

ROMANCING THE FOE: THE HIV EPIDEMIC AND THE CASE FOR A PRAGMATIC STANCE ON PROSTITUTION AND ILLICIT DRUG USE IN NIGERIA

Babafemi Odunsi*

ABSTRACT

This article examines the interplay between prostitution, injection drug use and the spread of HIV/Aids in Nigeria. It also considers how Nigerian criminal law and the unfriendly social attitude to prostitution and illicit drug use vitiate the control of HIV/Aids. The article stresses the need for Nigerian criminal law to maintain a 'soft stance' on sex workers and drug users in order to accommodate their needs and vulnerabilities relating to HIV/Aids. It underscores the need to put the overall public health interest in effectively controlling the spread of HIV over and above the social aversion to prostitution and illicit drug use – an aversion which Nigerian criminal law reflects and reinforces.

I INTRODUCTION

Generally speaking, law is an indicator of conduct that is acceptable or unacceptable in a society. The approval or disapproval of any conduct may be influenced by religious, moral, health, public policy and other factors. In Nigeria and other countries, societal disapproval of prostitution or sex work¹ and illicit drug use is reflected in the adoption of criminal law prohibiting these acts and punishing those who engage in them.

Law is, or ought to be, enacted to safeguard the interests of society. Thus, where circumstances dictate, a law can be amended or repealed to accommodate new trends. Similarly, there can be exceptions whereby someone who

* LLM (Toronto); PhD (Ife); Senior Lecturer, Faculty of Law, Obafemi Awolowo University; McArthur Fellow, Faculty of Law, University of Toronto; formerly Research Associate, AIDS and Human Rights Research Unit (Centre for Human Rights and Centre for the Study of AIDS), Faculty of Law, University of Pretoria; Barrister & Solicitor, Nigeria.

1 The two terms are used interchangeably in this paper to refer to the same concept.

justifiably transgresses a law may not face sanctions. For example, the legal defence of necessity² has been recognised as an exculpatory justification for someone who commits an unlawful act to prevent a greater evil in the overall public interest.

As relevant statistics and facts referred to in subsequent parts of this paper indicate, Nigeria has the third highest number of people living with HIV in the world. Thus, it is incumbent on Nigeria to take concerted action to combat HIV. Prostitution and illicit drug use through the sharing of needles have been identified as major means by which HIV is spread in the country.³ Therefore, it is imperative that Nigeria's HIV control strategy deals with the incidences of prostitution and injection drug use. This would entail taking measures to prevent the spread of HIV among sex workers and injection drug users and for their care when they are infected. An example of such measures is the provision of sterile needles or syringes for injection drug use, especially for those in confined settings.⁴

However, due to the fact that prostitution and illicit drug use in Nigeria are criminal, taking measures that target these groups faces a major challenge; it can be interpreted to imply that the government is condoning, aiding or abetting the commission of prostitution or drug use related crimes. At the same time, the role that these groups play in the spread of HIV in Nigeria, and which they can play in its control, cannot be trivialised or ignored. The situation seems to present a knotty problem.

Against this background, this article seeks to review the incidents of prostitution and injection drug use in Nigeria in the context of HIV control. It calls for the reform of Nigerian criminal law to legitimise prostitution and drug use or at least make exceptions to the prohibitions of these acts by allowing the state to take measures to minimise the spread of HIV between sex workers and the general population or among drug users. It maintains that even if the criminal law is not changed, the government can legitimately ride on the crest of the doctrine of necessity to accommodate the HIV-related needs of sex workers and injection drug users as special groups. To support the initiatives advocated in this article, the prevailing negative attitude to sex workers and drug users in Nigeria needs to change. Essentially, this article stresses the need

- 2 For a detailed discussion of the doctrine of necessity, see JC Smith & B Hogan *Criminal law* 5th ed (London: Butterworths, 1983) 201–209.
- 3 Federal Ministry of Health *HIV/AIDS: What it means for Nigeria: Background, projections, impact, interventions, and policy* (Abuja: Federal Ministry of Health, 2002) 8. See also Federal Government of Nigeria 'National HIV/AIDS policy' (2003) 11.
- 4 See, eg, R Jurgens & G Betteridge 'Prisoners who inject drugs: Public health and human rights' (2005) 8(2) *Health and Human Rights* 46, 61–62, 64.

for a pragmatic choice to be made between two options: one, relaxing the stern disapproval of these 'offensive' acts and, the other, maintaining their disapproval at the risk of jeopardising the effective control of the spread of HIV.

II PROSTITUTION AND NIGERIAN CRIMINAL LAW

Prostitution in a general sense can be defined as the exchange of sex for money or other things of value, such as meals, housing and gifts.⁵ Based on this unrestricted definition, some interpersonal relationships involving sex, such as the 'aristo' or 'sugar daddy' syndrome, would qualify as prostitution.⁶ Simply put, a 'sugar daddy' or 'aristo' relationship as understood in Nigeria is a sexual or romantic relationship between a relatively elderly wealthy man and a younger lady, which largely revolves round the financial or some other benefits that the young lady receives from the older man in exchange for sex.

