

Legal Responses to HIV Transmission

Mahmoud Abbassi

Ladan Abbassian

S.R. Ehsan Pour

Abstract

This article, in the first place, studies the features of AIDS disease, the factors of infection and the ways of its transmission, and then represents some statistical figures of AIDS in Iran and the world. In this article, the authors regard the criminal liability for transmission of HIV and the arguments for and against the criminalization of HIV transmission will be discussed. In Iranian Penal Code, there are some suitable criminal subjects like murder, attempted murder and transmission of STD (Sexual Transmissible Disease) to apply to related behaviors. Although abortion of HIV positive fetus is forbidden in both Islamic rules and penal code, in some specific conditions it will be permissible. Finally it will point out that all suffered injuries should be compensated for.

Key words: HIV transmission; Suicide; treatment; Verdict; Justification; legitimacy.

I. Medical facts about HIV/AIDS

A) Definition of HIV/AIDS

Human immunodeficiency virus (HIV) is a lent virus (a member of the retrovirus family) that can lead to acquired immunodeficiency syndrome (AIDS); a condition in humans in

which the immune system begins to fail, leading to life threatening opportunistic infections¹ (Wikipedia, the free encyclopedia)

B) The ways of transmission

Infection with HIV occurs through the transfer of blood, semen, vaginal fluid, or breast milk. Within these bodily fluids, HIV is present as both free virus particles and virus within infected immune cells. The four major ways of transmission are unprotected sexual intercourse; contaminated needles; breast milk, and transmission from an infected mother to her baby at birth (Vertical transmission).

C) Statistics

UNAIDS and the WHO estimate that AIDS has killed more than 25 million people since it was first recognized in 1981, making it one of the most destructive pandemics in recorded history. Despite recent improved access to antiretroviral treatment and care in many regions of the world, the AIDS pandemic claimed an estimated 2.8 million lives in 2005 of which more than half a million were children (Joint United Nations Programme on HIV/AIDS) (2006)..² In 2007, from 30.6 to 36.1 million people were believed to live with HIV, and it killed an estimated 2.1 million people that year, including 330 thousand children (UNAIDS, WHO 2007).³

In Iran the first instance of HIV infection was recognized in 1987. According to the reports, it was found in the body of a six hemophilic child who used imported blood products after that, the number of HIV-positive persons is sharply increasing.

Nowadays, statistics shows that 18320 people are infected with HIV (i.e 93/7% men and 6/3% women).

II. Arguments for and against the criminalization of HIV transmission

One of the most important issues before lawyers is criminalization of HIV transmission when the person knows s/he is HIV- positive. Consideration must be given to both pros and cons in favor of application of criminal law:

A) Arguments for are as follows:

- 1) The most common argument for criminalization is that it will deter people from transmitting HIV. Some argue that using criminal sanctions prevents people from harming others (1997 - Elliott R)⁴
- 2) Criminalizing and then convicting HIV- positive offenders to a fine would be a great financial source for preventing spread of HIV.⁵
- 3) A person who knowingly transmits HIV to the others is blame worthy and should be punished.

B) Arguments against are follows:

- 1) Criminalization in this area may breach the right to privacy. When two persons knowingly engage in sexual activity, application of criminal law would be against their fundamental rights (Justice & KIRBY, 1995).⁶
- 2) Controlling HIV transmission falls in the area of public health law not criminal law. Applying criminal sanction should be the last resort in this respect (Elliott R, 1997, P.58).⁷

3) Criminalization of HIV transmission is a great obstacle to HIV- tests by people who believe they may be HIV-positive (Holland, 1994).⁸

4) Criminalization of HIV transmission, arresting and then convicting related offenders need huge financial resources. Instead, we can educate people and use preventive measures (Ehsanpour, 2008, PP.77-86).⁹

5) The most important argument against criminalization is the burden of proof. Proving that one person transmitted HIV to an other is undoubtedly impossible (Ehsanpour, 2007, P.17).¹⁰

