

Reckless trials?

The criminalization of the sexual transmission of HIV

Daniel Monk

In 1998 a report by the Home Office concluded that it would be contrary to the public interest to criminalize the reckless transmission of HIV. Moreover – and in keeping with received academic opinion – it also suggested that under the existing law such cases could *not* be prosecuted.¹ HIV organizations greeted the report with general approval and a sigh of relief: it seemed that sober, cool-headed, pragmatic public health arguments that focused on prevention rather than punishment had won the day. So the conviction in 2003 of Mohammed Dica under section 20 of the Offences Against the Persons Act 1861 for infecting two women with HIV – in law, ‘recklessly inflicting GBH’ – and the subsequent conviction of eleven other people in similar circumstances consequently came as a total surprise. And, predictably, the intervention of the criminal law in this area resulted in widespread confusion and turmoil across the HIV sector.

For clinicians the cases raised fears about potential third-party liability where they knew clients were engaging in risky practices. They also challenged the degree of confidentiality that could be offered to clients – always a critical factor in promoting sexual health; for advice to clients can now be used as evidence in court of a defendant’s knowledge of sexual risks. More generally for health campaigners the cases challenged a long-established emphasis on harm reduction, as opposed to the elimination of risk. Safer Sex campaigns that promoted taking responsibility for oneself now appeared at odds with the legal expectation that one should be able to rely on a partner’s disclosure of any infection. Moreover there are concerns that fear of prosecution and the increased stigma attached to HIV created by the trials might have a negative impact on attempts to encourage testing and accessing the new treatments that substantially reduce the likelihood of transmission.

These concerns have received little, if any, publicity. Rather, the media have reported the trials either unquestioningly or with loud approval. For the tabloids the cases provided a toxic combination of death, race and sex; resulting in headlines such as ‘AIDS Assassin’ (*Sun*, 15 October 2003) and ‘Asylum Seeker Sentenced Lovers to Death’ (*Daily Mail*, 15 October 2003). No surprise there. But the BBC has also repeatedly reported the cases inaccurately, blurring the crucial distinction between intentional and reckless transmission. For the record: all of the prosecutions to date have been for reckless transmission and all in the context of consensual sexual activity.

Since the initial shock of the first cases much work has been done by campaigners and activists to attempt to clarify the practical implications; and lengthy consultations with the Crown Prosecution Service, which claimed to have no knowledge of the Home Office’s 1998 report, have resulted in a greater understanding of HIV.² But the prosecutions continue.

While it is difficult to establish with any certainty the precise impact of the trials, identifying the conditions of possibility that enabled the trials to take place, the convictions, and the silencing of attempts to challenge them remains a critical task. For the trials and the responses to them provide an insight into issues relating not just to HIV and the role of the criminal law but also to broader questions of governance and (sexual) citizenship and contemporary understandings of deviancy and intimacy.

The flawed self-understanding of law

Alan Norrie, a leading criminal law critical theorist, wisely reminds us that, 'In thinking about law one should not take law's own word on how it developed'.³ This is particularly pertinent in this context, for if one accepts the legal arguments that enabled the criminalization of the sexual transmission of HIV, the development appears perfectly logical. The key cases here are the decisions of the Court of Appeal in *R v. Dica* (2004) and *R v. Konzani* (2005). The judges – in their usual creatively logical fashion – ensured that the facts of the cases fitted neatly within the offence under the 1861 Act. Infection with HIV is a form of 'grievous bodily harm' and the defendants were deemed to have 'inflicted' it on the victims. And while the victims had consented to the sex, they had not consented to the infection, nor, and this was the critical question, to the risk of infection. All perfectly logical. But in reaching this conclusion the courts had to creatively distinguish these cases from other earlier precedents.⁴

