

Revisiting the Criminalization Case of HIV/AIDS Transmission in Local Regulations and the Urgency of Its Revision by the Indonesian Government

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Abstract

UNAIDS and the United Nations Development Programme (UNDP) published a Policy Brief on Criminalization of HIV Transmission on 6 December 2015 that recommends countries to repeal criminal regulations that criminalize the transmission of HIV/AIDS and other rules that are counterproductive to the HIV response and apply general criminal law only to cases of intentional HIV transmission. Still, in Indonesia, there are approximately 85 local regulations at the provincial and district/city levels that criminalize the transmission of HIV/AIDS. The criminalization of HIV/AIDS transmission perpetrators can cause individuals with a high risk of HIV/AIDS exposure to ignore HIV/AIDS screening tests, resulting in the spread of HIV/AIDS that cannot be controlled. The articles that criminalize perpetrators of HIV/AIDS transmission have the potential to criminalize HIV/AIDS sufferers who have done their best to prevent the transmission of the virus. Therefore, decriminalization efforts are needed to limit criminal proceedings against HIV/AIDS sufferers who have made efforts to prevent HIV/AIDS. Criminalization is only allowed for HIV/AIDS transmission perpetrators accompanied by deliberate malicious intent to transmit HIV/AIDS that damages the health of their victims and can be charged with articles of persecution resulting in serious injury. Yet, it is necessary to establish evidentiary guidelines that show the origin of the HIV/AIDS virus suffered by victims of the virus transmission. Moreover, there must be very convincing evidence (beyond reasonable doubt) that HIV/AIDS transmission is used as a “weapon” in sexual contact or other transmission routes involving coercion, abuse of power, and fraud.

Keywords: Criminalization; HIV/AIDS Transmission; Local Regulation

Introduction

Transmission of Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS) remains a problem faced by citizens of the world and Indonesia in particular. According to data from the United Nations Programme on HIV/AIDS (UNAIDS) in 2023, there was an estimated total of 570,000 people with Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (HIV/AIDS) (ranging from 520,000-630,000).¹ Meanwhile, according to the Ministry of Health of the

¹ Country Factsheet Indonesia, United Nations Programme on HIV/AIDS (UNAIDS), pg. 1, accessed from <https://www.unaids.org/en/regionscountries/countries/indonesia> on January 22th, 2025

Republic of Indonesia in 2020, there were an estimated 543,100 people with HIV/AIDS² with the number of people receiving antiretroviral treatment (ARV) around 179,595 people (the Ministry of Health of the Republic of Indonesia version)³ and 177.277 people (UNAIDS version).⁴ These numbers show that there is still a small number of HIV/AIDS sufferers who receive ARV treatment compared to the total number of HIV/AIDS sufferers.

The characteristics of the problems faced in fighting HIV/AIDS are unique compared to other diseases, due to the nature of HIV/AIDS itself which cannot be cured with the current health technology capabilities and can be transmitted through sexual contact, through mothers with HIV/AIDS to their children, through contaminated needles, and blood or organ transfusions with the percentage of spread through sexual contact reaching 85% of all cases in the world.⁵ The initial symptoms of HIV/AIDS are inconspicuous symptoms such as fever, cough, swallowing pain, diarrhea, and swollen lymph nodes within 3-6 weeks after transmission, which then gradually improves and shows an asymptomatic phase for approximately 8-10 years which then leads to symptoms of AIDS where immunity cannot protect the body from disease, with the majority of HIV sufferers showing symptoms of AIDS after 13 years of transmission dying.⁶

Amid the spread of HIV/AIDS, some countries have issued regulations that criminalize the perpetrators of HIV/AIDS transmission both at the national and state levels, such as in the United States.⁷ However, some other countries still have not issued regulations that specifically criminalize the perpetrators of HIV/AIDS transmission, such as the Netherlands⁸ which applies the article of grievous bodily harm and assault. Meanwhile, in Indonesia, there are no regulations at the level of national law that specifically criminalize the perpetrators of HIV/AIDS transmission. Yet, at the level of local regulations, there are approximately 85 provincial and district/city regulations that criminalize the act of spreading HIV/AIDS. The basic problem with the existence of local regulations that criminalize HIV/AIDS transmission is whether the benefits of implementing these regulations outweigh the negative impacts caused?

² The 2022 Annual Report on HIV/AIDS, The Ministry of Health of the Republic of Indonesia, pg.17, accessed from https://p2p.kemkes.go.id/wp-content/uploads/2023/06/FINAL_6072023_Layout_HIVAIDS-1.pdf on January 22th, 2025

³ Ibid.

