Queer Judgments

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Appeal-Review-(1)-Zi No. 162 (2021) (Taiwan):
Queering the Taiwan High Court Criminal Judgment

Po-Han Lee, Tsung-Han Yu, Titan Deng and Tzu-Wei Lin

Introduction

We decided to rewrite the 2022 judgment in Appeal-Review-(1)-Zi No. 162 (2021) (hereinafter the *AR-162 ruling*) by the Taiwan High Court from a queer critical perspective, to help us address the complexity and relationality of sexuality and the collaboration between biomedical and juridical powers. The case concerned the criminality of the defendant, Mr A's non-disclosure of his HIV-positive status before engaging in oral sex with Mr B under the influence of drugs.[1] This High Court's judgment was conclusive in terms of the factual findings regarding whether the sexual behaviour of Mr A to Mr B falls within the scope of 'unsafe sexual behaviour' criminalized by the HIV Infection Control and Patient Rights Protection Act (HIV Act).[2]

In summary, the defendant, Mr A, was HIV-positive and had not been constantly undetectable in terms of his viral load when he was accused of having unprotected oral sex in a chemsex encounter with Mr B, who claimed to be a *victim* of HIV transmission.[3] In Taiwan, intentionally infecting others with HIV still constitutes a crime. Although Mr B eventually tested negative, the potential consequences of causing significant harm to him led to the prosecution of Mr A, and the case experienced four levels of court hearings and five decisions, respectively, in 2019, 2020, 2021, and two in 2022.[4] In fact, following the AR-162 2022 ruling by the Taiwan High Court

1. Taiwan High Court Criminal Judgment Appeal-Review-(1)-Zi No. 162 (2021), 12 January 2022. Notably, Titan Deng was the legal representative of Mr A since the second instance of the criminal proceeding.
2. Supreme Court Criminal Judgment Tai-Appeal-Zi No. 55 (2021), 17 June 2021; HIV Infection Control and Patient Rights Protection Act, available at Laws & Regulations Database of the Republic of China (Taiwan), accessed 5 August 2023, https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=L0050004.
3. Chemsex refers to sexual activities combined with recreational drug use as an increasingly widespread sexual practice among gay and bisexual men who have sex with men. See Poyao Huang et al., 'An Object-oriented Analysis of Social Apps, Syringes and ARTs Within Gay Taiwanese Men's Chemsex Practices,' *Culture, Health & Sexuality* 26/4 (2023).
4. For the history of the case, see the Appendix below. We want to emphasise that both Mr A (the defendant) and the prosecutors appealed to the Taiwan High Court for different reasons. While Mr A pleaded total innocence, the prosecution argued against punishment reduction granted under Article 59 of the Criminal

that we have chosen to re-write, the prosecution appealed (again) to the Supreme Court, which dismissed and settled the case.[5] In Taiwan, the Supreme Court can only review and decide on the interpretation and application of the law.

A notable development of the process was that, on 2 July 2021, the Ministry of Health and Welfare revised the *Criteria of Unsafe Sexual Behaviour* and officially recognized the 'undetectable equals untransmittable' (U=U) discourse—i.e. someone with an undetectable viral load cannot sexually transmit HIV to others. Thus, the Ministry redefined the scope of 'unsafe sexual behaviour' from sexual contact with a 'potential' to a 'significant' risk of infection.[6] Moreover, the new criteria include a medical assessment of the 'risk' before prosecution is pursued. Before this policy revision, judicial decisions had equalled 'direct contact … without isolation' to a medical assessment.[7] However, we expect this policy change to significantly reduce the findings of criminal motive and thus the chance for a prosecutor to file a case, especially in situations with no victim, namely no legal right or interest of any particular individual being harmed.

The first four judgments, in this case, employed different approaches to using U=U in legal reasoning and have thus reflected the contentiousness and inconsistency of legal and moral responsibility of HIV-positive persons regarding their exercise of sexual freedoms. Among them, the AR-162 judgment crystallizes a paradigm shift regarding the criminalization of people engaging in certain sexual practices. Eventually, the case was not about U=U since Mr A's viral load had not been consistent with the standard of so-called *undetectable*. Instead, the court considered the evidence regarding the low to ignorable risk of oral sex and declared Mr A as not guilty.

The persons and the behaviour in question had remained the same, yet their legal status changed. Is it because of HIV science? Yes and no. The biomedical discourse has changed based on new evidence since the early 2010s; this can be seen from the references relied on by the courts.[8] The new discourse did not directly affect the law's attitudes to the sexual lives of HIV-positive persons in Taiwan until the Ministry adopted this discourse and reflected it in an administrative order. This development reflects the temporal gaps between bioscience, health policymakers, and legal reasoning, in which one's criminal status is unforeseeable despite one's serostatus remaining

Code. For the convenience of the rewriting exercise, and since we conclude that Mr is not guilty, we did not consider the argument about punishment..

5. Supreme Court Criminal Judgment Tai-Appeal-Zi No. 2419 (2022), 14 July 2022.

6. Executive Yuan's General Description of the Draft Amendment to Article 2 of the Criteria of Unsafe Sexual Behaviour, Executive Yuan Gazette Vol. 27, Issue 60, No. 20210406 (2021), accessed 20 October 2022, https://gazette.nat.gov.tw/EG_FileManager/eguploadpub/eg027060/ch08/type3/gov70/num35/images/Eg01.pdf.

