THE RELEVANCE OF GENDER TO POTENTIAL OR PERCEIVED HIV 'EXPOSURE' CHARGES IN HIV CRIMINALISATION CASES

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BACKGROUND

HIV criminalisation is a global phenomenon with significant implications for public health and human rights. Since 2006, when we first began recording case reports for our *Global HIV Criminalisation Database*, criminal cases for alleged HIV non-disclosure, exposure or transmission have been reported in 92 countries. This analysis covers **73 countries** with cases involving cisgender women and men engaging in heterosexual sex, or other HIV 'exposure' allegations.

What is HIV criminalisation?

HIV criminalisation describes the unjust application of criminal law to people living with HIV based solely on their HIV status. In many instances, HIV criminalisation laws are exceedingly broad – either in their explicit wording, or in the way they have been interpreted and applied – making people living with HIV (and those perceived by authorities to be at risk of HIV) extremely vulnerable to a wide range of human rights violations.

A common justification for HIV criminalisation has been the protection of women from male partners who engage in sexual behaviour that risks exposing or transmitting HIV. However, research reveals that women are often more vulnerable to prosecution due to their likelihood of discovering their HIV status first through prenatal screening and the challenges they face in disclosing their HIV status and/or negotiating safer sex due to gendered power imbalances.

This study aims to identify the relevance of gender in HIV criminalisation cases.

Why care about gender when discussing HIV criminalisation?

One of the key justifications for criminalising HIV non-disclosure, 'exposure' and/or alleged transmission has been to 'protect women' – that is, to prevent heterosexual women from contracting HIV from male partners.

Our data show that women are more vulnerable to prosecution and have less access to legal representation. In short, HIV criminalisation exacerbates existing gender inequalities. Therefore, gender is relevant because HIV criminalisation harms women in distinct, gendered ways.

