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“No Condoms in Prisons” FULL STOP - A narrow-minded and backward response.

By Vivian A. Gray Jr

I find it extraordinary that we live in a country where those of us who know better, allow policy makers who are light years behind in thought and knowledge to use their own ignorance and narrow-mindedness to overshadow urgently needed policy and legal reforms. I speak specifically in this instance of two recent events which have dominated the news headlines.

First, our Parliament is debating an amendment to our Constitution to provide for a Charter of Rights and Freedoms. It seems however that if the majority of the Committee members examining the Bill and certain other interest groups have their way, this so-called Charter of Rights and Freedoms will do nothing more than enshrine discrimination in our Constitution. Secondly, despite clear evidence to the contrary, the nation guided by these same policy makers prefer to deny the reality that HIV and AIDS exist in our Prisons and that sex between men (whether consensual or otherwise) also take place in our prisons.

Given **Sections 76 and 79 of the Offences against the Person Act** which criminalizes buggery and sexual intimacy between men, it is understandable that allowing access to condoms in prisons might reasonably be seen as an encouragement of homosexuality. As such, the Prison Authorities are entitled to avoid a policy that might give this impression. In addition, condoms have uses other than those for which they were designed and therefore some level of control of condoms as a commodity should be the exclusive prerogative of the Prison Authorities.

However, there is a broader issue involved --- the issue of public health. The mere fact that a person asserts that he wants a condom does not mean that he is homosexual, nor does it mean that he is necessarily intending to engage in penetrative or other dangerous sexual activity, nor does it necessarily mean that he is in truth a consenting party to whatever activity is anticipated. Therefore, if we accept that HIV exists in our prisons and that prisoners will some day be readmitted into the general population, then in an era where HIV is the second leading cause of death for both men and women in Jamaica, there must be some other policy in place to enable access to condoms for “genuine health reasons” and this question is best left to health professionals.

It is at this juncture that one would expect to see some leadership from our policy makers and elected representatives. Indeed, one expects a Minister of Health to stand firmly behind any position he has taken on a public health issue. Instead all we hear are cowardly statements and excuses, espoused by those who use their elected positions to legislate, not according to what is in the best interest of the public, but according to their own personal narrow-mindedness and bias.

The morally upright hypocrites in the Jamaican society have used the call for access to condoms in prisons to mask their own blameworthiness – puffing themselves up as paragons of virtue -

pretending that they are without sin. We hear sermons about brimstone, fire, Sodom and Gomorrah; as if to suggest that sexual intimacy between men was the only event taking place in Sodom and Gomorrah.

As the Bible tells it, drunkenness (the present day use of narcotics including Ganja); all night partying (present day passa passa), revelry (an entire season of Carnival) all around lasciviousness, greed, envy, murder – all the things present in modern day Jamaica - were the reasons for the destruction of Sodom and Gomorrah.

Yet, we turn a blind eye to all these other morally reprehensible behaviour and behave as if men who have sex with men are the only ones engaged in immoral behaviour and further, that the call for access to condoms in prisons is the greatest of all sins.

In Jamaica, women bed, give open support to and bear children for men who are notorious murderers of women and children. Yet, these same women, their families and friends are quick to jump on their moral high horses and ride a bandwagon which seeks to deny prisoners the right to access condoms so that they can protect themselves against the deadly HIV disease. I ask you, which act is morally more reprehensible?

Even if it be true that men who have sex with men are engaged in an act of sin according to Christian philosophy, the duty of the state is not, in a pluralistic society such as Jamaica, to legislate conformity with any single religion. The only justification preferred to date for the buggery law is that “the bible seh so.”

Contrary to what some would have us believe, the law and the way in which it is realized, is continuously evolving and must be continuously evaluated. The function of the law, the organization of society and the provision of a stable context for dealings within that society require interests being weighed **all the time**, in order to render legislation useful for promoting those interests.

