UNOFFICIAL TRANSLATION

CNS - Conseil national du sida
Paris, France

Comments on the criminal classification of the sexual transmission of HIV in France

[Translator's Note: *All quotes are unofficial translations, but the English translations of the Penal Code and Code of Penal Procedure, available at www.legifrance.gouv.fr, were used in this translation.*]

In the wake of convictions handed down by several courts in cases involving HIV transmission, the CNS issued a public communiqué, in which we reiterated our commitment to the principle of promoting shared responsibility in unprotected sexual relationships, and expressed our concerns about the potentially negative consequences of criminalizing HIV transmission, notably the potential to set back years of efforts with respect to voluntary testing.

Before these ethical and public health considerations come into play, there is a preliminary issue: How does the criminal law categorize the transmission of HIV? In other words, does the conduct in question, namely, unprotected sex by which HIV is transmitted, come within the ambit of one or more provisions of criminal legislation?

The fundamental principle that must be borne in mind is that criminal laws are to be strictly construed. A person can only be found guilty of an offence if the precise framework of the law makes the person's conduct an offence. This requires a legal enactment which states that the conduct constitutes a major crime (felony), a lesser crime (misdemeanour) or a petty offence (contravention). There are no crimes by analogy in France. Occasionally, a single act can constitute more than one offence but this phenomenon, which we call *cumul idéal*, is marginal.

In cases where HIV is transmitted during unprotected sex, the first thing that must be noted is that France's criminal enactments were passed before the emergence of the epidemic, so it would be absurd to say that people are criminalized for being HIV-positive, since there is no enactment criminalizing HIV-positive status. Nonetheless, any individual who is dangerous to the community must answer for his actions in the criminal justice system.

Now that this has been reiterated, it should be noted that several offences are potentially relevant.[1] There are numerous offences against the physical integrity of persons, and it would be an oversimplification to restrict the list to murder and poisoning. Certain specificities of HIV transmission might be hard to fit into categories of offences created roughly 200 years ago. Although some of the offences have recently been updated, the original conceptualizations of these offences reverberate into the present, making it difficult to understand them in light of the biological and technical developments tied to the appearance and

[1] This study will not consider the economic offences, chiefly fraud (which is prohibited by section L. 231-1 of the Consumer Code and originates from the former section 1 of the Law of 1 August 1905) which resulted in convictions in France's tainted blood scandal but have no concrete role in cases involving the voluntary transmission of the virus through sex. Unless, of course, the sex is the subject of a contract...

development of the AIDS phenomenon. The wide variety of transmission cases presents another complication. The rise of risky consensual sexual practices (like the famous "bareback") troubles already murky waters. There are degrees of malevolent intent, dishonesty and indifference, and judges will often assess these degrees based on the facts of the specific case. To use a concrete example from our nation's dockets,[2] the sentence for a failing to disclose HIV-positive status cannot possibly be the same as the sentence for falsifying or forging HIV test results. For the sake of clarity, it is generally best to distinguish between "knowing transmission" (which merely means that the wrongdoer knew that he was HIV-positive) and unknowing infection.

When dealing with the wide range of options available under the criminal law, jurists must concentrate on the major categories, which constitute reliable guideposts. Hence, this paper will be divided into two categories of potential offences: lesser crimes (misdemeanours), and major crimes (felonies). Let us begin by going over what is at stake procedurally.

1. Felonies and misdemeanours: a brief reminder of the procedure

There are three categories of offence in France's criminal law system: felonies, misdemeanours and petty offences. Each offence falls under one of these three categories, depending on the length of the potential jail sentence.

- If the sentence is more than 10 years of imprisonment, it is a felony.
- If the sentence is less than 10 years of imprisonment, it is a misdemeanour.
- If the sentence is a fine, it is a petty offence.

Some misdemeanours can become felonies if an aggravating circumstance is proven, because of the lengthening of the sentence.[3]

The type of offence has a considerable impact on the conduct and outcome of a trial. The Code of Penal Procedure clearly distinguishes between the three categories of offences. Each has its own procedural characteristics: competent court; investigation and trial; and limitation period.