7. Titan Deng, 'Can the Undetectable be Unpunished? On U=U and the Crime of Attempting to Infecting HIV,' [測不到病毒可以無罪嗎？談U=U與蓄意傳染HIV罪] *Prevention of HIV/AIDS Quarterly*, 110 (2020).

8. UNAIDS, *Guidance Note on Ending Overly Broad HIV Criminalisation: Critical Scientific, Medical and Legal Considerations* (Geneva: Joint United Nations Programme on HIV/AIDS, 2013); Françoise Barré-Sinoussi et al., 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law,' *Journal of the International AIDS Society* 21/7 (2018).

the same.[9] Such indeterminacy of criminality has made us question the constitutionality of the relevant norms. For instance, in our rewritten judgment, we once considered suspending the proceedings and submitting a petition for constitutional review. However, following a conversation between ourselves, we decided to declare Mr A's innocence as the AR-162 ruling did, prioritizing the defendant's right to a speedy trial in criminal proceedings. Even so, as a reasonable lower-court judge would do, we mentioned our doubts regarding the constitutionality of the criminal punishment against HIV transmission.

Queering such a case is to recognize the agency of people who have sex with each other and to problematize HIV exceptionalism in Taiwan's criminal justice system. HIV exceptionalism denotes the global trend for treating HIV/AIDS in law and policy differently from other diseases.[10] We adopt a socio-relational approach to sex between persons living with HIV (PLHIV) and others, contrasting with the dominant medico-legal perspective that defines responsibility based on the risks of specific acts.[11] When focusing on the blameworthiness of PLHIV, the law reflects the state's desire to punish and depict the faults of those living with HIV/AIDS who are sexually active.[12] The law fails to capture the power dynamics of sexual encounters, suppresses the HIV-positive party's right to sexual autonomy, neglects the other parties' sexual agency, and potentially harms queer solidarity. The judgments at various levels on this case have painted contested images of *irresponsible gay men* regarding intimacy, risk management, and trustworthiness.

In our commentary, we first discuss the tension between the messiness of sex and the pursuit of specificity by law and science. In this context, we consider the implications of chemsex for the law on sex and that on drugs, both of which have failed to address the right to sexual autonomy, including the desire for intimacy involved with the materiality of narcotics. The idea and normative content of the right to sexual autonomy will be discussed in the rewritten judgment; hence, we herein focus on the intersection of sex and drugs. We thus argue for a shared responsibility for protecting sexual partners' right to sexual autonomy as the starting point for rethinking/queering a sexual encounter, with or without drugs. Lastly, from the perspective of shared responsibility, we demonstrate how punitive laws against HIV-positive persons harm the solidarity between sexual minority men, including not only gay and bisexual men, but queer and other men who have sex with men.

9. Serostatus refers to the presence or absence of a serological marker in the blood. The presence of detectable levels of a specific marker within the serum is considered seropositivity, while the absence of such levels is considered seronegativity.

10. The exceptionalist stance has, on the one hand, produced and reinforced HIV stigma, and yet, on the other hand, obtained extraordinary attention and resources from policymakers and the scientific community. See Shin-Rou Lin, 'HIV Screening and Informed Consent: An Analysis of the Changing Paradigm of HIV Exceptionalism and HIV Screening Laws in Taiwan,' [愛滋篩檢與告知後同意－愛滋例外主義轉向趨勢與臺灣法制之檢討] *Chengchi Law Review* 150 (2017).

11. Po-Han Lee, 'Irreducible Interactional Dilemmas: Understanding "Infectious Sexualities" Sociologically,' [無法化約的互動困局：從社會學理解感染「性」] *Prevention of HIV/AIDS Quarterly* 113 (2020).

12. Po-Chia Tseng, 'Subordinated Agency: Negotiating the Biomedicalisation of Masculinity Among Gay Men Living with HIV,' *Sociology of Health & Illness* 43/6 (2021); Alvaro Martinez-Lacabe, 'The Non-positive Antiretroviral Gay Body: The Biomedicalisation of Gay Sex in England,' *Culture, Health & Sexuality* 21/10 (2019).

Messy sex and unsexy law

In Mr A's case, his legal representative in the first trial focused on U=U. The prosecutor successfully challenged the U=U defence when the expert witness, Mr A's attending doctor, expressed the nature of uncertainty of science regarding how and whether the medication works. As Carl Stychin once identified, the law of modern times tends to seek specificity and regulate ambiguity even in the face of risk and uncertainty in contemporary societies.[13] The law's demand/desire can hardly be satisfied, especially when it is entangled with biomedical sciences, in which health and clinical uncertainties are folded in a complex combination of factors and are not necessarily unpackable.[14] Thus, legal and ethical challenges exist in the overreliance of judicial reasoning on science, which locates law in an opaque space where inconsistencies are almost unavoidable. This situation is further complicated by the need to legally characterize the sexual encounter of an HIV-positive person, whose serostatus and sexual behaviours must be first determined.

Criminal law requires an action/inaction to meet specified factual elements (described as *Tatbestand* in German legal terminology) to declare a crime has been committed. This ensures the foreseeability of committing an offence by the persons involved; otherwise, the person's action/inaction should not be punishable. However, circumstances (e.g. in public health and medical law) that constitute unspecified/blank elements (described as *Blankettatbestand* in German legal terminology) are allowed if the facticity of part of the offence is subject to the development of scientific understanding. The HIV Act is an example of this.[15] On this matter, the law—or judicial decisions relying on such law—tends to assume the comprehensiveness and certainty of science but fails to see the uncapturable and uncontrollable—thus excluded—messiness of interpersonal dynamics of sexual encounters by science.