The question which arises then is this: what useful purpose does Sections 76 and 79 of **the Offences against the Person Act** serve in a 2006 Jamaica? I cannot imagine that there have ever been any successful prosecutions in Jamaica for consensual buggery. Usually, the police indict men who have sex with men for buggery but the outcome of the case in favour of the state is never because of any physical or credible evidence. Rather, there is a certain “horror” in the charge itself. It is standing in the dock in the face of a judge, police and sometimes other litigants where it is known that you are charged as a homosexual. Add to this the fact that the Press will publish the names of men charged with consensual buggery and gross indecency, shaming them and putting them at risk of physical injury. This often cause a defendant to plead guilty to the lesser charge of gross indecency, to abbreviate the embarrassment

Unfortunately, the call for access to condom by prisoners has been lost in the cacophony about erosion of morals and the fact that it would be contrary to the Offences Against the Persons Act. Those astride their high moral horses tend to disregard the fact that a policy allowing access to condoms in prisons would be to preserve health, particularly in light of the risk of HIV transmission and not to encourage homosexuality.

WHAT PRICE IS GOVERNMENT WILLING TO PAY?

The cowardly policy makers would be well advised however, that not providing condoms and simply burying their heads in the sand puts the government and its agents at legal risk, since anyone who contracts a sexually transmitted infection in prison may be able to maintain a successful action in negligence against the state, for breach of duty, in just the same way as he would be able to sue a doctor for improper medical attention.

What makes such a lawsuit even more likely to succeed is that time and again policy makers and prison officials have been warned that there is a known risk of HIV infection among the prison population and they have done nothing remotely significant to protect the prison population. The present approach of mandatory testing is not remotely sufficient, **given: (1) the window period between infection and detection and (2) the fact that prisoners do not each have separate private quarters!**

LESSONS FROM OTHER JURISDICTIONS:

In Australia, litigation grounded in negligence – breach of the duty of care owed by the state to prisoners - led to change in policy on condoms in prisons in 1996. The case is **Prisoners A-XX Inclusive v. State of New South Wales (1995) 38 NSWLR 622**. The plaintiffs were fifty inmates of New South Wales prisons who filed a statement of claim against the State of New South Wales.

Remedy sought:

The prisoners sought a mandatory injunction to force the New South Wales government to reform its policies regarding condoms in prisons. The application sought:

- An order that the state of New South Wales, through the Commissioner of Corrective Services and the Director General of the Department of Corrective Services, must permit the plaintiffs and other male prisoners in New South Wales prisons to possess and use condoms;
- A declaration that the decision not to supply or permit the possession or use of condoms by male prisoners was made in breach of the duty of care owed by the state of New South Wales to the plaintiffs; and
- An order that the state of New South Wales supply, and permit the possession and use of, condoms by the plaintiffs and other male prisoners in New South Wales prisons.

Background and material facts:

Until the mid-1990s the policy of the New South Wales Department of Corrective Services (like that of the majority of other Australian systems) was to oppose condom distribution. Although the authorities were aware that sexual activity occurred in prisons, reliance was placed on education as the primary HIV prevention measure.

Legal arguments and issues addressed:

The prisoners argued that the decision not to supply condoms or permit their possession or use by male prisoners:

- Was so unreasonable as to constitute an improper exercise of power;
- Gave rise to a writ of habeas corpus (a written order requiring investigation into the legitimacy of a person's detention); and
- Constituted a breach of the duty of care owed by the Department to the prisoners.

Outcome:

At first instance, the judge dismissed the first two grounds. With respect to the third ground—that the policy constituted a breach of the duty of care owed by the Department to the prisoners—the judge held that the statement of claim must be redrafted, to be brought in the name of four aggrieved inmates rather than as a class action on behalf of 50.

From this the reader will recognize that, with good reason, the judge was unwilling to allow a challenge to the “policy decision” not to provide condoms in prisons. To do so would be to review an issue involving “political considerations” and this would lead to the judiciary exercising “political power which is the purview of parliament and the electorate, not the courts.