⁴ UNAIDS, Op. Cit, pg. 3

⁵ Jocelyn, et. Al, HIV/AIDS in Indonesia: current treatment landscape, future therapeutic horizons, and herbal approaches, *Frontiers in Public Health*, February 14th, 2024, Vol: 12 – 2024, pg. 3, accessed from <https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2024.1298297/full> on January 22th, 2025.

⁶ Liza Salawati, "Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome Prevention" in the Scientific Meeting of the Faculty of Medicine UNSYIAH "SCIENTIFIC MEETING: THE LATEST CONCEPT OF MANAGEMENT OF VARIOUS MEDICAL PROBLEMS", September 27th, 2017, accessed from <https://conference.usk.ac.id/TIFK/1/paper/view/789/84> on January 22th, 2025

⁷ Deanna Cann, Et. Al., Current Trends in HIV Criminalization in South Carolina: Implications for the Southern HIV Epidemic, AIDS and Behavior, Vol.23 October 2019, accessed from <https://pmc.ncbi.nlm.nih.gov/articles/PMC7182101/>

⁸ Wetboek van Strafrecht voor Nederlandcsh 1881 (Amendment of October 1st, 2012) Article 300-304.

UNAIDS and the United Nations Development Programme (UNDP) published a Policy Brief on Criminalization of HIV Transmission on December 6, 2015, which recommends countries to repeal criminal regulations that criminalize HIV/AIDS transmission, regulations that require the dissemination of HIV/AIDS status, and other regulations that are counterproductive to HIV prevention along with care and other medical efforts for people with HIV and other vulnerable people, as well as apply general criminal law only to cases of intentional spread of HIV.⁹ The recommendations of UNAIDS and UNDP are in stark contrast to the condition of laws and regulations in Indonesia, where at the local regulation level, articles that criminalize the actions of HIV sufferers who are known to transmit or spread HIV infection to others are applied.¹⁰ In addition, proving who transmitted HIV in most cases is very difficult, especially when the infectious person has more than one sexual partner and relies heavily on the testimony of the parties. Consequently, people charged with spreading HIV are very likely to receive a verdict that does not match the incidence of HIV transmission.¹¹

Another problem arising from the criminalization of HIV/AIDS transmission is the complicated evidence to determine that the defendant has transmitted HIV/AIDS to the victim, and how to ensure that the HIV/AIDS virus strain transmitted by the defendant is the same as the victim. One method that can be used is the phylogenetic analysis method that compares at least two parts of DNA sequence (above 500 nucleotides). It is better if the analysis is carried out on the entire genome, yet, this method is not economically feasible.¹² The disadvantage of this phylogenetic analysis method is that the test results are highly dependent on the time of sampling after transmission, because the HIV/AIDS virus from patients who consumes ARV drugs undergoes mutations that eliminate the similarity of HIV/AIDS virus samples from victims and defendants of HIV/AIDS transmission. Besides these limitations, the biggest weakness of this method is that the analysis results cannot be sufficiently reliable to estimate the direction of HIV/AIDS transmission, and although the victim and the defendant have similar HIV/AIDS virus strains, it is possible that both the victim and the defendant were infected by other people in the same area who have virus strains from the same virus tissue. Nevertheless, the test results can be relied upon to draw the conclusion that the defendant is not related to the virus transmission experienced by the victim.¹³

Based on the explanation above, this research focuses on analyzing the criminalization of HIV/AIDS transmission contained in local regulations in Indonesia and its potential negative impact on people with HIV/AIDS, as well as the scientific obstacles to proving HIV/AIDS transmission and the urgency for the Government of Indonesia to revise regulations that criminalize HIV/AIDS transmission.

⁹ UNDP & UNAIDS, Policy Brief on Criminalization of HIV Transmission, December 6th, 2015, accessed from <https://www.undp.org/publications/undp-and-unaid-policy-brief-criminalization-hiv-transmission>, pg. 6

¹⁰ Article 39 paragraph (2) conj. article 59 paragraph (1) of Purwakarta District Local Regulation Number 13 of 2020 concerning the Management of Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome and Tuberculosis

¹¹ UNDP & UNAIDS, Op. Cit. pg. 4

¹² Edwin J. Bernard, Et. Al., The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission, HIV Forensics-NAM Aidsmap, February 2007, pg. 8

¹³ Ibid., pg. 6

Research Methods

The type of research applied in this research was Normative Legal Research which is descriptive analytical, where the criminal elements related to the spread of HIV were described thoroughly and then reviewed based on legal perspectives and social behavior of society to produce constructive criticism of existing regulations. Approaches of the problem used in writing this thesis were statute approach, conceptual approach, case study, and comparative research. There were two legal materials used in this research, consisting of primary legal materials and secondary legal materials. Primary legal materials consist of legislation, official records or minutes in the making of laws, and judges' decisions. Secondary legal materials were obtained from law books, legal and medical journals, legal dictionaries, and court decisions relating to Family Law and Marital Property, especially regarding guardianship. The collection of legal materials in this research was obtained from library research in the form of both primary legal materials and secondary legal materials, which were inventoried first and then those that are relevant to the topic of the problem were selected. Analysis of legal materials in this research was conducted through literature research by describing each existing problem and by sorting out which ones are in accordance with the problem formulation.