Although science may acknowledge such limits, the law does not. In the context of the growing dominance of the U=U paradigm, one's viral load matters more than what happens in the sexual encounter. Yet, beyond such context, it matters whether one performs oral, anal, or vaginal sex; whether they have an erection or ejaculate or not; whether protected measures are taken; their sexual roles in each *scene* matter, signifying the ability of scientific discourse to dissect a sexual encounter. People engaging in a sexual encounter have also embodied the risk paradigm, informed by non-erection and non-ejaculation, usually taken as sexual dysfunction for a man, and which become risk aversion practices. A pathology in sexual medicine constitutes the protective factor for sexual health and, therefore, non-criminality.

Whether one has reached the state of viral suppression according to a blood test

13. Carl F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995).
14. Brian King, 'HIV as Uncertain Life,' *Geoforum* 123 (2021); Sonali P. Kulkarni et al., 'Clinical uncertainties, health service challenges, and ethical complexities of HIV "test-and-treat": A systematic review,' *American Journal of Public Health* 103/6 (2013).
15. Yu-Wei Hsieh, 'Legal Problems of Attempting to HIV Infection: The Dangerousness of Unsafe Sexual Behaviour,' [愛滋病毒蓄意傳染條款的法律問題：危險性行爲的行爲危險性] *Prevention of HIV/AIDS Quarterly* 97 (2016).

or not, conversations about their *infected* subjectivity are very complex and challenging, not only because of sexual and HIV stigmas but also due to the ethical burden embedded in *disclosure* decisions.[16] Considering the sexual encounter between Mr A and Mr B involved drug use, the *sex scenes*, in which the risk assessment may have been overshadowed by 'the moment of pleasure,'[17] must be messy, according to their narratives. Equating *intentional* non-disclosure with the *attempt* to infect others with HIV and considering it a crime, which demands the state's intervention, seems to paint a sexual relationship in which one is a stereotypical perpetrator and the other the victim, based on the serodiscordance between them. The set-up does not necessarily represent the power dynamics and interactions between all who engage in sex. Sex tends to unleash unbearable contradictions that all parties must bear,[18] such as moments of self-pleasure mixed with the responsibility for others and excitement/frustration, as well as (Mr B's) moments of intimacy and victimization and (Mr A's) moments of reluctance.

Whereas sex is messy, the law is not; it is even less sexy (less sex-positive) due to the uncertainty of science when the latter analyses a sexual encounter by segmenting it into separate acts, disregarding the contextual complexity. Informed by new evidence of HIV science, it is increasingly necessary for the law to balance its desire to capture and control sexualities, on the one hand, and the justification for restricting personal, sexual, and informational freedoms of PLHIV or persons identified as belonging to *high-risk populations*, on the other hand.[19] As mentioned earlier – and constituting one of the already discussed blank factual elements – Article 2 of the *Criteria of Unsafe Sexual Behaviour* defines 'unsafe sexual behaviour' and has been revised by the Ministry in 2021. It requires both a 'direct contact with the mucous membranes of organs or body fluids without isolation' and a medical assessment of 'a significant risk of causing HIV infection.' This revision reflects the health authority's updated understanding of HIV infection from a probable to significant risk—in addition to the new procedural requirement regarding medical assessment.[20]

HIV exceptionalism and queer solidarity

HIV criminalization is a result of HIV exceptionalism, which is evidenced by the fact that legislator removed the crime of transmitting venereal diseases (Article 285 of the Criminal Code) in 2019. The constitutionality of Article 21 of the HIV Act in and by itself is contested due to the lack of evidence that prohibitive and punitive policies are beneficial for achieving public health goals, while seriously limiting the sexual

16. Grant H. Roth et al., '"It's a Very Grey, Very Messy Area": A Qualitative Examination of Factors Influencing Undetectable Gay Men's HIV Status Disclosure to Sexual Partners,' *Culture, Health & Sexuality* 25/5 (2023).
17. Annette Houlihan, '(Ill-Legal) Lust is a Battlefield: HIV Risk, Socio-Sexuality and Criminality' (Doctor of Philosophy Griffith University, 2007), ii.
18. Lauren Berlant and Lee Edelman, *Sex, or the Unbearable* (Durham: Duke University Press, 2013).
19. See, for example, regarding HIV screening in Taiwan, Shin-Rou Lin, 'Not Truly Mandatory? Not Fully Voluntary? An Empirical Study of Taiwan's Implementation of HIV Screening Laws,' [非真正強制？不完全自主？臺灣愛滋篩檢法制之實證檢討與改革] *National Taiwan University Law Journal* 47/4 (2018).
20. Deng, 'Can the Undetectable be Unpunished? On U=U and the Crime of Attempting to Infecting HIV.'

autonomy and life of PLHIV.[21] HIV/AIDS prevention and treatment policy—or the lack of it—at both institutional and societal levels since the 1980s, is a history of the politics of survival entangled with the pursuit of a sense of belonging.[22] A counterpublic has been constituted in resisting the state's ignorance of queer people's health needs and overregulation of queer bodies.[23] Article 21 of the HIV Act signifies the state's invasion of queer private lives and matters.