However, prostitution in the context of Nigerian criminal law has a more restricted definition. It includes prostitution in public places or common prostitution.⁷ In Nigeria, prostitution is proscribed impliedly by sections 222, 223, 225 and 226 of the Nigerian Criminal Code. Section 222 makes it a crime for anyone to procure or induce, directly or indirectly, a girl under 16 years to engage in prostitution. Section 223 makes it an offence for any person to procure a girl or a woman of mature years to engage in prostitution whether in or outside Nigeria. Section 225 is divided into parts A and B. Part A makes it a crime for a male person to live on the earnings of prostitution or to solicit money or any other reward for any immoral purposes in any public place. This part also makes it unlawful for a female to aid or abet prostitution. Part B outlaws the use or permitting the use of premises as brothels for prostitution. Section 226 makes it an offence for any person to detain a woman against her will in a brothel or any other place for the purpose of prostitution. As is clear from these sections, the Nigerian Criminal Code does not contain any provision that expressly or directly outlaws prostitution. Rather, the Code criminalises conduct that is intricately connected with the practice of prostitution. However, in Edo State, one of the 36 states constituting the Federation of

5 Canadian HIV/AIDS Legal Network *Sex, work, rights: Changing Canada's criminal laws to protect sex workers health and human rights* (Toronto: Canadian HIV/AIDS Legal Network, 2005) 3.

6 See 'Prostitution wears a new garb on campuses' *Nigerian Punch* 6, May 2008, 37.

7 See sec 223(2) of the Criminal Code, Cap 41 Laws of the Federation of Nigeria, 2004 ('Criminal Code').

Nigeria, prostitution has been expressly criminalised.⁸

III PROSTITUTION AND NIGERIA'S HIV CRISIS

Statistics underscore the seriousness of the HIV/Aids crisis in Nigeria. Recent estimates⁹ indicate that about three million Nigerians live with HIV/Aids. Out of this figure, 2.6 million are estimated to be adults (men and women) aged 15-49, while 240 000 are children falling within the age bracket of 0-14. Out of the estimated 2.6 million adults living with HIV/Aids, 1.6 million are women. Based on these estimates, the adult HIV-prevalence rate in Nigeria is 3.9 per cent. At present, Nigeria has the third highest number of people living with HIV/Aids in the world, after South Africa and India.¹⁰

Because of Nigeria's huge population, currently estimated at 140 million,¹¹ the HIV prevalence in Nigeria may not seem as alarming as that of other African countries such as Botswana, Swaziland or Lesotho¹² which have comparatively much smaller populations. The scale of the Nigerian HIV/Aids crisis may, however, be better appreciated if one considers that Nigeria's estimated three million people living with HIV/Aids is about the equivalent of the total populations of Botswana, Seychelles and Swaziland put together.¹³

HIV/Aids has caused the death of many people in Nigeria. According to one source, 'in 2003, an estimated 310 000 Nigerians died of HIV/AIDS'.¹⁴ A later source attributed 221 000 deaths to HIV/Aids in Nigeria in 2005.¹⁵ HIV/Aids deaths in Nigeria have spawned a significant population of orphans (aged 0-17), reportedly the highest in sub-Saharan Africa,¹⁶ now estimated at

8 See Criminal Code Amendment Law (2000), Laws of Edo State – Amendments to secs 222, 223, 225, 226 and 233 of the Criminal Code. This amendment law was enacted in reaction to the perception that the state was the epicentre of trafficking in women for sex in Nigeria. See I Guest 'Italy: Forced prostitution and women from Nigeria' *International Herald Tribune*, 1 June 2000.

9 Joint United Nations Programme on HIV/AIDS (UNAIDS) & World Health Organisation (WHO) *Sub-Saharan Africa, AIDS epidemic update – Regional summary* (Geneva: UNAIDS & WHO, 2008) 18.

10 'HIV & AIDS in Nigeria: Why is Nigeria important?', available at <http://www.avert.org/aids-nigeria.htm> (accessed 29 January 2011). See also 'HIV/AIDS: Why Nigeria is important', available at <http://www.avert.org/aids-nigeria.htm> (accessed 29 January 2011).

11 National Agency for the Control of AIDS (NACA) *United Nations General Assembly special session (UNGASS) country report: Nigeria (2007)* 7.

12 UNAIDS & WHO, above note 9, 1–9.

13 The estimated populations of Botswana, Seychelles and Swaziland are available at <http://www.cia.gov/cia/publications/factbook/geos/> (accessed 29 January 2011).

14 The HJ Kaiser Family 'The HIV/AIDS epidemic in Nigeria' *HIV/AIDS policy fact sheet*, October 2005, 1.

15 NACA, above note 11, 14.

16 The Henry J Kaiser Family, above note 14.

1.3 million.¹⁷

Heterosexual intercourse is the dominant source of HIV/Aids transmission in Nigeria, accounting for an estimated 80–90 per cent of the total infection rates.¹⁸ It is in this context that sex workers play a crucial role in the spread of HIV in Nigeria. There is a huge population of sex workers across Nigeria with the rate of HIV/Aids infection among them at some point estimated at about 30 per cent.¹⁹ Moreover, it has been estimated that Nigerian women who engage in commercial sex have a 50 per cent greater risk of contracting HIV than women who do not.²⁰ Poverty and poor governance contribute to the high number of Nigerian women resorting to prostitution.

