalities.[19,20]

A "model" HIV law that has had particular currency in Africa has been aggressively promoted by Action for West Africa Region-HIV/AIDS (AWARE-HIV/AIDS), a US Agency for International Development (USAID)-funded NGO that ended its work in 2008.[21] The AWARE "model" law was adopted at a meeting of parliamentarians from the region in N'Djamena, Chad, in 2004. Having a law that could be adapted and applied throughout West and Central Africa was part of AWARE-HIV/AIDS' overall strategy to strengthen the legal framework and promote replication of (so-called) best practices across the region.[25] The law includes provisions on HIV testing and counselling, confidentiality of medical information, and prohibitions of discrimination based on HIV status, amongst others. It also lays out criminal penalties for transmission of HIV "through any means by a person with full knowledge of his/her HIV/AIDS status to another person" without regard to the perpetrator's intent.[22,23] Since 2005, 14 countries in West and Central Africa have adopted HIV-specific laws, the majority derived from the AWARE model law.[27] USAID portrays the project as a success, particularly for the protection of women, although many parts of the model law contradict UN guidance on HIV legislation.[24] These laws are too new to know whether they will have the intended effect, but they open the door to a wide range of criminal prosecutions.

Industrialised countries have also applied criminal sanctions to HIV exposure or transmission. In Canada, as of August 2009, there were some 93 criminal prosecutions in cases involving sexual exposure and transmission of HIV, resulting in at least 53 convictions and over 40 prison sentences. According to the Canadian HIV/AIDS Legal Network, sentences of those convicted have ranged from 12 months conditional sentence to 18 years imprisonment. These prosecutions are derived from Supreme Court decisions rather than HIV-specific legislation.[25] By 2002, 24 of the 50 US states had passed HIV-specific criminal laws on exposure and transmission, of which 13 make explicit reference to sexual contact or intercourse as a means of transmission.[26] Eight of the laws that specifically address sex and four that specifically refer to infection through contaminated injection equipment state that any exposure where HIV-positive status is not disclosed is a criminal act.[30]

Only one of the US state laws that expressly criminalizes HIV transmission – that of Oklahoma – specifically notes that *in utero* transmission of HIV is excluded from prohibited conduct.[27] A 2003 review of the outcomes of criminal cases involving HIV in the US found records of 316 prosecutions, of which 184 had known outcomes. Of these, 80% resulted in convictions and imposition of criminal sentences.[8] Almost one-quarter of these prosecutions were for spitting, biting and other actions extremely unlikely to result in HIV transmission.

Little is known about the deterrent effect of these laws or their application in these cases. In their review of HIV-related prosecutions in the US, Lazzarini and colleagues conclude that while sensational media coverage of high-profile cases may provide some level of deterrence from unsafe behaviours, overall the deterrent effect of these laws is likely to be small in the absence of widespread awareness of the law.[30] Those who might be deterred are likely to be a tiny minority amidst the millions who engage in sexual encounters without knowledge of the law or without concern about the likelihood of punishment. If the long history of ineffective prohibitions on alcohol, drugs, sex between men and sex work is anything to go by, criminal law will be hard pressed to have a significant impact in deterring sexual behaviours that risk HIV transmission.

## Criminal law and vertical HIV transmission

Are criminal prosecutions for vertical transmission next on the horizon in the global escalation of the criminalisation of HIV? While there have not been significant numbers of criminal charges or legislative provisions focused on pregnant women as there have been for sexual transmission, some developments in this area are of concern.

Most of the HIV-specific national criminal laws that have been adopted or proposed may not have had the explicit intention of criminalising vertical transmission of HIV. But some of these laws have been drafted so broadly that vertical transmission is caught in the net that they cast. For example, the AWARE model law and many of the newer African statutes based on it make "willful transmission of HIV an offence, defining "willful transmission" as "through any means by a person with full knowledge of his/her HIV/AIDS status to another person".[26] In addition to being a legally deficient definition of "willful" (which should require evidence of an intention to transmit) the phrase "by any means" could include a woman who transmits HIV during pregnancy, labour or delivery, or through breastfeeding, regardless of whether prevention services were available or used.[28]