The criminalization of HIV infection has harmed queer solidarity.[24] Not only has Mr A suffered a new depressive episode because of the criminal investigation that took place and, as a consequence, stopped taking TRIUMEQ regularly,[25] but Mr B has also forgiven Mr A and asserted that he should be less punished. Decriminalization does not mean non-responsibility for one's intentional transmission of HIV infection. Still, such instances should remain civil disputes in which the rights consciousness regarding a *damaged* body and feelings (should one feel and embody so) can be developed, and compensation can be claimed. Beyond tort law, a sexual-contractual obligation to respect and protect each other's sexual agency and health based on good faith may also be breached. Or, alternative dispute resolution mechanisms can be designed to facilitate reconciliation and provide redress for interested parties beyond the recourse to litigation or remedies for non-justiciable issues.[26] Decriminalizing HIV infections also aims to address negative sentiments of the general public and within queer communities due to an exceptionalist attitude towards HIV among sexually transmitted diseases,[27] and to rebuild queer solidarity through the exit of the state from the realm of sexuality.[28]

21. UNAIDS, *Guidance Note on Ending Overly Broad HIV Criminalisation: Critical Scientific, Medical and Legal Considerations* (Geneva: Joint United Nations Programme on HIV/AIDS, 2013); Barré-Sinoussi et al., 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law.'

22. João Biehl, *Will to Live: AIDS Therapies and the Politics of Survival* (Princeton: Princeton University Press, 2007).

23. Counterpublic signifies the collectivity of publics that conscientiously resists the dominant ideology and strategically subverts that ideology's construction in public discourse. See Ta-Wei Chi, 'Translation/Public: AIDS, "Tongzhi," and "Ku'er,"' [翻譯的公共：愛滋，同志，酷兒] *Bulletin of Taiwanese Literature* 26 (2015); Lauren Berlant and Michael Warner, 'Sex in Public,' *Critical Inquiry* 24/2 (1998).

24. For a similar discussion in other contexts where queer solidarity is also threatened by the law's repression of sexual autonomy in the name of (sexual) health, see Lucy Wanjiku Mung'ala and Anne de Jong, 'Health and Freedom: The Tense Interdependency of HIV/AIDS Interventions and LGBTIQ Activism in Kenya,' *Kohl: A Journal for Body and Gender Research* 6/1 (2020); Sarah Schulman, *Stagestruck Theater, AIDS, and the Marketing of Gay America* (Durham: Duke University Press, 1998); Justyna Struzik, 'Thick Times: Transformation, Activism and HIV in Poland,' *European Review of History* 28/4 (2021).

25. TRIUMEQ Film-Coated Tablets are a cocktail of dolutegravir, abacavir, and lamivudine, a prescription medicine used to treat HIV-1 infection in adults and children weighing over 40kg.

26. See David Barr, Joseph J. Amon, and Michaela Clayton, 'Articulating A Rights-Based Approach to HIV Treatment and Prevention Interventions,' *Current HIV Research* 9/6 (2011).

27. Heather Love, *Underdogs: Social Deviance and Queer Theory* (Chicago: University of Chicago Press, 2021). Some may argue that HIV exceptionalism has also led to more attention and specified allocation of resources and funding for HIV prevention and treatment from the government than is the case for other diseases. Yet, we do not agree that HIV exceptionalism aims to protect HIV-positive persons' rights beyond the law's public health goals – especially when considering the 'normalization' of public financing of HIV/AIDS care through payments from the specified budget of the Taiwan Centers for Disease Control to the National Health Insurance. See Hans Tao-Ming Huang, 'Medical Governance, Name-Based HIV Surveillance and the New Moral Authoritarianism,' [列管制度下的醫療治理：「人類免疫缺乏病毒傳染防治及感染者權益保障條例」與新道德權威] *Taiwan: A Radical Quarterly in Social Studies* 94 (2014).

28. Ellis Hanson, 'The Future's Eve: Reparative Reading after Sedgwick,' *South Atlantic Quarterly* 110/1

Therefore, we have rewritten the AR-162 ruling informed by a queer-relational approach to sexuality, which rejects stereotypes of pathways of HIV transmission and considers that the power relationship between sexual partners is unfixed and dynamic. Although the ruling was a landmark decision as the first judgment recognizing the legitimacy of the U=U defence and the exception of oral sex from the scope of unsafe sex, it did not go far enough to challenge the constitutionality of the law itself because it could not appreciate the messiness of sex and the uncertainty of science from a doctrinal perspective. This judgment marks the success of using an administrative order to introduce into the law new biomedical evidence about HIV infection, although this fails to see the sociality and agency of the persons involved in the voluntary sexual encounter. Thus, the judgment offers no alternative when criminal law is no longer a viable option for situations between safe and unsafe sex. Our rewritten judgment provides a reparative reading for the unfinished work left by the AR-162 ruling.

(2011); Odette Mazel, 'Queer Jurisprudence: Reparative Practice in International Law,' *AJIL Unbound* 116 (2022).

Taiwan High Court Criminal Judgment

Appeal-Review-(1)-Zi No. 162 (2021)

Appellant: Taipei District Prosecutor's Office
Appellant and Defendant: Mr A

I. Decision

The original judgment—Taiwan Taipei District Court Criminal Judgment Prosecution-Zi No. 493 (2018) based on Indictment of Taiwan Taipei District Prosecutor's Office Investigation-Zi No. 7474 (2018), which ruled that Mr A committed the crime of attempting to infect others by having unsafe sex and concealing the fact that he had been infected with HIV and shall be sentenced to 1 year and 5 months in prison—is revoked.

