

Criminalization of HIV transmission and exposure: in search of rights-based public health alternatives to criminal law

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The use of criminal law to address HIV transmission and exposure has been misguided and ineffective. Criminalization of HIV transmission and exposure raises difficult legal questions: what is the appropriate degree of mental culpability to trigger criminal prosecution? Is it appropriate for the law to equate nondisclosure of (known) HIV-positive status to a sexual partner with rape (as the law does in some jurisdictions)? Can it be justified to treat mere nondisclosure of HIV status as equivalent to the intent to cause harm? To what extent will the law recognize circumstances that mitigate harm, risk of harm and mental culpability, such as safer sex practices and low viral load, in mitigating the application of criminal sanctions? Sound guidance on avoiding the misuse of the criminal law in this area has been developed, but unfortunately many criminal laws in this area allow for prosecution even in cases where there is little justification. It is reasonable to expect that the use of these laws contributes to HIV-related stigma and discrimination, particularly when cases are portrayed sensationally in mass media. The harm caused by unjustified prosecutions and convictions and stigma is not counterbalanced by any evidence of public health benefits of this use of criminal law. These laws should urgently be repealed or reformed as part of a shift to strategies centered on human rights.

Preventing diseases that are transmitted through sex is one of the most difficult challenges in public health. It requires confronting both the complexity of intimate human behavior and the reality that sex tends to bring out the worst in policy-makers. Sex-related health problems too often inspire policies that arise from moral judgments rather than from scientific evidence. This tendency is magnified with respect to HIV, which is not just any sexually transmitted disease but one that from its beginnings has been associated in the public mind with homosexuality, sexual promiscuity, sex work and drug use.

It is then perhaps unsurprising that defining the acts of transmitting HIV or exposing another person to HIV as criminal has been a part of many national responses to HIV since early in the epidemic. By 2010, an estimated 53 countries had laws that criminalized HIV transmission or exposure [10]. Many others prosecute HIV transmission and/or exposure based on laws not specific to HIV, but rather criminal laws of general application, often laws related to assault or sexual assault [10]. Prosecution of persons for HIV exposure or transmission have been numerous in some countries. In Canada, since a landmark decision of

the country's Supreme Court in 1998, there have been more than 120 such prosecutions known to legal experts in the field, and probably numerous others that have not come to their attention (as tallied by the Canadian HIV/AIDS Legal Network, of which Elliott is the executive director). These include at least one case in which the accused faced charges of both aggravated assault and first-degree murder related to HIV transmission. Some 350 arrests and prosecutions through 2010 were documented under 36 HIV-specific criminal laws in US states and territories [1]. By another accounting, a high percentage of over 300 prosecutions for HIV transmission and exposure in the USA in the period 1986–2001 resulted in the imposition of prison sentences [2].

In this article, we consider the implications of the use – or misuse – of criminal law to address transmission of and exposure to HIV and suggest some directions for moving away from inappropriate uses of criminal law in this area.

Vexing legal issues

The use of law to control sexually transmitted diseases did not begin with HIV. In the USA, for example, the fact that 13% of men drafted

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into World War I had syphilis or gonorrhea led to widespread and ill-considered crackdowns against sex workers and attempts to close down 'red-light districts' [4]. With the return of large numbers of military personnel and the advent of effective antibiotics after World War II, laws in some countries mandated premarital testing for syphilis, for example. In the USA alone as late as 1976, approximately 43 million syphilis tests were performed as the result of such laws [4]. The syphilis testing laws did not generally impose criminal penalties. Indeed, it is a long way from requiring a medical test as a condition of receiving a marriage license to harsh criminal penalties for transmission of or exposure to a sexually transmitted disease.

