

For the Decriminalization of HIV Exposure

A person with HIV who has unprotected sex can be prosecuted even if he or she has not transmitted the virus. Switzerland is one of the harshest countries in Europe when it comes to prosecution, but recent medical advances regarding non-transmissibility have opened the door to change.

Raoul Gasquez, Lawyer, Groupe sida Genève
Plaidoyer 4/09

[English Translation of French original. All English quotes, titles and names are translations.]

This article is intended for a general audience. Its focus is the criminalization of mere exposure to HIV/AIDS (as opposed to actual transmission) during unprotected sex. Recent developments from Geneva make this topic worthy of such focus. The developments were prompted by statements made by the Federal Commission on Problems related to HIV/AIDS (see Pietro Vernazza, Bernard Hirschel, Enos Bernasconi and Markus Flepp, in *Bulletin des médecins suisses* I 2008, at pages 165 *et seq.*) We will also explore the positions of the people — notably physicians, investigating judges, and lawyers — who debated this matter at a conference hosted by Groupe sida Genève in Nyon on 17 June 2009.

For several years, prevention advocates have opposed and denounced the criminalization of HIV/AIDS transmission, and it stands to reason that they decried the criminalization of mere exposure even more. The most recent Swiss medical publications regarding the risk of HIV/AIDS infection have revolutionized the way people look at the illness. The risk of transmission, through unprotected sex, by a person undergoing effective HIV/AIDS treatment, is believed to be close to zero. This concept of risk is at the heart of current discussions. Based on this recent good news, will people living with HIV/AIDS no longer be prosecuted? Will they suffer less of a stigma? We certainly hope so.

Criminalization, Swiss style

Since 1990, Swiss courts have dealt with 131 cases involving charges under sections 122 and/or 231 of the Penal Code. This statistic is from a study published by Aide Suisse contre le sida and the Fonds national de la recherche scientifique (see Kurt Pärli and Peter Moesch's study, commissioned by Aide Suisse, about HIV transmission and criminal law, entitled *Strafrechtlicher Umgang bei HIV/Aids in der Schweiz im Lichte der Anliegen der HIV/Aids-Prävention: Status quo, Reflexion, Folgerungen*).

Twenty-six of the 39 proceedings resulted in convictions. **In more than half these convictions, there was either no infection, or no proof that the accused infected the complainant.** Consequently, only charges of attempt were successful.

There were three convictions for “attempted” propagation of a dangerous disease (section 231 of the Penal Code) alone. They involved unprotected sex between informed serodifferent partners.

UNOFFICIAL TRANSLATION

In the cases where the accused was convicted under both sections 122 and 231 of the Penal Code (PC), the sentences ranged from two to four years of imprisonment.

In the cases where the accused was convicted of a lower-grade offence that did not actually result in transmission (*délit manqué*), the sentences varied considerably, depending on whether other offences had been committed. The average sentence was 18-24 months of incarceration, but some of the sentences at first instance were 10-12 month suspended sentences.

The current situation: overcriminalization

Punishing non-transmission

Swiss criminal legislation regarding HIV/AIDS transmission or exposure is among the harshest in Europe. Unlike most European countries, Switzerland punishes not only unprotected sex resulting in actual transmission, but also unprotected sex involving mere exposure.

The most common convictions where the sexual contact did not transmit HIV were “attempted” infliction of serious bodily injury within the meaning of s. 122 PC, and “attempted” propagation of a human disease within the meaning of s. 231 PC. (Under s. 22 PC, a person can be guilty of attempt where the result was ultimately not achieved — *délit manqué* — or even if it could not possibly have been achieved — *délit impossible*.)

Unprotected sex can mean two offences at once

Another unusual aspect of Swiss law is that a person with HIV can be concurrently convicted of infliction of serious bodily injury and propagation of a human disease.

Under s. 231 PC, a person who intentionally propagates a human disease that is dangerous and transmissible can be punished. Switzerland is the only country that allows this.