Mr A is not guilty.

II. Facts

The defendant, Mr A, was infected with HIV on 27 June 2003, and has received antiretroviral treatment since 11 July 2003. The genotype testing report on 17 May 2016 showed that Mr A developed no drug resistance. On 21 October 2017, Mr A switched to taking the TRIUMEQ Film-Coated Tablets. In November 2017, he tested with a viral load of 48cp/ml. Viral load is the amount of HIV in the blood of someone who has HIV; adherence to taking HIV medicine can make the viral load low to the point that a test cannot detect it (below 200cp/ml, known as *undetectable viral load*). On 11 April 2017, Mr A was screened for a viral load of 15,400 cp/ml while receiving 28-day TRIUMEQ medicine on the same day. With the viral load having increased from 48 to 15,400 cp/ml, he tested no drug resistance after a test conducted by his attending doctor. In Taiwan, persons living with HIV (PLHIV) receive repeat prescriptions for patients with chronic conditions, which include a 28-day portion of drugs three times about every 3 months. Since the National Health Insurance Administration pays the medical expenses for blood tests four times a year, HIV-positive patients need to visit a doctor for blood tests and repeat prescriptions every 3 months. On 9 May 2017, when Mr A received 28-day TRIUMEQ medicine with his repeat prescription, no blood test was recorded.

From 22 to 24 May 2017, Mr A offered Mr B methamphetamine *for high fun*. During the same period, Mr A and the alleged victim, Mr B, performed oral sex to each other several times at Mr A's residence, although neither of them *came* (ejaculated). When Mr B surrendered himself to the police under the influence of drugs and was referred to the Taipei District Prosecutor's Office due to the violation of the Narcotics Hazard Prevention Act, the prosecutor learned that in addition to taking drugs, there were also matters potentially related to the breach of Article 21 of the HIV Infection Control and Patient Rights Protection Act (人類免疫缺乏病毒傳染防治及感染者權益保障條例, hereinafter 'HIV Act'). On 9 June 2017, Mr A received the other 28-day portion of TRIUMEQ medicine. However, Mr A reported that because of the relevant investigative procedures, he had developed depressive episodes, which prevented him from taking the medication regularly. That was why he was tested with a viral load of 12,100cp/ml on 14 July. Mr B underwent an HIV test on 26 October 2017, and the result was negative.

III. Reasoning

i. The Prosecution contends that:

Mr A knew he had AIDS due to infection with HIV and, thus, he was 'the infected' as defined by Article 3 of the HIV Act. He was also aware that condom-less oral or anal sex constitutes 'unsafe sexual behaviour,' according to the Criteria of Unsafe Sexual Behaviour defined by the Ministry of Health and Welfare. Such sexual behaviour would infect Mr B. Supposing Mr B were also 'the infected,' such unsafe sexual behaviour might also lead to so-called *HIV superinfection*, a condition in which a person with an established HIV infection acquires a second strain of HIV, often of a different subtype. Consequently, Mr A engaged in 'unsafe sexual behaviour,' although Mr A was aware that he was infected with HIV and that his blood test results in April 2017 showed a high viral load. That Mr A did not reveal his HIV status before having sex with Mr B is uncontested, and whether Mr A had an erection or ejaculated or not, and whether they stopped condom-less oral sex before having an erection, as argued by Mr A, is irrelevant.

ii. This Court holds that:

Relevant laws

[1] According to Article 21, Paragraph 1, of the HIV Act:

> Individuals who are fully aware that they are infected and have, by concealing the fact, unsafe sex with others…, and thus infect others, shall be sentenced to 5–12 years of imprisonment.

Paragraph 3:

> An attempt to commit the offence shall be punished.

Paragraph 4:

> The central competent authority shall formulate the definition of unsafe sex following the relevant regulations outlined by the World Health Organization.

[2] According to Article 2 of the Criteria of Unsafe Sexual Behaviour (version of 10 January 2008, effective when Mr A and B had sex):

> The scope of unsafe sexual behaviour refers to sexual behaviour that involves direct contact with the mucous membranes of organs or body fluids without isolation, medically assessed *as probably causing HIV infection* (emphasis added).

[3] According to the same Article (version of 2 July 2021):

> The scope of unsafe sexual behaviour refers to sexual behaviour that involves direct contact with the mucous membranes of organs or body fluids without isolation, and that has been medically assessed *as having a significant risk of causing HIV infection* (emphasis added).

[4] According to Article 10, Paragraph 5, of the Criminal Code:

> The term sexual intercourse means the following sexual acts that are not based on rightful purposes: (1) Insertion of a sexual organ into the reproductive organ, anus, or mouth of another person or an act of making them connected; (2) Insertion of a body part or an object other than a sexual organ into the reproductive organ or anus of another person or an act of making them connected.