Laws on prenuptial syphilis testing were repealed when it was clear from scientific evidence that the tests were an extremely inefficient tool for detecting new and treatable cases of the disease [5]. Laws criminalizing HIV transmission and exposure were never grounded in scientific evidence of their effectiveness as a tool of HIV prevention. Their passage in some cases seems to have been a response to general public fears of HIV mortality, especially in the early years of the epidemic before it was widely understood that HIV is not highly contagious [2]. In some cases, legislators were inspired to pass these laws by what we would characterize as the very rare case of a person living with HIV who clearly exhibits a malicious intent to infect others [2]. Some legislators have seen these laws as a means of protecting women and girls from predatory male sex partners who fail to disclose their HIV status and refuse to use condoms [6]. It seems clear that some policy-makers have turned to criminal law solutions out of frustration with the ineffectiveness, real or perceived, of other means of HIV prevention, particularly condom promotion and education [7]. However, it does not follow the fact that deploying the criminal law, primarily a *post hoc* response, will be effective. Indeed, the available data and years of experience have shown that it likely has little HIV prevention benefit, while carrying considerable other costs, including possibly undermining HIV prevention efforts, which should also be of concern to policy-makers.

Laws on HIV exposure and transmission vary from jurisdiction to jurisdiction. Most focus on sexual transmission, although some jurisdictions criminalize HIV transmission or exposure through spitting, biting and scratching, in spite of strong evidence that transmission by these actions is extremely unlikely [101]. A

number of west and central African countries have statutes based on a 'model' law promoted by a US-funded project, which allows for criminal penalties for HIV transmission "through any means by a person with full knowledge of his/her HIV/AIDS status to another person," regardless of the person's intent [8]. Ironically, some countries established wide-ranging criminal penalties in the very same laws that are meant to protect people living with HIV from discrimination [9]. In the USA, as of 2010, 36 out of 50 states and five territories had HIV-specific criminal laws on transmission and exposure, most of which refer to sexual contact or intercourse [1].

These laws generally fly in the face of international norms and guidance on the use of law as part of HIV responses. The Joint United Nations Program on HIV/AIDS (UNAIDS) [10] recommends that criminal law to address HIV transmission should not be used in (at least) the following circumstances:

- When there is no significant risk of transmission;
- When the alleged perpetrator does not know if he or she is living with HIV;
- When the person involved does not understand HIV transmission;
- When the person disclosed his or her HIV-positive status to his or her sex partner (or has reason to believe in good faith that his or her status is already known to the partner);
- In the case of nondisclosure of HIV status because of fear of violence or other negative consequences of disclosure;
- When reasonable measures have been taken to reduce risk of transmission (such as condom use);
- When the parties involved "previously agreed on a level of mutually acceptable risk".

Some of these recommendations are related to the important legal issue of how to establish the requisite criminal mental culpability (*mens rea* in legal terms). UNAIDS reiterates the opinion of many scholars of this topic that criminalizing HIV transmission or exposure is appropriate only when there is an intent to transmit or expose [10]. To establish that someone is criminally liable under the law generally requires demonstrating malicious intent, recklessness or gross negligence [11]. Which of these is the applicable threshold of mental culpability will depend on how the charge laid is defined

in the law. As the recommendations above suggest, it is impossible to demonstrate the malicious intent to transmit HIV by someone who does not know that he or she is HIV-positive or does not understand how HIV is transmitted. Malicious intent would also seem to be nonexistent if the person in question uses a condom; it would also be perverse to characterize such a person as reckless or grossly negligent. Too often, however, prosecutions under existing laws, or the crafting of HIV-specific statutes, have not reflected the cautions in the UNAIDS guidance. People have been charged, tried and convicted in cases where transmission was neither likely nor demonstrated, and intent to transmit was not demonstrated [12].

The UNAIDS guidelines also allude to this complex legal question: if a person discloses his or her HIV-positive status followed by a partner's consent to sex (and sex takes place) in spite of that risk, is criminal intent negated? Law and jurisprudence on the question vary from jurisdiction to jurisdiction. In Canada, for example, following the 1998 Supreme Court decision in *R. v. Cuerrier*, in cases where there is a 'significant risk' of transmission, sex becomes non-consensual unless the person living with HIV discloses his or her status [13]. This ruling raises the question of what constitutes 'significant risk', which has not been completely resolved by subsequent decisions [13]. In other countries, criminal intent may be construed even if disclosure of status is made [12].

Even aside from the issue of intent, in those instances where a conviction requires proof of actual transmission – which accords with a further limitation on the scope of the law recommended by UNAIDS – legal experts have noted the difficulty of demonstrating beyond a reasonable doubt that a given instance of sexual transmission occurred as the result of a given encounter and even that the complainant's infection originated with the accused person. Even with scientific advances in identifying subtypes of the human immunodeficiency virus, it is most often not possible to determine definitively the timing, source or means of a given instance of HIV transmission [14].