1.1. Competent court

The type of offence determines which court has jurisdiction. The Assize Court has jurisdiction over felonies, and the Correctional Court has jurisdiction over misdemeanours. The distinction is not merely formal, because each court operates quite differently. The Correctional Court is a criminal court composed only of judges: a president and two assessors. The Assize Court is a people's court, composed of three professional judges and nine jurors. The existence of a jury is a source of complication: moral and political considerations that

[2] See Court of Appeal, Rouen, September 22, 1999.

[3] For example, the misdemeanour of intentional violent acts causing mutilation or permanent disability (punishable by 10 years' imprisonment) becomes a felony if committed against a minor under 15 years of age (article 222-10 of the Penal Code).

go beyond the framework of the law are factored into their decisions. Their moderating role is even more important when the question is sensitive.

1.2. Investigation

Under the *Code of Penal Procedure*, the judicial investigation procedure (*instruction*) is mandatory for felonies, and can be used at the prosecution's option for misdemeanours. If a person is prosecuted for a felony, the investigation will be very thorough. If a person is prosecuted for a misdemeanour, the conviction can be very quick, especially under the summary (immediate appearance) procedure. However, it is reasonable to assume that the summary procedure will not be used for misdemeanours involving HIV transmission because they require a certain degree of investigation or expertise that make such a procedure unsuitable.

1.3. Limitation period

The limitation period depends on the category of offence. It is three years for misdemeanours, and 10 years for felonies. This detail is important, because the prosecution can only have knowledge of intentional contamination if the victim decides to file a complaint. The point from which the limitation period begins to run will vary. For poisoning, it begins on the date that the victim was contaminated. This means that there is very little time in which to act. For involuntary injury, it is the day of discovery of the harm on which the offence is based. It goes without saying that the problem of proof is crucial in such cases. The victim must then file a complaint within the allotted time, or he will be barred by the limitation period.

2. Categories of potential felonies

The transmission of HIV/AIDS to a partner through unprotected sex could constitute several felonies. However, the legal profession has primarily been concerned with the felony of poisoning.

2.1.1 Poisoning

Poisoning is a special offence in the French *Penal Code*. It faced abolition as part of the 1992 Penal Code reform, but it survived with its unique characteristics intact. Although it is a "crime of intent against the physical integrity of the person", it is not a special category of murder, the latter being defined in section XXXX.

Poisoning is a specific offence that addresses a phenomenon that can be traced back to Antiquity (e.g. the poisoning of Britannicus by Nero). Until the 20th century, poisonings were quite frequent because many unexplained deaths were catalogues as such. Scientific progress has caused the numbers to drop significantly and has shown that poisoning was not merely a rural phenomenon. Today, the very same scientific progress prevents many instances of poisoning from being detected. From a criminological point of view, the offence was long associated with inheritance. The secret nature of the transgression against human life reflects the perverse nature of the behaviour and explains why it is a major crime.

Article 221-5 of the *Penal Code* states: “Making an attack against the life of another by the use or administration of substances liable to cause death constitutes poisoning.” The felony is punishable by 30 years’ criminal imprisonment, or, under aggravating circumstances, criminal imprisonment for life.

Cases involving HIV transmission have been controversial among legal scholars. However, three points are undisputed:

- Poisoning was not the offence found to have occurred in France’s tainted blood scandal.
- In the tainted blood scandal cases, poisoning was never explicitly rejected.
- A compensation fund specifically intended for haemophiliacs was created, and this was a factor that prevented criminal prosecutions.

All of this seems far removed from HIV transmission through sexual contact. However, the case law and scholarly writing from 1992 and 1996 has had a considerable influence on the debate. So far, the Court of Cassation [France’s highest court] has not clearly come down for or against calling this phenomenon poisoning. The decision made by its Criminal Division on July 2, 1998, did not establish any general rule. The Court preferred to defer the question, and was content to censure a decision of an indictment chamber (*chambre d’accusation*) which issued a decision ordering that a case, involving a person who knowingly infected someone with HIV, proceed to trial in the Assize Court. Major media organizations reported that the definition of the felony of poisoning had changed (*Les Échos*, July 3, 1998; *Le Monde*, July 4, 1998) but in reality, the Criminal Division merely said that the indictment chamber’s decision was incorrectly worded in law. The Criminal Division pointed to the insufficiencies and contradictions contained in a particular judgment, but never articulated a principle that intentional HIV transmission could not constitute poisoning. In defence of the Court of Cassation, there are numerous unsettled questions which interfere with legal conclusions. First of all, sex, which is at the heart of this debate, is difficult to regard as an act of poisoning. In common parlance, poisoning evokes images of cyanide, hemlock or asbestos, not semen. Secondly, the word “crime” suggests an intent to cause harm, which does not seem to be present in consensual sexual contact. In theory, however, the legal community does not concern itself with moral considerations. But these two issues remain obstacles for the two elements that define poisoning: the *actus reus* or physical element, which is the use or administration of deadly substances; and the *mens rea* or mental element, which is the criminal intent.