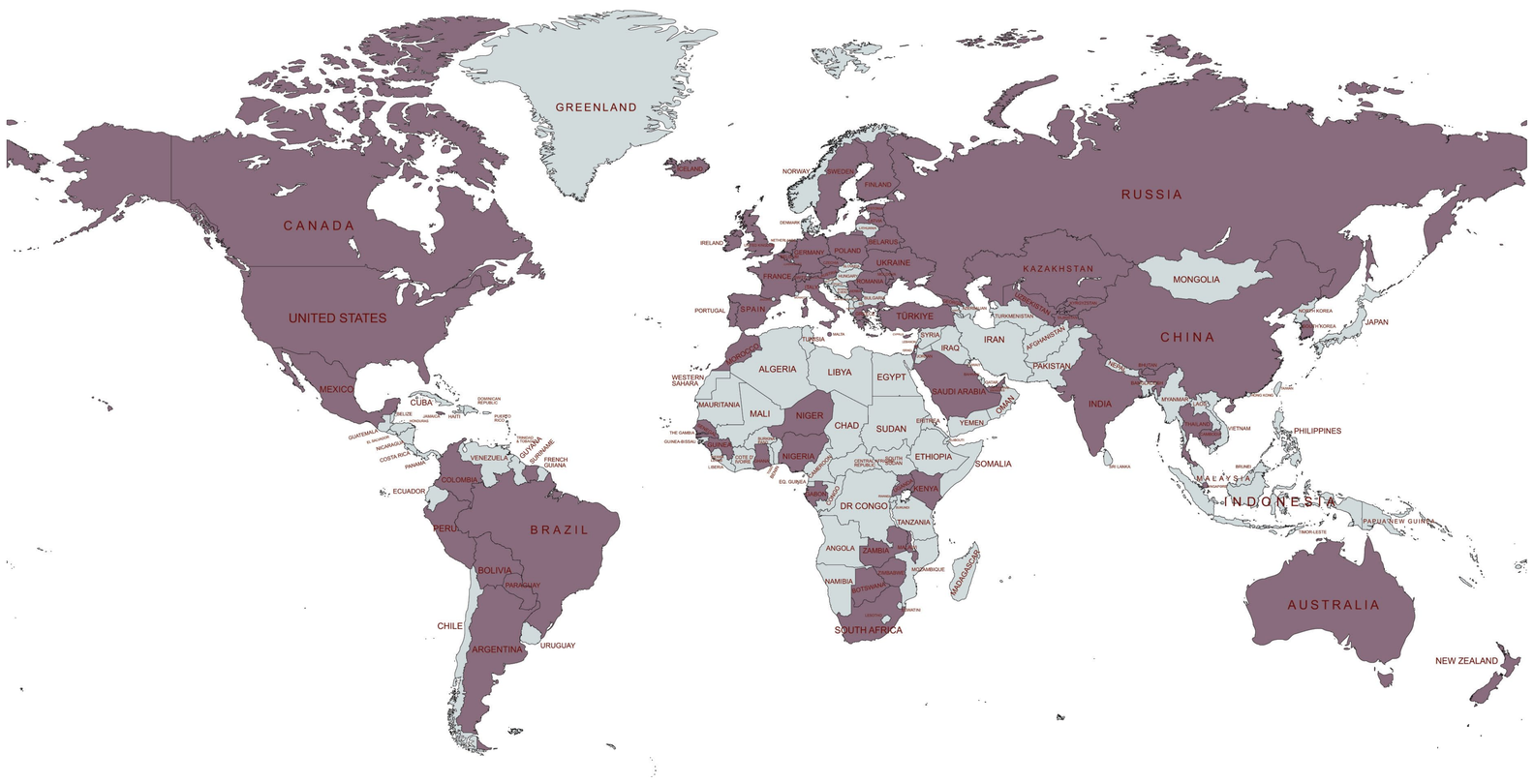
METHODS

Data Source: HIV Justice Network's *Global HIV Criminalisation Database*.[1]
Time Frame: January 2006 - December 2023.
Subjects: Cisgender women and men who have been prosecuted either in cases of HIV criminalisation involving heterosexual sex, or in cases involving other HIV 'exposure' or transmission allegations (n= 723).
Data Collection: Media monitoring, civil society organisation reports and legal records.
Limitations: Case reports, including the number of known cases, should be considered illustrative of what is likely to be a much more widespread use of criminal law against people living with HIV based on HIV-positive status.

What is HIV 'exposure'?

What is termed exposure in law isn't necessarily true HIV exposure — which is why we use the quotation marks ('exposure'). In the context of HIV criminalisation, the term exposure is often used to describe any contact with any body fluid of a person living with HIV — thereby including within the scope of prosecution many situations where HIV transmission is not possible or unlikely. Police, prosecutors and courts often disregard up-to-date science and charge people with HIV 'exposure' for what would otherwise be minor assaults (e.g., biting, spitting, or throwing urine, faeces, or blood-stained clothing), or in relation to consensual sex with a negligible or no risk of transmission (e.g., oral sex, where the defendant is on effective treatment, condoms were used).

Countries with documented cases of HIV criminalisation included in this analysis

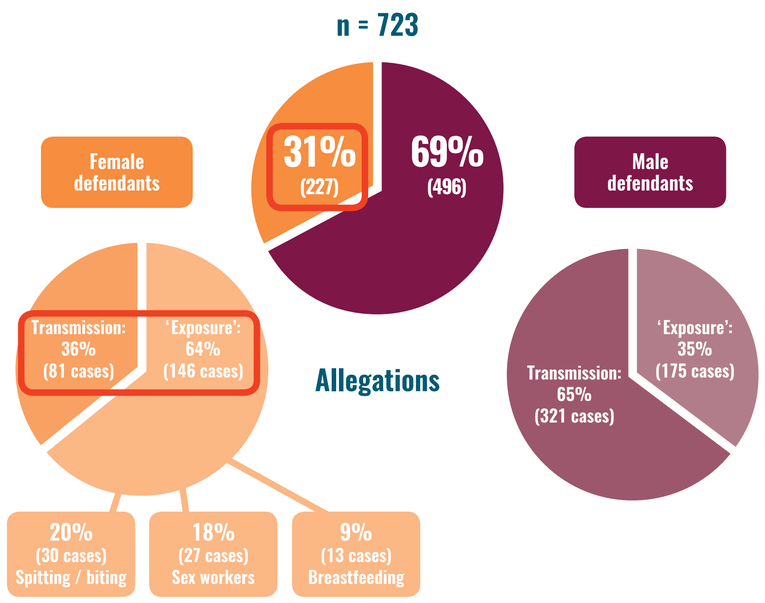


Argentina, Australia, Austria, Belarus, Belgium, Bermuda, Bhutan, Bolivia, Botswana, Brazil, Canada, Cambodia, China, Colombia, Cyprus, Czechia, Estonia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea, Iceland, India, Ireland, Italy, Israel, Jamaica, Kazakhstan, Kenya, Republic of Korea, Kyrgyzstan, Latvia, Malta, Malawi, Mexico, Moldova, Morocco, Netherlands, New Zealand, Niger, Nigeria, Spain, Tajikistan, Paraguay, Peru, Poland, Portugal, Romania, Russia, Saudi Arabia, Senegal, Serbia, Singapore, South Africa, Spain, Suriname, Sweden, Switzerland, Thailand, Türkiye, Ukraine, United Arab Emirates, Uganda, United Kingdom, United States, Uzbekistan, Zambia, Zimbabwe