The many other legal complexities of these laws are beyond the scope of this article but have been discussed elsewhere [11,12]. Suffice it to say that there is a strong consensus globally, as reflected in the UNAIDS guidelines, that the legal and human rights issues raised by criminalization of HIV transmission and exposure warrant repeal or reform of these laws [12].

Impact on prevention & treatment

In addition to legal and human rights concerns, many organizations and experts have concluded that criminal statutes on HIV exposure and transmission undermine public health responses to HIV [10–12]. This conclusion is intuitively obvious. Since knowing one's status is central to making the case for criminal intent or recklessness, the law in this case provides an incentive to remain ignorant of one's status and to avoid seeking HIV testing and care [15]. In addition, as Weait observes [16], "condoms are not 100% effective. Where criminal liability may be imposed merely for exposing someone to the risk of transmission, some people living with HIV (even if only a very small minority) may take the view that there is no point taking precautions. In the absence of a defense (in the law) for appropriate condom use, such a criminal law provides no incentive to minimize onward transmission risk."

An important concern about these laws arises from the fact that in many settings the people most at risk of HIV are already stigmatized, socially excluded and indeed criminalized. Sex workers, people who use illicit drugs, women who face social and economic subordination, and men who have sex with men in places where homosexuality is the object of criminal and social sanctions already face enormous structural obstacles to seeking and obtaining HIV and other health services. The intersection of criminal law on HIV transmission and exposure with laws that criminalize and marginalize these persons is more than conceptual. For example, in some parts of the USA, prostitution not in the presence of HIV is a misdemeanor (minor crime) but prostitution engaged in by someone who knows he or she is HIV-positive is a felony punishable by 5 years in prison [2]. More broadly, criminalizing HIV exposure or transmission when the stigma of both HIV and socially condemned behavior or status already weighs heavily on these vulnerable persons only strengthens barriers to seeking health services.

At the individual level, it is clear that imprisoning someone does not neutralize that person's capacity to transmit HIV. Indeed, HIV transmission in prison is too often facilitated by lack of access to condoms and HIV information, lack of antiretroviral treatment, uncontrolled sexual coercion and violence, and lack of access to sterile injecting and tattooing equipment in spite of the well-documented prevalence of both drug injection and tattooing in prisons [17]. Short of

solitary confinement, the incapacitation goal of criminal law is not met through incarceration with respect to this particular ‘crime’.

The public health impact of laws on HIV transmission and exposure is of greatest concern where laws are broadly written, as noted above, without regard to the cautions represented in the UNAIDS guidelines. The criminal code in Zimbabwe, for example, enables charges to be brought against anyone for whom “there is a real risk or possibility” that he or she might have HIV and who engages in any act that can possibly transmit HIV. In this case, the crime is “deliberate transmission of HIV” even if there was no knowledge of HIV-positive status on the part of the accused, no malicious intent and no transmission [102]. This law and others in west and central Africa open the door for prosecution of vertical transmission of HIV from mother to child in pregnancy or childbirth, even though it is difficult to imagine malicious intent behind vertical transmission [18]. It is ironic that under some of these same laws that were passed ostensibly to protect women, it is women who may find themselves more likely to be accused than to be the accuser. Because women generally have more contact with health services than men do, they are more likely to be the first in a sexual relationship to be tested for HIV and thus more vulnerable to prosecution for both sexual and vertical transmission [10].

Acceptance of the negative public health impact of these criminal laws at the policy level is, however, handicapped by a lack of strong empirical evidence of such impact, however intuitively obvious it may be. A survey of people at high HIV risk in two US states – one of which (Illinois) had a law specifically criminalizing HIV transmission in cases where the person with HIV has not disclosed his or her HIV status and the other (New York) with no HIV-specific criminal law – concluded that the presence of specific law on HIV transmission had no impact on people’s sexual behavior [19]. This study corroborated the prior conclusions of legal experts that with or without a law, it is an extremely rare person among those living with HIV who would form the intent to transmit HIV intentionally and set out to accomplish that goal. The authors conclude that disclosure of HIV status to a sexual partner before sex was seen to be a good practice by the large majority of people in both states [19]. As stated by Lazzarini and colleagues [2], with respect to HIV transmission and exposure: “The behavior most widely accepted as wrong – deliberately

using HIV as a tool to harm or terrorize another – is too rare to influence the epidemic, whereas the behavior most responsible for spreading the virus – voluntary sex and needle-sharing – is difficult and controversial to prohibit.”