The vulnerability of sex workers to HIV is primarily due to their involvement with multiple sex partners. Their vulnerability is further heightened by their lack of use of condoms.²¹ As noted earlier, poverty, hunger and the need to survive propel sex workers to hawk their bodies. In such situations, attention to the more immediate concerns of food, shelter and other pressing financial needs often take priority over future concerns about HIV infection. A popular saying among Zambian sex workers, ‘AIDS may kill me in months or years, but hunger will kill me and my family tomorrow’,²² offers a chilling illustration of this mindset among sex workers. With such an attitude, sex workers are more likely going to ignore the risk of HIV infection than accept the loss of revenue obtainable from a client who insists on unsafe or unprotected sex.²³

Furthermore, some Nigerian sex workers believe that they have a supernatural shield against HIV/Aids.²⁴ Susman has observed:

While it is clear that many of the sex workers engaged in unprotected risky sex, they incorrectly judged their risk as low apparently because many felt ‘their belief in God offered them protection from infection’, said Zaccharus Akinyemi, a researcher with the social services agency in Africa’s most populous nation ... In the discussions, he said typical comments of the sex workers were: ‘It is only God that gives protection’. ‘I can’t catch it in Jesus’ name’. ‘Whether I use a condom or not, it’s only God who can protect’. ‘If God says it will happen, so will it

17 NACA, above note 11, 14.

18 Federal Ministry of Health, above note 3, 2.

19 ‘HIV/AIDS: Why Nigeria is important’, above note 10.

20 See E Susman ‘Sex workers believe in God, not condoms’ *UPI Science News*, available at http://sexworkersGoogle Groups alt_gossip_celebrities.htm (accessed 29 January 2011).

21 As above. See also ‘HIV & AIDS in Nigeria: Why is Nigeria important?’, above note 10.

22 ‘Introduction to AIDS in Zambia’, available at <http://www.avert.org/aids-zambia.htm> (accessed 29 January 2011).

23 See ‘A job to die for’, available at http://www.news24.com/News24/Africa/Features/0,,2-11-37_1456450,00.html (accessed 29 January 2011).

24 See Susman, above note 20.

happen'. 'We will not die, unless we reach the time God says we will die'.²⁵

To sum up, Nigerian sex workers are highly vulnerable to HIV and yet engage in unsafe sex with a large number of people across the country. Many of their clients are mobile populations, such as long-distance drivers, sailors and military men, who ordinarily move from one point to another within or across national frontiers. Usually, these clients have steady sexual partners such as spouses and they only engage in sexual liaisons with the sex workers on a temporary basis. Apart from that, these clients may also have sexual partners in other places who may or may not be sex workers in the conventional sense. Similarly, sex workers may have steady sexual partners who are sometimes their spouses.

The foregoing discussion shows that sex workers occupy a crucial junction in the HIV/Aids transmission highway. As will be shown below, hostile criminal law provisions significantly contribute to making sex workers more vulnerable to HIV and to the spread of HIV in Nigeria. Similarly, criminal law and unfriendly societal attitudes hinder the accommodation or participation of sex workers in HIV control programmes.

IV CRIMINAL LAW, PROSTITUTION AND HIV/AIDS CONTROL IN NIGERIA

A Consequences of criminalising prostitution for HIV transmission

With one side engaging in a criminal activity and the other side sworn to a legal duty to curtail criminal activities, sex workers and law enforcement agencies find themselves on opposing sides. In a Nigerian environment where abuse of power by state agents is rife, sex workers have been easy prey for extortions by unscrupulous law enforcement agents. It is common knowledge that 'police raids' of sex workers are regular in Nigeria, with sex workers often having to offer bribes to secure their release. To remain in business, sex workers have to accommodate such incidents as 'occupational hazards' and make necessary 'budgetary arrangements' to address them when they occur. When such expenses and other incidental expenses are added to the fixed expenditures for shelter, feeding and clothing, sex workers are compelled to solicit as many clients as possible in order to meet their basic survival needs.

The illegality of prostitution makes it impossible for sex workers to seek legal redress when their rights are violated in the course of their work. It is a

25 As above.

trite legal principle that parties to an illegal contract cannot enforce the contract or generally obtain any legal redress in respect of grievances arising from such a contract.²⁶ Thus, for example, when a ‘pimp-agent’ misappropriates the earnings of a ‘prostitute-principal’, the prostitute cannot press charges or obtain redress in court. Similarly, sex workers have no legal protection against brothel owners who arbitrarily increase rents or attach harsh terms to a tenancy. Neither do they have avenues for legal redress in case of forceful ejection. In all these situations, they simply have to adjust and adapt, which further complicates their already desperate battle for survival.

