

CRIMINALIZATION OF HIV/AIDS: AN ANALYSIS RELATING TO DIFFERENT COUNTRIES

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ABSTRACT

People suffering from HIV suffer from contemporary issues which lead to bias and it shows tied with inequality. They suffer various stigma and discrimination which does not let them disclose their status. In this complex health and social issues because of transmission of HIV there is a need to balance between criminal law and public health. It is a need to protect people and promote health such as prevention, treatment, care and support of the population. There has been various offences like men having sex with men, using of same syringe, having unprotected sex goes against public policy. It has been noticed a lack of laws even in developed countries for protection of health of its public. There are different countries having different laws as per their jurisdiction has set penal provisions for criminalization of transmission of virus. This paper analysis different countries laws relating to criminalization of HIV and non disclosure, explosion, transmission and its need to implement specific laws for the protection of public. This paper has limited its scope to examine laws of England, Wales, Canada, USA and India. Penalize the accused for the offence as per its jurisdiction. Many developed countries does not have strong specific laws, it showcase the need of it. Human rights are said to be the natural rights and it should be taken into account in order to achieve effective response to fight against the virus and how the framework has been set to do the same.

Keywords: Stigma, Discrimination, AIDS and Criminalization.

INTRODUCTON

Discrimination between people suffering from HIV/AIDS effect mentally and physically. They suffer a stigma against the society. They cannot enjoy human rights as guaranteed by our constitution. According to Locke man is born with a title to perfect freedom and an uncontrollable enjoyment of right and privileges of law of nature. People suffering from such disorder cannot enjoy access to education, inheritance, and enjoyment, health care. Social and health services, this makes the condition worst. It shows how stigma and discrimination is tied with inequality. It puts a barrier of treatment, care or protection among them making the matter worst. The fear of stigma and discrimination make the affected people hide the status from their close ones which make the matter worst. The fear weakens the ability of people to even stay healthy if suffering from it.¹

International standards and treaty are set to make laws for HIV affected people has right to heath and healthcare services, poor implementation leads to nonsuccess of it.² If these are properly implemented it can give a fight against vulnerability of HIV/AIDS.

HIV Criminalization means laws that penalize people living with HIV based on their HIV status. This includes unintentional HIV transmission, exposing it publicly where it was not transmitted and non-disclosure of HIV positive status. It is use of Criminal law to prosecute and punish people engaging in sexual activity. Its motive is not to punish people but the fear of punishment not to do act. HIV justice network showcase that 72 countries have adopted laws for HIV criminalization.³

It can be said ethically wrong not to disclose HIV status to the partner, criminalization of it over every county is debated. The improvement of medical science the person can live a normal life goes against the resist of any use of criminal law⁴

Countries like Canada, Australia, New Zealand, England and Wales have criminal liability to those who transmit or expose to HIV to others. Criminal law implementations can be said to

¹ UNAIDS(2014)'Reduction of HIV related stigma and discrimination'.

² UNAIDS(2006)'International guideline on HIV/AIDS and human right'.

³ HIV justice Network and GNP+(2016)'Advancing HIV justice 2: Building momentum in global advocacy against HIV criminalization'.

⁴ M. Weait, Unsafe Law: Health, Rights and the Legal Response to HIV, INT'L J.L. IN CONTEXT (2013 ,forthcoming).

decrease the level but not remove it. It can be seen if a rape victim suffers from HIV or will it be stated sexual assault. The higher number of rape showcase higher rate of HIV. Strong rape laws can eradicate it. UNAIDS (United Nation Programme on HIV/AIDS) suggest that intention should not be only the primary criteria to keep a check on HIV transmission, it should be was it actually transmitted.

There should be laws for person did not know his or her HIV status, or understands its transmission, other partner knew about the status, not disclosing status because of fear or violence, took reasonable precautions for safer sex like using condoms.

The state should set guidelines for the same per se issuing of HIV specific law instead of general law to punish the culprit, reduce police and prosecutorial discretion in application of criminal law, ensure any application of general criminal to HIV transmission is consistent with international human right obligations.⁵

LAWS OF DIFFERENT COUNTRIES RELATING TO HIV CRIMINALIZATION

Different countries have set criminal liability as per their jurisdiction and have their laws to penalize the accused. This consent plays a major role it may be any country law. These offenses are categorized as sexual assault, how different countries contemplate with such issues.