As Elliott also observed, in cases where concern for the welfare of others, and hence the taking of precautions to prevent transmission, may be overwhelmed by desire, addiction or – in the rare case – malicious intent, it is a stretch to expect that the law will restore reasoned judgment [11].

Although, again, the public health impact of criminalizing HIV exposure may seem obvious, it might be useful for ensuring more informed public policy to have more evidence on this point. In the absence of such evidence, legislators and judges creating and applying the law are even more susceptible to being swayed by political expediency or by gut feelings and unexamined assumptions. Particularly in the context of a disease that from the beginning has evoked fear and been influenced by a wide range of prejudices about those groups with whom it has been associated, this is a recipe for poor public health policy and abusive law enforcement. Yet, it appears to have been challenging for researchers to obtain funds to gather such data from health research or other funding bodies. To date, only a few studies have attempted to document the impact of criminalization of HIV transmission or exposure on people living with HIV, let alone try to capture data as to the impact on public health of such resort to the criminal law.

International leadership to mitigate the impact of laws on HIV transmission

Early in the struggle against HIV, Jonathan Mann, who headed the first United Nations (UN) global program on HIV, recognized that national responses to HIV would be handicapped by moral judgments against people because of such things as sexual practices or illicit drug use [20]. UNAIDS was created partly as a platform for rational discussion of and leadership on HIV, with the recognition that national-level decision-making on anything having to do with sex, drug use or populations seen as ‘other’ can be fraught with political challenges. As already noted, UNAIDS has published guidelines on appropriate use of criminal law with respect to HIV transmission and exposure [10]. These guidelines are helpful and clearly derived from international human rights norms.

In recent years, UNAIDS has highlighted the importance of removing 'punitive laws' that undermine universal access to HIV prevention, treatment, care and support. One of the ten 'priority actions' in the UNAIDS 'outcome framework' for 2009–2011 was to "remove punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS" [21], though exactly how this was to be accomplished was not elaborated. In its 2011–2015 strategic plan, which is meant to guide its actions and resource allocation, UNAIDS proposes the goal of reducing the number of countries "with punitive laws and practices around HIV transmission, sex work, drug use or homosexuality that block effective responses" by half [22]. As part of this goal, UNAIDS has begun monitoring the number of countries with such laws. To reach this goal, UNAIDS states the intention to invest in the following interventions [22]:

- Generating more complete, timely and transparent information on country-level rights and legal frameworks and how they affect HIV;
- Providing support for expanding programs on legal literacy, legal assistance and law reform;
- Providing support to leadership and programs in government, parliament and the judiciary to strengthen systems of justice in the context of HIV.

At the time of this writing, UNAIDS is supporting development of a project led by the International HIV/AIDS Alliance that will provide training in human rights issues related to HIV, including the use and misuse of criminal law, to policy-makers in Latin America, Africa and Asia (Csete and Elliott are technical consultants to this work). The project includes making legal and human rights experts available to policy-makers and legislators in selected countries for technical advice and regional training for policy-makers on integrating human rights activities into national AIDS strategies. UNAIDS with the Inter-Parliamentary Union also prepared a handbook on use of legislation in HIV responses with a detailed chapter on transmission and exposure offenses that explains the many health and human rights pitfalls these laws present [23]. UNAIDS has also commissioned a handbook to educate judges on a range of HIV-related issues, including the criminalization of HIV transmission and exposure (Elliott is involved with the preparation of this work).

The UN Development Programme (UNDP) is the UNAIDS 'cosponsor' agency charged with addressing punitive laws. Under UNDP's aegis, a global commission on HIV and the law was convened in 2010, including several former heads of state and other eminent legal and HIV experts (Csete and Elliott are members of the Technical Advisory Group also convened by UNDP to advise the Global Commission) [24]. The report of the Commission is due in 2012. The Commission's scope of work includes consideration of the use of criminal law to address HIV transmission and exposure.

