

**Factsheet on the Swiss National Science Foundation (SNSF) Study (2009):  
“Criminal justice handling of HIV/AIDS in Switzerland in the light of HIV/AIDS prevention concerns: status quo, reflection, conclusions”, headed Kurt Pärli, University of applied sciences Zuerich, Switzerland, with the cooperation of Peter Moesch, in collaboration with Aids-Hilfe Schweiz<sup>1</sup>**

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**Background and point of departure of the SNSF study**

In the course of the early 1990s, there was a fierce debate in terms of criminal policies and criminal law doctrine regarding whether and how HIV transmission should be prosecuted. To date, there is no consensus in jurisprudence on this topic. In a European comparison of the number of convictions as a result of HIV transmission, Switzerland is in the lead, together with Sweden and Austria.

**Project objectives**

Systematic scientific evaluation of legal precedent on criminal justice handling of HIV/AIDS to date is to provide a basis for a current analysis of the role of criminal justice in the light of prevention-theory and medical knowledge acquired in recent years. The necessity and effectiveness of relevant criminal justice norms and their interpretation for the purposes of HIV/AIDS prevention should be reflected in particular.

For the Swiss AIDS Federation (*Aids-Hilfe Schweiz – AHS*) as a partner in this project, the study is to provide a decisional basis for further course of action; on the one hand in terms of counselling services, which have to anticipate and take into account criminal justice, and on the other hand for the normative commitment of the association against discrimination of persons with HIV.

**RESULTS AND ANALYSES**

**Data collection**

In order to record as thoroughly as possible all judgments involving cases of assault with intent to cause bodily harm (according to Article 122 ff of the Swiss Penal Code [*Strafgesetzbuch – StGB*]) and spread of dangerous diseases (according to Article 231 of the Swiss Penal Code), 94 courts of first instance and all cantonal courts of second instance were asked whether judgments in connection with HIV/AIDS were available. Sixty-two courts of first instance and 17 courts of second instance replied. The results were compared with AHS documentation, judgment statistics of the Swiss Federal Statistical Office as well as the legal online database Swiss-lex and newspaper archives.

**Judgments passed**

The following chart shows an increase in convictions in connection with HIV/AIDS since the time period 2000–2004. It appears that criminal judgment of HIV/AIDS is primarily a matter for courts in urban areas. In all, the judgments contain 39 sets of facts, which could be discerned from the judgments in varying detail.

**Table 1: Convictions according to period (n=51)**

	First instance, cantonal	Second instance, cantonal	Fed. Supr. Court	Total
Before 1989	0	0	0	0
1990–1994	2	2	2	6
1995–1999	4	2	2	8
2000–2004	9	3	3	15
2005–2009	9	9	4	22
<b>Total</b>	24	16	11	51

<sup>1</sup> This factsheet is a very condensed version of the final report on the SNSF study. For the sake of legibility, all source details have been deleted. For source evidence and an in-depth discussion of the results, please see the final report NF 13DPD3118107/1.

**Table 2: Gender of victims (n=68) and accused (n=39) in the 39 proceedings**

	Men	Women	Total
Accused	32 (82.1%)	7 (17.9%)	39 (100%)
Victims	37 (54.4%)	31 (45.6%)	68 (100%)

There are generally no details on the nationality of the victims, which is why no valid data is available in this respect.

**Table 3: Nationality of accused (n=39)**

	Number	Percent (rounded off)
Switzerland	9	23.077 (23)
African countries	11	28.205 (28)
European countries	4	10.257 (10.5)
USA	1	2.564 (2.5)
Asia and Middle East	2	5.128 (5)
Unknown	12	30.769 (31)
Total	39	100 (100)

Thirty-six of the 39 cases involve the transmission of HIV through sexual contact. Only three cases involve other criminal offences in connection with HIV. Most of the relevant sexual contacts which were the object of the criminal judgment in connection with HIV occurred on a consensual basis; only three of the 36 constellations involved rape and other sexual assaults.

Thirty-one cases involved (attempted) transmission in connection with heterosexual relationships, while five cases involved infection through homosexual contacts.

