

# THE DETERRENT EFFECT IN THE CASE OF HIV/AIDS SPREADING: A STUDY IN THE PROGRESSIVE LEGAL PERSPECTIVE

Nanik Trihastuti, Diponegoro University  
Pujiyono, Diponegoro University  
Bagoes Widjanarko, Diponegoro University  
Stephanie Apsari Putri, University of Wollongong

## ABSTRACT

**Aim:** *The purpose of this research is to study positivist law on the effect of prevention in cases of the spread of HIV/AIDS, in which the absence of regulations on HIV/AIDS transmission causes the absence of legal protection for women, especially housewives who contract HIV/AIDS from their husbands.*

**Methods:** *This study was a doctrinal research, which refers to the formulation of legal doctrines through the analysis of legal rules. The data analysis included analysing legal issues to identify issues that needed further research to familiarise the researcher with the area of law being studied. The facts in terms of the law were then analysed to match the identified issues with the applicable rules.*

**Results:** *This research revealed that there was gender-related violence among spouses, which led to HIV/AIDS transmission to wives. To reformulate the positivist law, the progressive law was proposed as it used progressive reasoning to analyse factors that cause the transmission and to determine the necessary measures taken by the government to protect housewives against HIV/AIDS transmission.*

**Conclusion:** *Legal positivism, which reflects patriarchal and masculine ideologies, has triggered the law and the impacts of legal theory to oppress women and marginalised groups. HIV/AIDS transmission to housewives may demonstrate that the state tends to overlook the justice, especially for housewives, as there is no legal protection regarding the risk of transmission from husbands to their wives.*

**Keywords:** Deterrent Effect, HIV/AIDS Transmission, Progressive Law.

## INTRODUCTION

HIV/AIDS transmission in Indonesia has shown a new trend in which the transmission has spread not only among the vulnerable groups, but also within the lower risk groups, including housewives and children. The data from UNAIDS demonstrates that 210,000 Indonesian women are living with HIV/AIDS, and only 14% of pregnant women have received treatment and have been given access to antiretroviral medicines. Compared to 23 countries with

over 10,000 pregnant women living with HIV, Indonesia has the lowest percentage of pregnant women (14%) who have received antiretroviral treatment for the prevention of HIV/AIDS transmission. In addition, data from UNAIDS also reveals that the infected children due to the mother-child transmission has increased significantly from 2,300 children in 2010 to 3,200 children in 2016. These findings may show that women and children are now at risk for HIV/AIDS infection.

Fulfilling women's rights to live is essential considering the possible effects of HIV/AIDS transmission not only to mothers but also their children, the stigma, and the discrimination (Mboi & Smith, 2006), such as reduced access to services, loss of dignity, and deprivation.

HIV/AIDS transmission to housewives often happens to those who have a spouse who is at risk of HIV/AIDS infection. There are 1.6 million women who are married to men who are at risk. These men are usually from a high social class and even the highest number of people living with HIV/AIDS is those who freely spend their money on prostitution. Thus, the more men who use sex workers, the more women who suffer from HIV/AIDS. In this respect, women in Indonesia should be able to take legal action, so that their husbands can be imposed with a legal sanction.

Legal actions can be taken, but there is no positivist law that regulates HIV/AIDS transmission, particularly among spouses. This fact leads to an intriguing question as to whether housewives have the right to obtain legal protection against the risk of HIV transmission from their husbands considering that they also have the right to a healthy life as the representation of basic human rights.

Legal protection can be given if the legal system used also supports its implementation, meaning that the law enforcement should be viewed as a human's struggle to get justice. In fact, the law enforcement which reflects the legal positivism emphasises more on regulations, legislations, and procedures (Rahardjo, 2006). As a result, the law enforcement often refers to written regulations. In other words, what is stated in the legislations should be applied without taking into account if these regulations are fair. The absence of a regulation regarding HIV/AIDS transmission has led to the absence of legal protection for women, especially housewives who have HIV/AIDS transmitted from their husbands. In this context, progressive law enforcement is required to examine the positivist law in order to give a deterrent effect for the perpetrator.

## METHODS

This study was a doctrinal research, which refers to the formulation of legal doctrines through the analysis of legal rules. The essential features of a doctrinal scholarship involve “*a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation*” (Hutchinson, 2014). The doctrinal approach assumes that the law constitutes rules, principles, and precedents that should be recognised, and that these elements are a coherent system (Watkins & Burton, 2013).