2.1.1 The *actus reus* or physical element of the offence

The *actus reu*s of the offence is the administration of a substance. Among legal scholars, this aspect of ascertaining whether an offence has been committed has taken a back seat to the debate about intention. Precedents have perhaps shortened the debate on the issue of administration a bit more than would have been ideal. It is nonetheless important to go over the various elements of the *actus reus*. However, before this can be done, it must be specified that poisoning might be termed an “inchoate offence” because it punishes the use of certain means, regardless of whether those means achieve the intended result. It is therefore unnecessary for the result, i.e. the victim’s death, to occur.

- *2.1.1.1. The administration*

The cases and scholarly writing stand unanimously for the proposition that the act of administration can be in any form.[4] The substance can be administered through the mouth, respiratory system, or skin, or can be administered anally, or vaginally. The deadly substance must be introduced into the body by a vector of some kind. Thus, administration through sexual contact (specifically the seminal fluid transmitted in the context of such contact) comes within the definition of poisoning.

Moreover, the victim need not have been infected. As we have seen, poisoning is an inchoate offence, so it does not depend on a result. It is worth going over the possibilities that can arise in cases related to sexual infection. The first possibility is a proven infection: here, all the elements of a classical offence are met. The second possibility is contact with infected semen that does not ultimately infect the victim: administration has occurred here as well. The third possibility is contact with uninfected semen: this is an attempted administration, and thus, an attempted poisoning. The difference between the second and third situations is difficult to establish.

- *2.1.1.2. The deadly substance*

Legal scholars are debating the question of the deadly nature of the substance.[5] In the traditional view, the substance must be objectively deadly. Everything else is unimportant, since it can be a solid, a liquid or a gas. In cases involving viruses, reference is often made to a decision of the Criminal Division of the Court of Cassation dated July 18, 1952. This decision, which involved the inoculation of bacteria, would apply perfectly well to non-sexual HIV transmission. However, the courts have always held that the fact that HIV is administered through semen is not a complication, because it is administration.

The deadly nature of HIV is still recognized today, even though there have been developments associated with the advent of tritherapy; the illness should not be confused with the treatment. The fact that people now die more slowly of AIDS is attributable to tritherapy, not to changes in the nature of the virus. The courts do not consider it relevant that HIV infection only causes death indirectly (through opportunistic infections after it has become full-blown AIDS).

[4] J. Pradel and M. Danti-Juan, *Droit pénal spécial* (Cujas, 2004) at 77.

[5] See D. Mayer, "La notion de substance mortelle en matière d'empoisonnement (Paris: Dalloz, 1994), #325, and A. Prolais, "Le sida ne serait-il plus, au regard du droit penal, une maladie mortelle? ["Is AIDS no longer a deadly substance for the purposes of criminal law?"] (Paris: Dalloz, 2001), #2054.

2.1.2 The mens rea or mental element of the offence

Poisoning is a crime of intent, but this assertion requires an explanation. In French criminal law, there is no felony or misdemeanour in the absence of an intent to commit it (article 121-3 of the Penal Code). This foray into in the psychology of the offender has proven difficult because each criminal mind is unique. Essentially, the intent is defined by two stages. The first stage is awareness of the intentional act. The second stage is the desire to achieve a result. This intention to kill (*animus necandi*) comes on top of the awareness of the act. In the realm of homicide, this explains the distinction between (a) simple homicide or murder (article 221-1 of the *Penal Code*), in which the perpetrator intends to cause death, and (b) intentional acts of violence causing unintended death (article 222-7 of the Penal Code) in which the perpetrator was aware of his act and committed it intentionally, but never wanted the victim to die. Phenomenon (b) is called manslaughter (*homicide praeter intentionnel*) because the result was not part of the perpetrator's plans; the offender's actions went further than his thoughts.