**Table 4: Offender-victim constellations (n=39)**

	Frequency
Heterosexual contacts	31
Homosexual contacts	5
Other constellations	3
<b>Total</b>	<b>39</b>

Statistics show that most matters coming for court judgment involve serodiscordant couples who have unprotected sex in new partnerships and where the seronegative participants are unaware of their partner's serostatus. A second frequent constellation is when, in new partnerships, no truthful information is given upon inquiry concerning serostatus. A third constellation which frequently occurs is that serostatus is not clarified in long-term partnerships. Finally, there are also frequently judgments where serostatus is known and the partner is informed, and unprotected sex occurs subsequently with the knowledge of both parties. In this case, the seropositive partner is often convicted on the grounds of violating Art. 231 of the Swiss Penal Code but (since 2004) no longer on the grounds of (attempted) grievous bodily harm.

### **Sanctioning and sentence**

There were convictions in 26 cases. In five cases there were convictions combined with partial acquittals or partial abandonment of case regarding relevant accusations. In six cases there were acquittals, whereby acquittal in two cases was based on adherence to safer sex rules, one case involved a judicial error with regard to medical secrecy, in another case the concerned party was *non compos mentis*, in a further case Swiss law is not applicable, and in one case the offences were statute-barred.

The following table shows that in over half the convictions no HIV infection occurred or could be proved in the manner stipulated by law and for this reason only constituted a tentative prosecutable offence.

The three judgments which were issued only on the grounds of (possibly attempted) violation of Art. 231 of the Swiss Penal Code (StGB) all relate to informed, unprotected sexual contact between HIV-positive and HIV-negative partners.

**Table 5: Facts in convictions relating to HIV/AIDS (n=33)**

	Number of cases
Art 122and231 StGB	6
Art. 122 and Art. 231 StGB in conj. with Art. 22 StGB (attempt)	17
Art. 123 and Art. 231 StGB in conj. with Art. 22 StGB (attempt)	1
Art. 122 and Art. 231 StGB in conj. with Art. 23 StGB/former version (unsuitable attempt)	2
Art. 123 in conj. with Art. 22 StGB, Art. 125 and Art. 231 StGB	1
Art. 125 and Art. 231 Clause. 2 StGB (negligence)	1
Art. 122 StGB	1
Art. 122 in conj. with Art. 22 StGB	0
Art. 127 StGB	1
Art. 231 StGB	1
Art. 231 in conj. with Art. 22 StGB	2

In cases where conviction occurred according to Articles 122 and 231 of the Swiss Penal Code, the sentence was between two and four years' imprisonment. Even in more recent judgments, severe penalties have been pronounced in the event of an infection, e.g., a sentence of three years and five months was pronounced for a single act which was also linked to a conviction on the grounds of coercion and assault. Compensation amounts for the victim vary greatly and are to be found in some individual cases, particularly in this category. The maximum amount is CHF 80,000.

As stated, the large majority of cases meet the definition of Articles 231 and 122 of the Swiss Penal Code in the form of attempt (Art. 22 Section 1 of the Swiss Penal Code); there was consequently no infection or there was no causal connection between an infection and the accused's behaviour. In these cases, the sentence varies greatly between judgments, depending on accompanying circumstances that are relevant to guilt: While on average judgments of approximately 18 months to two years are pronounced, individual outliers (first instances) showed suspended sentences of 10 or 12 months.

In cases of informed consent with unprotected sexual contact between seropositive and seronegative persons, conviction on the grounds of grievous bodily harm has been excluded since Federal Court Decision (BGE) 131 IV 1. In these cases, conviction on the grounds of spreading a dangerous disease (or an attempt to do so) according to Art. 231 of the Swiss Penal Code is thus the only option.

Whereas in one such case in 2005 a suspended sentence of six months – with a probationary period of five years – was pronounced, the other judgment in 2006 provided a 12-month suspended sentence with a probationary period of four years.

The latter judgment of Zurich District Court (*Bezirksgericht*) contains a notable anomaly: Conviction on the grounds of attempted spread of a dangerous disease (Art. 231 of the Swiss Penal Code in conjunction with Art. 22 of the Swiss Penal Code) is supplemented by conditions such as the duty to inform persons with whom one engages in sexual contact and by a duty to register (*Meldepflicht*) all persons with whom there is sexual contact.

### ***The role of the victim in the case of HIV: between consent, permitted risk and victim's responsibility***

The cases indicated in legal precedent are mostly based on unprotected sexual contact without the victim having been informed. In a number of cases, however, the question arises as to what effect the victim's knowledge of his/her partner's seropositive status has in terms of criminal liability of the HIV-positive accused party.