Criminalization of HIV/AIDS Transmission and Its Potential Negative Impact on Society

Criminalization of the perpetrators of HIV/AIDS transmission is actually intended to control the transmission of HIV/AIDS itself. As stated by Barda Nawawi Arief, the purpose of punishment essentially contains aspects of community protection against criminal acts in the context of protecting the community from the impact of criminal acts, and aspects of protection / individual development of criminal offenders in the context of rehabilitating convicts to no longer repeat acts that harm themselves and the community.¹⁴ Departing from this opinion, it can be concluded that the purpose of criminalization in the context of HIV/AIDS transmission can be seen as a two-way effort to prevent and protect the community from the spread of HIV/AIDS and to limit the behavior of HIV/AIDS sufferers from spreading the HIV/AIDS virus itself. However, in practice, criminalization of the HIV transmission perpetrators does not always produce results that are in line with the purpose of criminalization, and risks putting marginalized groups such as commercial sex workers (CSWs), homosexuals, and users of narcotics, psychotropic substances, and other addictive substances (NAPZA) through needles at risk of criminalization for HIV/AIDS transmission.

The marginalized groups above are very likely to be used as “scapegoats” for the transmission of HIV/AIDS that occurs, even though these groups have done their best to prevent the transmission of HIV/AIDS to their sexual partners such as using condoms. Moreover, until the time of this writing, there is no data that successfully shows the correlation between criminal threats in local regulations with a decrease in behavior that is at risk of transmitting HIV / AIDS. In fact, from approximately 35,415 cases of HIV and 12,481 new AIDS cases found by the Ministry of Health in 2024 in Indonesia¹⁵, there is no

¹⁴ Barda Nawawi Arief, 2009, “Purpose and Guidelines for Criminalization”, Publishing Agency of Universitas Diponegoro, Semarang, pg. 34

¹⁵ CNN Indonesia, “Ministry of Health Records 35 Thousand New HIV Cases Throughout 2024”, December 2nd, 2024, accessed from <https://www.cnnindonesia.com/gaya-hidup/20241202104452-255-1172755/kemenkes-catat-35-ribu-kasus-hiv-baru-sepanjang-2024> on January 23th, 2025

information related to any court decisions regarding the enforcement of HIV/AIDS criminalization in Indonesia. This shows that the articles criminalizing the HIV/AIDS transmission perpetrators in local regulations are not properly enforced by law enforcement institutions and is very much at odds with the purpose of the existence of articles on criminalizing perpetrators of HIV/AIDS transmission itself.

In fact, there is a possibility that the existence of regulations criminalizing the transmission of HIV/AIDS will actually hamper ongoing HIV/AIDS prevention efforts, due to the majority of the article formulation in local regulations related to the criminalization of HIV/AIDS transmission both intentionally and unintentionally. Some samples of local regulations related to HIV/AIDS are as follows:

No.	Local Regulation	Article Imposed	Criminal Sanction
1.	DKI Jakarta Provincial Regulation Number 5 of 2008 concerning the Prevention of HIV and AIDS	<p>Article 30</p> <p>(1) Criminal acts related to the transmission of HIV that are carried out intentionally and/or planned, in addition to being subject to sanctions as referred to in Article 29, are subject to criminal penalties in accordance with the provisions of laws and regulations.</p> <p>(2) Criminal acts as referred to in paragraph (1) are criminal acts of crime.</p>	<p>Article 29</p> <p>Any individual and/or person in charge who violates the provisions as referred to in Article 15 letters e and h. Article 17 and Article 18 paragraph (3) shall be subject to criminal penalties with a maximum imprisonment of 3 (three) months or a maximum fine of Rp. 50,000,000,- (fifty million rupiah)</p>
2.	Banten Provincial Regulation Number 6 of 2010 concerning the Prevention of HIV and AIDS	<p>Article 25</p> <p>Any individual who knows that they are infected with HIV and AIDS is prohibited from intentionally infecting other people.</p>	<p>Article 35</p> <p>(1) Any individual who violates the provisions as referred to in Article 18, Article 19, Article 20, Article 21, Article 22, Article 23, Article 24, Article 25, Article 26, or Article 27 shall be punished with imprisonment for a maximum of 6 (six) months and/or a</p>