With the offence of poisoning, there was rarely a difficulty with intent: the poisoner's motive was frequently to inherit the victim's estate, so the desire to cause death was present. This intent to kill was, of course, combined with the use of a deadly substance. However, the tainted blood cases brought situations to light in which the persons responsible had allowed products to circulate when they knew the products were deadly, albeit with the intent to treat as many hemophiliacs as possible. Thus, while it was difficult to say that there was an intent to cause patients to die, it was clear that the people responsible were aware of the deadly nature of the product and distributed it in full knowledge thereof. This resulted in a dichotomy between the two stages of intent. The question arose in the following terms: in order for HIV infection through sexual contact to constitute poisoning, does the offender simply need to have known the deadly nature of the substance and to have acted in the full knowledge thereof, or does the offender also need to have intended to kill? In the HIV realm, the problem began to emerge in a decision of the Criminal Division of the Court of Cassation on July 2, 1998. Legal scholars hotly disputed the consequences of this decision: on one side were those who believed that homicidal intent is necessary, and on the other side were those who believed that poisoning is unique in nature and merely requires merely the awareness of deadliness on the other. According to the classical formula, in addition to general intent, there must be specific intent. As the decision notes, "the elements of the felony of poisoning are only present if the perpetrator has acted with the intent to cause death. This *mens rea* is common to poisoning and the other crimes of intentional attack against the life of a person. Thus, poisoning partakes of a logic of wrongful death, not a logic of risk. This position is contrary to that of numerous legal scholars, who believe that since the result of the act (the death of the victim) is not part of the *actus reus* (physical element) of the offence, it cannot be part of the *mens rea* (mental element) either.[6]

[6] See M.L. Rassat, *Droit pénal special* (Paris: Dalloz, 2001), no. 267.

2.1.3 Summary

The offence of poisoning is considered an intentional attack against the life of a person. Beyond mere awareness that one is administering a deadly poison, it requires the deliberate intent to cause a person's death, though it is irrelevant whether the result is achieved, since poisoning is an inchoate offence.

This position, adopted by the courts, appears inconsistent with the discussions leading up to the reform of the Penal Code. The special offence of poisoning was retained in 1992 at the Senate's initiative because "it seems particularly clear that it is needed in today's society because it can apparently be used to punish intentional transmissions of AIDS."[7] In addition, "by eliminating the offence of poisoning, we would be depriving judges of a way to punish a new and little-known type of felony, in which someone who has AIDS intentionally transmits his disease. By keeping the offence on the books, we give judges the opportunity, by equivalency or analogy, to punish this type of crime."[8] Aside from the mistaken understanding that underlies this statement — need it be recalled that criminal law does not permit conviction by analogy? — one can see that the philosophy at the time was that HIV-positive people who infect others should be prosecuted for poisoning, without distinction as to whether the state of mind of the person who caused the transmission was active or passive. The view was that indifference to the possibility of killing someone by administering a substance known to be potentially deadly was as blameworthy as the intent to kill. An HIV-positive person who infects someone was at worst a maniac who wanted to sink as many partners as possible, and, at best, a reckless person who was insensitive to the fate of the infected person. Both attitudes were considered felonious.

The case law on poisoning avoids considering both attitudes interchangeable. Only someone who actually wishes to contaminate another person can be charged with poisoning. Other situations — including not only indifference, but also denial of the illness, denial of its deadly nature, or inability to disclose the illness due to a fear that it will end the relationship — do not come within the ambit of the offence.

2.2 Other potential felonies

The other potential felonies are of little interest compared to what has just been examined with respect to poisoning. As a reminder, one can cite simple homicide (second degree murder), and premeditated homicide (first degree murder). These felonies require the intent to kill, but their physical elements, or *acti rei*, are poorly adapted to the knowing transmission of HIV.