Mr A's conduct does not satisfy the required elements of the crime

This point concerns the prosecutor's contention about anal sex yet there has been no evidence on this point other than Mr B's original statement. The lack of further proof results in the ambiguity of relevant facts and, based on the principle of *in dubio pro reo* ('when in doubt, rule for the accused'), this Court dismisses the contention that anal sex took place. U=U means that the virus cannot be continuously detected for 6 months. Mr A's viral load was detectable in April and July; thus, this Court cannot conclude that his situation meets the requisites for U=U. However, Mr A's attending doctor testified to the possibility of viral suppression to an undetectable level should Mr A have taken his medicine stably for more than 1 month before his sexual encounter with Mr B. Based on the principles of presumption of innocence and *nulla poena sine lege* ('no penalty without law'), the lack of further evidence has created reasonable doubt regarding the possibility of Mr A's HIV transmission through anal sex.

Regarding the act of oral sex performed by Mr A and Mr B to each other, the critical issue here is whether the circumstances surrounding *unprotected* oral sex constitute 'unsafe sex' under Article 21, Paragraph 1, of the HIV Act. The scope of 'unsafe sexual behaviour' provided in this provision is determined by the health authority mandated by Paragraph 4 of the same Article, constituting a so-called blank norm of criminal law to be completed by administrative acts and decisions. More precisely, the interpretation of the element of unsafe sexual behaviour depends on the definition given in Article 2 of the Criteria of Unsafe Sexual Behaviour, revised on 2 July 2021, considering

the new evidence concerning HIV infection. The Ministry explicitly acknowledges that the report *Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations*, published by the Joint United Nations Programme on HIV/AIDS (UNAIDS) in 2013, is authoritative in determining the Ministry's revision. The Ministry also considered the *Expert Consensus Statement on the Science of HIV in the Context of Criminal Law* adopted at the 2018 International AIDS Conference among the best available scientific and medical evidence.[29]

The replies from the Ministry, Taiwan AIDS Society, and National Taiwan University Hospital to this court's earlier inquiry confirmed the credibility of both documents. Based on Documents 1 and 2, the studies of sexual transmission pathways and the possibility of infection with HIV have all considered sexual acts separately. For example, oral sex has been evaluated along with the presence/absence of ejaculation and erection. In the context of anal and vaginal sex, in addition to ejaculation or not, the sex role of the HIV-positive party (insertive or receptive) also matters. The UNAIDS report, in particular, considers the estimated per-act risk of HIV infection from oral sex (orogenital contact) from 0 to 0.04%,[30] recommending that:

> In no case should prosecution for HIV non-disclosure, exposure, or transmission proceed when one of the following circumstances exists: the person took reasonable measures to reduce the risk of HIV transmissions, such as practising safer sex through using a condom or engaging in non-penetrative sex or oral sex; the person believed that they could not transmit HIV given their effective treatment or low viral load.[31]

The Expert Consensus Statement also mentions that 'the possibility of HIV transmission from oral sex performed on an HIV-positive person varies from none to negligible, depending on the context.'[32] Article 21 of the HIV Act contains a constitutive element of 'infecting others;' it also punishes 'attempted offenders,' i.e. sexual behaviour is still punishable for its attempt, although it does not transmit the virus. The UNAIDS has recommended that the use of criminal law in the HIV context can be legitimate only 'where there is an actual and significant harm intentionally caused to another person;'[33] it is clearly unreasonable for the law to include a crime of *attempting* to infect others with HIV and equate it with the intention to cause harm.

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29. Executive Yuan, General Description of the Draft Amendment to Article 2.

30. UNAIDS, *Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations* (Geneva: Joint United Nations Programme on HIV/AIDS, 2013), 17.

31. UNAIDS, *Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations*, 26. See, also, as cited in the UNAIDS report, Rebecca F. Baggaley, Richard G. White, and Marie-Claude Boily, 'Systematic Review of Orogenital HIV-1 Transmission Probabilities,' *International Journal of Epidemiology* 37, no. 6 (2008). This review mentioned that the upper range (0.04%) was related to unprotected receptive oral intercourse with ejaculation between men with an HIV-positive or unknown serostatus partner.

32. Françoise Barré-Sinoussi et al., 'Expert Consensus Statement on the Science of HIV in the Context of Criminal Law,' *Journal of the International AIDS Society* 21, no. 7 (2018), 5.

33. UNAIDS, *Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations*, 12.

An un-holistic notion of 'sexual behaviour' and the law's ambiguity

This court has considered the status of 'unsafe sex behaviour' in law, namely the relationship between the concept of 'sex behaviour' referred to in the HIV Act and the notion of 'sexual intercourse' used in Article 10, Paragraph 5, of the Criminal Code. According to the Criminal Code, 'sexual intercourse' is defined explicitly to include vaginal intercourse, anal sex, oral sex, fingering, and so on. Yet, 'sexual behaviour' under the HIV Act refers to direct contact with the mucous membranes of organs or body fluids. In comparison, vaginal, anal, and oral intercourse should be included in the definition of sexual behaviour, whereas kissing, *scissoring*, and *rimming* are not considered sexual intercourse. The insertion of an object such as a dildo with sexual intent into the anus or vagina constitutes sexual intercourse, although this is not regarded as sexual behaviour, simply because it does not involve direct contact with mucous membranes or bodily fluids.

