HIV, CRIME AND PUNISHMENT
to tell their doctor who they may have gotten HIV from and to whom they may have passed it on, without worrying about repercussions. HIV prevention must also focus on everyone’s responsibility to prevent the transmission of the HIV virus, not just on the responsibility of those who carry the virus today.

The legislation and adjudication that we have in Sweden is counterproductive and alarming in view of the turning point we are at: more people than ever are living with HIV in Sweden and young people’s awareness about HIV is low. In combination with increased sexual risk-taking there is a clear risk for an increased spread of HIV.

It is time that Sweden reviews its HIV policy and bases it on international recommendations and respect for human rights. Sweden must begin there, as the foundation for HIV prevention work but then also tackle the issue of the number of prosecutions and convictions.

There is an easy way to do this. The UN Cooperation Programme for HIV/UNAIDS established a policy in 2008 that says that only those who intentionally transmit HIV to another person should be punished. We find it a clear choice that Sweden should join the UNAIDS policy and with the policy as a starting point, review the Communicable Disease Act and the criminal law application. Such a change will not automatically enable Sweden to achieve the objective of the national HIV strategy by 2016, however, we believe that such a change gives us the right foundation to build upon when the next strategy for the Swedish HIV policy is created in a few years’ time.

Kristina Ljungros
Board of directors, RFU
Ulrika Westerlund
Board of directors, RFSL
Christina Franzen
Chair, HIV-Sweden
Those who are suffering from a disease should not be turned into criminals. Rather they should be empowered to live with their health condition responsibly as should the rest of society to protect themselves against transmissible diseases. General criminal law should be reserved for the very rare and truly blameworthy case, that is, where someone actually intends to infect another and does so.

SUSAN TIMBERLAKE, Senior Human Rights and Law Adviser with UNAIDS who works specifically with issues associated with criminalization and HIV worldwide.

THE HIV/AIDS PANDEMIC is one of modern times’ greatest human catastrophes. Most people are aware of this, even though many rarely hear about or come in contact with the disease today. In the early 1980s the first person was diagnosed with AIDS in Sweden and now about 5,000 people in Sweden live with HIV. In recent years, around 400–500 people have been diagnosed with HIV in Sweden each year. In total, approximately 34 million people currently live with HIV worldwide.

When we announced a year ago that we could not perform the analysis and tracking for the police, a media storm ensued. The difference in knowledge and understanding of the complexity of problems between us as experts in the field and among the average person became very clearly apparent. This lack of knowledge of what the reality looks like is a consequence of the criminalization and is a threat to the work against HIV as I see it. For the tracking of all infectious diseases, we start from ‘molecular typing’, a method dependent on voluntary involvement and openness from the participants. Criminalization means that privacy and patient safety is lost, which in turn destroys the possibility of realistic documentation of transmission routes in the manner needed to develop effective prevention strategies and locate vulnerable groups. Criminalization is directly contrary to the promises of the National Strategy on HIV/AIDS. This must come to something that affects society as a whole, while it involves vulnerable groups.

It is very difficult to compare crime statistics among different countries. Legal systems have different procedures and methods for gathering statistics vary. However, it is clear that Sweden is one of the countries in the world where the highest number of people have been sentenced for having transmitted HIV or exposed another to the risk of transmission through sex. If you look at the number of prosecutions and verdicts in different countries, it looks like is a consequence of the criminalization and the manner needed to develop effective prevention strategies. An important reason for this is that knowledge and understanding of the complexity of problems between us as experts in the field and among the average person became very clearly apparent. This lack of knowledge of what the reality looks like is a consequence of the criminalization and is a threat to the work against HIV as I see it. For the tracking of all infectious diseases, we start from ‘molecular typing’, a method dependent on voluntary involvement and openness from the participants. Criminalization means that privacy and patient safety is lost, which in turn destroys the possibility of realistic documentation of transmission routes in the manner needed to develop effective prevention strategies and locate vulnerable groups. Criminalization is directly contrary to the promises of the National Strategy on HIV/AIDS. This must come to something that affects society as a whole, while it involves vulnerable groups. It is very difficult to compare crime statistics among different countries. Legal systems have different procedures and methods for gathering statistics vary.