Of the laws passed in West Africa since the AWARE project began, we were able to review directly those of Mali, Guinea, Guinea-Bissau, Niger and Sierra Leone. All of these criminalise "willful transmission" of HIV (although they derive willfulness from the mere fact of knowing one's HIV-positive status). Sierra Leone's 2007 law states that any person knowing he or she is HIV-positive "shall take all reasonable measures and precautions to prevent the transmission of HIV to others and in the case of a pregnant woman, the foetus".[29] It does not specify what constitutes "reasonable measures". The law goes on to state that"[a]ny person who is and is aware of being infected with HIV...shall not knowingly or recklessly place another person, and in the case of a pregnant woman, the foetus, at risk of becoming infected with HIV, unless that other person knew that fact and voluntarily accepted the risk of being infected...". The clause of "knowing and accepting" the risk of infection is written to apply to the fetus but obviously cannot. The punishment for violating this provision is imprisonment for up to seven years or a fine of 5 million leones (US $1,426).

The other laws reviewed from West Africa do not explicitly name vertical transmission but are broadly written to cover *transmission volontaire* (voluntary transmission) by anyone knowing he or she is HIV-positive. The law of Guinea, for example, criminalises all voluntary transmission by means of sex or blood (article 35).[30] In Guinea's law, vertical transmission is included in the definition of HIV transmission (article 1), and it therefore seems that this provision could be used to prosecute women for transmitting HIV to an infant. Vertical transmission is not mentioned explicitly in the criminal penalties section of the act, but a broad provision on the voluntary administration of contaminated blood in any manner (*de quelque manière que ce soit*) provides for a punishment of life imprisonment (article 38). In cases of unprotected sex with the

intent to infect (*des rapports sexuels non protégés avec un partenaire dans le but avéré de le contaminer*), even if the partner is not infected, the punishment is 5–10 years imprisonment and a fine (article 36). If violence, coercion or deception was involved or the act was committed against a person who was particularly vulnerable, by multiple actors or accomplices, or in breach of trust, the punishment is life imprisonment. With respect to transmission committed in the health sector through administration of contaminated blood by negligence, imprudence, a blunder or infringement of rules (*négligence, imprudence, maladresse ou inobservation des règlements*) the punishment is 1–5 years imprisonment (article 38).[35] This range of possible mental states is not noted for sexual transmission. The laws of Mali, Guinea-Bissau and Niger are similar to that of Guinea.

Legislation not derived from the AWARE model law, the 2004 revision of the criminal code of Zimbabwe, includes a specific provision on "deliberate" transmission of HIV.[31] This striking law criminalises HIV transmission effectuated deliberately not just by someone who knows he or she is HIV-positive, but also:

*Any person who... 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... and shall be liable to imprisonment for a period not exceeding twenty years.*[36]

As the noted South African jurist Edwin Cameron commented, this law encompasses a pregnant woman, including one who merely fears she could be HIV-positive, if she does "anything" that involves the possibility of HIV transmission. This would include giving birth or breastfeeding, in which case "the law could make her guilty of 'deliberate' transmission – even if her baby is not infected".[32]

A handful of HIV laws have been sensitive to the dangers of criminalising vertical transmission. For example, Papua New Guinea's AIDS law contains a provision criminalising intentional HIV transmission but clarifies that "[n]othing in this Part applies to the transmission of HIV by a woman to her child, either before, during or after the birth of the child".[33] A model HIV law commissioned by the Southern African Development Community (SADC) contains no criminal penalties for HIV transmission but rather includes provisions obliging states to ensure that vertical transmission services are available to all women and that the state establish measures to protect women from sexual violence, including within marriage.[34]

## Emergence of prosecutions

While the HIV-specific statutes examined above have yet to be used against HIV-positive women in relation to pregnancy or childbirth, other laws have led to such prosecutions. In the US, there is a long history of using criminal law to protect fetuses from the "irresponsible" actions of pregnant women, particularly in the area of use of narcotic drugs.[35] With respect to HIV, for example, a woman in Florida was charged with felony child neglect in 2008 for failing to take action to prevent HIV transmission to her second child, who was born HIV-positive.[36] In her defence, she cited her fear that the father of the child would react abusively to learning about her HIV status, which she had not previously revealed to him.[37] No HIV-specific law was applicable; she was charged under child neglect laws for failing to seek medical services "that a prudent person would consider essential for the well-being of a child".[41] She faced up to 15 years in prison on the felony charge but in the end was sentenced to two years of probation and mandatory health and parenting classes so as not to hinder her ability to provide for her child. The court recognised that incarceration of a mother for reckless transmission was not in the best interest of the child.

