

In France, sexual HIV transmission and/or exposure to transmission risk may constitute a criminal offence, under certain conditions. People living with HIV (PLHIV) are not familiar with these conditions, and nor are the prevention and care providers. In order to provide specification, the French National Aids Council (CNS) has conducted an in-depth legal analysis of the 23 criminal proceedings for HIV transmission and/or exposure decided by the French courts.

THE LEGAL GROUNDS OF PROSECUTION

- Unlike in certain countries, there is no legislation in France that makes specific reference to transmission of HIV or transmissible diseases.
- According to well-established case law since 1999, the prosecutions for HIV transmission and/or exposure are based on the offence of "administration of harmful substances causing physical or psychological harm to another person" ("administration de substances nuisibles ayant entraîné une atteinte à l'intégrité physique ou psychique d'autrui", or ASN), defined by Article 222-15 of the French Criminal Code.

Elements required to constitute the ASN offence

Actus reus (objective element)	Mens rea (intentional element)
<ul style="list-style-type: none"> Harmful substance: any body fluid containing HIV (<i>sperm, pre-seminal liquid, vaginal secretions, etc.</i>) Administration of the substance: by any unprotected sexual relations, presenting a risk, albeit minimal, of HIV transmission (<i>vaginal or anal intercourse, oral sex, etc.</i>) Actual harm to the victim's integrity <ul style="list-style-type: none"> - either physical: <i>HIV infection</i> - or psychological: <i>in the absence of actual HIV transmission, the psychological shock and anxiety suffered by the victim upon being informed of the risk to which he/she was exposed</i> 	<ul style="list-style-type: none"> The voluntary nature of the act is sufficient to constitute criminal intention: <i>the fact of having decided to have unprotected sexual relations upon the awareness of the risk for the victim.</i> Furthermore: <ul style="list-style-type: none"> - Harmful intention is not required: <i>it is not necessary for the perpetrator to have contaminated the victim on purpose.</i> - The level of intention accompanying the act (<i>concealing that he/she is HIV-positive/lying about his/her status/produce false results to manipulate the partner, etc.</i>) is without effect on the characterization of the offence, but may be taken into account in the assessment of the severity of the fault and determining the penalty.

THE SCOPE OF CRIMINALLY REPREHENSIBLE ACTS

The legal grounds and the elements of case law show that any unprotected sexual relation between HIV discordant partners may incur the criminal liability of the HIV-positive partner.

The simple exposure to the risk of HIV transmission, without actual transmission, is an offence that may give rise to prosecution and a sentence	Sentences for the simple exposure have only been pronounced as an incidental issue in matters including, in principal, a sentence for the actual transmission of HIV to at least one victim. Nonetheless, in law, there is nothing to exclude incriminating a person solely for simple exposure.
An unprotected sexual relation between HIV discordant couples is an offence committed by the HIV-positive partner, even if the HIV-negative partner is informed of the risk to which he/she is exposed and that he/she consents	The concealment by the perpetrator of his/her disease characterises nearly all the procedures. Nonetheless, in law, the criminal nature of the unprotected sexual relation shall not depend on either the concealment by the accused, nor the victim's consent, as the latter cannot exempt the perpetrator from his/her liability.
The formal awareness by the perpetrator of his/her HIV-positive status prior to the events is not an absolute condition to classify the offence	The awareness by the accused of his/her HIV-positive status prior to the events is nearly always certified by a previous HIV-positive result or engagement in HIV medical care. Nonetheless, the accused's liability may be initiated, even if he/she never tested for HIV, but could not ignore the likelihood of being HIV-positive given his/her at risk behaviour. Accordingly, avoiding to take an HIV test does not prevent the criminal risk.
Protecting the sexual relations by other means than systematic condom use presents a criminal risk	The admissibility of other means of protection than the condom, in particular the protection by the use of antiretroviral drugs remains uncertain at this stage, as the courts have not yet judged such cases. If the accidental condom breakage could be considered as a force majeure event exempting the perpetrator from his/her liability, some lawyers consider that if the prevention provided by the treatment fails, this could, under law be apprehended as a non-exempting uncertainty.

THE PENALTIES INCURRED

Criminal charges according to the seriousness of the infringement	Jurisdiction	Maximum penalty incurred
Actual transmission of HIV		
<ul style="list-style-type: none"> ASN (<i>art. 222-15</i>) having resulted in a mutilation or permanent disability (<i>art. 222-9</i>) 	Criminal Court	10 years' imprisonment + a €150,000 (~170,000 USD) fine
<ul style="list-style-type: none"> With aggravating circumstances (<i>art. 222-10</i>)^(a) 	Court of Assize (French higher criminal court, involving a jury)	15 years' imprisonment + a €150,000 (~170,000 USD) fine
Exposure to HIV without transmission		
<ul style="list-style-type: none"> ASN (<i>art. 222-15</i>) which resulted in a work incapacity of < 8 days or no work incapacity, with aggravating circumstances (<i>art. 222-13</i>)^{(a), (b)} 	Criminal Court	3 years' imprisonment + a €45,000 (~50,000 USD) fine

^(a) Aggravating circumstances: being the victim's spouse, cohabitee or partner under a PACS (civil solidarity pact); premeditation

^(b) In the absence of aggravating circumstances, a simple summary offence of the 4th class (Art. R624-1, up to a €750 (~835 USD) fine)

CONCLUSION

It is necessary to improve the information for PLHIVs on their rights and legal responsibilities. The prevention and support actions for PLHIVs must incorporate the criminal risk dimension