The UN Office on Drugs and Crime (UNODC) is one of the ten cosponsor agencies of the UNAIDS joint program. UNODC has a unit on HIV/AIDS that focuses mainly on HIV and illicit drug use and HIV in prison, and it has published technical support materials and guidelines on these subjects. UNODC is also the UN system's technical agency for criminal justice and criminal law reform. The justice section of UNODC provides technical assistance to countries in the area of criminal justice reform, "paying particular attention to vulnerable groups" [103]. This unit of UNODC has, however, been silent on the misapplication of criminal law in the area of HIV transmission and exposure.

In addition to international developments, there have been some helpful national-level measures in this area. The 2010 National HIV/AIDS Strategy of the United States calls into question state-level criminal laws on HIV transmission, including, but not only, those related to spitting and biting, and notes that such laws are likely to make people less willing to disclose their HIV status to sex partners [25]. The strategy goes on to suggest that state legislators may wish to revisit these laws with an eye towards reform. Norway and Denmark recently also took measures to repeal or reform laws criminalizing HIV transmission [104]. UNAIDS announced in April 2011 that it is undertaking to develop more detailed guidelines for the countries with the most prosecutions under these laws to help them to find ways to revisit these laws or circumscribe their use appropriately [104].

Conclusion

Laws that make HIV transmission and exposure a crime are not appropriate on legal, human rights or public health grounds. They do not contribute to incapacitation of criminals, to rehabilitation or to deterrence of future misdeeds. They provide for punishment and retribution but are too often

applied in situations where there is plainly no criminal intent, but only the mixture of human emotions and sometimes impulsive actions that are part of sexual relations. Even if prosecutions by the terms of these laws are relatively few compared with the millions of people whom they might involve, media coverage of court cases can be rationally expected to undermine people's inclination to seek HIV services, including testing and treatment and, more generally, to contribute to a climate of misinformation, fear and stigma related to HIV and hence people living with HIV or perceived to have HIV.

Some 30 years into the global struggle to control HIV, there have been many successes, but stemming the tide of the epidemic remains frustrating in many places, often because of the failure to scale-up programs to address risks faced by marginalized persons. International donors and domestic decision-makers have too often been unwilling to mobilize the resources and efforts needed to address the human rights abuses and deficiencies that fuel the epidemic. Recourse to criminalization of HIV transmission and exposure is a response to this frustration with the ongoing epidemic, but it is the wrong response. In 30 years of confronting HIV, policy-makers should have absorbed one of the key lessons of this battle – that respecting the rights of people living with and at risk from HIV is the best guide to effective policy and program strategies in HIV responses. Interventions that exacerbate stigma and fear are not only unacceptable in themselves but also ineffective and unsustainable.

Criminal law in the area of HIV transmission and exposure is a testament to the difficulty of removing moral judgment and fear from policy-making in relation to a disease transmitted by sex. It also reflects a paternalistic vision of protecting women from HIV. In passing these laws, male-dominated parliaments have mobilized the criminal law enforcement system rather than focusing on building the capacity of women – and men – to understand HIV prevention, have consistent and ready access to condoms (and other prevention options once available, such as microbicides), and avoid situations in which sex is unsafe. If the concern is women's vulnerability, the criminal law 'solution' also represents the easy way out. Addressing the structural economic and social factors that lead to subordination of women would require much more thought, consultation and courage to confront entrenched inequities [12]. In this case, the easy way out is also, plainly, the ineffective and even harmful way.

A focused effort to eliminate these laws or their most harmful provisions requires much more leadership and resources than the UN system, donors and national governments have so far mobilized. For example, the harmful provisions of laws that were passed in west and central Africa based on the US-funded 'model law' were highlighted in several regional meetings that included policy-makers from a number of countries [26], but country-level follow-up to work with parliamentarians and civil society toward law reform was not strong. Stigma and discrimination, fueled by these criminal laws, are frequently mentioned in national HIV strategies, but effective and well-funded programs to combat them are difficult to find [26]. Approximately a third of UN member states do not have laws that protect people living with HIV from discrimination [22], a minimum basic requirement for effective HIV responses. And when laws intending to prevent discrimination based on HIV status are passed in the same statute as wildly expansive laws criminalizing HIV transmission and exposure, as in a number of African countries, the protective impact of antidiscrimination measures is effectively neutralized.