The question is discussed in legal precedent primarily in terms of "consent". Consent on the part of the victim is fundamentally a possible justification which may legitimate actions constituting an offence in the case of the rights of individuals such as those involved in bodily harm. On the other hand, any justification as a result of consent in the case of offences directed against common interests is excluded from the outset. The question of justifying consent is contested in cases of grievous bodily harm in general and independently of HIV/AIDS. It is assessed on the basis of whether the purpose of the consent is related to a justifiable interest of the person concerned, or even to a moral value, and thus offsets the severity of the injury in terms of weighing up interests. This is the assumption particularly in the case of medical interventions.

In cases where the parties had unprotected sexual contact even though the seropositive status of one partner was known, from the criminal law point of view it is, strictly speaking, not a question of consent to a possible infection with HIV but rather consent to a specific risk. From a structural point of view, these cases correspond to the question of consent to participate in dangerous sports activities. In essence, it is a question of permitted risk within the context of demarcating spheres of risk.

According to the Swiss Federal Supreme Court, cooperation in another person's self-endangerment is exempt from punishment if the victim freely and consciously exposes him/herself to a specific danger. It is crucial that the consenting party has sovereignty over the event and thus is able to influence what is happening and to intervene at any time and right up until the last moment.

On the other hand, a so-called mutually agreed endangering of another person is categorically punishable if sovereignty over the event no longer lies with the consenting party but the victim is exposed to an incalculable development which he or she would no longer be able to stop.

According to current jurisdiction, the key issue is who has sovereignty over the event. This depends in particular on the state of knowledge and the ability to grasp the actions in question and their possible consequences. If both parties have sovereignty over the risk occurrence, participation in another party's self-endangerment is always assumed not to be subject to prosecution.

In Swiss Federal Supreme Court practice regarding the effect of consent in the case of informed, unprotected sexual contact (Art. 122 of the Swiss Penal Code), the principle of personal responsibility and of a victim's joint responsibility is expressed, which ultimately also corresponds to the prevention strategy with regard to HIV/AIDS. In the light of this, it is a matter of controversial debate in international discussion whether informing one's partner of one's HIV status is, or should be, an absolute requirement for impunity in participating in self-endangerment. The question becomes particularly relevant if the uninformed HIV-negative partner accepts the HIV-positive status and/or explicitly wants unprotected sex without knowing the specifics of his or her partner's serostatus. In Swiss criminal jurisprudence and legal precedent, to date this question hardly appears to have been discussed. The question of consent and requirement to inform becomes even more virulent if the viral load of the person concerned is below the detection limit and infectivity is thus very low.

The construct of consent or cooperation in self-endangerment by the victim is justificatory for grievous bodily harm and Art. 122 of the Swiss Penal Code. According to prevailing jurisprudence and practice, however, this does not apply to Art. 231 of the Swiss Penal Code as this article does not involve individual legal interests which can, in principle, be consented to, but rather is a question of public legal interests which are not accessible to consent. It is readily recognised by legal precedent that anyone who adheres to classic safer sex rules cannot be liable to prosecution. Technically, these principles would also have to apply under the provisions laid down by the Swiss National AIDS Commission (*Schweizerische Kommission für Aids-Fragen – EKAF*), where, as a result of effective treatment, the viral load is no longer detectable and then unprotected sexual contact within a partnership takes place.

In legal precedent, the question of the victim's personal responsibility is also partly taken up in connection with a possible right to compensation (Art. 49 of the Swiss Code of Obligations [*Obligationenrecht* – OR]). It is primarily the degree to which the victim is affected that is taken into account, but this is also considered to the detriment of the victim if, despite knowledge of the HIV infection, he/she again seeks sexual contact with the accused. If the injured party, despite knowledge of the (supposed) HIV infection of the partner does not defend him/herself either physically or verbally against unprotected sexual intercourse, a certain amount of personal fault is assumed and deducted from any compensation due.

### ***Findings on infectivity and its significance in criminal justice***

Swiss Federal Supreme Court precedent recognises that the probability of infection as a result of sexual contact is low or even very low depending on the constellation of the case. The likelihood of infection as a result of one-off unprotected sexual intercourse is thus estimated in the per-mille range. In more recent judgments, the Swiss Federal Supreme Court denies that these research-based results have any significance regarding intent and, with regard to unprotected sexual contact of people with HIV, thus establishes an actual “zero-risk doctrine” with regard to HIV infection which has so far not been held when dealing with other dangers: HIV positive persons who have unprotected sexual contact with another person are thus normatively assumed to accept the realisation of the risk of infection and thus the realisation of an offence with eventual intent (*dolus eventualis*).