3. Categories of potential misdemeanours

For a long time, the debate about poisoning seemed to overshadow the other potential offences, which are misdemeanours. This refusal to consider the other possibilities was rooted in the logic of implacable death that was systematically associated with thinking about AIDS in early to mid-1990s. In this mindset, HIV transmission could only be a felony, and the response

[7] France. Senate committee on legislation, No. 295, April 18, 1991, by C. Jolibois, p. 40.
[8] P. Clément, 2nd sitting of June 20, 1991, *Journal officiel de l'Assemblée nationale CR*, p. 3448.

had to set an example. And yet the variety of misdemeanours involving intentional "offences against the physical integrity of the person" should not be neglected. After the rejection of poisoning as a basis for punishing HIV transmission, AIDS associations wrongly believed that the legal debate had ended, and that criminalization was now a distant memory. As always, reality quickly catches up with naive positions, and the debate reopened on September 22, 1999, when the Court of Appeal in Rouen convicted a person of the misdemeanour of administering noxious substances. This first conviction remained an isolated case for a considerable time because the circumstances of the case were particularly cruel: the offender forged an HIV test result to obtain his partner's consent to unprotected sex. However, a new conviction based on the same offence was handed down by the Colmar Court of Appeal on January 4, 2005.

There are four potential misdemeanours: administration of a noxious substance (sometimes called mini-poisoning); failure to offer assistance to a person in danger; involuntary violence; and endangerment.

3.1 Voluntary offences: Administration of a noxious substance (ANS)

The misdemeanour of administration of a noxious substance was created in 1832 as a complement to poisoning, which applied only to deadly substances. However, the offence is a material offence (as opposed to an inchoate offence) which means that the result, an adverse effect on the physical integrity of a person, must be achieved. Thus, no one can be prosecuted for administering a noxious substance if the person has received the substance but develops no reaction that could be harmful to him. Attempts are not punishable because the Code does not specifically provide for a misdemeanour of attempt. Article 222-15 subjects ANS to the same scheme as acts of violence, defined by articles 222-7 to 222-14. This reference was understandable when the sections dealt with "assault and injury", which excluded the administration of substances. Today, the sections refer to "acts of violence", a generic term that encompasses administration and makes article 222-15 useless. However, the constituent elements, namely a physical element (*actus reus*) and a mental element (*mens rea*), must be present.

3.1.1 The actus reus or physical element of the offence: a noxious substance

The technical features of the administration of a noxious substance are the same as those of poisoning. A product must be administered. Administration can be in any form: oral, buccal, cutaneous or sexual. The question of the nature of the substance is a bit more problematic. It must be "noxious", but article 222-15 does not define that term. Legal scholars believe that any product liable to cause bodily harm, aside from substances that could cause death, will qualify. Does AIDS come within this category? It would seem that if HIV is more a mortal substance than simply a noxious one, the inability to convict a person who transmits HIV for the offence of poisoning (except if he wanted his partner to die) has led judges to accept the second solution. HIV is a deadly infection, so it can, at the very least, be considered a noxious substance. This might have been the reasoning of the Rouen and Colmar judges. However, in both cases, the substance must have an impact on bodily integrity. The fact that article 222-15 refers to articles 222-7 to 222-14 complicates matters. The latter provisions graduate the sentence based on the physical injury and any aggravating circumstances. A person who commits violent acts is

liable to a stiffer sentence if the violence results in permanent disability as opposed to an inability to work for less than eight days. In the realm of HIV transmission *qua* noxious substance, it seems that judges have held that contamination does indeed result in permanent mutilation or disability (article 222-9), and is punishable by 10 years' imprisonment and a €150,000 fine. Lastly, it should be specified that there must be a causal relationship between the administration of the products and the harm. This could be problematic with HIV because of the need to establish that the infection was caused by the accused. This need could put the victim's sex life under the microscope, requiring the court to verify whether the victim had other unprotected sex earlier or during the same time frame as his or her relationship with the accused. Furthermore, the origin of the viral strain might have to be proven. In short, this could bring a battle of experts into the courtroom. The Court in Colmar did not see fit to conduct such an inquiry, noting that it would not prove or disprove anything, since HIV undergoes constant mutation.