However, it is clear that Sweden is one of the countries in the world where the highest number of people have been sentenced for having transmitted HIV or exposed another to the risk of transmission through sex. If you look at the number of prosecutions and verdicts in relation to the number of people living with HIV, Sweden stands out even more. As an example, in a globally unique case, the Swedish court punished a woman living with HIV for having exposed her children to the risk of HIV transmission by not informing medical personnel about her status during pregnancy and after delivery.

Since the late 1980s, more than 40 people in Sweden have transmitted or exposed another to the risk of transmission of HIV and many have been accused and convicted of crimes. The clarification of the crime has varied. Some of the cases brought to court concern people who have been charged with additional crimes involving violence or coercion, however, the vast majority involve voluntary and consensual sex.

What is remarkable is that many of the trials have taken place only quite recently. About half of the rulings have occurred after April of 2004, when the Supreme Court announced an indicative ruling in the case of «Christiane». Between 2004 and 2011 over 20 people were punished for having sex that carried the risk of infection, that is to say, when the person knew or she was HIV-positive and had unprotected sex.

Global Commission appointed in 2010

To increase knowledge about how criminalization impacts people living with HIV and what meaning this has for HIV prevention work, the United Nations Development Programme (UNDP) together with the Joint United Nations Programme on HIV/AIDS (UNAIDS) launched the Global Commission on HIV and the Law in the summer of 2010. The work will continue until December 2011, 2012, 2013 and 2014. Sweden participates actively in this work.

1) There has been a government interest in recent years to investigate the incidence of prosecutions for HIV in Sweden. As a result of Sweden receiving international criticism for the number of prosecutions for HIV, the National Board of Health and Welfare conducted a study - «transmission and punishment inventory 1988-2010», Stockholm. A list of cases between 2004 and 2009 can be found in the report by Peter Gröön and Ingela Berggren, «En studie om brottmål med grund i HIVsmitta och HIV/avläsning», Socialstyrelsen, 2 November 2009.
2) For a comparison, see the table on page 2.
3) For a comparison, see the table on page 2.
4) The case is depicted in the movie Title nude (2010), directed by Inge Leiding. More on Lilliehöök can be read in Anna-Maria Sörberg’s documentary book, Det påska-döde (2010).
5) In a few cases, the prosecution and verdict focused solely on whether HIV should be seen as a factor that changes what is classified as a rape to aggravated rape.
6) See page 3.
7) At least 12 cases have been brought to court, with two cases leading to a prosecution and conviction.
anyone who is aware that she or he is living with HIV is probably more inclined to think about practicing safer sex than before the diagnosis. But it can be difficult to talk about one’s illness due to the fact that fear and ignorance about HIV are high in the social community. Knowing that there are still so much prejudice can even lead people to avoid getting tested. The consequences of such a decision can be serious. The infectiousness of a person receiving effective treatment over time is often very low; however, it is high among those who have recently contracted HIV. This means that people who do not test themselves may pose a significantly greater risk to their own and others’ health than those who know their HIV status. To reduce the spread of HIV, it is therefore important that people understand the need to test themselves and have the opportunity to test themselves in a safe environment.

For a person receiving a notification that he or she has tested positive for HIV, it can be important for them to receive psychological and social support. It is especially important to reach people who do not practice safer sex or who, for various reasons, may find it difficult to inform their sexual partners that she or he is living with HIV. However, many do not receive the support that they need and have a right to receive. There are even people who have been advised by medical staff not to tell those in their social network that they are living with HIV since the risk of ostracization and discrimination is considered so high.

The Information Obligation must be seen more as a goal: that everyone should be able to talk about their illness without fear of the outside world’s reactions, or of being subjected to discrimination. It is important to ensure that this is possible. To legislate for the Information Obligation can increase stigmatization and lead to it being even more difficult to reach HIV-positive individuals with support and treatment. The current key issue, in terms of infection spread, is not how a few HIV-positive people behave, but rather, how we can reach those who do not get tested and who do not feel able to be open about their illness due to the discrimination HIV-positive people must face. It is this group which constitutes the main risk, to themselves and to others. That we have such difficulty reaching these people is in part a consequence of criminalization.

Anders Blaxhult, chief physician at Venhälstan, a clinic for HIV-positive men and women that was started in 1982 at Stockholm’s Södersjukhuset.