RESULTS

Key findings:

- Women defendants accounted for **31%** of documented HIV criminalisation cases during the study period and represented **45%** of all potential or perceived HIV 'exposure' cases.
- Women were **twice as likely** to be charged with HIV 'exposure' (not transmission) as compared to men, irrespective of actual transmission risks. This reflects a lack of understanding or disregard of scientific facts about HIV transmission in law enforcement and the wider criminal legal system.



- **20%** (30/146) of women's 'exposure' cases involved **acts that do not transmit HIV**, such as spitting or biting.
- **18%** (27/146) of women's 'exposure' cases involved sex workers who were often arrested during police sting operations before any sexual act took place, and then charged with 'aggravated prostitution' or 'HIV exposure.'
- **13** women living with HIV have faced criminal prosecutions for **breastfeeding or comfort nursing**, although no transmission occurred. In fact, research has shown that breastfeeding "poses an extremely low risk of transmission when people have proper medical care, access to treatment and open relationships with medical professionals".[5] Furthermore, breast/chestfeeding is widely supported globally as the optimal feeding method for both mothers and infants – irrespective of HIV status.[6]

Case examples

In 2020, a woman with HIV and hepatitis C and mental health issues was sentenced to 6 months[2] in jail in England for throwing a soiled sanitary pad at a police officer. The judge cited "the risk of contamination" from "life-changing or killer" viruses during sentencing.

In 2017, a female sex worker in Senegal was charged with "deliberate transmission"[3] despite having an undetectable viral load, no allegation of actual transmission, and her sworn testimony that she never had sex without condoms. The court found her testimony to be unreliable primarily because she was a sex worker.

In 2021, a judge in India kept a woman in detention[4] because releasing her was "likely to pose a danger to society" as she was alleged to have engaged in sex work.

CONCLUSIONS

Our data indicate that **women are not protected by HIV criminalisation laws, but in fact are disproportionately facing HIV 'exposure' charges, often prosecuted under conditions that involve little to no actual risk of transmission**. This disparity may stem from biological factors related to transmission science or may be the result of potential gender bias in law enforcement and the criminal legal system, influenced by stereotypes and prejudices, especially in cases involving sex workers.

Further research is needed to explore the root causes of this gender disparity and to assess potential gender bias in sentencing. This understanding is critical for promoting equitable legal systems and effective public health strategies. Detailed case studies of women prosecuted for HIV 'exposure' could help identify common themes and potential areas for legal and policy reform, and help to uncover any discriminatory patterns, especially in the context of sex workers' arrests.

Pro-criminalisation arguments premised on 'protecting women' should be categorically rejected. Women's health and human rights are not advanced through punitive approaches to HIV and other public health threats, but instead through science- and rights-based, gender-sensitive public health policies and programmes.

1 HIV Justice Network's *Global HIV Criminalisation Database*, 2006-2023. https://www.hivjustice.net/global-hiv-criminalisation-database/cases
2 UK: Woman with HIV/Hep C and mental health issues sentenced to 6 months for throwing sanitary pad at police https://www.hivjustice.net/cases/uk-woman-with-hiv-hep-c-and-mental-health-issues-sentenced-to-6-months-for-throwing-sanitary-pad-at-police/
3 Senegal: 2 years suspended sentence for woman sex worker despite undetectable viral load https://www.hivjustice.net/cases/senegal-2-years-suspended-sentence-for-woman-sex-worker-despite-undetectable-viral-load/
4 India: Mumbai judge rules that sex worker living with HIV cannot be released as she would "pose a danger to society" https://www.hivjustice.net/cases/india-mumbai-judge-rules-that-sex-worker-living-with-hiv-cannot-be-released-as-she-would-pose-a-danger-to-society/
5 Symington A, Chingore-Munazvo N, Moroz S. *When law and science part ways: the criminalization of breastfeeding by women living with HIV*. https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9465574/ Ther Adv Infect Dis. 2022 Sep 8;9:20499361221122481. doi: 10.1177/20499361221122481. PMID: 36105181; PMCID: PMC9465574.
6 World Health Organisation. *Guidelines - Update on HIV and Infant Feeding*; https://www.who.int/tools/elena/interventions/hiv-infant-feeding

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