In summary, Nigerian criminal law compounds the vulnerability of sex workers to HIV/Aids. Criminal law facilitates an atmosphere that puts sex workers under an endless rat-race of making sufficient money to ‘break even’. This race is undertaken in a situation of deadly competition for clients. In such circumstances, sex workers would naturally find it difficult to insist on the use of condoms if clients that come their way are not inclined to use condoms.²⁷ Moreover, sexual intercourse without condoms reportedly attracts higher pay.²⁸

To reverse this scenario would require a major change in the prevailing criminal law position. If sex work as a vocation is endorsed as a legitimate economic activity, sex workers would be relatively empowered to negotiate the terms under which they accommodate clients. Similarly, they can take legal measures to address any injustice they experience in the course of their work and they would be free from harassment or exploitation by unscrupulous state agents. Generally, a change in the circumstances in which sex workers operate would significantly reduce their vulnerability to HIV infection.

The following *verbatim* account of a project in Nigeria (‘the Calabar project’)²⁹ illustrates the likely benefits of creating an environment where sex workers do not operate under harsh and unfriendly situations imposed by the current criminal law and hostile societal attitudes:

The Calabar Project in Nigeria, which seeks to reduce the vulnerability of prostitutes to HIV infection, began informally in 1987. By 1988, a formal, community-based intervention was created to promote condom use, provide

26 For a detailed discussion of illegal contracts, see IE Sagay *Nigerian law of contract* (Ibadan: Spectrum Books Limited, 1998) 296–382.

27 See ‘A job to die for’, above note 23.

28 ‘Prostitution wears a new garb on campuses’, above note 6.

29 EE Williams ‘Women of courage: Commercial sex workers mobilise for HIV/AIDS prevention in Nigeria’ available at http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=12345902&dopt=Abstract (accessed 29 January 2011).

health education as well as literacy and vocational training, and seek better working and living conditions for the prostitutes. The first task of the Calabar Project was to overcome the resistance of the hotel owners and managers where the prostitutes work and to win the confidence of the women. The owners and managers had to be convinced that it was in their best interest for the women to insist on condom use by their clients. The women had to be informed about the nature of HIV/AIDS and to be convinced that the project sought improvements in their general welfare. This was accomplished by helping the prostitutes improve both their relationship with the local police and their access to health services. Negotiations with hotel owners stabilized the prostitutes' rent for a year to enable the women to increase their charges for services and reduce the number of clients they needed so they could insist on condom use. Peer educators were trained to provide health education and to teach prostitutes techniques to get clients to use condoms. Clients were reached through the prostitutes and by providing information to small groups in hotel bars. Condoms were initially distributed for free and eventually were sold through a social marketing program. Peer educators also encouraged prostitutes and their clients to use a clinic the project established to diagnose and treat sexually transmitted diseases. In 1993, the Calabar Project helped create a vocational and literacy training centre to improve the women's ability to understand the complex issues related to HIV/AIDS and to give the women a way to supplement their income and improve their self-esteem. By this time, more than 60% of the women reported using condoms for all sex acts.³⁰

This project predicts a more positive outlook of the Nigerian sex-work terrain if there is no hostile societal attitude or if prostitution is legalised. It also demonstrates the significant impact which the incorporation of sex workers into Nigeria's HIV control framework can have in Nigeria. As this project demonstrates, increasing the use of condoms among sex workers would remarkably reduce the vulnerability of sex workers to HIV infection and, by extension, the rate of transmissions emanating from them. Overall, this would have a positive impact in the drive to control the spread of HIV.

B Prostitution and the role of criminal law in HIV control

Criminal law, primarily through criminalising HIV transmission, is one of the measures that have been used by states in the fight against HIV/Aids.³¹

30 As above.

31 See, eg, J Csete & Others 'Vertical HIV transmission should be excluded from criminal prosecution' (2009) 17(34) *Reproductive Health Matters* 154–162; R Jurgens & Others 'Ten reasons to oppose the criminalisation of HIV exposure to transmission' (2009) 17(34) *Reproductive Health Matters* 163–172. See also C Dodds & Others 'Responses to criminal prosecutions for HIV

The rationale is that the coercive force of criminal law would deter people from infecting others with HIV, thereby stemming the further spread of the virus. This can be described as active intervention of criminal law in HIV control. However, efforts to tame the transmission of HIV/Aids have gone beyond this dimension of active intervention. Criminal law has also been used to prohibit certain practices such as prostitution, drug possession and use. These prohibitions, it has been argued above, hinder, rather than aid, the effective control of HIV/Aids. The ways by which the criminalisation of prostitution renders sex workers particularly vulnerable to HIV infection have been demonstrated above. In addition, criminalisation of prostitution impedes access by sex workers to HIV control measures. As the Joint United Nations Programme on HIV/AIDS (UNAIDS) has said: 'Criminal law in the area of prostitution impedes the provision of HIV/AIDS prevention and care by driving people engaged in the industry underground'.³²

Thus, it is clear that there are considerable public health benefits of accommodating sex workers in HIV preventive or other control measures in Nigeria. However, the criminalisation of prostitution constrains the government from implementing the necessary measures, because doing so may amount to recognising or giving support to an unlawful group. The consequence is that a veritable source through which HIV is spread remains unplugged.