In 2009, a woman of Cameroonian origin was arrested in the US state of Maine on the charge of possessing false immigration documents.[38] Shortly after her arrest, she learned that she was pregnant and HIV-positive. Going beyond the prescribed sentence for the immigration infraction, the judge took advantage of permissible enhanced sentencing for pregnant women and sentenced the woman to 238 days and denied bail, noting explicitly that this would keep her in prison to the end of her pregnancy and oblige her to take measures to prevent vertical

transmission. "I don't think the transfer of HIV to an unborn child is a crime technically under the law, but it is as direct and as likely as an ongoing assault," the judge noted.[43] At this writing, the woman had been granted bail following the intervention of a number of organisations, and her sentence was being appealed. As the NGO National Advocates for Pregnant Women noted, the case exemplified the tendency to deprive pregnant women of their liberty "in order to advance state interests in fetal health" and reduce pregnant women to fetal vessels.[43]

A woman in Canada pleaded guilty in 2006 to the charge of "failing to provide the necessaries of life" to her second child, who was born HIV-positive, after she failed to inform health workers that she was HIV-positive at the time of the child's birth.[39] She was initially also charged with criminal negligence causing bodily harm, one of the criminal charges that has been used in Canada for alleged non-disclosure in HIV sexual exposure cases. Publicly available reports of this case did not offer an explanation of the woman's rationale.

Whether or not criminal charges were appropriate in this particular case, it raises questions about whether the criminal law is an appropriate tool for preventing vertical HIV transmission. If a woman decides to breastfeed her infant, are charges appropriate, for example? Does it matter whether a safe alternative to breastfeeding is available? If she declines antenatal HIV testing, for whatever reason, are charges appropriate? If she chooses not to take PMTCT medications for whatever reason, are charges appropriate? When does the mother's right to decline medical interventions for herself or her child end and the state's ability to impose such interventions or punish her (potentially with imprisonment) begin?

## Discussion and recommendations

In most countries, the criminal justice system moves very slowly. It can take many years for charges to be laid and cases to move their way through the courts. It could therefore be years yet before newer criminal HIV provisions are applied against HIV-positive women, and then even more time before the broader impact of these prosecutions is known. From the perspective of preventing vertical transmission and protecting the rights of women, however, and in the face of global escalation of the criminalisation of HIV, there is good reason to be concerned about criminalisation of vertical transmission.

Predicating criminal charges on a woman's having failed to take "reasonable" measures for PMTCT is problematic. For example, breastfeeding has been estimated to add 5–20% additional risk to the other forms of vertical transmission, but reducing breastfeeding-related HIV risk is not straightforward. The infant feeding decisions of an HIV-positive woman in a resource-poor setting depend on whether clean water is available and formula feeding is affordable; whether she can maintain exclusive breastfeeding for six months, which is more protective against HIV than mixed feeding;[40] and the social costs of being "exposed" as HIV-positive by formula feeding in a culture where breastfeeding is the norm. There is not one "reasonable standard of conduct" for all HIV-positive women, and counsellors in maternity facilities may not have the time or information to help women through these complex decisions.[41] As the World Health Organization notes, "the most appropriate infant feeding option for an HIV-infected mother should continue to depend on her individual circumstances".[42] In addition, in PMTCT programmes, women may have to decide whether to give birth by caesarean section, and whether and how often to seek viral load monitoring, What are considered reasonable precautions will depend on the services and guidance available to a woman as well as her personal circumstances. Finally, even if women make all the "right" decisions at each turn, PMTCT measures are not infallible, and transmission may still occur. In any prosecution, to what lengths will women have to go to prove that they took "reasonable" measures?

