



Criminal law and HIV :An Analysis

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Abstract

Many health care professionals and public authorities have maintained that education and counselling are the most effective means to stem transmission of HIV.. There is evidence that educational programs have been effective in changing the conduct of certain populations at high risk of HIV infection .There is, however, concern ncertain that individuals, knowing that they are infected., may disregard the risk that they pose to othesr. More significantly, certain individuals may deliberately engage in conduct that threatens others with HIV infection . When individuals endanger the health of others by their deliberate or reckless behavior, .it has been that criminal prosecutions should be initiated

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INTRODUCTION.

The purpose underlying the criminal law are realized in appropriate rules and penalties directed at stemming HIV transmission .those persons who deliberately engage to conduct likely to transmit HIV deserve to be punished .As the Report of the Presidential Commission on Human Immune Deficiency Virus Epidemic stated " just as other individuals in society are held responsible for their actions outside .the criminal law's established parameters of acceptable behavior,HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions' Moreover, there are social reasons to prevent conduct likely to spread HIV,.It is thought that criminals prosecuting those who deliberately seek to spread HIV will educate the public about conduct likely to spread HIV , while at the same time reinforce social norms against behavior likely to resultt in HIV transmission'¹

Serious objections have been raised to the use of criminal law for prosecution of conduct likely to transmit HIV ,some of these objections can be easily met. Others ,however ,are compelling and necessitate continued monitoring of prosectutorial authorities to prevent violations of civil rights and avoid inappropriate prosecution.

It may be argued that statutes aimed at controlling behavior intended or likely to spread HIV involve an intrusion into legally protected privacy rights ..Courts, however , have refused to recognize the privacy rights of sexual partners as constituting a barrier to criminal convictions arising out of sexual conduct, even in marriage State vs Bateman courts in civil cases have held that a constitutional claim of privacy does not preclude an unmarried woman from suing a man in tort for transmission of herpes to her as a result of sexual intercourse Kathleen. k vs Robert B. The privacy interests of an individual intentionally or knowing by engaged in conduct likely to transmit



HIV are similarly outweighed by the social interest in protecting a sexual partner from HIV infection.

It can be argued that criminal laws seeking to prohibit sexual activities between consenting do not provide an effective deterrent. The example is cited of ineffectiveness of sodomy statues in deterring the behavior they prescribe. There is however, a difference between a sodomy statute that forbids all sexual activity between partners and a HIV specific statute as such that of Idaho which is directed only to certain behaviors and recognizes a defense based on consent.

There are three basic lessons about HIV/AIDS and the criminal law. The first is that there is almost no necessity for laws creating new offences. The second is that there is a need for laws inflicting penalties upon those who behave inappropriately towards people with HIV.. Third., there is need systemically to examine criminal laws with a view to adjustments needed in order more effectively to deal with the epidemic and create a legal environment in which behaviour change is encouraged and respect and care for those infected and at risk is facilitated.

No new offences

Almost no new offences need to be created to deal with the HIV epidemic.. Armed robbers whose used a blood – filled syringe whether HIV nfected or not , are just as guilty of armed robbery or using an offensive weapon as those who use a stick, knife or gun . The mythical ,deliberate infector surely guilty of attempted murder, or manslaughter ,or reckless act endangering life or assault occasioning greivous bodily harm.

The usual problem is with politicians ignorant of basic public health

principles , who want to be seem to be' doing something' often in response to a sensationalized story in the media .They then enact quite appropriateness laws such as. One in the Australian state of new south whales ,which criminalizes sexual intercourse including oral sex by a person with HIV unless the other party given informed consent..The laws say nothing about protected or unprotected sex. It is unforceable have been never prosecuted and is broken daily by the hundreds if not thousands of people with HIV who are saving safe sex ,particularly outside relationships. And of course the law not Only fails to reinforce act But, because it can operate only on those who know they have HIV actually contradicts official government policy people at risk for HIV have only safe sex

An Australian territory on the other hand(the Australian capital territory) has passed a law criminalizing unsafe sex with a sex worker, and indeed criminalizing conduct of a brothel rproprietior which discourages safer sex. This is more the sort of law which is appropriate to the epidemic.

Another offence appropriate to HIV/AIDS and other blood borne pathogens is one which imposes a penalty for knowingly making false declarations about risk behaviour history for those donating blood to the national blood pool such laws are not a substitute for ,but work in conjunction with, systems for screening donations, Laws regulating those who deal with people with HIV

There is a need for laws to create powerful disincentive to misconduct towards or in respect of people with HIV or at risk of infection .such laws will be likely include a penalty for infraction and thus constitute criminal laws.