One of the objectives of the Nigerian HIV/Aids policy is to 'remove all possible barriers to HIV/Aids prevention and control'.³³ The policy seeks to ensure that prevention programmes are developed and targeted at vulnerable groups, including sex workers.³⁴ The necessity of reforming Nigeria's criminal law on prostitution has to be considered along this axis. At the international level, there have been calls for the review of prostitution-related criminal law provisions that have a negative impact on HIV control. The UNAIDS, for example, has recommended that such laws should be reviewed with the aim to decriminalise sex work where no victimisation is involved and to regulate occupational health and safety conditions to protect sex workers and their

transmission among gay men with HIV in England and Wales' (2009) 17(34) *Reproductive Health Matters* 135–145; UNAIDS & United Nations Development Programme (UNDP) 'International consultation on the criminalisation of HIV transmission' (2009) 17(34) *Reproductive Health Matters* 180–186.

32 UNAIDS & Inter-Parliamentary Union (IPU) *Handbook for legislators on HIV/AIDS, law and human rights- action to combat HIV/AIDS in view of its devastating human, economic and social impact* (Geneva: UNAIDS, 1999) 56.

33 Federal Ministry of Health 'Nigerian HIV/AIDS policy', above note 3, 9.

34 As above.

clients.³⁵

Prostitution remains an emotive issue and attracts strong disapproval, grounded largely in religious beliefs, from various members of the society. Hence, efforts to decriminalise or legitimise prostitution in any form may encounter strong opposition from the general public. A pertinent question to ask, however, is whether the moral disapproval of prostitution should be upheld at the expense of the public health benefits which the accommodation of sex workers holds for HIV control in Nigeria.

Indeed, different sections of the society may find prostitution offensive and unacceptable based on religious, cultural and other factors. Nevertheless, the need to review the criminal position on the issue deserves serious and pragmatic attention in the light of Nigeria's disturbing HIV crisis. The tension between public health and socio-legal factors on prostitution presents a situation where hard choices need to be made in the quest for an effective means to curtail the HIV pandemic. The choice is between whether to tolerate the 'evil' of prostitution and tap the likely advantages this offers for HIV/Aids control, or to maintain an unyielding stance on the illegality and social abhorrence of prostitution, with the attendant threat to HIV control efforts. In answering this question, it is perhaps necessary to reflect on how well criminalisation has fared, or is likely to fare, in the prevention or extermination of prostitution. It is to this issue that the following section turns.

C How successful has criminal law been in suppressing prostitution?

It is trite that prostitution has thrived despite the existence of stern criminal law sanctions against it in Nigeria and elsewhere. Prostitution is literally indestructible and inevitable,³⁶ a fact that is demonstrated by its continued existence in spite of the long-standing criminal law sanctions. According to Bressler, 'one stands as much chance of ending prostitution by [an] Act of Parliament as King Canute did of stopping the waves of the English Channel coming in ... merely because he ordered them not to'.³⁷ Bressler goes further to provide a reason for the resilience of prostitution: 'The simple truth is that from the beginning of time – and until the end of time – men have been going, and will continue to go, with prostitutes because they are seeking something

35 UNAIDS & IPU, above note 32, 56 [emphasis added].

36 See DW Selfe & V Burke *Perspectives on sex, crime and society* 2nd ed (London: Cavendish Publishing Limited, 2001) 215–216.

37 F Bressler *Sex and the law* (London: Frederick Muller, 1988) 49, quoted in Selfe & Burke, above note 36, 216.

which, for whatever reason, they cannot get elsewhere'.³⁸ Ritchie, one time British Home Secretary, has similarly argued: 'to get rid of prostitution by legal enactment or by official interposition is out of the question – so long as human nature is what it is, you will never get rid of it entirely'.³⁹

Admittedly, the 'inevitability' of prostitution is not synonymous with its desirability or propriety. The fact that a vice proves resistant to legal control does not imply that society should summarily embrace it or relinquish efforts to control it. This may amount to saying that crimes like murder or stealing which still occur despite criminal law sanctions should be decriminalised. With respect to prostitution and HIV control, the issue goes back to the need to make realistic, though difficult, choices. That is, choosing between ensuring the effective control of the HIV crisis and sustaining societal disapproval of prostitution by means of legal sanctions that have no chance of ending prostitution.

Prostitution is not the only social and legal problem which requires the government to make difficult choices to deal with the HIV pandemic. Injection drug use is another. Like prostitution, criminal law has erected barriers to the provision of harm-reduction measures to control the transmission of HIV/Aids. There is a need here for criminal law to soften its stance on injection drug use.

V CRIMINAL LAW, HIV CONTROL AND INJECTION DRUG USE

A Injection drug use and HIV transmission

One way by which HIV is spread is the sharing of HIV-tainted hypothermic needles in the process of injection drug consumption. The use of injection drugs has a long history. With about 13 million people using such drugs across the world, injection drug use at some point accounted for an estimated 10 per cent of HIV infections globally.⁴⁰

As is the case with prostitution, the typical approach world-wide to combating drug use has involved the adoption of criminal laws prohibiting the cultivation, production, transportation, distribution and possession of illicit drugs.⁴¹ Huge amounts of money have been spent in the global battle against

38 As above.

39 As above.

40 R Elliot & Others 'Harm reduction, HIV/AIDS, and the human rights challenge to global drug control policy' (2005) 8(2) *Health and Human Rights* 104, 107–108. See also note 2 above.

