



Position paper of the AIDS-Hilfen Austria on §178 and §179 StGB: Against discrimination in court

Unprotected sex between an HIV-positive person and an HIV-negative person can have not only health consequences, but also legal consequences. These legal consequences are no longer compatible with current research findings in the field of HIV and AIDS.

The provisions of Austrian criminal law, sections 178 and 179 of the Criminal Code (StGB), and the case law to date, discriminate against and stigmatise people living with HIV.

The initial situation

Section 178 of the Criminal Code (StGB) reads as follows:

"Any person who commits an act likely to cause a risk of spreading a communicable disease among humans shall be punished by a term of imprisonment of up to three years if the disease, by its nature, is one of the diseases which must be notified or reported, even if only to a limited extent"

With the paragraph just mentioned, it is possible to hold people suffering from a communicable disease criminally liable if they intentionally engage in acts (e.g. unprotected sex) that pose a risk of infecting another person with a notifiable infection or disease. In this context, it is not necessary for a conviction that an infection has actually occurred, nor that the person in question knows that the disease is reportable within the meaning of Sections 178 and 179 of the Criminal Code or that it is positive. The subsequent § 179 StGB includes criminal liability even in the case of negligent action.

An HIV infection (and not only the disease¹ AIDS) also falls under this provision, as it is reportable "by its nature". Although an HIV infection in the sense of the AIDS Act is in principle not reportable or notifiable (in contrast to AIDS), it nevertheless falls within the scope of §§ 178 and 179²

¹ Both the AIDS Act and the Epidemic Act are based on the term "disease". In this respect, it is problematic if an infection (which HIV represents) can be subsumed under the offence in the sense of the Criminal Code - which also uses the term "disease". Against this background, a precise demarcation between the terms seems particularly important for future proceedings and also for other infections.

² Cf. Hinterhofer, Hubert: "AIDS, HIV und Strafrecht. On the Criminal Liability of Sexual Contacts of HIV-infected Persons According to the §§ 178, 179 StGB. Legal opinion commissioned by the AIDS-Hilfen Österreichs, AIDS, HIV und Strafrecht. On the punishability of sexual contacts of HIV-infected persons according to §§ 178, 179 StGB, JRP 2002, 99-109.



Example:

An HIV-positive person who knows about his infection has unprotected sexual intercourse with an HIV-negative person. Even if there is no infection, the HIV-positive person fulfils the offence of § 178 StGB, since the provision is purely about the danger of the mere possibility of transmission and not about the actual infection!

Even if the HIV-positive person informs his or her counterpart about his or her infection and the latter consents to unprotected sexual intercourse, this leads to criminal liability according to § 178 StGB. The regulation is primarily concerned with the legal interest of "the health of the population as a whole" and therefore consent cannot "nullify" criminal liability.

The development

There have always been problematic decisions in this regard. For example, an HIV-positive person was convicted, although the viral load was below the detection limit due to a consistent and effective antiretroviral HIV therapy (ART) and thus a transmission is scientifically considered impossible.

Fortunately, a recent ruling from 2020 seems to bring about a change in trend - the Higher Regional Court of Graz overturned a ruling of the first instance which assumed that an HIV-positive person - although he was undergoing successful antiretroviral therapy - had a risk potential for infection.³

The second-instance court substantially incorporated the currently applicable scientific findings into the annulment judgment. Consistently administered antiretroviral therapy, as a result of which the viral load is below the detection limit, protects against infection and thus cannot constitute a dangerous act. Since there is no risk of transmission, the facts of § 178 ("risk of spread") are also not fulfilled. In this case, the therapy is considered to be prevention, since adequate drug therapy prevents proven HIV transmissions.