**RISK OF PUNISHMENT ADVERSELY AFFECTS PREVENTION EFFORTS**

Anyone who is aware that she or he is living with HIV is probably more inclined to think about practicing safer sex than before the diagnosis. But it can be difficult to talk about one’s illness due to the fact that fear and ignorance about HIV are high in the social community. Knowing that there are still so much prejudice can even lead people to avoid getting tested. The consequences of such a decision can be serious. The infectiousness of a person receiving effective treatment over time is often very low; however, it is high among those who have recently contracted HIV. This means that people who do not test themselves may pose a significantly greater risk to their own and others’ health than those who know their HIV status. To reduce the spread of HIV, it is therefore important that people understand the need to test themselves and have the opportunity to test themselves in a safe environment.

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For examples of how people diagnosed with HIV have changed their behavior, see the »Venhälstoren« in 1999:51 page 247ff.
COMMUNICABLE DISEASE ACT—A TOOL FOR PREVENTION

The individual’s rights and obligations when it comes to dealing with infections such as HIV and preventing the spread of HIV further can be found in the Communicable Disease Act. The law is part of a regulatory framework aimed at controlling the spread of serious diseases in the country. Today, the law comprises of over sixty diseases, including sexually transmitted infections such as chlamydia, gonorrhea and HIV. The Communicable Disease Act is important as it enables us, for example, to follow the development and expansion of dangerous diseases among the general public and within communities in Sweden, to understand the risks associated with them, and to allow for the development of effective preventative measures.

The Communicable Disease Act guarantees, for example, the right to free healthcare and medication, while at the same time making stipulations regarding the behavior of the person carrying the disease. The obligations that the HIV-positive individual has to their sex partners can be found in the rules of conduct given by the attending physician who notifies the person that he or she is HIV-positive. One rule of conduct is that the individual needs to use condoms for safer sex.

The Communicable Disease Act’s purpose is thus forward-looking—to prevent the spread of disease, not to punish individuals for past actions. If a doctor believes that a person is not compliant, or will not follow the rules of conduct and the doctor does not consider him- or herself to be able to help the patient in changing their behavior, the doctor can notify the county infectious control physician. This physician should first request a discussion with the patient and offer support. The physician, then, may apply for the detention and isolation of the individual if there are compelling reasons to believe that a person will not follow the rules of conduct and if there is a real risk that other people can be infected. The administrative court would then make a decision about how to proceed.

Sweden was one of the countries in the world that forced the most people living with HIV into isolation in the 1990s and early 2000s. In 2004, a new Communicable Disease Act was adopted that gave more consideration to every person’s equal worth and to the individual’s personal integrity. Since then, forced isolation has only been applied in a few cases.

The deficiencies in psychological and social support and the difficulty in talking about HIV can mean that society fails to reach people who are not expected to be living with HIV. One such example is Lillemor, whose story is documented in the film How could she? As a young, Swedish-born woman from a middle-class background, she belonged to a group not anticipated to ever come in contact with HIV. At nineteen years old, when she was informed that she was HIV-positive, she chose to keep her HIV status to herself. Not until the infection was discovered by medical personnel during a hospital stay, did she tell her husband. Lillemor did not transfer HIV to her husband, nor to the two children she bore, but was still sentenced to two and a half years imprisonment for attempted aggravated assault.
HIV and Criminal Law

It was important for all of us who worked on the issue during the ‘panic years’ not to create a separate legislation on HIV and AIDS because it would risk increasing discrimination and isolation. The fact that HIV is now considered to be a chronic disease and that infectiousness is reduced through treatment, makes it necessary to rethink the wording of the Communicable Disease Act and the application of the law. HIV should be treated the same way as other infectious diseases. I read interviews with judges who speak out about HIV without having any medical facts at hand. I was shocked that the court does not care about having facts.

LARS OLOF KALLINGS, virologist who led the Aids delegation in Sweden during the 80s and was head of the Swedish Institute for Infectious Disease Control for many years. Kallings has also many years of international experience with HIV, including as UN’s special representative on issues of HIV and AIDS.

A PERSON LIVING WITH HIV who is aware of his or her status, and subsequently has unprotected sex with another person without informing them their HIV-positive status may risk being reported to the police and charged with a violent crime.

To transmit HIV to another person, or to expose a person to HIV, is not in and of itself a crime in the Penal Code. Instead, a person can be prosecuted and convicted of various crimes. The act itself is not sufficient—the prosecutor must also show the court that the person acted intentionally or negligently.

If a person is deemed to have transferred HIV intentionally (intentional transmission), he or she may be convicted of the crime of aggravated assault. The sentence is between one and ten years in prison.