41 As above, 108. For example, Nigeria has adopted the National Drug Law Enforcement Agency

illicit drug use, a battle that has been severe, deadly and bloody in some cases.⁴² The seriousness of the global war against drug use underscores in some way the extent of the societal disapproval of the use and dealing in illicit drugs.

Despite the doggedness and severity of the international war against illicit drugs, dealing in and the use of drugs still thrive. According to Elliot & Others:

[A]vailable evidence suggests that the drug law enforcement has not produced the purported benefits. Street-level drugs policing has been shown to have little, if any, sustained effect on the price of illicit drugs, their availability, or the frequency of use. Nor have law enforcement efforts produced greater use of addiction treatment by drug users.⁴³

That the war against illicit drug use has achieved marginal success is perhaps best underscored by the fact that drugs even find their way into penal institutions, notwithstanding the existence of severe security measures and the regimented lives to which prison inmates are customarily subjected.⁴⁴

Injection drug use is essentially an advanced form of illicit drug use or consumption, compared with conventional forms of consumption such as smoking, in the case of cannabis, or sniffing, in the case of cocaine. The need by drug users to avoid or minimise the possibility of detection and arrest is one of the factors that have influenced the growing preference of injection drug use among drug users over other methods of drug use.⁴⁵ While the success of criminal law in stamping out drug possession or use remains debatable, there is no doubt that the criminalisation of drug possession and use have contributed to the increasing attraction of injection drug use among drug users in confined environments and, by extension, to the spread of HIV/Aids.

With regard to the spread of HIV, the problem of injection drug use becomes particularly serious among confined population groups, such as prisoners, who are subjected to regimented living. Because of restrictive and

Act, Cap 30 of the Laws of the Federation of Nigeria, 2004. According to the title, the purpose of the Act is 'to establish the National Drug Law Enforcement Agency to enforce laws against the cultivation, processing, sale, trafficking and use of hard drugs and to empower the Agency to investigate persons suspected to have dealings in drugs and other related matters'.

42 Elliot & Others, above note 40, 109. See also PA Wilson & Others *Combating AIDS in the developing world* (London: Earthscan, 2005) 67–68.

43 Elliot & Others, above note 40, 108–109.

44 See Jurgens & Betteridge, above note 4, 28.

45 Elliot & Others, above note 46, 109: 'Policies of prohibition have prompted some drug users to switch to drug injection from other practices: drugs consumed by smoking (for example, opium and cannabis) can be harder to conceal than drugs regularly consumed by injection (for example, heroin), and injection may be a more efficient way to consume when drug supply or time for consumption is limited'.

other security measures, it is relatively more difficult to smuggle needles and syringes into prisons than to smuggle in hard drugs. In most situations, just a handful of needles circulate among a large population of prisoners, precipitating sharing in injection drug use.⁴⁶ In the words of Jurgens and Betteridge:

Needle sharing [in prisons] is frequent, and often 15 to 20 people will inject using the same equipment. Sometimes, the equipment is homemade, with needle substitutes fashioned out of hardened plastic and ball point pens, often causing damage to veins, scarring and severe infections The high rates of injection drug use, coupled with the lack of access to sterile injection equipment, which leads to increased levels of sharing of equipment among prisoners, can result in the frighteningly quick spread of HIV in penal institutions.⁴⁷

Apart from catalysing unsafe injection drug use, criminal law has some other HIV-related impacts. The desperation to escape from law enforcement agencies can push drug users into unsafe environments and deter them from seeking medical assistance or from accessing available health services, including HIV control programmes, in the event of infections. Alluding to the impact of criminal law on HIV control, Elliot & Others have observed that ‘public order gains are generally time-limited and often simply result in displacement of drug markets and drug users into other areas, frequently away from HIV prevention services’.⁴⁸

In addressing injection drug use-related spread of HIV, some countries have developed ‘harm reduction’ measures.⁴⁹ Simply defined, ‘harm reduction’ measures in relation to drug use are measures taken to *decrease* ‘the harmful consequences of drug use without necessarily reducing drug consumption’.⁵⁰ These measures have been taken to safeguard the rights of drug users.⁵¹ As has been argued above, criminal law encroaches upon the rights of drug users by making it difficult for them to access health care. As Wodak has put it:

46 Jurgens & Betteridge, above note 4, 52.

47 As above.

48 Elliot & Others, above note 40, 108–109.

49 As above, 115: ‘Harm reduction is a pragmatic and humanistic approach to diminishing the individual and social harms associated with drug use, especially the risk of HIV infection. It seeks to lessen the problems associated with drug use through methodologies that safeguard the dignity, humanity and human rights of people who use drugs’.

50 Jurgens & Betteridge, above note 4, 56.

51 Elliot & Others, above note 40, 115: ‘Most obviously, as a movement aimed at reducing harms that are sometimes associated with the use of drugs, harm reduction’s *raison d’être* is the fulfilment of the human right to enjoy the highest attainable standard of physical and mental health’.