In a 1990 case from the canton of Vaud, the Federal Court held that the legal interest protected by s. 122 PC is bodily integrity, whereas s. 231 PC seeks to protect public health (ATF 116 IV 125, 22 February 1990; ATF 125 IV 242, 20 October 1999). This case law is criticized both for policy reasons and for its effect on prevention efforts. However, it’s anticipated that this will soon change as a result of the *Epidemics Act* reform. A draft bill on the subject is being debated in Parliament. It would remove negligence and add malevolent intent as a condition precedent to its application. (See notably Fridolin Begliger, *Basler Kommentar zum StGB*, 2. Aufl. 2004, Art. 231, N. 63 f; *Rapport explicatif du projet de consultation concernant la révision de la loi fédérale sur la lutte contre les maladies de l’être humain* (Loi sur les Épidémies, LEp) – Federal Department of Interior, 21 December 2007, at p. 63).

UNOFFICIAL TRANSLATION

A person who has notified his or her HIV-negative partner cannot be convicted of infliction of serious bodily harm (s. 122 PC) through unprotected sex.

A person who is HIV-positive cannot be prosecuted for attempted infliction of serious bodily harm if his partner, being aware of this status and of the risks of transmission, freely consents to having unprotected sex and shares control over the events (ATF 134 IV 193, 13 June 2008, C.3).

However, someone who has notified his or her HIV-negative partner can be convicted for propagation of a human disease (s. 231 PC) through unprotected sex.

Even if the HIV-negative partner consents, the HIV-positive partner can be convicted under s. 231 PC for having unprotected sex (see Fonds national study, *supra*.) According to the Federal Court, “A person who transmits HIV through unprotected sex has also committed the offence of propagating a human disease. In this regard, his partner’s consent does not negate the elements of the offence and does not make the act legal.” (ATF 131 IV 1, 27 October 2004). This decision has been criticized as well.

Given the above, if a serodifferent couple decides, on a fully informed basis, to have children, or to have unprotected sex, the HIV-positive partner could conceivably be prosecuted and convicted for the lower-grade offence of attempted propagation of a human disease based on the *mens rea* of recklessness, even if he or she has no detectable virus.

Only HIV-positive people are targeted for prosecution under s. 231 PC.

Before the early 1990s, s. 231 PC was applied only once: in the 1940s, a prostitute was convicted for transmitting gonorrhoea (see F. Begliger, *supra*). Since then, only HIV-positive people have been convicted under s. 231 PC. What of the recent cases of measles, tuberculosis or Influenza A, in which there were no prosecutions?

The most recent judgments from Geneva

Two cases from Geneva recently made legal news in Switzerland (ACC/2/09 of 13 January 2009 and ACJP/60/2009 of 23 February 2009, see *Plädoyer* 2/09, at p. 65). In both cases, the judges based their decisions on the opinions of physicians who specialize in infectious diseases and were called as experts, and on the findings of the Federal Commission on Problems Related to HIV/AIDS. The courts decided they could not convict the accused for offences under ss. 122 and 231 PC while they were undergoing antiretroviral treatment.

In its decision of 13 January 2009, the Correctional Court of Geneva found a woman guilty for events that took place while her viral load was detectable. However, she was acquitted (based on reasonable doubt) of charges related to subsequent events which occurred while she was receiving tritherapy and the analyses revealed that her HIV was undetectable, even though she had unprotected sex with several partners during that period.

A scientific revolution

In the 23 February 2009 decision of the Criminal Division of the Geneva Court of Justice, currently under review by the Federal Court, the Criminal Division held that an HIV-positive person who had unprotected sex with an HIV-negative person must be acquitted of lower-grade offences of unsuccessful infliction of serious bodily harm and of the concurrent lower-grade offence, under s. 231, para. 1 PC, of unsuccessful transmission of a human disease (both of which are treated as attempts by virtue of s. 22 PC). At the hearing, Professor Bernard Hirschel confirmed that **“the risk of contamination posed by a patient who is receiving AIDS treatment and whose viral load is undetectable is too small to be quantified scientifically.”** The Federal Court will have to determine whether the Federal Commission’s announcement, a new scientific development, will modify its case law regarding convictions for infliction of serious bodily injury and propagation of a human disease.

On 28 January 2008, the Federal Commission, in an article published in the *Bulletin des médecins suisses* (Bulletin of Swiss Physicians) stated that “HIV-positive people who suffer from no other STD and are undergoing effective treatment do not sexually transmit HIV.” The Commission declared:

. . . After lengthy deliberation, the Commission finds as follows: An HIV-positive person who is not suffering from any other sexually transmitted disease (STD), is undergoing antiretroviral treatment, and whose viral load has been completely suppressed, does not transmit HIV sexually, i.e. does not transmit the virus through sexual contact. This assertion is true provided

- the person complies completely with his antiretroviral treatment and is under the regular care of a doctor;
- the person’s viral load has been below the detectable level for at least six months; and
- the person has no other STD.

