How to Fight HIV Criminalization in Courts of Law and Public Opinion

August 2, 2012 By Laura Whitehorn

As the XIX International AIDS Conference (AIDS 2012) in Washington, DC, presented hopes of achieving an AIDS-free generation, some advocates focused attention on a major obstacle to this goal: the criminalization of people living with or at high risk for HIV. At a symposia session on July 23, speakers from Jamaica, South Africa, the United States and Egypt mapped out ways to oppose such laws, using litigation, diplomacy and community mobilization. Discriminatory laws, they said, marginalize, isolate and punish the people most at risk for HIV or already living with the virus, preventing programs and strategies from effectively stemming the epidemic.

Challenging Jamaican Anti-Sodomy Statutes with International Law

“It is impossible to know your epidemic and respond when the people at risk are classified as criminals,” said Maurice Tomlinson, of AIDS-Free World, who left his native Jamaica for Canada to escape anti-sodomy laws. He explained that he labeled his talk “Bugger Off!” because Jamaica outlaws men having sex with men as “the abominable crime of buggery,” with sentences up to 10 years in prison and hard labor for anal intercourse, even between consenting adults in private.

The Jamaican statute also categorizes any intimacy among men as indecent behavior. As a result, Tomlinson explained, all gay men become a class of criminals, and HIV prevention or treatment interventions for them become ‘aiding and abetting criminals’.

The law—inherited from the era of British colonialism, Tomlinson pointed out—also promotes popular homophobic attitudes. “AIDS-Free World challenged the law,” he said, “because we see a correlation between homophobia—measured at 82.5 percent of Jamaicans [who think homosexuality is ‘morally wrong’]—and the level of HIV among men who have sex with men, currently at 32.9 percent, meaning one in three MSM in Jamaica have HIV.”

Homophobic Jamaican music—some 250 songs call for the murder or maiming of gay men—stems from the anti-sodomy law. When asked about such lyrics, Tomlinson said, musicians typically point to the fact that homosexuality is a crime.

Advocates decided to tackle the law, but found that the new Jamaican Charter of Fundamental Rights and Freedoms bars domestic challenges to the anti-sodomy statutes. So they turned to the international arena, filing litigation with the Inter-American Commission on Human Rights (IACHR).

Although the IACHR can issue only a recommendation, not a binding decision, Tomlinson explained, the filing provides a focus for advocacy, and a recommendation would help advocates lobby politicians to repeal the law.

Crucial to any anti-criminalization strategy, he said, is combining a public groundswell for repeal of such laws with litigation. Tomlinson described tactics including public service announcements, rallies, articles and letters in the press, and a campaign of diplomacy, urging Jamaican politicians to repeal the anti-sodomy law. The new Prime Minister says she will review the law.

“I think we will succeed at IACHR,” Tomlinson concluded, “And after decriminalization must come a fight to pass anti-discrimination statutes—and, I should add, ‘with strong enforcement.’”

Criminalization Blocks Women’s Rights in Southern Africa

Criminal laws target conduct specific to women, such as sex work, said Priti Patel, deputy director of the Southern Africa Litigation Center in Johannesburg. “At the same time,” she added, “criminal laws do not protect women: In most southern African countries, marital rape is not criminalized.” Practices that could protect women’s sexual and reproductive health, such as abortion, are illegal in most of those countries as well.

As a result, Patel explained, women not only have difficulty negotiating sexual and reproductive health but cannot even discuss these issues openly. She described a case her group recently litigated (and which received a favorable ruling on July 30): the Namibian government’s sterilization of HIV-positive women giving birth at pubic hospitals.

In 2009, she recounted, the Namibian chapter of the International Community of Women Living with HIV held a series of workshops for young women. At one session, a participant mentioned in passing that she had been sterilized because she is HIV positive.

When workshop leaders asked whether anyone else had this experience, Patel related, “Hands went up. Their cases were from 2001 and 2002, so this meant that for seven years, no one—no civil society organization—had picked up that this was happening.” That reflected self-stigmatization by the women, who didn’t know they had rights: “They didn’t think this was something to report,” Patel said.

Using the case as an example, Patel outlined several critical components to challenging criminalization.

