

Decriminalisation of HIV Transmission in Switzerland

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In Switzerland, two different non-HIV-specific statutes can be applied to HIV exposure or transmission. Art. 231 of the Penal Code allows the prosecution of anyone who spreads “intentionally or by neglect a dangerous transmissible human disease” without the need of a claimant. Disclosure of HIV-positive status and/or consent to unprotected sex does not prevent the offence, in effect criminalising all unprotected sex by people with HIV.

Spreading of human diseases (Art. 231 of the Swiss Penal Code)

1. Anyone who intentionally spreads a dangerous transmissible human disease shall be punished with prison from one month up to five years. If the offender has acted out of a mean attitude, the punishment will be penitentiary up to five years.
2. If the offender has acted out of negligence, the punishment shall be prison or he/she shall be liable to a fine.

In addition, art. 122 (relating to grievous bodily harm) can be used to prosecute HIV transmission after unprotected sexual intercourse without disclosure. In that case, disclosure and consent are a defense, and a claimant is required. We do not wish to eliminate art. 122, but we oppose to how prosecutors have been using this article.

Art. 231 is not a specifically HIV/AIDS aimed legislation but has survived as an old article of the Swiss Penal Code adopted at the end of the 1940s in order to fight the propagation of syphilis among sex workers. With the arrival of antibiotics, syphilis ceased to be a problem, yet the article remained unnoticed until it was “rediscovered” in 1989 when it was first applied to HIV. Since then, 39 prosecutions and 26 convictions have been carried out under this article, sometimes used in connection with art. 122.

Despite the significant scientific progress in the field of antiretroviral therapy (ART) massively decreasing the risk of transmission (EKAF statement, 2008) and despite the fact that HIV is seen nowadays in western countries as a chronic infection, a significant number of cases, in Switzerland, still come before the courts as a result of this article.

On the international level, it is recognized that the criminalization of HIV exposure and non-intentional transmission goes against all preventive efforts and places the whole responsibility on HIV-positive people. This was also recognized in a special report presented at the UN Human Rights Council in Geneva in June 2010.¹

¹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Human Rights Council, Geneva, June 2010 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.pdf>.

The EKAF adopted a long-term and multiple-pronged strategy to modify the application of article 231 in the courts as well as to change the wording of the article, in order to incriminate only HIV transmission committed with harmful intention. We have identified three main components in this strategy:

The Evidence: why the law is problematic

By supporting and participating in studies, publications and research, the EKAF is trying to achieve a comprehensive knowledge of all aspects of the problematic use of art 231 in order to support, with scientific evidence, the necessity of a change in the law.

The so-called “Swiss Statement”² from the EKAF in 2008, widely discussed during AIDS 2008 in Mexico City, in regard to the non-transmissibility of HIV under ART was a major step in creating awareness not only in the scientific community, but also in courts and among prosecutors, that today a person living with HIV cannot be automatically considered infectious.

The Law: changing its application

The EKAF also supported all efforts to change the interpretation and application of art. 231 before the Swiss courts, notably encouraging a specialised legal debate. Moreover, this was particularly successful following the publication of the “Swiss Statement”. In early 2009, an HIV exposure case was appealed in Geneva and finally dismissed in early 2009 after both prosecutor and judge took the Statement into account. However, in the absence of an appeal to a higher court, this case does not yet constitute binding case-law for courts in Switzerland’s other cantons.

The Political Process: change the law

Given the many pitfalls that can occur in the Swiss political and legislative process, it is very difficult to erase an article from the Penal Code. In most countries, historically, Penal Codes tend to grow, adding more and more articles over time. In order to avoid this issue, EKAF opted for a solution that pleads for the modification of the article, leaving only intentional transmission as a criminal offence.

The modification of art. 231 of the Swiss Penal Code is now accepted in the draft of a new Law on Epidemics. The EKAF continues to engage in the debate on this topic by collaborating with partners (NGOs etc.) in order to sustain the necessary political pressure to modify the art. 231 of the Penal Code, foreseen in the Law on Epidemics. The EKAF also regularly wrote to or attended meetings with political leaders in order to keep the issue at a certainly level of visibility.

The new Law on Epidemics should be discussed before Parliament next year. If it passes, this will automatically change the text of art. 231, leaving only intentional transmission as a criminal offence.

² <http://www.ekaf.ch>

Swiss Aids-Links:

The Swiss National AIDS Commission:
Check-your-Loveline-Tool:
LOVE LIFE STOP AIDS Campaign:
Federal Office of Public Health:
Swiss AIDS Federation:

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