In brief, this doctrinal research owed more to the subjective and argument-based methodologies than to the more detached data-based analysis of the social sciences. The data analysis included analysing legal issues to identify issues that needed further research. This step

involved background reading to familiarise the researcher with the area of law being studied. The facts in terms of the law were then analysed to match the identified issues with the applicable rules. Lastly, a probable conclusion based on the facts and the law considered was drawn (Singhal, & Malik, 2012). A deductive syllogism was used to draw a conclusion (Jain, 1982), in which common moral principles became the major premise, while behavioural cases under scrutiny became the minor premise. The conclusion or the closing premise in the syllogism became the legal norms or the moral norms.

Although there are several criticisms regarding the doctrinal methodology that is concerned with its theoretical nature without considering the social, economic, and political significance of the legal process, following Jain, the researcher “*may look for his value premises in the statutory provisions, cases, and history in his own rationality and meaning of justice.*” In other words, this methodology allows the researcher to find several alternative solutions to a problem and adopt one that achieves the best interests of the society in a particular context.

To analyse the positivist law, which considers legal certainty to be apart from moral values, this research used progressive reasoning. The progressive legal theory, proposed by Rahardjo, is a result of dissatisfaction towards the positivist law in Indonesia. This theory states that the progressive law is for man, not man for the law and that the state is no longer absolute power<sup>10</sup>. One of the characteristics of progressive law is that the behavioural aspect should be put above the regulatory aspect. Thus, the human factor and humanity have an important role in the implementation of the law. In other words, the implication of using the progressive legal reasoning is that it not only focuses on textual aspects, but also considers contextual legal reasoning.

## RESULTS AND DISCUSSION

### Gender-Related Violence in HIV/AIDS Transmission to Housewives

Women are assumed to be more vulnerable to HIV transmission compared to men in terms of biological and social aspects. Regarding the biological aspect, HIV transmission occurs through sexual intercourse. Sexual intercourse consists of several steps. In physiology, sexual intercourse is initiated by a desire in the mind. Sexual organs are then stimulated to demand for sexual gratification. In women, the stimulated sexual organs trigger the accessory glands to produce a lubricant which can protect the surface of the vagina during vaginal intercourse. In the case of physical force, this process may fail so the accessory glands cannot produce a lubricant. Thus, vaginal intercourse is at a risk of irritation and virus penetration if the partner is HIV positive. Moreover, HIV transmission can also happen during pregnancy, labour, and breastfeeding, known as vertical transmission. In addition to transmission from one adult to another adult, HIV/AIDS can also be transmitted vertically from mothers to children. Around 30% of children born by infected mothers will also be infected. Furthermore, exposure of a larger area of vaginal epithelium during sex and transmission of a larger volume of genital fluids that are infected from a male to a female may also make women more vulnerable to HIV/AIDS transmission. Some research has also revealed that the clinical manifestation to women, such as

gynaecological infections and precancerous lesions in the vagina and cervix, place women at a biological disadvantage (Korn, 2001).

In terms of the social aspect, women are expected to do both domestic and public spheres, e.g. doing household chores and working in public sectors. Moreover, women in some areas are at a greater disadvantage due to poverty, gender norms, a high prevalence of violence, and limited access to employment and education. These conditions may possibly increase the risks of HIV/AIDS transmission to women. In fact, HIV/AIDS can be transmitted to both men and women. Some people living with HIV/AIDS seem to look healthy, but they are infected by the virus. Avoiding sexual intercourse may be the best way to stop HIV/AIDS transmission. However, some people consider sexual intercourse as one of their essential needs. Thus, it is impossible for them to completely avoid it. To reduce the risk, one may only have one sexual partner, while others prefer using a condom, so it is still safe for them to have more than one sexual partner although using a condom may reduce sensitivity and pleasure during intercourse.

In short, HIV is not only a health problem, but it is also deemed as a societal problem due to its impacts on society in general. Considering the social aspect, there is the stigma of living with HIV/AIDS, which may result in discriminative acts. This stigma may occur in any place such as in the family, society, educational settings, religious places, workplaces, and public services such as health and legal services. Thus, both internal and external parties may contribute to spread the stigma which may affect HIV-infected people's personal lives.

Among educated societies, most of them understand that HIV/AIDS is caused by a virus. However, others may think that HIV/AIDS is a disease that is usually suffered by certain societal groups with high-risk sexual behaviour. In this view, the issue of HIV/AIDS is deemed inappropriate to be discussed especially among religious groups. In this context, HIV/AIDS is usually considered as a curse of God caused by sexual sins or other sinful behaviour.