			maximum fine of IDR 50,000,000 (fifty million rupiah).
3.	Central Java Provincial Regulation Number 5 of 2009 concerning the Prevention of HIV and AIDS	<p>Article 13</p> <p>(4) Any individual who knows that he/she is infected with HIV and AIDS is prohibited from intentionally transmitting the infection to other people.</p>	<p>Article 18</p> <p>(1) Any individual who violates the provisions of Article 12 and Article 13 shall be punished with imprisonment for a maximum of 6 (six) months or a maximum fine of Rp. 50,000,000.00 (fifty million rupiah)</p>
4.	West Java Provincial Regulation Number 12 of 2012 concerning the Prevention and Control of Human Immunodeficiency Virus and Acquired Deficiency Syndrome (AIDS)	<p>Article 35</p> <p>(3) Every PLWHA is prohibited from transmitting HIV and AIDS to their partners and/or other people.</p>	<p>Article 36</p> <p>(1) Any individual who violates the provisions as referred to in Article 35 shall be subject to a maximum imprisonment of 3 (three) months or a maximum fine of Rp. 50,000,000 (fifty million rupiah).</p> <p>(2) The criminal act as referred to in paragraph (1) is a violation.</p> <p>(3) In the event that the criminal act committed is subject to a higher criminal penalty than the criminal threat in this Local Regulation, a higher criminal threat shall be imposed, in accordance with the provisions of laws and regulations.</p>

5.	East Java Provincial Regulation Number 12 of 2018 Concerning the Prevention of HIV and AIDS	<p>Article 11</p> <p>Any individual who knows that they are infected with HIV is responsible for protecting their sexual partners by taking preventive measures.</p> <p>Article 12</p> <p>Any individual who engages in risky sexual intercourse is responsible for taking preventive measures by using protection.</p>	There are no criminal provisions.
6.	Surabaya Mayor's Regulation Number 4 of 2013 concerning the Prevention of HIV and AIDS	<p>Article 15</p> <p>Any individual who knows that he/she is infected with HIV is prohibited from carrying out actions that are known to be able to transmit or spread HIV infection to other people.</p>	<p>Article 41</p> <p>Any individual or person in charge of a business and/or activity who violates the provisions as referred to in Article 13, Article 14, Article 15, Article 16, Article 17, Article 18, Article 23, Article 28 paragraph (3) Article 36 and/or Article 37 shall be subject to criminal sanctions of imprisonment for a maximum of 3 (three) months or a maximum fine of Rp. 50,000,000.00 (fifty million rupiah).</p>
7.	Purwakarta District Regulation Number 13 of 2020 concerning the Prevention of Human Immunodeficiency Virus/Acquired Immune Deficiency	<p>Article 39</p> <p>(2) Any individual who knows that he/she is infected with HIV is prohibited from carrying out actions that are known to be able to transmit or spread HIV infection to others.</p>	<p>Article 59</p> <p>(1) Any individual and/or institution that violates the provisions as referred to in Article 39 to Article 49 shall be subject to criminal sanctions of imprisonment for a maximum of 3 (three)</p>

	Syndrome and Tuberculosis		months or a maximum fine of IDR 50,000,000 (fifty million rupiah).
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It can be seen from the formulation of the articles above that the majority of convictions against perpetrators of HIV transmission require the perpetrator to know he/she is infected with HIV/AIDS or there is an element of intent/planning of the act, with the exception of East Java Province which does not apply the article of conviction against perpetrators of HIV/AIDS transmission. The existence of this element encourages marginalized groups such as sex workers not to take tests to determine their HIV/AIDS infection status with the fear that if they have taken an HIV/AIDS screening test and find out that they are HIV/AIDS positive, they will be criminally prosecuted using the articles of criminalization in the local regulations mentioned above.

Some formulations of criminal articles against perpetrators of HIV/AIDS transmission from some of the above Local Regulations are also very ambiguous and multi-interpretive, as in the formulation of the Surabaya Mayor's Regulation and the Purwakarta District Regulation which prohibits HIV/AIDS sufferers from carrying out actions that are known to be able to transmit or spread HIV infection to others, which can cause HIV/AIDS sufferers who are in a position where they cannot refuse their sexual partner's request not to use protection during sexual intercourse. The helplessness of HIV/AIDS sufferers in applying these protection devices should also be taken into consideration by local regulation makers to determine whether or not the perpetrators of HIV/AIDS transmission are guilty.

Even, in the formulation of the articles of the Surabaya Mayor's Regulation and the Purwakarta District Regulation does not require the transmission of HIV/AIDS that occurred as a material offense. This has the potential to result in unfounded criminalization for marginalized people who are accused of spreading HIV/AIDS when the victim himself may not have contracted the alleged HIV/AIDS. In addition, the formulation of criminal articles for perpetrators of HIV/AIDS transmission can also criminalize pregnant women who only find out they are infected with HIV/AIDS after pregnancy and transmit HIV/AIDS to their children who are born if law enforcers use criminal articles for HIV/AIDS transmission in the form of formal offenses. The criminalization of such conditions undermines the sense of community justice as in general fact, no mother wants her child to be infected with HIV and the transmission of a child from a mother infected with HIV cannot be seen as a form of intent (*dolus*).

