Fighting against the virus or human beings?

Case study on human rights violations regarding HIV criminalization in Taiwan Versons with HIV/AIDS Rights Advocacy Association of Taiwan

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► HIV Special criminal law the Article 21: Legislative Evolution

1990 1997 2007 2020 2018

Minister of Justice: "conviction is based on the result of HIV transmission; it constitutes no crime if no transmission. Previous Article 21: Individuals who are fully aware that they are infected have, by concealing the fact, illicit sexual behavior, and

Minister of Health: "as there was no punishment for an attempted offence, the original regulation cannot deter people living with HIV (PLHIV) from transmitting HIV intentionally." Additional items were added regarding shared needles and punishment for an

The amendment which aimed at excluding attempted offence turned out to be aggravated.

An amendment was made to decriminalize consensual agreement of organ transplant between PLHIV

Rights violation

from public authority

Article 21-related

rights violation

Rights violation

in private sphere

Human rights violations caused by the Article 21

Concealment of HIV is one of the elements of crime. The Article forces PLHIV to disclose their HIV status to others

Evidence collection about sex behavior is extremely difficult For instance, it is hard to prove whether a condom was used, or how many times oral sex occurred, etc. While the presumption of innocence should be the rule, the judges often rule against

The Article punishes attempted offence. Even if no HIV transmission occurred, PLHIV could be convicted when other legal requirements are met. Note that among all those convicted in Taiwan, 76% were attempted offence

By the Article, those who are registered as PLHIV could be convicted. So far, the average sentence is 2.98 years. If getting a HIV test would place one at risk of being convicted for transmitting HIV, it could reduce HIV testing rate and thus the effectiveness of HIV prevention measures.

According to current regulation, safeness of sex is exclusively defined by the use of condom. In Taiwan, there were at least five defendants who engaged in condomless yet UN-defined very-low-risk or no-risk sexual behaviors (such as oral sex, or with extremely low HIV viral load) were convicted. Also note that HIV transmission did not occur in these cases. The following are the 5 cases

- 1. 2013: A defendant who was virally suppressed and engaged in condomless anal sex was sentenced for 11 years
- 2. 2013: A defendant who was a receiver of one-time oral sex was sentenced for 2 years and 8 months; after appealing the defendant was sentenced for 1 year and 6 months.
- 3. 2014: A defendant who was virally suppressed and a giver of one-time oral sex, was sentenced for 1 year and 10 months, probation for 3 years, and a fine of 30,000 NTD.
- 4 2018: A defendant who engaged in one-time oral sex was
- 5, 2018; A defendant who was virally suppressed and engaged in oral sex and condomless anal sex, was sentenced for 2 years, probation for 5 years.

PLHIV who were threatened by their partners with suing were mostly

Power and control could also exist in cases under judicial proceedings. For instance, there was a case where a PLHIV agreed to reimburse the plaintiff with money in an out-of-court conciliation prior to a court decision was made. Vet. this PLHIV was still sentenced for 1 year and 10 months, with a fine of thirty thousand NTD. Note that in this case, this PLHIV and the plaintiff have only engaged in oral sex for once, and the plaintiff was not infected with HIV because of this oral sex. (2014)

Current Article 21

People living with HIV, by concealing the fact, engage in unsafe sex with others and thus infect others, shall be sentenced for 5 to 12 years. Attempted offence shall be punished. (Full article can be found on https://bit.ly/3e3l9UU)

A Judge stated, "How can it be possible that anyone dare to have sex with PLHIV?"

During the trial, the defendant stated, "I did disclose my HIV-nositive status before sex." On the other side, the plaintiff stated, "He did not; I would not have had sex with him if he did." Both sides did not have direct evidence on whether HIV disclosure was made before sex. In the judgement, it is stated that "...the defendant's statement regarding HIV disclosure is one intended to shirk his responsibility and should not be adopted." (2013)

PLHIV are inapplicable to take a lie detector

In the aforementioned case, the defendant wished to take a lie detector for self-proving. The Judge agreed and asked Ministry of Justice Investigation Bureau (the "Bureau") to assist with taking a lie detector. However, the Bureau responded with a letter stating "PLHIV are patients with communicable disease, and thus inapplicable to take a lie detector."