The stigma and the discrimination received by people living with HIV/AIDS may prompt them to conceal their disease status from others, including their relatives and spouses. Some research studies have demonstrated that many spouses hide their HIV/AIDS status from their sexual partners because they cannot cope with the stigma and the rejection from their partners. There are some conditions related to HIV/AIDS status: (1) one does not realise that he/she is infected by the virus; (2) one knows that he/she suffers from HIV/AIDS, but he/she does not know how it can be transmitted; (3) one knows that he/she lives with HIV/AIDS and understands the way it can be transmitted, but he/she does not do any prevention to avoid the transmission. As sexual partners, wives should fully know their husbands' health conditions. In the context where the religions and beliefs dominate a society's lives, it might be difficult for wives to ask about their husbands' health conditions and whether they are HIV positive or whether their habits put them at a greater risk of the transmission. If their husbands are aware that they are infected and they understand about the ways the virus can be transmitted yet they do not care about it, they may not do any measures to avoid the transmission. Moreover, if wives know that their spouses live with HIV, they should have the right to reject sexual intercourse without using a condom for the sake of their health.

Gender-related violence can also be influenced by sociocultural contexts. Diarsi stated that a culture determines power relations within society, influencing women's and men's access to

and control over economic resources, and their ability to make decisions in the family and community. Such a culture may be manifested in the notion of a patriarchy. Patriarchy, as a concept, has a history of usage among social scientists such as Weber who used it to refer to a system of government in which men ruled societies through their positions as heads of households. Walby (1989) gave a more comprehensive definition of a patriarchy; that is, “*a system of social structures, and practices in which men dominate, oppress, and exploit women*”. Walby (1989) added that the term social structure is essential as it implies the idea that every individual man is in a superior position and every individual woman is in an inferior one. In an Indonesian context, the cultural context is still a heavily patriarchal society. Injustice against women, especially housewives, often happens because women tend to have limited roles in making decisions, not only in their social lives, but also in their households, e.g. making decisions regarding when they wish to have sexual intercourse with their husbands.

An interesting fact reveals that Indonesian legal systems tend to differentiate the roles of men and women in a sociocultural context. Article 31 Number 1 of 1974 on the Marriage Law puts husbands as the heads of the families and the breadwinners and places women as housewives. The cultural depiction of the husband as the breadwinner supports the greater rewards achieved by men in the workplace, legitimizes male power within the family, and provides men with resources for demonstrating their masculinity, which Connell called it hegemonic masculinity. This concept of masculinity as being hegemonic is derived from Gramsci’s theory of the state where one group claims and sustains a leading position in society during a given historical period. Connell further defined hegemonic masculinity as a construction of how men should be in a relational context to the opposite sex (women). In this case, if a man perceives that his wife has failed in her role as a wife or challenges his power, he may react violently to maintain his power and control. This may create a problem especially when a wife refuses to have sexual intercourse with her husband, as she knows that he suffers from HIV/AIDS. Nevertheless, this power relation may be somewhat problematic for men as not all men comply with the hegemonic values embedded on them.

This patriarchal culture is also strengthened by religious and traditional norms. Religions state rules regarding women’s obedience and disobedience to men. Thus, somehow men can legitimize their behaviour although in fact, religious norms are constructed based on humanity, and they are not gender-biased. Religious texts and doctrines, as well as cultural perceptions could be the underpinning rationale for formulating discursive views on gender identities. However, sometimes the logic is not consistent with the cultural logic.

The rising number of HIV/AIDS transmissions to housewives cannot be separated from the factors mentioned previously. Religious views which are dominated by Islam tend to be gender-biased. How women are treated in Islam is one of the issues about which Islamic groups often feel defensive in the face of outside criticisms of the backwardness of their religion, such as practices like polygyny and restrictions on the sexuality and mobility of women (Blackburn, 2008). Several empirical studies have found that although Muslims strongly support democratic political values and institutions, they maintain patriarchal social values. One of the shared views is that sexual satisfaction only belongs to men, in the sense that husbands are allowed to do sexual exploitation towards their wives, while wives should follow their husbands. This may

discourage women to refuse their husbands, even though they are aware of their husbands' disease. This could be even worse if men refuse to use a condom during sexual intercourse.