1. UNITED KINGDOM

It has a narrow approach towards criminal liability set for criminalization. The guidelines can be found in the case R v. Dica⁶ in the said case defendant had a HIV positive status, he had sex with two women. His claims were that they were aware of his status, women denied. It was noticed not to be a good law and passing of such a disease and consenting to such a thing person is liable under section 20 of Offences against the person act 1861. R v. Konzani⁷, he was HIV positive and was aware of it.

⁵ Particularly the individual right to privacy, the highest attainable standards of health, freedom of discrimination, equality before the law and liberty and security of the person (Article 3,7,12 of the Universal declaration of human rights and article 12 of International covenant on economic, social and cultural right).

⁶ [2004]3ALL ER 593.

⁷ [2005]EWCA Crim 706.

He had unprotected sex with three persons without informing them about his condition. These laid down guidelines for the court. In the case of Dica and further elaborated in Konzani it was noticed consent is said to be immaterial any such act will of transmission will result in charge with the section 18 read per se wounding or causing grievous bodily harm with intend and section 20 read per se inflicting grievous bodily harm as an offense under person act 1861.

The guidelines were transmission of HIV to prove does not only require the knowledge of the said infection but also recklessness in its transmission. It means if a person takes reasonable precaution are unlikely to infect or show demonstrably reckless. There were limited scope to criminalize changing of prosecuting decision or judicial law laid down of how the sex has taken place or of precautions be used or consent taken. These has set out the guidelines for prosecution in UK.

2. CANADA

In Canada there is no specific offence in the criminal code that showcase the transmission of HIV. In Canada police and prosecution have relied on criminal code offense like common nuisance, assault, sexual assault, murder, rape these were used to prosecute the offense of non-disclosure. Lower courts have defined that ‘significant test’ need to be applied on a case to case basis to decide on men to men having sex, consent, use of condoms.

In Canada Cuerrier rule develop the law for criminalization. R v. Currier⁸ laid down that transmission of such a disease constitutes prosecutable crime, who has not disclosed the status to his partner was guilty even though virus was not transferred. The consent to such an act can be said as immaterial will be criminally charged, it cannot be said as a defense to protect the accused against it. The activity can be termed as fraud. The term ‘significant risk’ was not explained clearly in the said case. There has be debate on its interpretation of the term on case to case basis and it leaves the decision to an arbitrary outcome.

⁸ [1998] 2 SCR 371.

The decision was further developed in *R v. D.C*⁹ and *R v. Mabior*¹⁰. In the case of *Mabior*, where the disease was not actually transferred but has sexual assault with many partner. Among the six victims four were quashed because of the defense of using protection. The Crown appealed to higher jurisdiction, it was heard with *R v. D.C.*, the women failed to disclose her status prior to her first act of sexual intercourse with her male partner even she did not transmit the virus to her. It was noticed and quashed of the plaintiff against D.C. and her sons on basis on low viral count. In the appeal of cases and advancement of technology and science Currier test need to be classified. It is said necessary to disclose the status not depending on harm or risk. SCC of Canada finally came up with the judgment that non-disclosure amounts to criminal liability. It was noticed that the accused person had low viral load and had made proper use of protection so it was seen as against the 'significant'. It was explained that it means the possibility of transmitting the virus. The courts has widen the scope of criminalization. Criminalization depends upon the harm caused and not disclosing the fact amounts to fraud and consent of intercourse. The scope is wider of Canada then England or wales. In Wales it depends upon actual transmission and it depends upon the degree of risk.

3. USA

Criminalization of HIV is complex than any other country, it laws are in its state list. All penal code of Colombia have different law for trial. There is criminal liability imposed in non-disclosure or transmission. They don't have specific criminal law to deal with the said virus in many states it dependence is on general laws whereas some has control status to manage the virus and some has specific laws. Major reported cases are because of fault of drug use, sharing used needles and saliva. US military personnel are prosecuted under the federal Uniform Code of Military Justice¹¹.

There is a mandatory provision of disclosure before any sexual contact in Akansas, Michigan, New Jersey whereas California has criminalized HIV positive unprotected sex. The proof is not required is an interpreted factor. Many a times enforcement is overlooked where there is no scientific factor to prove the guilt. Some laws are over

⁹ [2012] 2 SCR 626.

¹⁰ [2012] 2 SCR 584.

¹¹ Uniform Code of Military Justice, 10 USC Chapter 47, and article128.

inclusive which prevent their conduct for criminalization. If a testimony of defendant is given on moral grounds trust has allegedly been betrayed by non-disclosure of the status gets the ground of moral innocent.