It is hard to know the effect that prosecutions for vertical transmission would have on utilisation of services to prevent vertical transmission, but they are unlikely to be helpful and could give women one more reason to be wary of HIV testing and PMTCT services. Women experience HIV-related stigma and condemnation – from both the community and health professionals – for being pregnant,[43,44] e.g. HIV-positive pregnant women were publicly characterised as "suicide bombers" in Botswana.[45] Pressure on HIV-positive women from health professionals to terminate their pregnancies has also been reported.[46] As of early 2009, the Legal Assistance Centre of Namibia was assisting ten

women who allegedly underwent coercive sterilisation because they were HIV-positive.[47]

It would be inappropriate for any government to expend public resources to prosecute "willful" vertical transmission before it does everything possible to enable women to avoid unwanted pregnancies and to ensure ready access to effective PMTCT programmes.

We recommend that all countries review and revise their criminal laws, including HIV-specific laws, to ensure that vertical transmission is explicitly excluded from the possibility of criminal prosecution. In cases where a woman did not utilise readily available prevention programmes and vertical transmission of HIV has resulted, public health and social support services should clarify the circumstances of that non-utilisation and provide support and care to both mother and child. More broadly, with respect to HIV transmission, we endorse UNAIDS' call for restricting the application of criminal law to cases where there is a clear intent to transmit the virus and rejecting its use otherwise.[23] Respecting this principle would exclude mother-to-child transmission from criminal prosecution in all reasonably imaginable instances.

Governments that criminalise the transmission of HIV may do so with the best of intentions, but the solution of criminal law does not fit the complex problems of vertical transmission of HIV. Scaling up PMTCT services and ensuring that they are affordable, accessible, welcoming and of good quality is the most effective strategy for reducing vertical transmission of HIV and should be the primary strategy in all countries.

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**Résumé**

La prévention de la transmission mère-enfant du VIH (PTME) est un volet important des ripostes mondiales et nationales au VIH et au sida. Ces dernières années, beaucoup de pays ont adopté des lois qui criminalisent l'exposition au VIH et sa transmission. Beaucoup de ces textes sont rédigés au sens large et ont des clauses qui permettent, dans certaines circonstances, d'engager des poursuites pénales pour transmission verticale. Même si les actions en justice ne se sont pas encore matérialisées, le recours à ces lois contre des femmes enceintes séropositives pourrait aggraver la stigmatisation dont elles souffrent déjà et avoir un effet néfaste sur l'utilisation des programmes de PTME. Bien que l'on ait souvent proposé et adopté des lois pénales qui visent la transmission du VIH pour protéger les femmes, ces législations peuvent se retourner contre elles. Il faut réviser les lois pénales sur l'exposition au VIH et sa transmission afin d'exclure explicitement la transmission verticale comme motif de poursuites. L'élargissement des services de PTME en veillant à ce qu'ils soient abordables, accessibles, accueillants et de bonne qualité est la mesure la plus efficace pour réduire la transmission verticale du virus et devrait être la stratégie primaire dans tous les pays.

**Resumen**

La prevención de la transmisión materno-infantil (PTMI) del VIH es una parte importante de las respuestas internacionales y nacionales al VIH y SIDA. En los últimos años, muchos países han adoptado leyes para penalizar la transmisión del VIH y exposición a éste. Muchas de estas leyes son redactadas ampliamente y tienen disposiciones que permiten acción penal contra la transmisión vertical en algunos casos. Aunque las acciones aún no se hayan materializado, el uso de estas leyes contra las mujeres VIH-positivas podría acrecentar el estigma que ya afrontan las mujeres y tener un efecto disuasorio en su uso de los programas de PTMI. Aunque las leyes penales referentes a la transmisión del VIH a menudo han sido propuestas y adoptadas con la intención de proteger a las mujeres, estas leyes podrían perjudicar a las mujeres. Las leyes penales sobre la transmisión del VIH y exposición a éste deben revisarse y modificarse para garantizar que la transmisión vertical se excluya explícitamente como objeto de acción penal. Ampliar los servicios de PTMI y garantizar que estos sean accesibles, asequibles, acogedores y de buena calidad es la estrategia más eficaz para disminuir la transmisión vertical del VIH y debería ser la estrategia primordial en todos los países.