These phenomena may demonstrate that social constructions related to gender may promote inequality which can affect the policies and the mechanisms for decision-making in the government. This issue is not caused by 'women', but the ideology, systems, and structures reflecting gender inequality, which is triggered by gender differences incorporated into government policies, beliefs, religious values, and traditions.

### **Patients' Right to Confidentiality vs Wives' Right to Information**

HIV/AIDS is a sensitive ethical issue in health information management, as it deals with the right to confidentiality and the right to privacy. As stated in the Hippocratic Oath, new physicians must protect patients' confidentiality. The protection of patients' privacy may demonstrate the priority of patients' rights in medical treatment.

According to Daniel and Kitchener, confidentiality means a commitment to protect private information from the public unless permission is otherwise granted. It is included in patients' right to privacy in relation to personal information. This right is to emphasise patient autonomy. There are two main purposes of concealing patients' information from the public; that is, to support patients' autonomy and to honour patients' trust to physicians and medical services. Patients' confidentiality is also guarded to promote moral values which include personal development and individual autonomy (Bisman, 2008).

Regarding HIV/AIDS transmission, the main ethical obligation of medical professionals is to protect patients' privacy and to uphold patients' rights to confidentiality of HIV/AIDS patients' medical records. Confidentiality breaches are considered as a violation of the code of conduct. Minister of Manpower Decree Article 6 No. Kep. 68/MEN/IV/2004 on HIV/AIDS Prevention and Control in the Workplace states that the information obtained from counselling, HIV tests, medical treatment, and other activities should be kept confidential as applied in medical records.

Concerning health information management, hospitals as places of medical services have several obligations as stated in the code of conduct, including protecting all the medical/ non-medical data, fulfilling patients' rights, and giving sufficient information to patients about their diseases. The confidentiality of medical records is also stated in Article 47 Paragraph (2) Law No. 29 of 2004 on Medical Practices. Although this regulation only mentions that doctors, dentists, and heads of medical services must keep the privacy of patients' data; Government Regulation No. 10 of 1996 on Obligation of Medical Data Confidentiality states that all healthcare providers and those who are still taking Health majors must also protect patients' confidentiality. These stipulations aim to protect patients from any harm due to medical record breaches. However, what if patients' diseases may cause harm to others, especially their wives? This critical evaluation prompts the question: Do patients have the right to conceal their health status from their families, particularly their spouses who are possibly at risk of having a disease transmitted through sexual intercourse? Furthermore, if patients are not willing to inform their health status to their families or if the regulations' stating that medical records should be kept

confidential becomes the rationale for not revealing patients' diseases, should this regulation still be applied for the sake of upholding patients' rights although their diseases may be transmitted to their partners?

It cannot be denied that human rights need to be met. The essential element of rights is that a claim from the right holder to the right bearer or the obligation holder in which the fulfilment is not only voluntary, but also it can be enforced. Thus, it can be argued that it is unjust to force the realisation of the rights although it violates others' rights, such as wives'.

The regulation and the code of conduct regarding the obligation of healthcare providers to conceal patients' medical records from others including their spouses should be evaluated in terms of human rights. Protecting patients' rights by concealing their health status might not be relevant if this action violates others' rights, considering the importance of satisfying wives' and children's rights. Anderson & Barret provided an important reminder that just because individuals have a right to hold their own opinions and actions does not mean they have a right to engage in activities, which threaten others. When exploring beneficence, a balance must be struck between acting in the best interest of an individual client versus the welfare of others and society as a whole<sup>39</sup>. Hence, revealing important information about husbands' diseases should be permitted because it is closely related to the welfare of wives and their children.

If keeping medical information confidential is related to public interests, the right of patients who wish to conceal the information is also related to the right of others who consider the confidentiality as part of their interests. To protect public interests, parties who disclose the information should be freed from compensations. In this sense, public interests include public security, preventing violence, protecting morality and health, and protecting rights. Thus, confidentiality as part of individual rights is not absolute.

An appeal to confidentiality breaches which is not demanded by the law but is required to be done and can be realised if serious and foreseeable harm is identified. In relation to people living with HIV, information disclosure to sexual partners is not unethical conduct. It is justifiable even though patients are not willing to inform their health status to the family. The justification of information disclosure should be underpinned by some considerations: (1) partners are at risk of HIV but they are not aware of it; (2) patients refuse to give information to their spouses; (3) patients refuse physicians' help to inform their health status to the family; and (4) doctors have asked patients to reveal their health status to their partners. Doctors should disclose the HIV status to patients' family members, such as wives, children, parents, and patients themselves, although this action may cause detrimental psychological effects to the family and the patients.