3.1.2 The mens rea, or mental element of ANS

Like all misdemeanours, ANS requires intent to commit it. However, the classical rule for intentional acts of violence is that it is sufficient that the wrongdoer knew or was aware that he was carrying out an unlawful act. This is called general intent, or *dol général*. **That the perpetrator might not have *wanted* to cause the actual harm is immaterial: there is no requirement that the perpetrator committed the acts in order to cause harm.** The example of a factory worker who, as a joke, places the end of a compressed air hose on a co-worker's bottom, is traditionally cited as an example of this. The motive is of little importance, and the violent act must be carried out voluntarily, despite the awareness of its brutality and of the danger that it poses to a person.

Applied to ANS, these factors mean the court must find intentional administration, and knowledge that a noxious substance is involved. The intent to harm could be inferred simply from the conscious acceptance of the potential danger that the substance poses to the victim.

The Correctional Court in Strasbourg and the Court of Appeal in Colmar have made decisions, albeit brief ones, along these lines. The judges noted that Christophe Morat knew of the noxious nature of the disease because he knew he was HIV-positive and required treatment: "the accused cannot have been unaware of the risks of infection with an incurable disease." In addition, the judges had already found that the conduct of the accused was voluntary based on several elements. For one thing, the accused acknowledged that he had sexual relations with the victims without revealing to them the HIV-positive status of which he was fully cognizant. The court considered this non-disclosure blameworthy. Surprisingly, the judges also referred to the many risks that the accused was encouraging by having multiple partners. Lastly, and just as surprisingly, the judges pointed to the malicious attitude of the accused, who had little consideration for the young women exposed to the virus, even though he talked them into trusting him (with references to marriage, children, etc.) in order to get unprotected sex. Although this last consideration is legally superfluous, it seems to have played a decisive role in the solution. But it would have been sufficient for the judges to find the act wilful, not manipulative. However, this manipulation by the accused (buttressed by his claim that he was allergic to latex) undoubtedly justifies the sentence of six years of imprisonment, out of a

maximum of ten. And yet the malice does not appear to have played out the same way for both young women. In the first relationship, there was one instance of protected sex, and it was followed by protected sex due to the climate of trust fostered by the accused. The sex with the second young woman was unprotected from the start.

3.1.3 Summary

As we have seen, the debate about the intentional nature of the transmission was overshadowed by the manipulative behaviour of the accused for the purpose of obtaining unprotected sex. And yet the matter was worth discussing further. The intentional nature of the administration is complicated by the fact that the virus is transmitted through bodily fluid. The contamination is indirectly voluntary. Sometimes a wrongdoer will have wanted to go to any lengths to prevent the virus from being present in the fluids (semen or vaginal secretions) and sometimes he will have acted with total indifference. The voluntary nature of the transmission is even harder to ascertain because the act responsible for the transmission is ultimately not just a positive act, but an abstention as well. The abstention might be a non-disclosure of HIV-positive status within a pre-existing and unprotected trusting relationship, motivated by a fear of rejection, or it might be “forgetting” to use protection in the early stages of a relationship. The moral responsibility in each example is different, and at first blush it seems to be more shared in the second example than in the first. But recent court decisions convicting people of administering noxious substances do not draw a distinction between these examples; they place full criminal liability on the shoulders of the person who knew that he or she was HIV-positive. In fact, the question whether the victim consented to the refusal of protection of not is unimportant: although it might have an impact on entitlement to civil compensation, it has no impact in criminal law.

Lastly, it should be noted that the result plays an essential role in this type of offence. For example, an HIV-positive person who regularly uses protection but infects someone in one of his or her rare “slips” will be convicted, whereas a person who refuses ever to use protection but does not infect anyone will not be prosecuted. So there appears to be an advantage to playing Russian roulette.

3.2 Failure to offer assistance to a person in danger

Article 223-6 of the Penal Code states that anyone who wilfully fails to offer assistance to a person in danger, when he could provide that assistance without risk to himself or to third parties, or when he could initiate rescue operations, is punished by five years' imprisonment and a fine of €75,000. This offence seeks to deter indifference as to the fate of others. Everyone faced with a grave and imminent danger to a person must offer assistance if there is no risk in acting. The assistance has to be possible and safe for the person assisting. The Penal Code denounces egotism but does not require heroics.

This offence appears to be applicable to the “knowing” transmission of HIV. A person who knows that his status might contaminate his sexual partner could be putting that partner at grave and imminent risk. And the person can be found guilty if he fails to provide assistance, notably by failing to use protection. But all this remains theoretical, because the courts have not

yet rendered a decision to this effect. Nonetheless, a rejection of the offence of ANS by the Court of Cassation could cause complainants to take this road.