4. EUROPEAN COUNTRIES

Grievous bodily harm are being used to test HIV exposure or transmission, it can be said intentionally or negligently. It has been noticed consent from the sexual partner before sex is not a defense.

It was noticed that section 252 of the existing law is not enough to prove the harm or assault caused. It was noticed normally transmission is not itself but by particular mean of mind and it can be said criminal. It has some exceptions such as injecting drug, sex with men or anal sex these act will be said illegal but not transmission of HIV. Major reports were relating to consensual sex. Even a single time can cause HIV infection, the transmission has actually happened is under consideration. The risk are estimated to range between 1 to 10 and 1 to 1600 for unprotected sex and between 1 to 667 or 1 in 1000 for any one act of vaginal sex¹². It was reported that imprisonment was the most common punishment given for the transmission. The punishment could extend to life imprisonment. There is punitive punishment for the act.

Section 155 of the penal code is the only law that prosecutes people transmitting HIV it is said to criminalize the willful or negligent infection or exposure of communicable disease is hazardous to public health.

5. INDIA

There is a very narrow approach of the hazardous disease like HIV in India. It has always been seen for the importance of public health which arose the need for HIV laws in India. Equality before law as guaranteed under article 14¹³ means equal treatment of people the true test of equality. There cannot be any discrimination in enjoyment of a facility. Article 21 guarantees right to life and personal liberty¹⁴ that they should have an adequate mean of livelihood. Golden triangle of constitution is basic motto of

¹² 'Detention or prevention ' AIDS FONDS 2004.

¹³ Article 14 of Constitution of India.

¹⁴ Article 21 of constitution of India.

constitution and no one can infringe or withdraw it. The lawyer collective action should arise and come together to take step and fight against the discrimination and criminalize the prosecutor.

Mr.X v. Hospital Z¹⁵, right to privacy was given more importance than right to health. Mr.X had a blood test where his HIV status was disclosed to his fiancée and led to dissolution of marriage. There was a breakage of doctor-patient relationship which is an important essence under Medical Council Act, 1956. He had to leave his job and shift to another city. He was compensated. The decision can be said to be not a good decision by court of law as public health was not given importance and privacy got a better footing over it and decree was given accordingly. There should have been penal provisions attached to the person who hid his status and this can be said for a reason of specific laws to come into force and punish the accused. This can set to arise the need of legislation to punish the accused as per the gravity of the offence.

In 2013 the India Department of AIDS Control came up with the Anti-Retroviral Therapy program guidelines for all pregnant and lactating women to prevent the transmission of the disease to their children.¹⁶

CONCLUSION

Public welfare is the main motive of any country. HIV criminalization is done for the safeguard of every person human right. It is done so that the fear of penal punishment relating to the offense will make them not to do an act voluntarily or non-voluntarily. There is diversity in the penal laws of different countries relating to the disease which needs effective legislations to safeguard public interest at large. This notices a need of international standards to be set to criminalize the accused. It should be specific laws set for the same. If a country cannot protect its people it shows the bad policies of the country. People regardless of their status has right to life with dignity, not being discriminated, protect against the wrongdoer. If laws are

¹⁵ AIR 2003 SC 664, (2003) 1 SCC 500.

¹⁶ National AIDS Control Organization, updated Guidelines: Prevention of parent to children transmission of HIV using Multi Drug Anti- Retroviral Regimen in India, Government of India, Ministry of Health and Welfare Department, New Delhi, December 2013.

implemented HIV-positive person will fear the prosecution and will not have grudge over the society of being discriminated will disclose, have right to medical support. These legal strategies will provide assistance to all its commuters. Criminal law may be against the interest of a particular group but will work for the interest of the society at large. This would timely follow up complains by the people and speedy remedy can be provided. There is be set up different tribunals to deal with the matters. Criminalization of conduct of a venerable group will give a different scope to the society to look towards AIDS. Laws will impose safer intimation between people and reduce the vulnerable harms to the society. There has been international guidelines set by UNAIDS and UN human right commission, it should not be only referred but put forwards towards its implementation. Countries like Singapore and Swaziland has set the strong criminalization law relating to HIV in 2008 like not disclosure, non-protective, past history. These countries shows the need of requirement of HIV criminalization laws being implemented in India having such a large economy it needs specific laws for the same. It can be said to be not that harsh laws as capital punishment as a high illiteracy rate in India but penal provisions to reduce the number and safeguard public health.