Despite the stigma and the discrimination towards people living with HIV/AIDS, the WHO (2004) 40 stated that there are some advantages of revealing an HIV status to sexual partners and family members, such as (1) motivating sexual partners to seek testing, change behaviour, and ultimately decrease the transmission of HIV; (2) increasing opportunities for social support and improved access to necessary medical care; and (3) increasing opportunities to discuss and implement HIV risk reduction with partners. Instead, low rates of disclosure may lead to increased cases of HIV transmission to others.

It cannot be denied that the disclosure of HIV/AIDS status to sexual partners and family members can be complex, as it involves patients' emotions and feelings. However, it does not overlook husbands' interests or is biased. Huprich et al. (2003) argue that the best action could be the action that minimises harm and maximises benefits for individuals. In this case, it can be concluded that patients can obtain more advantages from revealing their HIV status to their wives, as concealing it can be considered as a violation to human rights, particularly for wives and children.

### **The Formulation of Deterrent Effects**

The issues mentioned above may show that the notion of neutrality or objectivity in the law are drawn on legal positivism, which means that legal certainty can be realised if the law is seen as autonomous and independent on particular moral values, religions, politics, and histories. An enquiry about the justice of law is not a relevant question. Legal positivism which aims to avoid the arbitrariness of the government in implementing the law has overlooked the moral value, resulting in the exclusion of certain parties' rights and opportunities. The doctrine of legal positivism underlying the enforcement of the law always refers to written legislations. Thus, what is stated in the law needs to be applied without any considerations of the legal justice.

Justice is a fundamental aspect of the legal system. This legal system is a required element to implement the notion of justice<sup>4</sup>. According to natural law, the positive law should be compatible with pro-positive moral standards which are formulated into concrete rights that can be included into the positive law in order to ensure that the law does not violate pro-positive norms.

Therefore, legal scholars might need to look beyond what is stated in the law, so that the law can accomplish its purposes for humanity. This could be the main aim of the enforcement of the progressive law in which the law is not only applied according to the letter, but also corresponding to the meaning of the law. Moreover, the enforcement of the law should not only be based on the intellectuality but also spirituality. In other words, the enforcement of the law should be realised with determination, empathy, dedication, and commitment towards the nation's struggle. The notion of the progressive law aims to encourage legal scholars to make a breakthrough in implementing the law in Indonesia and to liberate themselves from the positivist law and legal analytical reasoning. Hence, they should go beyond rule making and rule abiding and aim for rule breaking. The breakthrough is not a form of violence, as there could be other options for legal methodologies, legal theories, and legal paradigms that can be proposed.

In relation to HIV/AIDS transmission from husbands to wives, the protection for wives should be based on a law that can ensure this protection against the transmission. This legal protection is drawn on two conditions: (1) the right to information about husbands' health conditions to prevent HIV/AIDS transmission; and (2) the legal construction which can impose sanctions to husbands who intentionally or accidentally transmit the virus to wives. The sanctions aim to give deterrent effects to whoever is accused of violating the law<sup>9</sup>. The sanctions are also a reaction against inappropriate behaviour. Thus, the sanctions that are imposed depend on the policies. If certain behaviour is deemed a violation which can threaten the welfare of the



society, it will be considered as a severe violation and imposed by retributive justice. Meanwhile, if the behaviour is seen as an obligation, the refusal of the obligation will be considered as denial and imposed by restitution<sup>9</sup>. In this case, the sanction is penalties that are based on the acknowledgement of human rights (wives).

Criminal law is known as a two-edged sword. On the one hand, it aims to protect individuals from any violence which may harm their legal interests related to bodies, souls, and possessions. On the other hand, criminal law also gives a punishment of the body (freedom), the soul (death penalty), and the possession (fines). Therefore, criminal law is closely related to human rights because it takes the rights of the individuals who are charged with a crime. The enforcement of criminal law is expected to protect the freedom, the body, the soul, and the possessions of individuals. Violating others' rights is inevitable when it comes to protecting human rights. Thus, the enforcement and the formulation of a criminal law should be done with strong rationales and considerations. In this case, the principle of legality should be the basis for imposing sanctions.