Therefore, the conceptual scopes of sexual intercourse and sexual behaviour are different; they partly overlap and are partly mutually exclusive. Accepting this conclusion, we need to see sexual behaviour between involved parties from a holistic perspective. The statements of prosecutors, the defendant's defence, expert appraisals and replies, as well as this court's past decisions, have all divided a sexual encounter into oral, anal, or vaginal sex, against which the risk is assessed respectively. Such a reductionist methodology is blind to the blurredness, messiness, and continuity of sexual action/inactions within an encounter and fails to appreciate sexual behaviour between the parties. Besides, the law has led us to only focus on oral sex between Mr A and Mr B, and whether oral sex entails the risk of infecting the sexual partner with HIV. The oversimplifying tendency of law has failed to consider the sexual intent and sex roles of both parties, the presence and absence of erection or ejaculation during oral sex, and the effect of methamphetamine on their bodies (e.g. sexual function and performance) and minds (e.g. confusion, delusion, and somatosensory amplification). The lack of clarity on this matter has rendered the sexual behaviour of Mr A and Mr B beyond the current scope of the law.

Accordingly, this court considers that the law should also evaluate the risk of the sexual behaviours at issue from a holistic perspective. Differentiating between oral, anal, and vaginal sex and assessing unsafety regardless of its interrelationship with dangerousness (in legal terms) and risk (in biomedical terms) cannot capture a sexual encounter in which multiple sexual acts—active or passive—are involved. This normative development reflects the paradigm shift concerning the U=U discourse, which, nevertheless, may hardly resolve the problem of the opaqueness and complexity of sexuality and intimacy, especially in the chemsex context. Out of this concern, the court has reasonable doubt concerning the adequacy and temporal relevance of Article 21 of the HIV Act in the U=U era, where PrEP (pre-exposure prophylaxis) becomes increasingly available.

Potential unconstitutionality of the current Article 21 of the HIV Act

Since the repeal of Article 285 of the Criminal Code on 29 May 2019, the sexual activities of persons with non-HIV venereal diseases are no longer considered a crime. Comparatively, the constitutionality of Article 21, Paragraphs 1 and 3, of the HIV Act is not without question, notably since the Constitutional Court reiterates the constitutional protection of the rights to sexual autonomy and privacy, whose legal restrictions need to be subjected to strict scrutiny,[34] including being the least restrictive possible and directly related to the compelling/overriding governmental aim. Article 21, Paragraphs 1 and 3, of the HIV Act aims to punish infected individuals who do not self-disclose their status before engaging in unsafe sexual behaviour with others. HIV-positive persons are legally obliged to disclose their HIV seropositive status or not engage in *unsafe* sexual behaviour. This rule has restricted a person's freedom to decide whether and with whom to have sex. The right to sexual autonomy is an integral part of an individual's right to self-determination and is a fundamental right guaranteed by Article 22 of the Constitution.

This court considers that the right to sexual autonomy is not limited to self-determination regarding whether and with whom to have sex, but also refers to self-determination on all matters related to sexuality, including gender identity and expression, sexual orientation, sexual preferences and how, where, and when, how intense, and how often to have sex, as well as the health risks of sexual behaviour under one's control. Apart from masturbation, most forms of sexual practice require the participation of others.[35] Thus, there is a necessity to legally characterize and define the exercise of sexual autonomy of all parties whose rights can potentially be in conflict within an imbalanced power relationship. Nevertheless, any interference and limitation on sexual autonomy for such a purpose must be subject to strict scrutiny due to the indivisibility of sexual autonomy and one's personality.

In this light, the blank norm of criminal law is hardly consistent with the principle of clarity and certainty of law in a strict sense.[36] The lack of clarity lies not only in the unpredictability of the scope of safe/unsafe sex along with the development of HIV science, but also in the categorization of sexual acts that omits the complexity of lived and embodied experiences. Moreover, such a restriction upon HIV-positive persons entails a much higher duty of care, legally and morally, than that imposed on the general population, especially the actors who equally participate in sex. The higher burden imposed on HIV-positive persons is not grounded on any evidence that criminal punishment is effective in suppressing HIV transmission.

The legislator is allowed to use the indefinite concept of 'unsafe sexual behaviour' when formulating Article 21, Paragraph 1, of the HIV Act, and when authorizing the executive branch to issue an administrative order to complement the blank law.[37]

34. See Judicial Yuan Constitutional Interpretation No. 791 (2020).
35. This by no means suggests that masturbation is beyond the scope of sexual autonomy; on the contrary, social and cultural taboos and discrimination against sexual masturbation should not be underestimated.
36. See Judicial Yuan Constitutional Interpretation No. 690 (2011).
37. See Judicial Yuan Constitutional Interpretation No. 680 (2010).

However, the concept of unsafe sexual behaviour is questionable. Ordinary and HIV-positive persons do not necessarily have the ability, competence, or confidence to evaluate the significance of such risk based on the best available scientific and medical evidence. The safety/unsafety of sexual behaviour is neither understandable based on legal interpretation nor precise enough through biomedical discourse, with which the law tends to fail to catch up. Consequently, the burden of foreseeability is clearly excessive for the HIV-positive party in sex. The existence of scientific uncertainty and the uncertainty of risk have disproportionately restricted PLHIV (particularly those whose viral loads are not stably undetectable) from having a sexual life and exercising sexual autonomy, not to mention the responsibility to prevent transmission only lying on their shoulders.