This article has had a major impact on the international scientific community. To summarize the situation, Professor Hirschel explains that since the advent of tritherapy, there have been no scientifically documented cases of contamination in serodifferent couples. In 2008, Swiss scientists finally said what everyone had been thinking for a long time.

Risk and recklessness

All the convictions for attempts under ss. 122 and 231 of the Penal Code were for recklessness, with the exception of a single case in which criminal negligence was found (see Pärly and Moesch, *supra.*)

UNOFFICIAL TRANSLATION

Industrialization and technological evolution have created many kinds of risks that lawmakers have had to accept and regulate. Can a comparison be drawn between a driver and a person who has unprotected sex? And what about other risks of disease transmission that the courts do not punish even though they are higher?

Based on the Commission's findings, the risk of infection is considerably lower than 1 in 100,000. In a 7 September 2007 trial in the canton of Vaud, shortly after the first communication regarding the non-infectiousness of people receiving antiretroviral treatment, the Correctional Court refused to accept the opinion of the accused's physician to the effect that the probability of transmitting the illness whilst under effective antiretroviral treatment was similar to the risk of being hit in the head by a meteorite upon leaving the courthouse. The judges decided to remain prudent.

Is there still a relationship between the conduct of a person with no detectable viral load, and the offences of simple infliction of bodily harm or the risk of transmitting a human disease?

Recklessness exists if the perpetrator envisages the harmful result but nonetheless acts or does not do what is in his power to prevent it or to attenuate its consequences, thereby agreeing to live with the result should it occur, even though he does not actually want it to occur.

In ATF 125 IV 242, C.3, affirmed by ATF 131 IV 1 C.2.2, the High Court stated that the risk of transmission was 1 in 300. The accused was found to have intent. [*Translator's Note: It would perhaps have been more accurate to say that the accused was found to have had the requisite mens rea, since actual malevolent intent is not required and this conviction was based on recklessness.*] His defence had been based on the low statistical probability of HIV transmission through unprotected sex. According to the Federal Court, even if there is a 1/300 risk of contamination through unprotected sex, this possibility must be envisaged every time a person has sex, since there is no way of knowing which time will be more dangerous than the others. Consequently, the Federal Court held that the perpetrator was aware of the potential mortal consequences for each of his partners, even though he did not desire those consequences. He was found to have been reckless. These decisions have been harshly criticized.

Moreover, people under antiretroviral treatment are regularly followed up by their infectious disease specialists, whose opinion they generally trust. Thus, if a physician informs a patient that she cannot transmit the illness, she has every reason to follow the physician's advice, so there is no way to conclude that the patient acted recklessly, since she is was not agreeing to live with any consequences.

Are we headed toward a change in the case law?

[Photo caption: Will the revolutionary new view of the risk of HIV/AIDS infection, resulting from the most recent Swiss medical publications, put an end to the prosecution of people who live with the illness?]

UNOFFICIAL TRANSLATION

For the moment, courts and physicians are speaking two different languages. The question that legal professionals must now ask themselves is what they want to do with this study and how to treat such a low residual risk. Will they continue to punish non-transmission of HIV where the risk is practically non-existent, even though they do not prosecute people for higher risks, e.g. exposure to other infectious diseases like hepatitis? What will be the basis for affirming that sex while under effective tritherapy poses a risk?

Hopefully the courts' conception of HIV/AIDS will move closer to that of the scientific community and will no longer be tainted by the discriminatory criminalization of an illness which, like other conditions, is now considered chronic.

Additional information is available at www.groupesida.ch

Editor's Note: Effective antiretroviral treatment means effective HIV treatment that keeps the patient's blood viremia below the detectable level of 40 copies/mL.

Translator's Note: Swiss criminal law distinguishes between *délits* (lower-grade offences) and *crimes* (more serious offences). However, it would be misleading to translate *délit* as "misdemeanour" because some *délits* are punishable by up to three years of imprisonment (see s. 10.1 of the Penal Code.)