The criminalization of husbands living with HIV/AIDS and transmitting it to their wives is drawn from the process of a gender analysis as an attempt to overcome gender inequality regarding HIV/AIDS transmissions from husbands to wives. This aims to give new meanings, assumptions, ideologies, and relationship practices between women and men. Using progressive reasoning as opposed to traditional concepts enables the phenomenon of gender-related violations to be imposed by criminal law.

A criminal law and its sanctions may give negative impacts related to social stigma, moral degradation, and preconsation. Thus, a criminal act and its sanction should guarantee that penalties are needed. A criminal law is also called *ultimum remedium* and is applied by considering the principle of subsidiarity, but it is not *preimum remidium* as it is only used if other legal means are not relevant. Nevertheless, legal practices demonstrate that a criminal law and its sanctions are used in every legalisation including law, criminal law, and administrative law.

If there is criminalization, it means that the action of turning an activity into a criminal offense is required; this action should be examined carefully, especially when it involves family relationships, such as husbands and wives. There are some considerations that need to be taken into account in criminalisation. Not only criminal offense, but also the social relationships between husbands, wives, and children should become the main consideration to stipulate the policy, determine criminal sanctions, and hand down punishments. In a social context, the husband is the head of the family, the breadwinner, and the protector of the family. In some cases, the financial conditions of a family also depend on husbands. In addition to the social context, religious values also need to be considered in the act of criminalisation. Thus, the policy-making process should be more selective and restricted.

The formulation of penal sanctions to give a deterrent effect in this study is constructed based on domestic violence in Law Number 23 of 2004 on the Elimination of Domestic Violence. Moreover, the penal sanctions also refer to Article 4 of Law No. 23 of 2004, which aims to prevent all kinds of domestic violence, protect victims of domestic violence, sentence perpetrators of domestic violence, and maintain the welfare of the family. Referring to Article 5

a, b, and c of Law No. 23 of 2004, a violation of Article 5 a, b, and c of Law No. 23 of 2004 will have imposed criminal sanctions imposed as stated in Article 44 until Article 48.

Criminalisation should be imposed to husbands who are aware of their HIV/AIDS status as they commit adultery and who intentionally conceal their health status from their wives. This criminalisation does not apply to husbands who do not know their HIV/AIDS status. The rationale for this legal construction is that forced sexual intercourse may be at risk of causing irritation to the surface of the vagina as the accessory glands may fail to produce a lubricant under this condition. Hence, in the case of forced sexual intercourse in a legal marriage, husbands living with HIV/AIDS who transmit the virus to their wives should be criminalised.

The use of criminal law in the criminalisation of HIV/AIDS transmissions from husbands to wives should not only support the wives' right to refuse sexual intercourse due to their husbands' health status, but also facilitate their rights to financial support, protection, and love. As a result, an attempt to fulfil a particular right will not overlook the other essential rights. Thus, these aspects need to be considered more comprehensively.

Husbands living with HIV/AIDS should also get sufficient medical care despite the cause of the HIV/AIDS infection because their feelings and emotions also matter. Husbands who are not aware of their HIV status should not be criminalised because this condition may show that the information about HIV transmission has not been evenly distributed. In some developed countries, HIV-infected men who transmit the virus to their sexual partners (although they are not aware of their HIV status) can still be criminalised. This case also happened in Australia. A man intentionally transmitted HIV to his partner who accidentally transmitted the virus to another man. Consequently, he was sentenced to three years in prison. This man, Chris Muronzi, 44 years old, was from Zimbabwe. He had sexual intercourse with a woman from Sydney. He did it five times in nine months in 2002. However, he never told his partner that he had been suffering from HIV/AIDS for 8 years. According to the law in Australia, people living with HIV must reveal their disease to their sexual partners. The judge stated that Muronzi's action was considered a violation of the law, and the judge revealed that the emotional impact on the victim was the main consideration for the punishment.

Based on these constructions, the formulation of the offense can be proposed; that is, a material offence, a formal offence, and a complaint offence. A material offence can be imposed if husbands intentionally conceal their HIV/AIDS status from their wives and their wives have the virus transmitted to them. In this case, it can be considered as a criminal act if the unlawful act triggers certain consequences or effects. The effect is that HIV/AIDS is transmitted to wives.

In addition, a formal offence can also be imposed depending on the considerations of the criminal act. This offence can be applied if husbands intentionally conceal their HIV/AIDS status to their wives. In this case, husbands have committed a crime although there is no effect or consequence of their action, such as HIV/AIDS transmission to their wives. The important aspect of this offence is the unlawful act itself; that is, husbands are fully aware of their health status, but intentionally conceal it from their wives.