One problem facing the courts was a Victorian case of *R v. Clarence* (1889), which held that a husband could not be prosecuted for infecting his wife with a sexually transmitted disease. The courts dealt with this by arguing that it was out of date. Another problem they confronted was the House of Lords decision of *R v. Brown* (1993), which held that one could not consent to sadomasochistic activity (the infamous *Spanner* trial). To enable the defence of consent to be raised the judge in the *Dica* case gave the examples of Catholic couples and childless couples where one partner was HIV positive. The distinction between these scenarios is logical but it leads to a revealing conclusion: you are not allowed to consent to *safer* sex (if it involves sadomasochistic practices) but you *can* consent to *unsafe* sex if the aim is desiring a child or wishing to adhere to religious rules. That these rather than everyday sexual encounters are the examples referred to reveals a judicial distaste for and a reluctance to acknowledge 'sexual gratification' as a legitimate motive for (sexual) risk-taking. Consent to the risk of transmission is possible in other circumstances too, but the decision in *Konzani* suggests that evidence of disclosure of infection will almost always be required. While justified by the notion of informed choice, what remains impossible for law to comprehend is not only the realities of the stigma that makes disclosure difficult but also that sex is by its nature a risk-taking activity for a variety of physical and emotional reasons, and that consequently consent to sex is always implicitly a consent to a risk-taking activity.

Another way of revealing how the 'neutral' logic of law serves to mask judicial views of acceptable/unacceptable behaviour is by applying the law to very different circumstances. For example, it would, according to the logic of the cases, be possible to prosecute someone for visiting an old age home with the symptoms of a cold if one of the inhabitants subsequently develops flu. We might consider such an action thoughtless, but few would suggest we resort to the criminal law to prevent or punish it. Criminality and immorality are familiar bedfellows but the coupling can never be explained by legal principles.

The changing landscape of HIV

Catherine Dodds has argued that 'as the epidemic moves on so do the ways we collectively and individually interact with it'; and she identifies four significant changes that help explain the resort to criminal law.⁵ First is the fact that those infected with HIV

are now living much longer as a result of the success of new treatments. Law is a long-drawn-out process and, very simply, the fact that defendants are alive and fit makes the trials more feasible. It might appear ironic that the heavy hand of the criminal law has been turned to at the time when HIV has become a far less serious condition, at least one that it is no longer accurate to describe as fatal. And it is important to remember that no new law has been passed; if one accepts the judgments in *Dica* and *Konzani*, then there is no reason, in law, why the criminal law has only been used recently. But for those conservative moralists who in the early days spoke of AIDS as ‘God’s Punishment’, the criminal law can be seen to be filling a gap created by medical advances. Moreover, while in theory law applies equally to all, in practice it is able to differentiate far more selectively in identifying those perceived to be ‘innocent’ or ‘culpable’ sufferers.

Here Dodds’s second change in the HIV landscape is significant: the number of women infected is unprecedented and nearly all the cases have concerned male to female transmissions. It is not too crude to suggest that gay victims were simply not perceived as ‘victims of a criminal assault’ but as victims of their own lifestyle. (To date there has only been one male-to-male infection conviction). The language used in the cases makes clear that the judges see themselves as protecting innocent women; dispelling the case of *Clarence* fitted neatly with a judicial desire to be perceived as progressive and sensitive to the vulnerable position of women.

The third change is the increasing diagnosis among black Africans – who now make up the largest group infected with HIV (although in relation to new infections gay men still represent the largest group). The majority of the defendants have been black men, and the well-documented and deep-seated cultural anxieties about black male sexuality were clearly evident in the tabloids’ coverage of the trials.