First, she said, document the rights violations. At the workshop in Namibia, lawyers immediately took affidavits. The Minister of Health agreed to review them, but concluded that the women had all consented to the sterilization.

“Let me tell you what consent meant,” Patel said. “As the women were going into labor, they were given a sheaf of documents to sign. Some were told they or their babies needed a life-saving

procedure, and they had to sign the papers first."

This brought Patel to another lesson: Hire a strong, well-respected lawyer to litigate ("We were fortunate to have funding for this," Patel added). "In court, marginalized women are saying this happened, and doctors are testifying, 'no it did not'. [A lawyer's] strong voice saying, 'I believe them' gave legitimacy to the women's claims."

The other components, Patel said, are a local grassroots organization to mobilize support and extensive backing from international rights groups. "Local and international support, grassroots advocacy and the actual litigation must be married."

[*On July 30, the Namibia High Court ruled that the women were telling the truth and that the government had sterilized them without their informed consent. The women will receive monetary damages to be determined at a later date.*]

Sex Workers Challenge Louisiana's Crime Against Nature Laws

"When you put the right people together, with the community of women, trans people and LBGT people at the head," said Deon Haywood, director of Women with a Vision in New Orleans, "this leads to change."

In New Orleans, Haywood told conference delegates, that process took the form of fighting the use of crime against nature (CAN) statutes against women sex workers. In 1989, the laws, which outlaw "unnatural carnal copulation…with another of the same sex or opposite sex or with an animal," added "solicitation…with the intent to engage in any unnatural carnal copulation for compensation."

The police, Haywood explained, can decide whether to charge a woman with simple solicitation or CAN, which forces people to register as sex offenders. In racially polarized New Orleans, the result was that CAN targeted poor women, primarily African Americans, and also made them a permanent criminal class: 79 percent of women who must register as sex offenders in New Orleans are African American. "Their licenses have SEX OFFENDER in big letters," Haywood said. "Imagine having to show that to register your children for school."

Although Haywood's organization is small, she said, they felt they had to challenge the laws. "These laws disconnected our community members from what remained of a social safety net, making it impossible to them to develop their goals, dreams and desires." For women living with HIV, the consequences were dire.

"Our strategy was simple," Haywood said. "We told the stories of the women who were affected. The stories showed politicians what the laws were keeping women from doing—the degrees and jobs they had [that they could no longer hold due to the sex offender registry]."

The group persuaded a state legislator to introduce a bill equalizing penalties for solicitation and

CAN. It passed and was signed into law.

Having based the campaign on community engagement, Haywood said, the greatest victory was “seeing the women’s lives blossom.” But the bill was not retroactive, she added, and more than 500 women remain on the registry, “so now we are filing for the rest.”

“Human rights is a foreign concept in this country,” she concluded, so educating communities about their rights—and the need to fight for them—is critical.

Criminalization Blocks HIV Services in the Middle East and North Africa

In the Middle East and North Africa (MENA), said Wessam El Beih, MD, UNAIDS Country Officer in Egypt, the picture is less bright. “At this conference we’ve been hearing that the epidemic is on the decline, but that is not true in MENA,” where new cases and HIV/AIDS deaths are both on the rise. “We don’t have high prevalence,” El Beih added, “but the trend is scary.” Vulnerable populations—MSM, sex workers, IV-drug users and prisoners—are most affected.

Yet discriminatory laws in the region prevent all HIV services and treatment from reaching those groups, El Beih said. She pointed to laws criminalizing men who have sex with men (MSM), including five countries—Sudan, Saudi Arabia, Yemen, Iraq and Iran—where MSM face execution. Travel and work restrictions also limit HIV-positive people. As a result, El Beih said, “Populations go underground and can’t get the services they need.” And outreach workers who provide services and resources to vulnerable populations often find themselves targeted.

While the Arab Spring encouraged progress, El Beih said, there is a conservative backlash. She urged civil society and international organizations to educate governments and leaders about the cost of criminalizing the groups most at risk for HIV and in need of medical and social services.

“I’m not promising we will find a religious leader who will speak up about gay rights,” she said, “but at least when they understand the relevance of those programs to HIV control, I think we will get more balanced speech. I keep hopeful and I do think we will actually end AIDS.”

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