By restricting their sexual autonomy, the law also differentiates and punishes irresponsible HIV-positive persons from responsible ones. Regarding the scrutiny of the principle of proportionality, the legal interests to be protected by Article 21, Paragraphs 1 and 3 of the HIV Act include the legal interests of the body (personal sexual health) and society (public health). Comparing Article 21, Paragraph 1, of the HIV Act and the already-repealed Article 285 of the Criminal Code, we can find a difference in defining the criminal subjects. The HIV Act punishes the 'individuals who are fully aware that they are infected (of HIV),' while the Criminal Code criminalized the 'individuals who are fully aware that they have venereal diseases.' The former criminal subjects who are punishable are those living with the virus, whether or not the infected body develops into having the disease – namely, acquired immunodeficiency syndrome (AIDS). The latter became punishable when their bodies were diagnosed with non-HIV venereal diseases.

The law distinguishes those who are infected with non-HIV venereal diseases and can be exempted from regulation after recovery and non-reinfection from those infected with HIV and who will never be excused from monitoring and governing. The subjectivity of persons with non-HIV venereal diseases is subject to change, and thus may fall within or outside the scope of the law. In contrast, the subjectivity of PLHIV is assumed to be stable and always readily under control. Such an assumption might be acceptable because AIDS was incurable and HIV infection was non-suppressible when the law was enacted. However, until today, the status of *the infected* in the context of the HIV Act remains fixed, even if one's viral load is (once) undetectable, one's body fluids are not infectious, or one can be deemed as almost recovered. Their sexual behaviour, excluded from sexual autonomy, will always be regulated, and its safety/unsafety is never conclusive.

Regarding achieving the public health purpose of deterring unsafe sexual behaviours, the law is doubtful concerning its degree of restrictiveness of personal autonomy and the proportionality of the means employed. The UNAIDS report reveals that the broad application of punishment is not helpful, and is sometimes even harmful, for HIV prevention and control. Yet, the legislator has not assessed the use of administrative measures or civil liability as an alternative to criminalization. In criminal proceedings, uncovering intimate conversations between the parties, the steps of a sexual encounter, the defendant's medical records, and so forth, has allowed, almost unconditionally,

the state to invade a person's very private sphere. The disadvantage of combining such serious interference with one's privacy and the degree to which Article 21, Paragraphs 1 and 3, of the HIV Act limit sexual autonomy is unreasonably disproportionate to the interests it declares to protect.[38]

The right to sexual autonomy is inseparable from the development and expression of personality, and is closely related to human dignity, belonging to an individual's most intimate and private sphere. We must be highly alert whenever state powers intend to enter this private remit. This does not mean a total ban on any intervention, yet great caution is required. Most sexual activities engage more than one party; however, that does not make them a matter of public interest, and the state is still prevented from interfering in this field except for a legitimate interest and necessity.[39] In the present case, Mr A and Mr B consented to oral sex, regardless of performance. Their agreement to have oral sex protects their primary sexual autonomies, and the physical and emotional reactions to sexual desire embody the secondary sexual autonomy, which is unlikely to be a matter worthy of a criminal court. Among the sexual acts between these two persons (and sometimes three), neither Mr A nor Mr B disclosed or asked about each other's HIV status. Under the influence of *high fun* in the chemsex context, neither might have been able to think carefully about sexual health risks.

For this court, if Mr A and Mr B engaged in sex voluntarily, their sexual behaviour shall remain a civil affair. Since Article 21 of the HIV Act has allowed for criminal charges without complaint, protecting Mr B's right to sexual autonomy is not the sole purpose of the law. Nevertheless, from the public health perspective, the evidence does not support criminal law as necessary and effective for HIV prevention. Instead, 'relying on disclosure to protect oneself … can and does lead to a false sense of security.'[40] Laying responsibility on one of the parties in sexual behaviour is not consistent with the notion of the right to sexual autonomy, which entails all parties bearing responsibility for each other.

Conclusion

In the present case, the defendant, Mr A, has been prosecuted for violating Article 21 of the HIV Act, by *attempting* to transmit HIV to Mr B, who was not infected after the sexual encounter in question and testing for HIV. The court finds that the sex encounter between Mr A and Mr B does not constitute unsafe sex behaviour; therefore, Mr A is not guilty. Meanwhile, the court also believes that on reasonable grounds, the validity of provisions as applied may be in contravention of the Constitution.

38. See Judicial Yuan Constitutional Interpretation No. 603 (2005).
39. The prohibition of domestic, sexual, and intimate partner violence, for example, requires the state to address victimization resulting from power imbalances within an interpersonal relationship.
40. UNAIDS, *Ending Overly Broad Criminalisation of HIV Non-Disclosure, Exposure and Transmission: Critical Scientific, Medical and Legal Considerations*, 44.

Appendix. The history of the case

Trial	Judgment Number	Date	Judgment
First instance	Taiwan Taipei District Court Criminal Judgment Prosecution-Zi No. 493 (2018)	13 December 2019	Mr A (convinced by the judge to plead) guilty (for *pity* and punishment reduction, under Article 59 of the Criminal Code).
Second instance	Taiwan High Court Criminal Judgment Appeal-Prosecution-Zi No. 212 (2020)	9 June 2020	Mr A (withdrawing his plea as guilty and found) not guilty.
Third instance	Supreme Court Criminal Judgment Tai-Appeal-Zi No. 55 (2021)	17 June 2021	The second-instance judgment revoked, and the case returned for re-judging.
First review instance	Taiwan High Court Criminal Judgment Appeal-Review-(1)-Zi No. 162 (2021)	12 January 2022	Mr A not guilty.
Final instance	Supreme Court Criminal Judgment Tai-Appeal-Zi No. 2419 (2022)	14 July 2022	The appeal dismissed, and the whole case settled.