Witness became defendant

In 2016, the person F was sentenced for 13 years with the Article 21. During the trial, the prosecutor called 11 individuals to attend as a witness to clarify whether they had sex with F, but these individuals were not informed by court of the principle of "nemo tenetur se insum accusare" and the right to remain silent. Since 2017, the 11 individuals have been prosecuted by the prosecutor with the same Article basing on their testimony.

Right to privacy: HIV disclosure

By regulation, court documents are sent to one's household registration address. This has caused a number of involuntary HIV disclosure to the family of PLHIV. In addition, if imprisonment PLHIV are separated from the HIV-negative, therefore, their HIV status could be easily identified by living area in the correctional institution

Moreover, correctional institutions would send out notices to local health institution and police institution located in the district where a HIV-positive prisoner lives when the prisoner is about to be released; in some cases, this has also led to involuntary HIV disclosure to the community. (An amendment to the Article 87 of the Law of Execution in Prison was made in 2020, whereby notice on prisoner with infectious disease being released is no longer needed.)

Right to employment

The need of presence in court forced three PLHIV respectively to decline an international job offer; to self-transferred to a part-time job position; to give up job promotion in consideration of imprisonment. Furthermore, some jobs require a Police Criminal Record Certificate, which would show the record of "violating the Article 21 of HIV Infection Control and Patient Rights Protection Act

Mental health

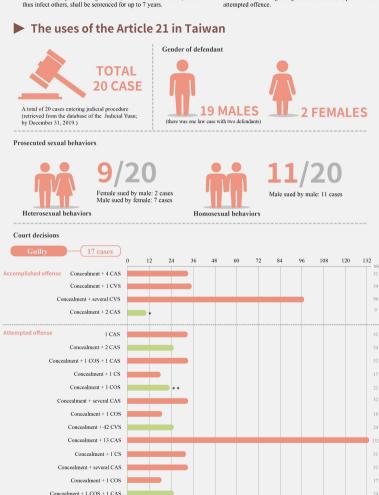
Prosecutions have caused most HIV-positive defendants mental illness, including anxiety, panic anger, resistance, insomnia, night sweat, etc. Some defendants have sought treatment from therapists or psychiatry. These emotional or mental reactions derive from the pressure of being convicted, being labelled, and life being changed. For some defendants, their family or friends were aware of the prosecution and showed support for the defendants. For others, they chose to face the prosecution alone because they did not want their family or partner to know.

Conclusion

For years, PRAA has long been concerning with regulations falling behind scientific facts, the social impacts of regulations helpless to public health, as well as harms facing PLHIV caused by the Article 21. In 2016, we worked with lawyers to file a petition for Constitutional Court however, we have not got further information thus far.

Although Taiwan has legalized same sex marriage in 2019, PLHIV is still under the threat of Article 21 of the HIV/AIDS Act. An amendment to out-of-date regulation in accordance with latest science will not only protect the rights of PLHIV but also improve the HIV prevention and control

Lastly, we wanted to express our appreciation to doctors and lawyers who have defended for PLHIV, and to those who stand with PLHIV. Let's work together to end HIV criminalization.



- Vaginal sex with condom: 2 cases
- HIV genotype from both sides did not match: 1 case
- The person did not have a HIV testing record at the time of sex at issue: 1 case

Imprisonment (under probation) * Fine of one million NTD * * Fine of 30,000 NTD

No evidence regarding if condom was used during sex: 1 case

CAS : condomless anal sex , COS : condomless oral sex , CVS : condomless vaginal sex , CS : condomless sex

Adopting the evidence of U=U: 2 cases

7 cases

Till December 31, 2019, PRAA has assisted seven threatened cases, including one female and males (who were threatened because of same-sex behavior).

Power and control

compliant with the requests made by their partners. For instance, there was a case where a PLHIV was compelled to re-union with his/her partner after breaking up in consideration of not being sued. There was another case where a PLHIV was compelled to maintain an intimate relationship that s/he disliked so that his/her partner would not take legal action against

sentenced for one year and five months.