If a person has transmitted HIV through negligent behavior (reckless transmission), they can be convicted of giving rise to disease. The sentence for this conviction is imprisonment for up to four years.16 It is possible to impose a penalty even if HIV is not transmitted. If there is an intention to transmit HIV, the person may be convicted of attempted aggravated assault. If the person intentionally or through gross negligence subjects a person to the risk of becoming infected with the HIV virus, he or she may be sentenced for the crime of reckless endangerment.17 Penalties for these offenses are lower than when HIV is transmitted.

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How does the court determine that someone has transferred HIV to another person?

For a person to be convicted of transmitting HIV it must be proven beyond a reasonable doubt that it was indeed she or he who transmitted the disease. But it is not possible to determine who transmitted HIV to anyone simply by studying the virus. It is possible to establish that the virus belongs to the same strain, but more than two people can carry the same strain. This means that it is not always possible to exclude the possibility that someone other than the person suspected of or charged with the crime actually transmitted HIV to the plaintiff. A conviction requires the opinion of the court beyond reasonable doubt that the accused has been guilty of the alleged crime.

The opinion of the court beyond reasonable doubt that the accused has been guilty of the alleged crime.

The majority of prosecutions for HIV taken to the Swedish courts concern voluntary sex between two adults. So far no person has been convicted by a Swedish court of intentionally or attempting to transmit HIV to another person. Since 2004, courts have instead decided upon what is known as reckless transmission in cases where individuals were convicted of aggravated assault or attempted aggravated assault. This means that one has determined that the offender understood the risk of HIV transmission in the situation and had an indifferent attitude regarding the possibility of transmission. When the probability of HIV transmission is low, as in cases surrounding sexual acts that have a proven lower risk, a very strong case is required to argue for acts of recklessness. To argue for such a case, the offender must have shown particular ruthlessness.

If it cannot be proven that someone actually had the intent to transmit HIV, it can, as described above, still be possible to prosecute and sentence a person on the grounds of reckless behavior. To reach the boundary of a criminally unacceptable risk and therefore be convicted of the crime of reckless endangerment of transmitting disease, it is sufficient that a person had knowledge of their illness and still proceeded to have unprotected sexual intercourse. In other words, that the person violated the rules of conduct regarding safer sex and the use of condoms according to the Communicable Disease Act, as communicated to the HIV-positive individual by the attending physician.

The Communicable Disease Act’s regulations are important in criminal cases related to exposure to HIV transmission, although the act itself contains no provisions for penalties. Peter Gröön, county council lawyer, and Madeleine Leijonhufvud, professor emeritus of criminal justice, have indicated in a 2009 study that the courts impose sentences based upon the Communicable Disease Act’s rules on disclosure and protection. Gröön and Leijonhufvud came to the conclusion that there is a legal obligation for people living with HIV to inform their partners and to use condoms as per the Communicable Disease Act regulations which have been given criminal consequences.

Another factor that is very difficult to determine in criminal cases relating to sexual activity and HIV is how great the degree of risk was for HIV transmission in that specific case. When a person has been under effective treatment for a long time, there is a notable reduction in the amount of virus in the blood and infectiousness is thus reduced. Of course, many other factors influence the risk of HIV transmission in a particular incident. These factors include whether a condom was used or not; in which manner the sex took place—for example, if it was oral, anal or vaginal intercourse; the other person’s immune response, and whether or not either person carried another sexually transmitted infection at the time.

How does the court determine if a person acted intentionally or negligently?

To introduce a special HIV crime

To introduce a special HIV crime or a communicable disease crime—which in principle will only be used for prosecutions related to HIV—could contribute to the reinforcement of prejudice and negative attitudes about HIV.

To have a provision of the Communicable Disease Act that could be used to punish people who violated either the rules of conduct or other provisions of the Communicable Disease Act would mean that the Communicable Disease Act and the disease control authorities have a purpose other than to work on behalf of prevention. Even if the penalties for persons who were prosecuted and convicted would be lower than it is today, the risk is high that the number of prosecutions would increase. This, in turn, would contribute to an increased stigmatization of people living with HIV in Sweden.

UNAIDS also opposes the introduction of a specific HIV crime.