Another type of criminalisation in a formal offence could be that husbands are aware of their health status and disclose it to their wives, but they force their wives to have sexual intercourse. Forced sexual intercourse can be considered as an unlawful act although husbands

have explained their HIV/AIDS status to their wives. Considering the relationship between husbands and wives, a formal offence is more preferable because there is an opportunity for wives to make a decision during the legal process, such as proposing a cancellation report of the case before the case is investigated further by the court. Cancelling the report ceases the legal process. This chance is necessary as the case involves the relationship between husbands and wives (Table 1). These are alternative formulations of the criminal act:

<b>Table 1 THE FORMULATION OF THE OFFENCE</b>	
<b>The Formulation of the Offence</b>	<b>Description</b>
Material Offence	Husbands are fully aware that they live with HIV/AIDS and intentionally conceal this information to their wives. This action leads to HIV/AIDS transmission to their wives.
Formal Offence	Husbands are fully aware that they live with HIV/AIDS and intentionally conceal this information from their wives.
	Husbands are fully aware that they live with HIV/AIDS and disclose this information to their wives, but they force their wives to have sexual intercourse.
Complaint Offense	The accusation can be executed if wives report a complaint.

These alternative offences demonstrate that the criminal act should not sacrifice the complexity of the relationship between husbands (the perpetrators), wives (the victims), and children (the victims). The imposed sanctions should not place wives and children as the victims. Thus, a punitive action should be done simultaneously with a therapeutic action. State policies need to be incorporated into the criminal law, so that judges can propose the suspect may receive medical treatment which is funded by the state.

In the positive law, as stated in Article 44 Paragraph (2) of the Criminal Code<sup>47</sup>, if the perpetrator has a mental illness, the judge may ask him/her to receive medication in the hospital and it is funded by the state. This policy is required as HIV/AIDS is a complex and endemic disease (therapeutic action).

## CONCLUSION

An attempt to support legal protection in the case of HIV/AIDS transmission from husbands to wives is by giving a deterrent effect to husbands who have intentionally transmitted HIV/AIDS to their wives. By using the construction of domestic violence, criminalisation in the form of a material or formal offence can be applied to husbands who live with HIV/AIDS and force their wives to do sexual intercourse without disclosing their health status. This criminal act can only be legally processed if there is a complaint from wives.

## ACKNOWLEDGMENT

I would like to thank Prof. Dr. Heru Susanto, the Director of LPPM Diponegoro University, for providing the funding for this research.

## REFERENCES

- Bisman, C. (2008). Personal information and the professional relationship: issues of trust, privacy and welfare. In Chris Clark & Janice McGhee (Eds.), *Private and confidential? Handling personal information in the social and health services*. Great Britain: The Policy Press.
- Blackburn, S. (2008). Indonesian women and political Islam. *Journal of Southeast Asian Studies*, 39(1), 83-105.
- Huprich, S.K., Fuller, K.M., & Schneider, R.B. (2003). Divergent ethical perspectives on the duty-to-warn principle with HIV patients. *Ethics & Behavior*, 13(3), 263-78.
- Hutchinson, T. (2014). *Law librarians, law libraries, and legal research in the post-internet era*.
- Jain, S.N. (1982). Doctrinal and non-doctrinal legal research. *Journal of the Indian Law Institute*, 24(2/3), 341-61.
- Korn, A.P. (2001). Gynecologic care of women infected with HIV. *Clin Obstet Gynecol*, 44(2), 226-242.
- Mboi, N., & Smith, K.H. (2006). Current status of HIV/ AIDS in Indonesia and prospect for its spread. In T. Yamamoto and S. Itoh (Eds.), *Fighting a Rising Tide: The Response to AIDS in East Asia*. Tokyo: Japan center for international exchange.
- Rahardjo, S. (2006). *Unpacking the progressive law*. Jakarta: Penerbit Buku Kompas.
- Singhal, A.K., & Malik, I. (2012). Doctrinal and socio-legal methods of research: Merits and demerits. *Educational Research Journal*, 2(7), 252-256.
- Walby, S. (1989). Theorising patriarchy. *Sociology*, 23(2), 213-34.
- Watkins, D., & Burton, M. (2013). *Research methods in law*. London: Routledge.