The criminalization of HIV/AIDS transmission perpetrators should be accompanied by proof that the transmitting individual acted consciously, either with clear malicious intent to spread HIV or acted with deliberate disregard for the safety of others and recklessly transmitted HIV to others.¹⁶ In addition to cases where the perpetrator has a deliberate intention to spread HIV/AIDS to others, an additional provision is needed to protect HIV/AIDS sufferers who make a good faith effort to prevent the spread of HIV/AIDS. Based on the UNAIDS recommendation, criminalization of HIV/AIDS transmission cannot be applied in the following conditions:¹⁷

¹⁶ Neiloy Sircar, HIV Criminalization Laws and the Right to Health, Health and Human Right, Harvard University, accessed from <https://www.hhrjournal.org/2017/08/18/hiv-criminalization-laws-and-the-right-to-health/> on January 23th, 2025

¹⁷ Ibid.

1. When the risk or “realistic possibility” of the spread of HIV can be mitigated, such as when people with HIV/AIDS always use new safe needles and practice healthy sexual relations, use protective equipment such as condoms, and HIV/AIDS-negative individuals use pre- and post-prophylaxis after being exposed to the risk of HIV/AIDS transmission;
2. When individuals with HIV/AIDS do not know they are HIV/AIDS positive;
3. When individuals with HIV/AIDS do not know how the victim became infected with HIV/AIDS (no sexual contact or relationship at all);
4. When an individual with HIV/AIDS explains his/her HIV/AIDS infection status to an HIV/AIDS-negative sexual partner and the partner fully understands how HIV/AIDS can spread;
5. When individuals with HIV/AIDS are constrained by socio-cultural conditions, where they have a well-founded fear of persecution or lawsuits that may hinder their freedom to prevent the transmission of HIV/AIDS;
6. When individuals with HIV/AIDS are unable to take the necessary steps to minimize the risk of transmission or willfully ignore efforts to prevent the risk of transmission;
7. When the individual with HIV/AIDS and his/her HIV/AIDS-negative partner understand and agree to the risk of HIV/AIDS transmission within acceptable limits after notification of HIV/AIDS status by the HIV/AIDS-positive individual.

Thus, there is a clear line between criminal policies that can punish perpetrators of HIV/AIDS who use HIV/AIDS as a weapon unlawfully to damage the health of others and protect HIV/AIDS sufferers who have obviously taken adequate measures or HIV/AIDS sufferers who are under overmatch so that they cannot take adequate measures to prevent HIV/AIDS transmission. Amidst the potential criminalization of HIV/AIDS transmission perpetrators in good faith due to local regulations in Indonesia, there are several articles that only target the criminalization of perpetrators of the deliberate spread of HIV/AIDS and are formulated in the form of material offenses, such as the Provincial Regulations of DKI Jakarta, Central Java, West Java, and Banten related to HIV/AIDS, and even the Provincial Regulation of East Java does not include criminal sanctions at all.

The Urgency of the Government to Revise the Regulation on Criminalization of HIV/AIDS Transmission Based on Analysis

UNAIDS recommends countries to use general criminal provisions against the intentional spread of HIV/AIDS rather than legislating regulations that specifically criminalize HIV/AIDS transmission and ensure the implementation of general criminal provisions against the intentional transmission of HIV/AIDS is in accordance with international human rights provisions. Indonesia can reflect on the Netherlands, which is revolutionary as one of the first countries in the world to apply HIV-related science to criminal law and directly decriminalize the spread of HIV/AIDS except for the intentional spread of HIV/AIDS.¹⁸

¹⁸ HIV Justice Network, Countries: Netherland, <https://www.hivjustice.net/country/nl/>, accessed on January 23th, 2025

In the Netherlands itself from 1989 to 2005, there were at least 15 criminal prosecutions for the spread of HIV using offenses resulting in damage to health and death.¹⁹ One of them is the Leeuwarden Case where a homosexual man had sex with two minors without telling them his HIV status. At the district court level, the man was convicted of rape and attempted murder. On appeal, the Leeuwarden Court of Appeal upheld the fact that the convicted person had committed rape and attempted murder for spreading the HIV/AIDS virus which could cause death. However, at the cassation stage, the Dutch Supreme Court held a different opinion where the article of attempted murder could not be accepted as according to the Dutch Supreme Court, the act of spreading the HIV virus to others could be combined with maltreatment resulting in serious injury as the convicted person did not act with the intention of spreading HIV. Thus, it could not be concluded that the convicted person had the intention to kill his victim according to the Dutch Supreme Court.²⁰