17| The prosecutors’ own guidelines (Skr 2009:158) is an illustrative case in point. Transfer risk is low; but the convicted man has actively denied HIV infection, failed to take medications, and was convicted of sexual assault after his HIV status was confirmed. He was found to have acted recklessly, which allows a determination of act of negligence.
‘Christian’ was reported to the police by eight men for not having informed his partners before sex, although none of them became infected. Taking this case to court was a journey for me. In the first instance, I experienced a horror that can only be understood as a relic of the eighties moral panic, when HIV was unknown and was a sure death sentence. I experienced no interest from the court’s side to understand my client’s situation, nor a desire to gain an understanding of how he had reasoned. Against all odds, Christian was finally cleared by the Supreme Court for his conviction that he is not contagious, with a reduced sentence as a result. But his case remains unique. I am not aware of recent examples where such consideration has been taken, despite the fact that the case should clearly be praxis. I guess that people just do not want to be open to a more realistic picture of reality, or beyond the scope of what we consider to be culture which is outside of the ‘average’ person’s consideration has been taken, despite the fact that the case should clearly be praxis. I guess that people just do not want to be open to a more realistic picture of guilt and responsibility in cases involving a sexual culture which is outside of the ‘average’ person’s reality, or beyond the scope of what we consider to be ‘normal’. Although the statistics show a greater overall tendency to take risks through not practicing safer sex, we continue to believe that liability rests on a reduced sentence as a result. But his case remains unique. I am not aware of recent examples where such consideration has been taken, despite the fact that the case should clearly be praxis. I guess that people just do not want to be open to a more realistic picture of reality, or beyond the scope of what we consider to be culture which is outside of the ‘average’ person’s

LEGAL UNCERTAINTY

Madeleine Leijonhufvud, professor emeritus of criminal justice, and Peter Gröön, county council lawyer, have revealed major shortcomings in adjudication in criminal cases relating to HIV. 19 They note that the Supreme Court’s attempt to clarify what is an intentional breach in the ruling of the case of »Christian« (see fact box) has not been the praxis in the district courts and courts of appeals, as was intended. Gröön and Leijonhufvud show that it is not currently possible to predict the application of the law in specific cases concerning transmission or risk of transmission of HIV. Cases that are objectively similar, involving unprotected sex where one person knows about their status but does not inform their sexual partners, is not always judged equally. A major problem that they point out is the courts’ difficult distinction between what is classified as an act of negligence as opposed to ruthlessness. For the individual, the classification difference means quite a lot, for example, with regard to the sentence. To be convicted of reckless endangerment or transmitting disease could mean a sentence of several months in jail while aggravated assault (or attempted aggravated assault) can lead to prison sentences of several years.

Guidance from the Supreme Court

What became known as the »HIV cases« began to appear in the Swedish courts in the late 1980’s, when the virus still appeared to be uncontrolled and an HIV diagnosis often meant a swift death. The disease’s hazard was considered to justify particular severity. But it was only after the advent of effective HIV drugs in the late 1990s, when HIV was no longer regarded as an illness that lead to death that the so-called HIV-crimes increa- singly began to go to court. In 2004 an important case was heard by the Supreme Court [NJA 2004 p. 176], one that looked like a breakthrough in the application of the law. A man named Christian, who had known about his HIV status since 1996, was charged with having had unprotected sex with multiple men. He had not transmitted HIV to any of them. In the court of appeals he was sentenced for attempted aggravated assault. He had only told his HIV status to one of the men before they had engaged in unprotected sex. He explained that he did not see himself as infectious because his virus-levels were low. The Supreme Court found that the risk of transmission of HIV with each incidence of sexual intercourse had been very low and that there was no indication that he had acted with negligence. Rather, the prosecution focused on him having engaged in sexual intercourse with a large number of partners, to judge him for attempted aggravated assault was, in other words, not applicable. The Supreme Court nevertheless considered that he had been guilty of unacceptable risk taking to an unlawful degree and convicted Christian for the crime of reckless endangerment. His prison sentence was reduced from three years to one.

Judgments from the Supreme Court are precedent, that is to say they are indicative for district courts and courts of appeals.

Foreigners are more severely affected

The consequences of a conviction for having transmitted HIV or exposed another to HIV can be more serious for people with foreign backgrounds. People who are not citizens of Sweden can be deported without a chance to return, after serving their sentence. Many times, this has occurred with little regard to the situation in the country of origin for the deportees, such as access to healthcare and medicine.