Future perspective

In a 2011 report to the Human Rights Council, the UN Secretary-General called for a paradigm shift in the global response to HIV that would make the human rights of people living with and vulnerable to HIV much more central to HIV priorities and resource allocation than has heretofore been the case [26]. Part of refocusing HIV responses centrally on human rights and stigma reduction would be allocating adequate resources to a systematic revisiting of criminal laws on HIV transmission and exposure with an eye toward repeal or reform.

It is clear to us that this paradigm shift is sorely needed and, if appropriately supported, would radically transform HIV prevention. That is, it would encourage the formulation of strategies that proceed from an understanding of who is vulnerable and include meaningful participation of those persons in decision-making to ensure that HIV prevention services correspond to their realities. From there, resources can be mobilized and allocated in an informed way, both to address vulnerabilities and to ensure ready access to basic prevention services. There are too few examples of such approaches, but there are some. Country-level structures created to make proposals to

the Global Fund to Fight AIDS, Tuberculosis and Malaria, for example, have in some cases brought vulnerable persons, including women and people who use illicit drugs, into national HIV policy-making for the first time, resulting in program breakthroughs for vulnerable populations [27]. Over US\$180 million in Global Fund support from 2004 to 2008 for programs for people who use illicit drugs, as inadequate as it still may be, nonetheless represents an important turnaround for some countries that might not otherwise have focused on this population's needs [28].

With respect to criminalization of HIV transmission and exposure, a rights-centered approach should include the following elements.

To remove existing laws

- UNAIDS and its cosponsor organizations should mobilize donor support for a major campaign to repeal or reform harmful criminal laws on HIV transmission. This should include finding a roster of legal experts who can work with both parliamentarians and civil society to ensure that harmful provisions are removed but antidiscrimination and other helpful provisions are retained.
 - The Global Commission on HIV and the Law convened by UNDP should make clear recommendations for governments on avoiding use of criminal law as a tool to address HIV transmission and exposure, and should suggest alternatives that are human rights-friendly and likely to produce positive health outcomes.
 - UNODC's Justice Section should make repeal of harmful HIV-related laws a priority in its extensive interaction with attorneys general and the criminal justice community, including issuing guidelines for repeal or reform of these laws.
 - High-level UN officials, including the Secretary-General and the directors of UNAIDS and UNODC, should make public statements clearly calling for decriminalization of HIV transmission and exposure except in the rare cases where malicious intent and actual transmission can be demonstrated. They should call for the complete and explicit exclusion of vertical transmission from criminal liability. They should also emphasize that incarceration is one of the most counterproductive measures possible in HIV responses, serving no incapacitation purpose and placing people with HIV into an environment likely to threaten their health and that of those around them.
- Statements from medical professional societies on the counterproductive nature of criminalization of HIV transmission would be helpful, as would the development of training modules on HIV and the law for use in both medical and law school curricula, as well as the training of judges and law enforcement personnel.
 - Funding to support research to document the harms associated with criminalization of HIV transmission and exposure would be a step toward more informed policy debates in some countries.
 - Revisiting criminal laws on HIV transmission and exposure would be most useful if it goes hand in hand with reforming or repealing repressive laws undermining the health and human rights of sex workers, lesbians and gay men, transgender people, and people with drug dependence. These laws have a synergy with laws on HIV transmission, as they feed intersecting forms of stigma and exclusion. Reforming criminal laws on HIV exposure and transmission may create a policy platform for removing these other criminal laws that also undermine the effectiveness of HIV programs [26].

To mitigate the harm of existing laws

- UNAIDS should lead a global campaign to increase the resources available for legal assistance for persons charged under criminal laws on HIV transmission or exposure, especially women and persons already criminalized because of drug use, sex work, homosexuality or transgender identity. Legal assistance can take the form of services by lawyers and trained paralegal staff as well as user-friendly 'know-your-rights' information.
- Funders concerned about effective responses to HIV, and therefore the necessity of human rights of people living with HIV, should support the work of advocacy organizations engaged in various strategies, including litigation, to resist the overexpansive use of the criminal law. Challenges to poorly crafted HIV-specific criminal laws, as well as interventions to influence the interpretation and application by courts of other criminal laws of general application being used by prosecutors, are vital to ensuring that a critical perspective is brought before the courts – one that is independent of prosecutors and of defense counsel whose primary concern must be the immediate interests of their individual client.