Examples include laws requiring the confidentiality of people whose serostatus is known by reason of testing to be respected, laws making it illegal to discriminate against with people with infection and her carers and associates laws making illegal to vilify people on the ground of their HIV, presumed HIV or status placing them at risk of HIV(e.g, homosexuality) .other instances include strictly regulating the use and distribution of HIV test kits ,respecting the wishes of people with HIV in respect of medical treatment and distribution of property both before and after death ..There are numerous other examples ,not all of which require penal section for enforcement.

Modifications to laws required by HIV/AIDS

There are many changes of a different kind needed to be laws of most countries in order for there to be an appropriate the response to the epidemic for example, law which directly or indirectly penalize risk behaviours will contradict public health policy by alienating people at risk of infection from the health authorities and disempower or deter people from appropriate behavior change and organizing to look after themselves and their friends.

Laws which criminalize possession and supply of drug injection equipment should be repealed ,preferable as cursor to repeal or decriminalization of laws regulating consumption of illicit drugs, In Australia ,every state and territory has now legislated for suppliers of needles and syringes to be licensed by the local health authorities The laws are supported by the politicians because they can see that by contrast with developed countries without authorised needle and syringe exchange

programmes.. Australia has been able to keep the rates of HIV infection in the injecting drug population to remarkably low levels..

The sex industry should be decriminalized..There is a vigorous debate as to the extent to which the industry should be legally regulated after decriminalisation. Over regulation runs the risk playing into the hands of bureaucrats and local politicians who dislike the industry. As indicated earlier , laws which might usefully be considered are ones which empower sex workers to insist on condoms and water based lubricant whenever they deal with their bosses and clients.

Homosexual acts should be discriminalized. unequal or unrealistic ages of consent for homosexual sex should be lowered (this is a different issue from the need for strict enforcement of laws against underage sex which puts girls and young women at increased risk of contracting HIV.

Police powers to test for HIV should be strictly confined to those medical tests required for the bonafide investigation of allegations of crime .In particular, such powers should not be used for covert occupational testing of sex workers and people suspected of exposing others to HIV . Such powers should be conditioned upon the order of a judicial officer such as a magistrate after the person affected has had the opportunity to be heard on the question, .Evidence laws need t o be examined.AN example is to prohibit the possession of a syringe as evidence in a drug case ,and of condoms in a sex case..

Some commentators take the view that criminal laws are not effective in deterring hiv transmitting behaviour because such behavior is emotionally charged and irrational .studies of other



forms of sexual behavior, such as incest, however, suggest that statutory schemes that are effectively used to detect, convict, and punish specified sexual behaviours can be efficacious..

Since behaviours such as unsafe sexual practices, and unsafe use of interavenous needles will involve consensual voluntary acts by both parties an argument can be made that there will be no complaint to legal authorities until there is an indication of infection, which may occur well after prescribed behavior.

History of prostitution is an old age institution in India. The well known socio-political treatise written by Kautilya sometime between 300 B.C., and 50 A.D., states that providing sexual entertainment using the public trained ganikas was an activity strictly controlled by the state was also, for the most part carried by own state own establishment. The ganikas had to pay taxes usually one sixth of their income. The chief controller of entertainment was responsible for maintain accounts regarding state expenses for ganikas and payments made to them.

The politics for the rights of women in prostitution seems to have emerged in India in the decade of 1990s, and the most cited force initiating the mobilization among the women was the HIV/AIDS prevention and control discourse. For effective aids control, these women are sought to be empowered. One of the earliest and the most celebrated organization of women in prostitution in India is the Durbar Mahila Samanwaya Committee (DMSC)-established in 1995 in Kolkata out of STD/HIV intervention programme undertaken through the government-NGO collaboration in 1992. SANGRAM is another significant organisation

founded in 1992 in Sangli, Maharashtra for prevention that eventually led to the formation of Veshya AIDS Mukhaba Parishad (VAMP) in 1996²

The Indian penal code 1860 drafted by Lord Macaulay lays down certain provisions which according to the conditions prevailing, acted as a ban on prostitution or any other kind of immoral behaviour. The said activities were made offences, there by carrying on such activities was made punishable either by the way of fine or imprisonment.

IPC section 268 chapter xiv deals with offences affecting the public health, safety, convenience, decency and morals relates to public nuisance. It is stated therein as to when a person who does not act or makes an omission shall be guilty of public nuisance. E.g. if a person were to solicit people for sex in a public place by passing lewd remarks and exposing his/her person in order to solicit customers, the said person would be guilty of public nuisance if such acts of the person affect people in general who dwell in the vicinity. According to this provision a person shall be guilty of public nuisance when such an act or omission cause any common injury, danger or annoyance to persons who may have occasion or use any public right. According to this provision it can be said that when a prostitute solicits customers in a public place or where a brothel is established and the same causes annoyance to the person living in the vicinity, the same shall amount to public nuisance.