Sweden is the global leader of prosecutions for HIV exposure or transmission amongst the countries that have prosecuted five people or more, with more prosecutions per capita than any other country in the world. Sweden has been one of the worst offenders of the human right of lack of interference in private life by overly interfering in the private lives of individuals diagnosed with HIV. It constantly places public health concerns over the human rights of people with HIV and appears to ignore the fundamental truth that responsibility for preventing HIV exposure is shared between both partners. In sentencing, Sweden’s criminal justice system also seems to treat non-Swedes worse than Swedish nationals, in terms of length of sentencing and with deportation regardless of family or other ties to the country. Considering that Sweden has a global reputation for being a particularly compassionate, fair, just and rational country, its lack of compassion and unfair, unjust and irrational treatment of people living with HIV is particularly shameful.

Edwin J Bernard, author, journalist and activist focusing on HIV and AIDS.

Having unprotected sexual intercourse as an HIV-positive individual is an obvious manifestation of a careless and unacceptable risk. But it rarely involves intent to transmit and thus, consensual sexual activity should not be classified as violent crime. What is reasonable is to assess the degree of negligence. Here, the precautions taken by a person regarding safer sex practice are of great relevance, as well as virus levels in the blood, which together with other factors determine the actual infectiousness. The constant association of intent with HIV crime only increases prejudice and furthermore, physician testimonies—called in as expert witnesses—are often difficult for the court to assess and evaluate. The lack of knowledge and compliance after the Supreme Court judgment of 2004 in the handling of these cases means that essentially there is a lack of legal certainty.

In recent years, a growing number of countries have taken steps to criminalize HIV transmission. In theory, this has been done to prevent the spread of infection. In practice, it has done the opposite in reducing the effectiveness of HIV prevention efforts by reinforcing the stigma. Such measures send the message that people living with HIV are a danger to society. We must instead encourage tolerance, compassion and inclusion.

I call on all governments to review their legal frameworks to ensure compliance with the human rights principles on which a sound AIDS response is based. This is not solely a medical or scientific challenge. It is a moral challenge, too.

Ban Ki-Moon, UN Secretary-General, from a speech to the General Assembly in 2009.

CRIMINALIZATION RISKS VIOLATING HUMAN RIGHTS

In recent years, UNAIDS has noted the problem that more and more countries are passing laws that contribute to stigmatization and discrimination against people living with HIV and that hinder HIV prevention. Legislation should instead help to strengthen the human rights for people living with HIV as well as for people within groups that are particularly vulnerable to HIV. In a policy statement from 2008, UNAIDS notes that there is no research indicating that the criminalization of HIV transmission contributes to the attainment of justice or prevention of HIV. Rather, criminalization risks undermining both human rights and public health.

UNAIDS currently works to encourage countries to change or repeal laws that impede effective HIV prevention efforts. Punishment should, according to UNAIDS, only be considered in the extreme case where a person intentionally transmitted or attempted to transmit HIV to another person.

Additionally, various experts in the field note how the criminalization of HIV transmission often goes hand in hand with other strict laws that restrict the human rights of people who have sex with someone of the same sex, transgender people, people who sell sex and intravenous drug users. In addition to such laws violating individuals’ human rights, these laws work against HIV prevention work. When the risk of suspicion, ostracization and arraignment for crime is high and there are few opportunities for support and care, there are few benefits to finding out one’s HIV status.

21 See Anand Grover, UN Special Rapporteur on the right to physical and mental health, in his report to the UN Human Rights Council in 2010, 4/41/14/20.
HIV CRIMINALIZATION IN OTHER COUNTRIES

In many countries aiming to criminalize HIV transmission, HIV is a far greater problem than it is in Sweden. In West and Central Africa, there is an aim to criminalize HIV which has been inspired by a »model legislation« sponsored by United States Agency USAID. In countries such as Benin and Tanzania, the transmission of HIV can lead to life imprisonment, and those who do not inform their partners about their HIV status before sex or who fail to use condoms risk prosecution in Tanzania. New Guinea’s law makes HIV testing compulsory before marriage and Sierra Leone criminalizes women who put their child or fetus at risk for HIV transmission. In other countries, similar legislation is discussed. The most shocking example is the 2009 Anti-Homosexuality Bill in Uganda, which proposed that a person living with HIV who had sex with a person of the same gender should be punished by death.