III. Using the best criminal titles in Islamic penal code

Iranian penal Code does not currently include any provisions to criminalize transmitting HIV or exposing another person to infection. However, criminal prosecution would be done under existing traditional offences as follows follows:

A) Transmission of STD (sexual transmissible)

In 1950, parliament enacted an article and criminalized transmitting venereal disease to others. Although the act did not explicitly pointed to HIV, but a relevant article could implicitly be applied in prosecuting HIV transmitters Clause 9 holds “Any person knowing s/he has venereal disease, or should have known s/he has, and transmits the disease to the others, shall be convicted up to one year imprisonment.” To apply this clause, and to begin prosecution, there should be at least one private complainant.

B) Killing

Article 206 of Islamic Penal Code is dedicated to murder and describes this crime in three clauses. The *actus reus* of this crime includes any criminal behaviors such as unprotected sexual intercourse, HIV infected needle-sharing, donation of blood and blood products etc, which transmit HIV. If a person intentionally commits these kinds of criminal behaviors and intends to kill another person through infection, he will be punished according to clause 1 of article 206 of Islamic Penal Code. However, if he only knows that he is infected with HIV and has no intention to kill but knowingly transmits infection to another person, he will be punished according to clause B of article 206. On the other hand, if a person who is infected with HIV but does not know about his infection at all, does any behavior that actually transmits HIV to others such as his wife through sexual behavior, we can punish him according to article 295 of Islamic Penal Code. (This article describes manslaughter). Nevertheless if a person through his negligent behavior like not testing donated blood samples, transmits or causes to transmit HIV to the others, he will be punished according to clause 3 of article 295 (This article describes killing a man negligently).

C) Attempted murder

Some lawyers believe that infection with HIV is not a direct and quick way to killing. When a person intentionally transmits HIV to the others, it almost takes a long time to affect victim's immunity system and to cause his/her death. The period between infection with HIV and emerging the first symptoms of AIDS is called "window". During this period, the victim is totally in good condition and nobody even he himself believes that he is

infected. After some times, HIV starts affecting immunity cells and begins making them weak. Human body in this condition cannot resist against different kinds of diseases and finally it will cause the victim's death. Now the question is whether we can prosecute the offender (who intentionally transmitted HIV) on charge of attempted murder before victim's death. If we can, what will be the answer after his death? In other words, if we first (before victim's death) prosecute and convict the offender of attempted murder and then (after death) convict him of murder, from a reasonable viewpoint, punish one criminal behavior with two different punishments. However, if we can not, it causes a criminal behavior not to be prosecuted. We believe that punishing a criminal behavior with two opposite punishments will be out of justice.

D) Abortion

The question is that if a mother who is infected with HIV becomes pregnant and special tests show that her fetus is infected with HIV, may the law allow her to abort fetus? Answering to this question is to some extent difficult. Islamic jurists have different views in this respect. Some of them believe that the mother can abort her fetus. They argue when HIV-positive child is born; s/he may not continue living and after some times s/he will die. Hence, they let the mother abort the already dead child. On the other hand, some jurists have other viewpoints. They believe when a child is born, he is the same as other people and nobody can let his parents convict him of death. Can we allow a physician to kill a man who sustained grievous harms saying he is actually going to die so we kill him now? Being infected with HIV is not a good reason to kill a human

being or abort a fetus. Every person even an unborn fetus has the right to life and nobody can deprive him. Some jurists, nevertheless, believe that a distinction should be drawn between two different conditions. It depends on whether soul (which is a matter of God) has not yet entered into the body of fetus or it has. Abortion of a fetus before the entrance of soul is not forbidden in Islam but abortion after is supposed to be as a sin and against the command of Allah.

Islamic penal Code has no article to respond this matter. Hence, while the law is silent in this respect, we should refer to great Islamic jurist's views. The authors asked leading jurists, about the abortion of HIV-positive fetus. The answers are as follows:

1) Ayatollah Makarem Shirazi confirmed that if a fetus is supposed as a defected creature and has severe mental illness, so the abortion is permissible provided that the soul doesn't enter in to it. But this is not true about HIV-Positive fetus except it has a great danger for society.