Departing from the opinion of the Dutch Supreme Court regarding the articles that can be applied to the perpetrators of HIV/AIDS transmission, Indonesia can apply articles related to persecution (Article 51 of the Criminal Code / 466 of Law 1/2023), specifically Persecution resulting in serious injury due to HIV can be equated with incurable disability (in line with Article 90 of the Criminal Code) and the nature of the spread of HIV itself is damaging to health. However, indeed, the use of the article against the perpetrators of HIV / AIDS transmission must be accompanied by very convincing evidence (beyond reasonable doubt) that the perpetrators of HIV / AIDS transmission do the spread with the aim and intention to damage someone's health.

The next question is how to determine the criteria for the spread of HIV that is accompanied by intent (*dolus*) and the spread of HIV that occurs not because of the intention of the perpetrator? In the context of sexual intercourse, the only action that guarantees a 100% HIV/AIDS prevention rate is abstaining from sexual intercourse altogether. Theoretically, consistent condom use can protect against HIV transmission by as much as 80% compared to unprotected sexual intercourse. Yet, there is a risk that the condom may break or slip off, although the risk of such an event is lower than unprotected sexual intercourse.²¹ In other words, although condoms do not guarantee complete protection and do not always successfully protect users against HIV/AIDS transmission, condoms remain an important part of protection in safe sexual behavior. This scientific fact is important as a reminder that HIV can still spread even though individuals with HIV/AIDS have done their best to minimize its spread. Thus, it is important to limit the element of intent that can be used to ensnare perpetrators of HIV/AIDS transmission. Prosecutorial policy in the Netherlands suggests that defendants cannot be found guilty of serious offenses by spreading HIV/AIDS if:²²

1. The person concerned does not know that he/she has HIV/AIDS; or
2. The person concerned has informed his/her HIV/AIDS positive status to his/her partner; or

¹⁹ Ibid.

²⁰ Executive Committee for AIDS Policy and Criminal Law of the Kingdom of the Netherlands, *Detention or Prevention?: Report on the Impact of the Use of Criminal Punishment on Public Health and the Status of Individuals with HIV*, Amsterdam, pg. 35

²¹ Ibid., pg. 13

²² Ibid., pg. 21

3. The sexual partner of the person with HIV/AIDS is considered to be aware of the person's HIV/AIDS positive status or at least aware of the increased risk of HIV transmission; or
4. The person concerned has had sexual intercourse with safety; or
5. He/she has forced his/her partner to have safer sexual intercourse which shows the intention of the person concerned to protect his/her sexual partner.

The Executive Committee of AIDS Policy and Criminal Law of the Kingdom of the Netherlands also has the opinion that although in general, having sexual intercourse with people with HIV/AIDS is an act that remains risky even though safety measures have been taken, the use of condoms or other safety measures has shown an implicit message to sexual partners that one does not want to transmit the disease to their partners. Thus, if something unexpected happens such as a condom unexpectedly rips or slips from the genitals, then it cannot be equated with “consciously accepting the risk of causing maltreatment resulting in serious injury”.²³

In addition to setting the boundaries in what cases HIV/AIDS transmission can be criminalized, it must also be determined how to prove HIV/AIDS transmission from individuals to other individuals, as it is known that HIV transmission itself can take place asymptotically for approximately 8-10 years. It is not impossible if someone who is known to frequently change sexual partners even accuses others who are known to have been HIV positive of transmitting HIV to him, even though the accuser has actually contracted HIV from his sexual activities with others in the past. Proving the existence of HIV transmission to determine the presence of HIV/AIDS can be easily done with HIV screening tests, but to find out from whom the HIV virus was transmitted is a challenge for law enforcement as the technology that currently can be used to detect the similarity of two different HIV/AIDS virus samples is Phylogenetic Analysis.

Phylogenetic Analysis is a method for analyzing small differences in HIV Virus genes using computational methods to calculate genetic distances between HIV virus strains. Unlike human DNA which is stable throughout its life, the HIV virus RNA changes very quickly resulting in very wide genetic diversity. This diversity results in the capability of the researchers who use this method to trace where the HIV virus comes from.²⁴ However, the Phylogenetic Analysis method has several fatal flaws and cannot be used as the only evidence or preliminary evidence of the transmission of HIV from the perpetrator to the victim and must be reinforced with other evidence according to the context of the case.²⁵ In addition, phylogenetic analysis cannot be relied upon to determine the direction of HIV transmission due to the need for multiple samples from infectious and infected people that must be taken as soon as possible from the time of suspected transmission to be fully analyzed using full-length sequencing.²⁶

If the results of the phylogenetic analysis show similarities between samples from the defendant who spread HIV and the victim, it should not be immediately concluded that the defendant actually spread the HIV to the victim. There are other possibilities that can produce such test results, including:

1. The defendant was actually infected with HIV from the victim;

²³ Ibid.