Reliance on criminal sanctions as the major response to illicit drug use inevitably results in the denial of [the] human rights of the IDU population as drug use remains defined as law enforcement rather than a health problem. Poor health promotion and health care services are more difficult to provide to a now stigmatized and underground population. Protection of human rights is an essential precondition to improving the health of individual drug users and improving the public health of the communities where they live.⁵²

The provision of sterile needles for prisoners is a notable and widely known harm reduction measure.⁵³ In the context of prisons, this measure is commonly known as a prison-based syringe exchange programme. Its aim is to provide sufficient needles to prisoners so as to prevent sharing.

Another harm reduction measure that has been tested is the methadone maintenance treatment (MMT) whose major aim is to induce the reduction in the consumption of illicit drugs by drugs users. This measure has proven to be effective in reducing high-risk injection behaviour and the risk of contracting HIV. It has also been recommended that prisoners too should have access to MMT.⁵⁴

B Criminal law and official resistance to harm reduction measures

Despite the advantages of providing sterile needles and MMT to control the spread of HIV, their acceptance has faced resistance because of the criminal law prohibitions of drug use. 'Prison systems and governments have argued that preventive measures such as those described above cannot be introduced in prisons for safety reasons and that making them available would mean condoning drug use in prisons'.⁵⁵

Fortunately, despite initial resistance, some countries have implemented the harm reduction measure of granting access to sterile needles to various population groups including prisoners. Evaluations of the effectiveness of the programme have been favourable, with no reports of serious unintended consequences. Similarly, in a number of countries, MMT as a harm reduction measure has been implemented for quite some time.⁵⁶

A pragmatic stance has to be taken on the tension between the benefits of harm reduction in HIV control measures and the rigid criminal law position

52 Quoted in Elliot & Others, above note 40, 116.

53 See Jurgens & Betteridge, above note 4, 56.

54 As above, 63–64.

55 As above, 65.

56 As above, 61–64.

on illicit drug use. A choice has to be made between condoning the spread of HIV and transgressing the letter of the criminal law on prostitution and drug use or possession that contribute to the spread of HIV. The choice, in view of the devastating impact of HIV/Aids on Nigeria and elsewhere, should not be difficult to make. There should be undivided support for measures that would make a meaningful contribution to the curtailment of HIV/Aids; no legal or other factor should be permitted to impede this drive.⁵⁷

In this respect, the courageous steps mentioned above that some countries have taken must be commended. Quite true, it may seem contradictory that governments should disregard their own laws in order to address a public health problem. However, the global HIV pandemic requires the making of difficult decisions. Martin Lachat, the interim director of Hindelbank Penitentiaries for Women in Switzerland has wisely said:

[T]he transmission of HIV or any other serious disease cannot be tolerated. Given that all we can do is restrict, not suppress, the entry of drugs, we feel it is our responsibility to at least provide sterile syringes to inmates. The ambiguity of our mandate leads to a contradiction that we have to live with.⁵⁸

VI HIV CONTROL, CRIMINAL LAW AND THE DOCTRINE OF NECESSITY

It has been the official argument in Nigeria that the implementation of harm reduction measures would amount to condoning criminal acts and, by implication, violating the law. Ordinarily, the need to guard against transgression of the law should be a legitimate concern of any society. It is thus pertinent to examine whether the adoption of harm reduction measures in the context of HIV control would constitute a culpable crime. If so, would the government have a legitimate justification and basis for taking such measures?

It will be argued that such a justification can be found in the doctrine of necessity. The argument is that even if accommodating prostitution and implementing harm reduction measures amount to a violation of the existing law in Nigeria, the doctrine of necessity would justify such a violation. This proposition is predicated on the reasoning that it is acceptable for the government to commit a lesser evil of ignoring the criminal law relating to the acts of

57 Contributing to this point, Jurgens & Betteridge, above note 4, 67, have argued: 'refusing to make condoms and bleach or sterile needles available to inmates, knowing that activities likely to transmit HIV ... are prevalent in prisons, could be seen as condoning the spread of HIV among prisoners and to the community at large'.

58 Quoted in Jurgens & Betteridge, above note 4, 67.

prostitution and illicit drug use for the purpose of suppressing a greater evil of the debilitating HIV/Aids epidemic in Nigeria, considering especially that the efficacy of the criminal law in curbing the acts of prostitution and drug use, at best, remains doubtful.

The doctrine of necessity is of long standing and can be traced to the 1550 English case of *Reniger v Fogossa*.⁵⁹ It was said in that case:

... in every law there are some things which when they happen a man may break the words of the law, and yet not break the law itself; and such things are exempted out of the penalty of the law, and the law privileges them although they are done against the letter of it, for breaking the words of the law is not breaking the law, so far as the intent of the law is not broken. And therefore the words of the law of nature, of the law of this realm, and other realms and of the law of God will also yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity ...⁶⁰

Over the years, this doctrine has been used to exempt from liability various acts that would otherwise constitute culpable transgressions of the law. Based on this doctrine, it has been held that it is justifiable for a constable to direct other persons to disobey traffic regulations if this is reasonably required to protect life and property.⁶¹ It has also been held that it is justifiable for the crew of a ship or a passenger to jettison the cargo in order to save the ship.⁶² In the case of *Buckoke v Greater London Council*,⁶³ Lord Denning, *obiter*, raised this poser:

A driver of a fire engine with ladders approaches the traffic lights. He sees 200 yards down the road a blazing house with a man at an upstairs window in extreme peril. The road is clear in all directions. At that moment the lights turn red. Is the driver to wait for 60 seconds or more for the light to turn green? If the driver waits for that time, the man's life will be lost.