2) Ayatollahs Sane'i and Khamenei also believe that abortion is permissible only when the soul has not entered into the fetus and it is harmful for the mother to continue her pregnancy.

3) Ayatollahs Fazel Lankarani, Zanjani, and Musavi Ardebili believe that abortion of a fetus, although infected with HIV, is not permissible at all.¹¹

IV. Civil liability for Transmission of HIV

Sexual intercourse, blood transfusion and sharing needles to inject are behaviors which cause civil responsibility. In other words, we can consider illness as harm and sharing needles to

inject or sexual intercourse as harmful acts. If there is a casual relation between these acts and their results, a person can claim for civil liability. Article 1 of Civil Responsibility Act 1969 holds:” every person who intentionally or negligently inflicts any harm on other's safety, life, property, liberty, dignity and commercial reputation shall be liable for compensation”.

V. Responsibility of the physician or the nurse in transfusion of contaminated blood

This chapter is divided in to two parts. In part one; we discuss a person’s responsibility (often a physician, a nurse or other medical participants) who transfuse contaminated blood to the others. Part two is dedicated to the ways of compensation victims.

A) Physician’s Responsibility

Nowadays, contractual agreements about medical matters are often made between individuals and the hospitals. A physician’s characteristics are is always important, but we should consider his responsibility according to general rules. However, the victim can also claim based on his contractual agreement. When there is a contractual agreement, the obligation of the physician is confined to his attempt to treat. There are few instances that he guarantee treatment but in jurisprudence the majority of jurists believe that a physician is liable for his prescriptions. On the other hand, some jurists point out that he shall not be liable provided that the patient has already consented to treatment

So based on the majority of jurists’ viewpoints, if a patient needs blood transfusion and the physician transfuses contaminated blood in to his/her body, physician will be liable. Article 319 of criminal law affirms this attitude. This article has

one exception: When a patient is in a bad condition and needs blood or otherwise will die and the physician transfuses the blood, he will not be liable. Because he offered his charity to patient and due to attribution to charity (Ihsan) rule, his acts are supposed to be permissible. Furthermore a physician not only has the duty to do his best to treat the patient but also has a duty to prolong his life. If the physician does not know that the blood is contaminated and transfuses it to prolong his life, he will not be liable.

B). Nurse's responsibility

Transfusion of blood is often done by a nurse and based on physician prescription. So the nurse is principal here. At first glance, the nurse who has transfused contaminated blood, may be supposed to be liable but if we ponder on it, we will find out that s/he is only a mediator and has no intention to do anything without physician's prescription. In other words, s/he is only performing his/her superior's orders. Jurisprudence has no special rule in this respect and jurists have only discussed the physician's responsibility. If we expand physician's responsibility to the nurse we should consider his duty as an obligation to result and make him liable as physician. Some authors have recently asked this question from some great jurists: Shall the physician's responsibility mentioned in jurisprudence be expanded to the nurse?

The great jurists like, Ayatolla Khamenei, Makarem Shirazi, Safi, Sistani, ruhani, Musavi Ardabili and Sane'i confirmed to expand the physician's responsibility to the nurse. Another question was asked about a person who transfuses the

contaminated blood. The answer was: A person who transfuses HIV contaminated blood to another is liable, so he should take much care to prevent such act negligently. Another answer says:” a person who transfuses the blood. Should be first sure about safety of blood, otherwise he will be liable. Laboratories and hospitals have a great responsibility for safety of bloods and they should always save safe blood to be used in emergency situations but, we believe this decision is not sound. Because the nurse has a duty to perform physician’s orders, and has no authority on him. If the nurse were aware of contamination of blood with HIV, we could make him liable. So, here, responsibility transfers from nurse to physician.