²⁴ Edwin J. Bernard, Op. Cit., pg. 4

²⁵ Ibid., pg. 8

²⁶ Ibid, pg. 6

2. The victim was infected from another individual with a similar strain of HIV virus;
3. Both the victim and the defendant were infected by one or more other individuals with the same strain of HIV;
4. The victim already had HIV, but was re-infected (known as superinfected) with the HIV virus strain from the defendant or other parties listed in the phylogenetic test results.

Based on the disadvantage of phylogenetic analysis as the only forensic method that can determine the similarity of HIV virus strains between HIV-infected defendants and victims, it is appropriate for the Government of the Republic of Indonesia to remove the articles on the criminalization of HIV/AIDS transmission in existing local regulations or formulate new articles that regulate how HIV/AIDS transmission must be proven and what boundaries must be drawn to separate perpetrators of HIV transmission accompanied by deliberate evil intentions from perpetrators of HIV transmission who have tried their best to prevent HIV/AIDS but in the end still transmit it to their victims. The Executive Committee of AIDS Policy and Criminal Law of the Kingdom of the Netherlands states that the decision to prosecute people who spread HIV in general is an unbalanced and counterproductive action. Government intervention in the judicial process is only necessary when society cannot protect itself from HIV infection, such as when HIV is used as a "weapon" and sexual contact involves coercion, abuse of power, and fraud, in such cases criminal law is deemed necessary.²⁷ This is also in line with the opinion of UNAIDS and the Executive Committee of AIDS Policy and Criminal Law of the Kingdom of the Netherlands which states that criminalization can cause people infected with HIV to not be treated or even not treated at all, thus causing a decrease in the life expectancy of the community in general.²⁸ It is even strange if criminalization of HIV/AIDS transmission perpetrators can be conducted, yet, the spread of other infectious diseases is not carried out even though it has an impact that falls into the category of serious injuries, such as chlamydia which can cause infertility.²⁹ The author agrees with the statements of UNAIDS and the Executive Committee of AIDS Policy and Criminal Law of the Kingdom of the Netherlands where criminalization of HIV/AIDS transmission perpetrators has the potential to hinder access for HIV sufferers to the health services they need, such as ARV drugs or other necessary drugs, based on the considerations and opinions that have been explained previously. Hence, the formulation, formation, and criminalization applied in local regulations related to HIV/AIDS apparently do not pay attention to factors that can influence the implementation and enforcement of the law such as aspects of the substance of law, structure of law, and culture of law, resulting in criminal law provisions in local regulations related to HIV/AIDS not being able to be implemented and even very difficult to enforce.³⁰

The inclusion of articles related to the fulfillment of health rights for HIV/AIDS sufferers in local regulations is also a bright side of the existing criminalization potential. Thus, it is hoped that the Indonesian Government can recommend to each local government to maintain articles that regulate access for HIV/AIDS sufferers to health services and carry out decriminalization by removing articles that

²⁷ Executive Committee on AIDS Policy and Criminal Law of the Kingdom of the Netherlands, Op. Cit., pg. 34

²⁸ Ibid., pg. 33

²⁹ Ibid., pg. 34

³⁰ Simplexius Asa, A Criminal Law Review of Risky Behavior Criminalization in Local Regulations on HIV and AIDS Prevention in Indonesia, Thesis, Faculty of Law, Universitas Indonesia, 2011, pg. 148

specifically criminalize HIV/AIDS sufferers. The elimination of criminal articles in local regulations related to HIV/AIDS will not create a legal vacuum, because there are articles related to abuse (Article 51 of the Criminal Code/Article 466 of Law 1/2023) which can be used by public prosecutors to attract HIV sufferers who intentionally have malicious intent to spread HIV/AIDS with the aim of damaging the health of others. Criminalization of HIV/AIDS transmission perpetrators must be accompanied by clear guidelines for not criminalizing HIV sufferers who have made efforts to prevent HIV (can be included in the regulations of the Republic of Indonesia prosecutor's office) as well as clear guidelines for providing evidence of HIV/AIDS transmission (can be included in the regulations of the Supreme Court of the Republic of Indonesia) to prevent errors in persona.