While accepting the view of both counsel that the driver would be committing an offence, Lord Denning maintained nevertheless, with reference to the above poser, that 'such a man should not be prosecuted. He should be congratulated.'⁶⁴

59 (1552) 1 Plow 1.

60 As above, 18.

61 *Johnson v Phillips* [1975] 3 All ER 682.

62 *Mouse's Case* (1608) 12 Co Rep 63.

63 [1971] All ER 254, 258.

64 As above.

When a state violates its own laws, it undermines the rule of law and this can result in chaos. As has been noted earlier, two options are open to Nigeria as regards the HIV epidemic and prostitution and drug use. The first is to decriminalise drug use and prostitution. The second is to create exemptions to these crimes for purposes of implementing health measures to avert or ameliorate health emergencies or epidemics.

Essentially, necessity, in the context of harm reduction measures touches on the pressing need for the government to take measures that are inconsistent with the existing criminal law in order to implement an all-embracing HIV/Aids control mechanism in Nigeria. It is trite that sex workers and injection drug users are marginalised at all levels of society. Thus, any indication that the government is giving legitimacy to the 'bad elements' through harm reduction measures may pitch the government against the 'good' people of the society or attract adverse public opinion. This raises the following dilemma: whether in the court of public opinion the government has a justification to act contrary to popular opinion or to take measures that change the prevailing social or legal order as depicted in criminal law provisions. It is argued that Nigeria needs urgently to find effective means to curtail the HIV/Aids pandemic. This means that a rational balance has to be struck between upholding the moral condemnation and segregation of sex workers along with illicit drug users, and protecting public health through an effective programme for the control of the spread of HIV/Aids. A reasonable option in the circumstance would be to ignore the chorus of moral condemnation, and reach out to and embrace sex workers and illicit drug users.

VII CONCLUSION

The inevitability of social vices such as prostitution and illicit drug use is a fact that every society would need to confront and accept, however difficult it may be. True, sex-workers and drug addicts may not have positive ratings among many people. They may even be associated with myriads of evils in the society such as the proliferation of drug and prostitution rings, human trafficking and violence. Various measures have been adopted to tackle the various evils associated with sex work and illicit drug use.⁶⁵ Nevertheless, sex

65 As this article focuses primarily on the need for a change in the legal and social attitude to sex work and illicit drug use *vis-à-vis* HIV/Aids control in Nigeria, a detailed discussion of the propriety or efficacy of the different measures taken to confront the effects of sex work and illicit drug use in other areas are not discussed. For commentaries on the battle against drugs see Elliot, above note 40, 109. See also Wilson & Others, above note 42, 67–68. For commentaries on sex work, see, DW Selfe & V Burke *Perspectives on sex, crime and society* 2nd ed (London: Cavendish

workers and illicit drug users still remain a significant part of the society and have to be taken seriously in Nigeria's HIV/Aids control measures. The global HIV pandemic dictates that Nigeria and other countries do not run away from taking appropriate measures to deal with HIV transmission among and with sex workers and injection drug users.

Given that Nigeria is a relatively conservative society, the argument made in this article may seem rather revolutionary. Naturally, some questions may arise, such as whether the relaxation of the law against sex work or drug use would not precipitate an increase in the number of people engaging in these activities. At best, the answer to such a question remains in the realm of speculation. However, it can readily be stated that factors that drive people into these activities go beyond the question of harsh or soft legal sanctions. Despite criminal prohibitions and sanctions, many people still engage in these activities. It can therefore be argued that de-criminalising sex work or relaxing the criminal law on sex work or illicit drug use in and of itself may not result in more prostitution or drug use. Problems associated with sex work and illicit drug use can be attributed to the criminal law prohibitions which force drug users and sex workers to operate in the dark corners of the underworld. In a situation where those compelled to engage in these activities are legally empowered to enforce their rights and these activities undertaken in the open, some of the problems they face may disappear or be significantly reduced.⁶⁶

It has also been suggested in this article that legitimising sex work and implementing harm reduction measures may contribute to the reduction in the spread of HIV in Nigeria. The Nigerian *Calabar Project*, as noted earlier, strongly suggests that the practice of sex work in an open atmosphere may encourage safe or protected sex, which is an important aspect of HIV prevention. With regard to harm reduction measures, studies have reported their positive contribution to HIV control where these measures have been adopted and implemented.

Nigeria must not close its eyes to approaches which promise to curtail the spread of HIV. This paper has discussed some of the measures some countries have employed to control the spread of HIV. These examples offer good lessons for Nigeria.

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