

## **INTRODUCTION TO FRENCH CRIMINAL LAW ON HIV TRANSMISSION – JUNE 2010**

### **Prosecution**

France has no specific statutory provisions criminalizing the intentional sexual transmission of HIV or the exposure of others to a risk of transmission.

However, several provisions of the criminal legislation could potentially be applied to the sexual transmission of HIV. A paper published by the *Conseil national du sida* (CNS) in 2005, and translated as “Comments on the criminal classification of the sexual transmission of HIV in France,” goes over the French Penal Code, identifies the charges that could be laid in such situations, and discusses the elements of the offences in question. The paper must be read with certain clarifications and reservations in mind:

1. The paper was written in 2005, and some of its statements have been qualified by subsequent scientific developments. For example, it is now increasingly clear that the semen of a person with undetectable viral load is much less likely to contain a noxious substance than before.
2. The paper scans the Penal Code and identifies possible charges in cases involving HIV transmission. It was written to show that it is unnecessary to resort to specific legislation regarding this issue in France. It was emphatically not written to encourage prosecutions on the basis of given legal doctrines.
3. This paper served as a discussion paper for CNS. Among other things, it helped enable the organization form and express its position in an opinion dated April 27, 2006. After examining the limits of criminal prosecution for HIV transmission and its implications for prevention efforts, public health, testing, and the stigmatization of people affected by the virus, the CNS decided that the best approach was to assert the principle of dual or shared responsibility: the responsibility of infected persons not to transmit HIV, and the responsibility of all persons to protect themselves against infection.<sup>1</sup>

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<sup>1</sup> Conseil national du sida, Prevention: Opinion on the Criminalization of the Sexual Transmission of HIV, April 27, 2006, see unofficial translation in: Canadian HIV/AIDS Legal Network, AIDES, Groupe sida Genève and Global Network of People Living with HIV (GNP+), *Responding to the Criminalization of HIV Transmission or Exposure. Resources for lawyers and advocates*. Toronto 2010

4. Lastly, the paper should be read in view of subsequent developments in the case law, particularly the decision of the Court of Cassation (Criminal Division) dated January 10, 2006 (see the case summary).<sup>2</sup>

In 1998, France's highest court, the Court of Cassation, quashed a felony charge of "poisoning" in a situation where HIV had been transmitted sexually (see the summary of the decision).<sup>3</sup> The Court reasoned that "mere knowledge of the deadly nature of the administered substance is insufficient to establish homicidal intent", and since the intention to administer a deadly substance and the intention to kill, are both essential mental elements of the felony of poisoning, the charge could not be sustained.

In a similar case dating back to 2006, the Court upheld a conviction on a charge of "administration of a noxious substance causing a permanent disability" (article 222-15 of the Penal Code). The *mens rea* of that offence requires the intent to administer a substance and the knowledge that it is noxious.<sup>4</sup> As early as 1999, the Court of Appeal in Rouen had upheld a conviction based on the same offence, having set aside the charge of failing to assist a person in danger because there was no wrongful abstention that could form the basis of the misdemeanour.<sup>5</sup>

### **Potential sentences**

The misdemeanour of administration of a noxious substance is punishable by up to 10 years of imprisonment and a €150,000 fine (article 222-9 of the Penal Code),<sup>6</sup> not including potential civil damages. The court can find aggravating circumstances (article 222-10), notably where the victim's spouse or concubine perpetrates the violence, in which case the offence becomes a felony, and the matter must be brought before an Assize Court (which includes a jury), not a correctional court. The sentence for such a felony is up to 15 years of criminal imprisonment.

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<sup>2</sup> Cass., Crim., 10 janvier 2006, n. 05-80787:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007068912&fastReqId=1442849287&fastPos=1>

<sup>3</sup> Cass, Crim. July 2, 1998, n. 98-80529:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007069037&fastReqId=1869250575&fastPos=1>

<sup>4</sup> C. cass, (supra note 1).

<sup>5</sup> CA Rouen, September 22, 1999, n. 99-00018:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006935923&fastReqId=1605028137&fastPos=1>

<sup>6</sup> The sentencing structure is the same for voluntary acts of violence: articles 222-7 to 222-14 of the Penal Code.

This is precisely what transpired in France for the first time in 2008, when the Loiret Assize Court convicted a woman of the felony of administration of a noxious substance by a spouse or concubine, causing a permanent disability.<sup>7</sup> She was sentenced to a five-year suspended prison sentence.

### **Are we moving toward an obligation to disclose one's HIV-positive status?**

In most criminal cases involving the sexual transmission of HIV in France, the court stressed the manipulative conduct engaged in by the accused to conceal or avoid revealing his or her HIV-positive status, or even to obtain unprotected sex.

This reasoning is based on the idea that such deceptive manipulations make informed consent impossible. For example, in a case heard by the Court of Appeal in Rouen, an HIV test result was forged.<sup>8</sup> In another case, the accused claimed to be allergic to latex, and this was held to be a deceptive manipulation.<sup>9</sup>

However, the decision of the Loiret Assize Court on December 3, 2008,<sup>10</sup> suggests that an HIV-positive accused need not have engaged in deceptive manipulation in order to be convicted of the offence of “administration of a noxious substance by a spouse or concubine causing permanent mutilation or disability.” It is enough that the accused fails to disclose his or her positive status (and the accused in the Loiret case even disputed that she had failed to disclose her status.)<sup>11</sup>

In the Loiret case, it is questionable whether the element of intent was present, because it was not proven that the wife schemed to infect her husband or conceal her condition.

Thus, the question that arises today is whether, in cases not involving manipulation, an inference of guilt can be drawn from silence regarding one's status, and whether there is

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<sup>7</sup> Assize Court, Loiret, December 3, 2008, No. 50/2008. In conjunction with this case, see the decision of the Chambre de l'instruction d'Orléans, dated November 9, 2007 (RG No. 07/00291) which does not rule on the merits but clearly sets out the statement of facts and arguments:

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017798788&fastReqId=1029719009&fastPos=1>

<sup>8</sup> CA Rouen (supra note 4).

<sup>9</sup> CA Colmar, January 4, 2005.

<http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000006945374&fastReqId=1857535203&fastPos=33>

<sup>10</sup> Assize Court, Loiret (supra note 6).

<sup>11</sup> Here, disclosure of status, and in particular, the date of disclosure, was at the heart of the debate. The couple continued to live together after the wife's HIV status was revealed. The complaint was filed after the couple separated.

a duty, under the criminal law, to disclose that status before having sex. Would such a duty apply only to people who are HIV-positive? In France, it is hard to imagine that such a duty would be imposed on people who are HIV-negative. It seems likely that the courts would justify a difference in treatment based on the need to preserve public order and public health. If so, one can question whether this difference in treatment is proportionate to the intended purpose. If not, it might constitute discrimination.