Conclusion

The criminalization of HIV/AIDS transmission perpetrators can cause individuals at high risk of HIV/AIDS infection, such as sex workers and injecting drug users, to ignore HIV/AIDS screening tests altogether to avoid charges of spreading HIV/AIDS which require the perpetrator to know that he/she is HIV/AIDS positive which hinders the process of providing ARV drugs and controlling HIV/AIDS. This is contrary to the purpose of local regulations to prevent the spread of HIV/AIDS. The inclusion of criminal articles that criminalize HIV/AIDS transmission perpetrators has the potential to criminalize HIV/AIDS sufferers who transmit HIV/AIDS to others, even though they have made the best efforts to prevent HIV/AIDS transmission. Therefore, decriminalization efforts are needed by removing articles that specifically criminalize HIV/AIDS transmission perpetrators and limiting the criminal process against HIV/AIDS sufferers who have made efforts to prevent HIV/AIDS. For the perpetrators of HIV/AIDS transmission accompanied by malicious intent to transmit HIV/AIDS that damages the health of the victim can be charged with the article of assault resulting in serious injury. However, it is necessary to establish evidentiary guidelines that show the origin of the HIV/AIDS virus suffered by the victim to avoid errors in persona in the prosecution process. The criminalization of HIV/AIDS transmission can only be carried out when there is very convincing evidence (beyond reasonable doubt) that HIV transmission is used as a "weapon" in sexual contact or other transmission routes involving coercion, abuse of power, and fraud.

References

United Nations Programme on HIV/AIDS (UNAIDS), Country Factsheet Indonesia, pg. 1, accessed from <https://www.unaids.org/en/regionscountries/countries/indonesia> on January 22th, 2025

The 2022 Annual Report on HIV/AIDS, The Ministry of Health of the Republic of Indonesia, pg.17, accessed from https://p2p.kemkes.go.id/wp-content/uploads/2023/06/FINAL_6072023_Layout_HIVAIDS-1.pdf on January 22th, 2025

Jocelyn, et. Al, HIV/AIDS in Indonesia: current treatment landscape, future therapeutic horizons, and herbal approaches, Frontiers in Public Health, February 14th, 2024, Vol: 12 – 2024, pg. 3, accessed from

<https://www.frontiersin.org/journals/public-health/articles/10.3389/fpubh.2024.1298297/full> on January 22th, 2025

Liza Salawati, “Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome Prevention” in the Scientific Meeting of the Faculty of Medicine UNSYIAH “SCIENTIFIC MEETING: THE LATEST CONCEPT OF MANAGEMENT OF VARIOUS MEDICAL PROBLEMS”, September 27th, 2017, accessed from <https://conference.usk.ac.id/TIFK/1/paper/view/789/84> on January 22th, 2025

Deanna Cann, Et. Al., Current Trends in HIV Criminalization in South Carolina: Implications for the Southern HIV Epidemic, AIDS and Behavior, Vol.23 October 2019, accessed from <https://pmc.ncbi.nlm.nih.gov/articles/PMC7182101/>

Wetboek van Strafrecht voor Nederland 1881 (Amendment of October 1st, 2012)

UNDP & UNAIDS, Policy Brief on Criminalization of HIV Transmission, December 6th, 2015, accessed from <https://www.undp.org/publications/undp-and-unaids-policy-brief-criminalization-hiv-transmission>, pg. 6

Purwakarta District Regulation Number 13 of 2020 concerning the Prevention of Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome and Tuberculosis

Edwin J. Bernard, Et. Al., The use of phylogenetic analysis as evidence in criminal investigation of HIV transmission, HIV Forensics-NAM Aidsmap, February 2007, pg. 8

Barda Nawawi Arief, 2009, “Purpose and Guidelines for Criminalization”, Publishing Agency of Universitas Diponegoro, Semarang, pg. 34

CNN Indonesia, “Ministry of Health Records 35 Thousand New HIV Cases Throughout 2024”, December 2nd, 2024, accessed from <https://www.cnnindonesia.com/gaya-hidup/20241202104452-255-1172755/kemenkes-catat-35-ribu-kasus-hiv-baru-sepanjang-2024> on January 23th, 2025

Neiloy Sircar, HIV Criminalization Laws and the Right to Health, Health, and Human Right, Harvard University, accessed from <https://www.hhrjournal.org/2017/08/18/hiv-criminalization-laws-and-the-right-to-health/> on January 23th, 2025

HIV Justice Network, Countries: Netherland, <https://www.hivjustice.net/country/nl/> accessed on January 23th, 2025

Executive Committee for AIDS Policy and Criminal Law of the Kingdom of the Netherlands, Detention or Prevention?: Report on the Impact of the Use of Criminal Punishment on Public Health and the Status of Individuals with HIV, Amsterdam, pg. 35

Simplexius Asa, A Criminal Law Review of Risky Behavior Criminalization in Local Regulations on HIV and AIDS Prevention in Indonesia, Thesis, Faculty of Law, Universitas Indonesia, 2011, pg. 148