- There should be replication and expansion of efforts such as those in the UK and Canada to work with prosecutors to mitigate the harms of criminalization of HIV transmission and exposure. In the UK, civil society organizations working on HIV persuaded the Crown Prosecution Service to consult with them on the development of guidance principles for prosecutions in this area under English and Welsh law (with Scotland having its own criminal law) [29]. The guidance addressed many of the points noted above. In Canada, the enforcement of the federal criminal law is the responsibility of provincial Attorneys-General. The Attorney-General of Ontario, the country's most populous province, announced in 2011 that his office would develop guidelines on criminal prosecutions of HIV transmission and exposure, apparently in response to a community-based campaign for such guidelines [105]. UNODC's Justice Section should be ideally placed to support such efforts in low-income countries.
- Where possible, civil society groups should work with journalists to minimize sensationalism in coverage of court cases involving criminalization of HIV transmission and exposure. In many cases, media coverage has served to heighten the stigma associated with this criminalization [32].

To strengthen prevention efforts through means other than criminal law

- It has long been well understood that women are disproportionately susceptible to HIV not only physiologically but because of social and economic subordination that renders them vulnerable to sexual coercion and abuse.

Nonetheless, many national HIV responses target women only for prevention of vertical transmission to newborns, without addressing the structural causes of women's HIV vulnerability [23]. It is daunting to take on entrenched gender-based inequities as part of HIV responses, but there are many useful places to start. Strengthening laws and law enforcement practices on domestic violence, including marital rape, is one area that directly addresses both gender-based abuses and HIV risk. Linking HIV services to reproductive health services and ensuring the quality and accessibility of both for all women is another. Ensuring that there is no gender-based discrimination in access to HIV prevention and treatment services should also be a central element of all national HIV responses.

- A rights-centered approach to HIV is impossible without better developed mechanisms than exist in many countries for meaningful participation of people living with and most at risk of HIV. Again, this is a big undertaking, but certain steps should be taken in virtually all countries. First, governments should remove barriers to the formation, official registration and flourishing of civil society organizations representing people living with HIV, women, people who use illicit drugs, men who have sex with men, transgender persons and sex workers. UNAIDS and donor bodies should mobilize financial support for such organizations as central to effective HIV responses and make it a high priority. Donors and governments should learn from the experience of the Global Fund – good and bad – and otherwise seek to develop functioning mechanisms for participation of representatives of affected populations in HIV program and policy decision-making.

Executive summary

- The use of criminal law should be reserved for the most heinous and repugnant offenses in society. Its use to prevent HIV transmission and exposure is questionable.
- Criminalizing HIV transmission in cases where a person does not know but may suspect his or her HIV status or where a condom is used raises the question of whether there is sufficient mental culpability to justify bringing criminal charges.
- International guidelines on this subject stress that criminal prosecution is appropriate only where mental culpability is present and demonstrable; such cases are extremely rare.
- Because national-level political debate on issues related to sex and HIV is often fraught with moral judgment that impedes evidence-based policy, stronger international leadership is needed to lead to repeal and mitigate the impact of these laws.
- Criminal laws on HIV transmission and exposure represent an approach to HIV based on moral judgment and punishment. Some 30 years of experience in addressing HIV should make it clear to policy-makers that such approaches are generally neither effective nor sustainable.
- A global campaign is needed to make repeal and reform of these laws a high priority for donors and governments. Changing laws takes time, and measures such as improving access to legal services and raising awareness among judges and prosecutors can mitigate the harm associated with these laws while they are still on the books.
- A shift to truly rights-centered approaches to HIV will spell the end of these laws and should be vigorously pursued.

The application of criminal law to HIV transmission and exposure is, overall, a harmful strategy that should be renounced and its harms addressed. It exemplifies an approach to HIV that springs from fear and moral judgment rather than consultation with those affected and strengthening of people's capacity to engage in safer sex. The future of effective HIV responses depends on turning away from this unsound use of criminal law and toward rights-centered strategies.

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