However, the Supreme Court's decision did not foreclose continuation of the proceedings, since the third claim – the arguments based on negligence remained intact. In relation to this third claim, the judge noted that **“different considerations would apply if the prisoners claimed a breach of the duty owed to them as individuals.”**

Thus, although a policy decision in itself may not be reviewable by the Court, the effect of this policy is reviewable. If the prisoner can establish that the effect of this policy has resulted in a breach of the duty owed to him by the state, an injunction to restrain the tort of negligence might, although novel, be available.

On this point, the High Court pointed out that there might be problems with proving a duty of care in this case: it could be held that the prisoners were contributorily negligent or that they voluntarily assumed the risk of being harmed. Nevertheless, even if they were held to have been negligent, the negligence of the government would remain. Further, any consideration of the voluntary assumption of risk “must surely be tempered by questioning how much of a prisoner's actions are relevantly voluntary.”

While the Court of Appeal cited the decision of the judge at first instance on this point in some detail, the Court of Appeal did not in any way criticize the substance of what the judge said. Referring to the decision of the judge in the lower court, the Court of Appeal stated (at paragraph 8):

“His Honour saw no reason why in an appropriate case the Court would not grant an injunction to restrain the tort of negligence, even without proof of damage. Accordingly, if the appellants were able to establish by evidence that the failure by the Department to permit their use of condoms constituted a breach of the duty of care owed to them, they might be entitled to injunctive relief.”

Interestingly, in oral arguments before the High Court, the Solicitor-General for the State of New South Wales accepted the judge’s ruling that four of the plaintiffs could pursue claims in the tort of negligence. He foreshadowed however, that the state may have a defence based on policy considerations.

COULD THIS HAPPEN IN JAMAICA?

The legal importance of this case lies in the fact that it provides recognition, albeit limited, that a claim of negligence could be brought in the future.

Given (1) the increasing dangers posed by HIV and hepatitis in prisons, brought into focus by cases of sero-conversion in custody, and (2) the unwillingness of the authorities to deal with the issue in a practical way, there is more reason than ever for prisoners in Jamaica to utilize a legal approach involving an old, somewhat flexible proceeding in the attempt to achieve substantive change in correctional policy. Prisoners may be able to demonstrate the need for changes in the current policy of no access to condoms or protective devices in prison by instituting an action in negligence.

International guidelines reflecting public health evidence assist in establishing the appropriate standard of care that should be met by prison officials in responding to HIV. According to WHO’s 1993 guidelines, the case for provision of condoms in prisons is clear:

[A]ll prisoners have the right to receive health care, including preventive measures, equivalent to that available in the community without discrimination, in particular with respect to their legal status or nationality. [...] Since penetrative sexual intercourse occurs, in prison, even when prohibited, condoms should be made available to prisoners throughout the period of detention.

This case brought about important policy changes in relation to condom provisions for prisoners in New South Wales. In 1996, at least in part because of the legal action, the New South Wales government decided to make condoms available in all prisons after evaluation of an initial, successful trial condom-distribution scheme in a few New South Wales prisons.

In **PW v. South Africa Department of Correctional Services (1997–2003)**, the plaintiff, who was infected with HIV while incarcerated, sued for future medical expenses, loss of earnings and general damages for such things as pain and suffering. The plaintiff claimed over 1.1 million rand (approximately US\$ 179 000). Media reports stated that the plaintiff settled for 150 000 South African rand (approximately US\$ 25 000 at the time). What is known is that the

Department of Corrections “denied any liability” for PW’s infection but admitted that prisoners were not allowed to have condoms until 1996.

As with so many other critical issues, Jamaican policy makers tend to be reactive. Sadly, the present state of affairs prohibiting access to condoms to prevent the spread of HIV in prisons seems likely to continue for some time yet. Given this reality, it appears that only payment of millions of dollars in settlement of litigation grounded in negligence will stir our cowardly policy makers into action and having them give this issue the level of serious attention which it deserves.

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