Section 269 deals with a negligent act likely to spread infection of disease that is dangerous to life. Such person who unlawfully or negligently does an act which he has knowledge or reason to believe to be likely to spread infection of



any disease which is dangerous to life shall be punished with imprisonment for a term of six months or fine or both .thus a prostitute who continues to carry on the trade on having knowledge or even negligently , of her person being infected with a dangerous disease .e.g. sexually transmitted disease may be booked under this section. This section was enacted to prevent people from doing acts, which are likely to spread infectious disease, as the government is bound to ensure the welfare of the society .A matter under this section was reported as early as 1886 where a prostitute who was suffering from syphilis encouraged and permitted a man ,whom she had assured that she was healthy , to have sexual intercourse with her and thus communicated the disease to him. it was held that she was not guilty under this section as the complainant was himself a responsible person and himself generally as accomplice. this decision is not sound as he complainant cannot be deemed to be an accomplice as he was unaware of the disease.. Communication of syphilis to a person must amount to spreading infection under this section however it is doubtful whether syphilis can be called a disease dangerous to life. in the present circumstances, this section can be used against persons infected with aids, which is a disease dangerous to life ,and continuing negligently to infect others. The ipc section 270 deals with malignant act likely to spread infection of disease . This section deals with a malignant act as opposed to an negligent act on the part of person to spread an infection which is dangerous to life. Such persons shall be punishable with imprisonment which may extend to 2 years or with fine or both

The offences under this section is an aggravated form of the offence punishable under the previous section .in this section the use of the word malignantly indicates that the person spreading infection should be actuated by malice .the word denotes a deliberate intention on part of the accused.

Public health offences

1. Transmission of communicable diseases

A number of states have statutes that make it a criminal offence for a person with a contagious disease willfully or knowingly transmit to expose another person to that diseases. these statutes provide criminal penalties for public health offenses that are otherwise dealt with by civil quarantine or isolation.

Some of these statutes have special elements , such as requiring that the conduct occur in a public Place. most treat willful communication of or exposure to a communicable disease as misdemeanor punishable by fines or by imprisonment for no more than a year, some states have explicitly to include intentional transmission of HIV

2. sexually transmitted diseases

Many states have provision specifically criminalizing willful or knowing exposures of another to a sexually transmitted disease. Typically these statutes impose a criminal penalty for the transmission of a communicable venereal disease through sexual intercourse , but some states make it a crime to willfully 'expose' another person to a venereal disease. courts have long upheld imposition of prison sentences for violation of these statutes. Many jurisdictions have not yet included hiv infection as a designated venereal disease .however some states have added hiv infection or aids to the enumeration of venereal disease in certain states ,



has designate authority such as the commissioner of health.

HIV -specific offenses

In response o the perceived inadequacies of the traditional criminal law in punishing and deterring conduct by 'HIV infected persons like;y to result in transmission of 'HIV,a number of state legislatures have enacted or prop;osed legislation making it a criminal offence for an HIV infected person to knowingly engage in activity likely to result in that transmission of HIV.

The presidential commission on the human immuno deficiency virus epidemic observed in its final report that problems in applying traditional criminal law to HIV transmission should lead to the adoption of criminal statues can provide clear notice of socially unacceptable standards of behavior specific to the HIV epidemic crime of HIV transmitting behavior.

While the enacted and proposed HIV-specific laws have varies from state to state, such statues make it an offence for an HIV infected person is knowingly engage in behavior likely to transmit hiv. some of the statues avoid the problems created by the more traditional offenses which require proof of intent ,purpose, causation, or actual injury. the majority of the proposed statues have classified and the prescribed behaviour as a felony thus avoiding the criticism leveled at other offenses available for prosecuting HIV-transmitting activity is engaged In knowingly or intentionally .the advantage of HIV-specific laws is that they are for the most part narrowly drafted to address particular conduct that places others at risk of infection with HIV

The laws that have been proposed or enacted thus far have been directed to

conduct that is specially designated , such as donation of blood by a person who knows that he or she is infected or to a more general conduct likely to transmit hiv by a person who knows that he or she is hiv infected.hiv specific criminal offences convey the most effective warning and have the maximum deterrent value.

Procedural laws may also be relevant. consideration might be given to protecting the identity in court of people with HIV. sentencing law must take HIV/AIDS into account where a sentence of imprisonment upon a person with HIV will involve than if imposed upon a person without infection .laws requiring mandatory imprisonment for offences which are not very serious of people at risk of infection plainly unduly increases the risk that more people will contract HIV by reason of being imprisoned.³

Conclusion

All countries sooner or later must systematically examine their laws to evaluate them for their appropriateness in the light of the epidemic .A major consideration must not only be their consonance with public health policy in respect of hiv/aids but also whether they will work in reality or will instead have untended consequences of making public health programs more difficult to implement increasing the burden of looking after people with HIV/AIDS and contributing to the spread of the virus. consultation with affected communities in this process is vital if the goals of such a systematic analysis are to be achieved.



End notes

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