

HIV and Criminal Law: Four Principles.

Criminalising HIV transmission is not a means of prevention, but has a counterproductive effect: It creates the illusion that the state has control over HIV and that HIV positive individuals have sole responsibility for protecting others against HIV transmission. However, when people think that HIV positive people are solely responsible for protection against HIV infection they may be tempted to neglect their own protection behaviour.

Apart from this: Only those who know that they are HIV positive can be prosecuted for HIV transmission. Criminalising HIV transmission may cause people not to test for HIV, under the motto: If I am not tested I can't be held responsible under criminal law. In addition to this, it promotes the stigmatisation of HIV positive people, which might hinder positive people from dealing with their status in a self-confident and responsible way.

On the other hand, there are cases where HIV transmission has criminal relevance, for example, if the other person was disceived, i.e. mislead fraudulently, their trust was betrayed or transmission was intended.

Whenever HIV plays a part in court the following principles should apply:

1. The principle of shared responsibility shall always apply for sexual encounters.

HIV prevention means in our opinion that all people involved must learn not to rely on others but to take their protection into their own hands. This means, in our view, that people with HIV cannot be required to disclose their infection at the very beginning of occasional encounters or at the beginning of a new relationship, but one can expect them as well as their partners to take responsibility for their own protection against HIV transmission.

We support the principle of shared responsibility in this respect. Shifting responsibility to people with HIV is not only unethical, but detrimental for preventing HIV transmission (see introduction).

Shared responsibility means for us that we see partners in sexual encounters – whether tested HIV positive or negative or untested – principally on an equal footing, as free and equal partners who take decisions jointly on the basis of information and communication and who are able to take their protection against a transmission into their own hands.

There may be cases, however, when no equal footing is given, for example, where one of the two partners is limited in their capacity to act due to alcohol and drug consumption, in cases of dependence, when pressure is exerted or in the case of reduced cognitive abilities. In such cases the other partner who is in the superior position has greater responsibility. Therefore, we never regard the individual as standing alone with their responsibility, but we always see the joint responsibility of their partners (resp. for their partners).

2. HIV positive individuals have the right to freedom from prejudice.

Many legal conflicts over a (potential) HIV transmission take place in the context of disappointment due to a desired relationship. Judges are required to face people with HIV in an unprejudiced way, i.e. they must not give them less credibility from the start than they would give a negative person. This includes also to free themselves from the idea of the “irresponsible positive person” which is widely promoted by the media. In this context it is important that the public and the judiciary do not accept to be misused in other people’s “war of roses”.

3. In the area of tension between law and prevention a subtly differentiated and sensitive behaviour is required.

The DAH deals with the issue of law and HIV mainly under two aspects:

- under the aspect of the human rights;
- under the aspect of prevention.

HIV prevention in the meaning of a “New Public Health“ wants to enable people to deal with HIV and AIDS in an independent and responsible way. The German strategy of fighting HIV/AIDS is particularly successful because it starts from the maturity and responsibility of each individual and because it speaks out against stigmatising HIV positive people and recognises their difficult situation in dealing with the “social taint“ of HIV.

Where (potential) HIV transmission is dealt with under legal terms, the judiciary and the media are required to act in a differentiated and sensitive way and should always have in mind the potential consequences for prevention. Witch hunts, for example, initiated by the media for allegedly reckless HIV positive people aggravate the stigma of HIV and make it even more difficult for positive people to disclose their HIV status and to enable their partners to deal responsibly with the infection.

4. Life with HIV has changed and requires modified legal decisions.

Administration of justice was so far based on a picture of HIV which is accompanied by high transmission rates (for example due to sex without condoms), rapid decline and death. HIV infection, however, has meanwhile turned into a treatable chronic disease. People who become infected with HIV today can have an almost normal life expectancy if they are diagnosed and treated early enough.

Apart from this, an antiretroviral therapy can reduce the transmission probability effectively. Such changes must be considered in jurisdiction to a higher extent. So far mentioning a condom in a sexual communication was regarded sufficient proof for the intention to avoid HIV transmission. The question is now whether the correctly applied viral load method should be assessed accordingly today, since it provides a comparable safety. (See DAH Position Paper “HIV-Therapie und Prävention“, April 2009, on the internet at http://www.aidshilfe.de/sites/default/files/0904_DAH-Papier_HIV-Therapie_und_Praevention.pdf).

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