The characteristic of this offence is that the ability to prosecute does not depend on a result. It matters little whether the victim placed in harm's way has actually been harmed. What is punished is the abstinence from acting and the indifference regarding the fate of another person, not the contamination itself. This allows prosecutors to take the repeated use of protection into account, and to determine whether someone has engaged in clearly risky behaviour, and potentially prosecute them even though they have not actually contaminated partners.

3.3 Involuntary offences [against the physical integrity of the person]

Article 222-19 of the Penal Code states: "Causing a total incapacity to work in excess of three months to another person by clumsiness, rashness, inattention, negligence or breach of an obligation of safety or prudence imposed by statute or regulations, in the circumstances and according to the distinctions laid down by article 121-3, is punished by two years' imprisonment and a fine of €30,000." If the work incapacity is less than three months, the sentence is one year's imprisonment and a €15,000 fine.

This misdemeanour punishes "a person who deviates from behaviour that is considered normal given the situation that he is in or the activity that he is carrying out, and who thereby causes bodily harm to a person without intending it, and, in some cases, without even foreseeing it."[9] Thus, the offence lumps several different kinds of behaviour together: clumsiness (such as where a worker lets his tool drop from scaffolding onto a passer-by); and negligence or carelessness (knowingly doing something badly, but either not realizing the potentially harmful consequences of the actions, or accepting the risk that they pose, such as where a worker juggles his tools while on scaffolding and thereby causes harm to a passer-by).

This extremely diverse range of behaviours can be observed in the realm of the "knowing" transmission of HIV as well. A prohibition against negligence or carelessness makes it possible to convict people who were aware of their illness, but who accepted the risk of failing to protect the HIV-negative person and of contaminating him. The misdemeanour of failing to offer assistance to a person in danger contemplates this kind of negligent attitude. In the misdemeanour of carelessly causing incapacity, the result, i.e. the infection of a person, is necessary. However, the misdemeanour of carelessly causing incapacity could permit the conviction of a person who is not formally aware of his infection, but who, by engaging in risky activity, realizes that he *might* have become infected. This scenario would depend to a large extent on the judge's assessment of the quantitative and qualitative value of the risks accepted. By targeting clumsiness, the offence could even be used to punish accidents that occur in the context of protected sex, such as the breakage of a condom which a person with sharp nails has put on poorly, or a situation where protected sex is followed by a facial ejaculation that comes into contact with the mucous membranes of a person's eye. All these kinds of scenarios, and the ensuing battles of experts, are quite foreseeable.

[9] M.L. Rassat, *Droit pénal spécial*, Dalloz, no. 299.

The disadvantage of this offence, then, is that it encompasses attitudes that are not morally equivalent: knowing infection during sex (where a person knows that he is HIV-positive, but does not want to transmit the virus, and nonetheless accepts the risk and is aware of the fact it could materialize) and accidental contamination through clumsiness. The advantage is that the relative leniency of the custodial sentence makes it easier to tailor the sentence to the offender by imposing as a suspended sentence with probation, a suspended sentence subject to a community service order, or other measures.[10] Such measures are only available where the custodial sentence is less than five years in duration. They offer the convicted person the opportunity to get regular medical or social care under the guidance of a social worker. With offenders who deliberately transmit HIV, this would make it easier for a person who is in denial about his illness or its mortal nature to be reintegrated into society.

3.4 The misdemeanour of causing risks to others

Article 223-1 of the Penal Code defines this misdemeanour as "the direct exposure of another person to an immediate risk of death or injury likely to cause mutilation or permanent disability by the manifestly deliberate violation of a specific obligation of safety or prudence imposed by any statute or regulation." It is punished by one year's imprisonment and a fine of €15,000. However, the offence cannot apply to "knowing" transmissions of HIV because it requires the existence of a specific obligation of safety or prudence, and no law or regulation requires the use of a condom during sex.

Conclusion

The range of measures available under the criminal law appears sufficient.

A specific statute does not appear to be necessary.

Prevention is not a job that the courts are able to do.

[10] Articles 132-39 through 132-57 of the Penal Code.