### ***In particular: the relevance in criminal justice of the new recommendations for serodiscordant couples in long-term relationships***

In the light of new scientific knowledge, the Swiss National AIDS Commission (EKAF) stipulates that a serodiscordant couple in a long-term relationship may dispense with further protective measures (i.e., a condom) in sexual contact on three conditions, because there is no discernible risk of infection:

- antiretroviral treatment of the HIV-positive partner must have suppressed the viral load in the blood to an undetectable level for at least six months;
- the treatment must be consistently adhered to by the patient and regularly monitored by the doctor; and
- the HIV-positive partner must not have any other sexually transmitted diseases.

According to EKAF's recommendation, the decision lies with the HIV-negative partner. For occasional encounters and in the case of new relationships, safer sex rules continue to apply.

New findings on sexual infectivity show that antiretroviral treatments have made massive progress in recent years and are able to suppress the viral load below the detection limit in the long term. The causal chain “HIV infection – outbreak of AIDS – death” was thus not only extended in time but became overall significantly more brittle and improbable. The threat to life that used to serve as grounds of grievous bodily harm (Art. 122 Section 1 of the Swiss Penal Code) as a result of HIV infection is thus also brought into question.

The improvement in antiretroviral treatment, which is the basis for the EKAF's new findings, shows the necessity to review Swiss Supreme Federal Court practice on this point, concerning all constellations of HIV transmission through sexual contact.

In constellations where unprotected sexual intercourse takes place without giving rise to any infection or where, based on the evidence, infection may have occurred through additional outside factors, there are no objective elements of an offence, but according to the current legal situation a conviction on the grounds of attempted bodily harm is still conceivable. Given that punishment on the grounds of an attempted crime always requires that the accused acts wilfully, in cases of unprotected sexual intercourse where the HIV-infected person complies with EKAF requirements, conviction on the grounds of attempted bodily harm is ruled out.

***Discourse on prevention and public health in the judgments, particularly AIDS counselling and prevention strategy of dual responsibility in criminal law practice***

Since the middle of the 1990s, the objectives of Swiss AIDS policy have been to minimise the number of new infections, prevent the stigmatisation of those affected and provide patient care suitable to their needs. The prevention model is based on the dual responsibility both of HIV-positive persons as well as the HIV-negative population in general, but also in concrete cases of sexual contact. This “new Public Health Strategy” makes it absolutely essential for everyone to behave responsibly and not discriminate against people with HIV/AIDS.

As previously discussed, in the case of informed, unprotected sexual contact in the context of Art. 122 of the Swiss Penal Code, where the person concerned has sovereignty over their actions, the Swiss Federal Supreme Court assumes self-endangerment, which excludes criminal liability on the part of the HIV-positive partner in this respect. This expresses the principle of personal responsibility and of a victim’s joint responsibility, which ultimately also corresponds to the prevention strategy with regard to HIV/AIDS.

As far as Art. 231 of the Swiss Penal Code is concerned, on the other hand, no importance is attached to “informed consent” and the criminal liability of the HIV-positive person is not diminished as a result of consent to unprotected sex. If one wanted to apply the idea of dual responsibility consistently in this respect, in the event of mutually agreed unprotected sexual contact, both partners would have to be convicted on the grounds of spreading a dangerous disease. If one does not wish to draw this conclusion, a restriction or reversal of the application of Art. 231 of the Swiss Penal Code would be worth investigating *de lege ferenda*.

***Acknowledgment***

Approximately 25 years after the start of the HIV epidemic, it can be said that the basic decision was correct to generally dispense with such classic health policing measures as compulsory testing, isolation and contact-tracing. Even though the (still) current Epidemics Act is more aligned with classic health policing intervention, the strategy to combat HIV/AIDS is based in epidemic law. Through a unique coalition of affected persons, AIDS organisations and government bodies, the HIV epidemic has been largely stemmed. As a matter of fact, Swiss HIV prevention has been getting international recognition. The new Public Health Strategy to combat AIDS that is based on the learning ability of individuals proved effective in part because it included the promotion of solidarity and non-discrimination of people with HIV/AIDS. The importance of respect for human rights in fighting HIV/AIDS is proving to be a key success factor worldwide.