The fourth change is what Dodds describes as ‘The Harm Vacuum’. This is a recognition of the fact that harm reduction methods (pragmatic, stigma-free) arguably fail to provide a space to acknowledge the aggrieved feelings that individuals may experience on discovering that they have been infected. Law to a certain extent serves to fill this vacuum, but explaining the law in this way raises broader criminological and comparative questions. Why, for example, has the criminalization route been rejected in the Netherlands but applied in an even harsher way in Finland (where individuals with HIV are convicted for exposing somebody to the possibility of harm even where no infection takes place)?⁶

Comparisons may also be made with other demonized (and frequently criminalized) constructions: asylum-seekers, recipients of ASBOs, paedophiles, and so on. From this perspective the trials can be seen to reflect what the criminologist Andrew Rutherford describes as the re-emergence of the ‘eliminative ideal’, which ‘strives to solve present and emerging problems by getting rid of troublesome and disagreeable people with methods that are lawful and widely supported’, and ‘sits all too comfortably with contemporary pressures for social exclusion, with notions of a culture of containment’.⁷ The ideal provides a seductive but dangerously false sense of collective certainty and security. Rutherford argues that challenges to this trend need to address both the *instrumental* and *expressive* dimensions of the eliminative ideal. In this context while the anti-criminalization pragmatic public health arguments address the former, one of the reasons for their failure is that they have not addressed the latter.

The expressive dimension owes much to Durkheim’s classic rejection of utilitarian explanations of punishment; that it is never ‘a rational social defence against harm done or threatened’ but ‘a passionate reaction, a matter of feelings’. For the HIV trials cohere with more complex *continually* forming and reforming understandings of a community and of questions of intimacy within communities. Criminal trials rely not only on the existence of laws but also on individuals internalizing and expressing the feeling of having been the victim of a crime.

New Labour, new trials?

Bullen, Kenway and Hey, echoing the concerns of many, observed that, ‘the vocabulary of New Labour (like that of the old radical Right) is emblematic of the search for a rhetoric of moral civility that will waylay and reinvent the wayward.’⁸ Placing the HIV trials in this political context, it is telling that they occurred at the same time that the Civil Partnership Act 2004 was working its way through Parliament. While it is not suggested that there was a direct connection between these judicial and legislative law-making events, there are significant elements of coherence. Whatever one thinks of the Act it unquestioningly represents a critical moment in the history of the regulation of sexuality. In progressive narratives it represents (almost) the end point in a process that began with the (partial) decriminalization of homosexual acts. But, as many feminist and queer theorists and activists have commented, the inherent liberalism of the Act masks a more complex story of governance. The legal theorist Carl Stychin, for example, commenting on the government’s own stated case for the Act, notes that:

there is a message within the Act ... that the encouragement of the rights and responsibilities of civil partnership through law will provide a disincentive for ‘irresponsible’ behaviour. In the context of New Labour politics, irresponsibility seems to include promiscuous sex, relationship breakdown at will, and the selfishness of living alone (or perhaps even living with friends and acquaintances).⁹

There is here, at least, a logic that links the construction of a new sexual deviant with the decriminalization and inclusion within civic society of an earlier one.

This trend has broader significance. Helen Reece describes similarly ‘progressive’ moves in regulating personal life, in the context of divorce law reform, as a form of (post-)liberalism. In contrast to both conservative morality and laissez-faire liberalism it represents in some ways a more invasive form of governance by demanding that individuals internalize a demanding model of ‘responsibility’. Within this model ‘psychological norms have replaced social norms, and therapeutic correctness has become the new standard of good behaviour.’¹⁰ So, put simply, instead of divorce bad/marriage good we have responsible divorce good/irresponsible divorce bad. And instead of straight good/gay bad we have responsible sex good/irresponsible sex bad (the gender of the sexual partner no longer matters). Where people fail to internalize the responsibility, the space has been created for new forms of penalty. Separated mothers, straight or lesbian, failing to support contact between their children and their ex-partners expose themselves to new forms of court order. And those with HIV who fail to practise safer sex risk criminal actions.

In practice few mothers objecting to contact are imprisoned and very few people who practise unsafe sex are prosecuted. But the fact that fathers who, frequently through their own actions, and people infected with HIV, again frequently through their own actions, now have the possibility of turning to law sends out the message that these intimate complex familial/sexual disputes are *politically* legitimate sites of grievance which are deserving of the authority and protection of the rule of the criminal law.