C) Compensation

If a person inflicts any injury on the others, he will be liable and should pay blood money to the victim. When HIV enters into a person’s body, it takes a long time to destroy his immunity system and finally causes his death. This period is called “window”.

The victim can claim, for compensation before his/her death. As AIDS develops in the victim's body, he can make a new claim. And if he finally dies, his relatives can claim for execution (capital punishment) of intentional transmitter of HIV, provided that they re-pay all paid blood money.

Footnotes

- 1-Wikipedia, the free encyclopedia;
<http://en.wikipedia.org/wiki/HIV#Epidemiology>
- 2-Joint United Nations Programme on HIV/AIDS (2006). [Overview of the global AIDS epidemic \(PDF format\)](#). 2006 Report on the global AIDS epidemic.
- 3-UNAIDS, WHO (December 2007). [2007 AIDS epidemic update \(PDF\)](#). Retrieved on 12-3-2008
http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf.
- 4- Elliott R, Criminal Law, Public Health and HIV Transmission.p33, Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997
- 5- Ibid
- 6- Hon Justice Michael Kirby. HIV and Law — A Paradoxical Relationship of Mutual Interest. Paper presented at IUVDT World STD/AIDS Congress, Singapore, 22 March 1995
- 7- Elliott R, Criminal Law and HIV/AIDS: Final Report .pp 58; Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society
- 8- Holland W (1994) HIV/AIDS and the Criminal Law. *Criminal Law Quarterly*; 36(3): 279 at 316.
- 9- Ehsanpur, SR. (2008). AIDS&Criminal Liability “ *Medical law Quarterly*”; NO 5; PP 77-86 Summer 1387
- 10- Ehsanpur, SR; Criminal Liability for Transmission of HIV; p 17; an article to get M.A degree. Imam Sadig University. autumn 1386

References

- Wikipedia, the free encyclopedia;
<http://en.wikipedia.org/wiki/HIV#Epidemiology>
- Joint United Nations Programme on HIV/AIDS (2006). "Overview of the global AIDS epidemic" (PDF format). 2006 Report on the global AIDS epidemic.
- UNAIDS, WHO (December 2007). "2007 AIDS epidemic update" (PDF):
http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf.
Retrieved on 2008-03-12.
- Elliott R, Criminal Law, Public Health and HIV Transmission.p33, Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society, 1997

- Hon Justice Michael Kirby. HIV and Law - A Paradoxical Relationship of Mutual Interest. Paper presented at IUVDT World STD/AIDS Congress, Singapore, 22 March 1995
- Elliott R, Criminal Law and HIV/AIDS: Final Report .pp 58; Montreal: Canadian HIV/AIDS Legal Network & Canadian AIDS Society
- Holland W (1994) HIV/AIDS and the Criminal Law. Criminal Law Quarterly; 36(3): 279 at 316.
- Ehsanpur SR; AIDS \$ Criminal Liability; PP 77-86; Magazine of "Medical law"; NO 5; Summer 1387
- Ehsanpur SR; Criminal Liability for Transmission of HIV; p 17; an article to get M.A degree. Imam Sadig University. autumn 1386

Authors' Notes

Mahmoud Abbasi; (PhD) is the chief of the department for medical law at Shahid Beheshti University for Medical Sciences; a member of the department for bioethics at the Academy for Medical Sciences; a member of the scientific board and the chief of the Iranian Research Center for Ethics and Law in Medicine at the Shahid Beheshti University for Medical Sciences.

Email: Dr.abbasi@sbmu.ac.ir

Ladan Abbasian; (MD) is the residency of infectious diseases; a member of the scientific board at health faculty at Shahid Beheshti University for Medical Sciences, and a researcher of the Iranian Research Center for Ethics and Law in Medicine.

Email: L.abbasian@yahoo.com

Seyed Reza Ehsanpour is a PhD student in criminal law and criminology and a researcher at the Iranian Research Center for Ethics and law in Medicine.

Date of reception: Jan 8, 2010

Date of review: March 11, 2010