It is therefore necessary that the administration of justice follows the scientific findings of medical research. In this way, it also makes a necessary and important contribution to the formation of opinion in the state and society and promotes an unprejudiced view of the group of people with HIV. According to the current state of science, adequate drug therapy is considered prevention, as it has been proven to prevent transmissions.⁴

³ Decision: OLG Graz 30.3.2020, 8 Bs 37/20g; Baier, Martina u. Soyer, Richard: Kein Gefährdungsnachweis bei ungeschütztem Geschlechtsverkehr einer HIV-positiven Person bei erfolgreicher antiretroviraler Therapie mit Viruslast unter der Nachweisgrenze, 2020, <https://elibrary.verlagoesterreich.at/article/10.33196/jst202003025201>

⁴ Cf. for example: German-Austrian Guidelines for Antiretroviral Therapy of HIV-1 Infection, Austrian AIDS Society, p. 10, https://www.aids-gesellschaft.info/uploads/files/leitlinien/Leitlinien%20zur%20antiretroviralen%20Therapie%20der%20HIV%201%20Infection_State%202020.pdf or Deutsche Aidshilfe <https://www.aidshilfe.de/schutz-durch-therapie-nicht-uebertragbarkeit-or-hiv.gov> <https://www.hiv.gov/tasp>



The current state of medicine - in agreement with the Austrian Aids Society - briefly summarized:

- **Safer sex**, i.e. e.g. the proper use of a condom or consistent and effective ART, reliably protects against infection with HIV and is recognised by the AIDS services of Austria as adequate behaviour to prevent the transmission of HIV. Consistent and effective treatment by means of antiretroviral therapy results in the viral load being below the detection limit (the value here is determined as 50 copies/ml blood). From a medical point of view, there is no longer any risk of infection for HIV-negative persons, as the viral load is so low that it is no longer sufficient for transmission. It is important here to follow the therapy consistently and to carry out regular laboratory tests.
- There is also no risk of transmission during **social contacts** such as shaking hands or when visiting the same sauna or toilet.
- Coughing or sneezing does not lead to infection
- **Safe sex** (petting, kissing, fondling) cannot transmit HIV

In the opinion of AIDS-Hilfen Österreichs and according to the current state of science, all of the aforementioned acts are not suitable for fulfilling the elements of the offence of §§ 178 f and therefore not only protect against the transmission of HIV, but must also protect against criminal prosecution.

U=U (undetectable is untransmittable)

HIV therapy is considered a safer sex method and - as already explained - also acts as prevention. The EKAF statement⁵ from 2008 found its final expression in 2020 through the above-mentioned decision of the Higher Regional Court of Graz in case law.

People who undergo successful therapy have a good quality of life with a normal life expectancy and can practice sex without criminal sanctions. Therefore, to continue to see them as endangered persons and, in the worst case, to condemn them under criminal law, is wrong, discriminatory and stigmatizing.

The social consequences

A particularly problematic issue arising from the criminal law provision is the shifting of responsibility for infection during unprotected intercourse onto people with HIV. The personal responsibility of their HIV-negative sexual partners is completely disregarded, although they can also contribute to the spread of HIV through unprotected intercourse.

Justice and morality must be separated in order to prevent stigmatisation and discrimination. In the worst case, sentences within the framework of §§ 178, 179 StGB, which discriminate against HIV-positive people, lead to exactly the consequences that the prevention work of the AIDS Hilfen Österreichs has been counteracting for decades: people no longer even get tested out of fear or shame, in order - in the mistaken belief - not to be criminally prosecutable, should a test show a positive result. This can create a climate in which it is no longer possible to talk

⁵ <http://www.saez.ch/docs/saez/archiv/de/2008/2008-05/2008-05-089.PDF>

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openly about sexuality and HIV. Even the "mere" criminal prosecution by state authorities, even in the case of an acquittal according to §§ 178 f, triggers fear, psychological stress and or at least great insecurity among those affected. Any form of criminalization lowers the willingness to test and the adherence to preventive measures.

In line with the goals of UNAIDS⁶ and the contents of the Oslo Declaration⁷, the decriminalisation of HIV-positive people is an essential approach to prevent discrimination and stigmatisation.

What Austria's AIDS support organisations are calling for:

We therefore demand the decriminalisation and thus the destigmatisation of people with HIV through criminal law and jurisprudence.

- HIV infection must no longer be covered by the criminal liability of §§ 178f
- As long as HIV is covered by §§ 178f, the current state of medical research must be taken into account when a court makes a decision. This means that both safer sex and the consistent pursuit of effective drug therapy must be considered grounds for exclusion from proceedings.
- Even in the preliminary stages - before any legal proceedings take place - the prosecuting authorities (e.g. police and public prosecutor's office) must refrain from filing charges or indictments.

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⁶ UNAIDS <https://www.unaids.org/en>

⁷ Oslo Declaration on HIV Criminalisation: <https://www.hivjustice.net/oslo/>