However, there are also examples where countries have started to open up discussions aimed at problematizing the criminalization of HIV transmission. Norway began an overhaul of its penal code and application of the law in criminal cases of HIV in December 2010 and Denmark announced a similar measure in February 2011. The United States adopted a national HIV/AIDS strategy in July 2010 under which states are encouraged to review the legislation relating to the criminalization of HIV transmission. In Switzerland, in 2008, the court changed a verdict in a HIV transmission case on the grounds that research has shown that the risk of HIV transmission is negligible when: the person with HIV is undergoing effective treatment, who does not have measurable levels of virus in their blood and who does not carry other infections, so minimal that criminal liability cannot be considered. In the Netherlands, the Supreme Court concluded that the risk of HIV transmission is too small for it to be possible to convict a person living with HIV for an aggravated assault in connection with unprotected sex. The Court stated that it is up to Parliament to make special arrangements if they want to punish people living with HIV who engage in unprotected sex. In order to strengthen the law and order, the regional public prosecutor offices in England and Wales have published guidelines for prosecution relating to the transmission of HIV.

There are no data indicating that the broad application of criminal law to HIV transmission will achieve either criminal justice or prevent HIV transmission. Rather, such application risks undermining public health and human rights. Because of these concerns, UNAIDS urges governments to limit criminalization to cases of intentional transmission i.e. where a person knows his or her HIV positive status, acts with the intention to transmit HIV, and does in fact transmit it. In other instances, the application of criminal law should be rejected by legislators, prosecutors and judges. In particular, criminal law should not be applied to cases where there is no significant risk of transmission or where the person:

- did not know that he/she was HIV-positive;
- did not understand how HIV is transmitted;
- disclosed his or her HIV-positive status to the person at risk (or honestly believed the other person was aware of his/her status through some other means);
- did not disclose his or her HIV positive status to the person at risk (or honestly believed the other person was aware of his/her status through some other means);
- took reasonable measures to reduce risk of transmission, such as practicing safer sex through using a condom or other precautions to avoid higher risk acts; or
- previously agreed on a level of mutually acceptable risk with the other person.

[UNAIDS Policy Brief: Criminalization of HIV Transmission, 2008]
Making the Law work for the HIV response. A snapshot of selected laws that support or block universal access to HIV prevention, treatment, care and support.

Sweden has signed the 2001 UNGASS Declaration on HIV, where 189 countries agreed on an action plan on how to combat the spread of HIV. The countries’ commitment includes working to counter discrimination and prejudice against people living with HIV and to guarantee that their human rights are respected. Additionally, Swedish foreign policy on HIV issues is based on Sweden’s clear commitment to respect for human rights and to combat the prejudice against people living with HIV.

However, at the same time, the Swedish legislation and application of the law goes against the UN’s policy recommendation to limit criminalization to cases where someone with direct intent transmits HIV to another person. Sweden is, worldwide, one of the countries with the highest number of people prosecuted and convicted of crimes in connection with sex after having transmitted HIV or exposed another to the risk of transmission.

RFSU, RFSL, and HIV-Sweden considers that the Swedish legislation and application of the law is a barrier to effective HIV prevention work and risks violating the human rights of people living with HIV. Studies show that there is legal uncertainty for people who are prosecuted for HIV-related crime in Sweden. Prosecutions and convictions also act to reinforce prejudice and negative attitudes toward people living with HIV.

The Swedish legislation and criminal law model complicate efforts to halt the increasing number of countries criminalizing HIV transmission. It also risks adversely affecting international efforts to promote the rights of people living with HIV. Sweden endorses the UNAIDS Policy from 2008 on the criminalization of HIV transmission. Criminalization should be limited to cases where someone with direct intent transmitted HIV.

1. Swedish law, including the Communicable Disease Act and criminal law application relating to HIV in criminal cases be reviewed.
2. Sweden endorses the UNAIDS Policy from 2008 on the criminalization of HIV transmission. Criminalization should be limited to cases where someone with direct intent transmitted HIV.
3. the National HIV Policy remains clearly focused on prevention, care, support and treatment, sex education, and human rights.
LITERATURE


How could she… live as if it did not exist? [How could she… live as if it did not exist?], A film directed by Ingela Lekfalk. 2010.


30 HIV, CRIME AND PUNISHMENT


Träskman, Per-Ö. HIV-smitta, sundna handskar och brottmål [HIV transmission, sanitation and crime]. 2010.