The violence of law

There is no simple explanation for the trials. One or two policeman were outraged by the behaviour of a few individuals and decided something should be done and a local Crown Prosecution Service branch, willing to try its luck in the courts, found sympathetic judges. But ‘times maketh the man’ and their actions could only be possible through a complex concatenation of changes in the nature of the epidemic of HIV in the UK; the re-emergence of the eliminative ideal and increased penalty in criminal justice; and the development of a new dominant morality of responsible intimacy. The cases do not fit neatly, if at all, in a familiar ‘miscarriage of justice’ paradigm. But it is precisely because

of this that critical thinking about the trials is important. For it requires us to go beyond the criminal law's seductively 'common-sense' logic of a simple perpetrator-victim causation model and in doing so confront if not the violence at least the recklessness of law.

Notes

1. Home Office Consultation Paper, *Violence: Reforming the Offences Against the Person Act 1861*, Home Office, London, 1998.
2. For up-to-date information, see: Terence Higgins Trust, www.tht.org.uk/informationresources/prosecutions/; and National AIDS Trust, www.nat.org.uk/Our-thinking/Law-stigma-and-discrimination/Criminal-prosecutions.aspx.
3. *Law and the Beautiful Soul*, Routledge, Abingdon, 2005, p. 8.
4. For an in-depth analysis of the cases, see Matthew Weait, *Intimacy and Responsibility: The Criminalisation of HIV Transmission*, Routledge, Abingdon, 2007.
5. 'Crime Punishment and HIV', paper presented at the HIV and the Law: Theory, Policy and Practice seminar at Keele University, 10 December 2005.
6. See UNAIDS, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, UNAIDS, Geneva, 2002.
7. A. Rutherford, 'Criminal Policy and the Eliminative Ideal', *Social Policy and Administration*, vol. 31, no. 5, 1997, pp. 116-35.
8. E. Bullen, J. Kenway and V. Hey, 'New Labour, Social Exclusion and Educational Risk Management: The Case of the "Gymslip" Mums', *British Educational Research Journal*, vol. 26, no. 4, 2001, p. 445.
9. 'Family Friendly? Rights, Responsibilities and Relationship Recognition', in A. Diduck and K. O'Donovan, *Feminist Perspectives on Family Law*, Routledge, Abingdon, 2006.
10. H. Reece, *Divorcing Responsibly*, Hart, Oxford, 2003, p. 217.

CENTRE FOR RESEARCH IN MODERN EUROPEAN PHILOSOPHY

THE UK'S LEADING RESEARCH CENTRE FOR MODERN EUROPEAN PHILOSOPHY

• MA Modern European Philosophy

Study the great texts of 19th- and 20th-century European philosophy: Kant's *Critique of Pure Reason*, Hegel's *Phenomenology of Spirit*, Nietzsche's *Will to Power*, Heidegger's *Being and Time*, Sartre's *Being and Nothingness*.

• MA Aesthetics and Art Theory

Combine study of philosophical aesthetics in the European tradition with an orientation towards contemporary art theory: Kant and the Aesthetic Tradition, Post-Kantian Aesthetics, Modernism and Contemporary Art Theory, Commodification and Subjectivation.

• MA Philosophy and Contemporary Critical Theory

Explore the two main traditions of Critical Theory, the Frankfurt School and French anti-humanism, along with more recent work by Agamben, Badiou, Rancière, Deleuze and Guattari, and Negri.

BURSARIES WORTH £1200 ARE AVAILABLE FOR ALL UK/EU APPLICANTS WHO ENROL IN ONE OF THESE MA PROGRAMMES IN SEPTEMBER 2009

Philosophy at Middlesex is based at its Trent Park campus in north London, and welcomes around 30 new MA students each year. Teaching staff include: Éric Alliez, Peter Hallward, Christian Kerslake, Stewart Martin, Peter Osborne and Stella Sandford.

For more information go to
www.mdx.ac.uk/www/crmep
+44 (0) 20 8411 5555
enquiries@mdx.ac.uk

