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Abstract

To quantify and characterize existing legal complaints for the sexual transmission of HIV in Spain, describe temporal trends and whether advance of scientific knowledge is reflected in charging decisions, judicial reasoning, and sentences.

Sentences and writs dictated by Spanish penal and civil jurisdictions between 1981-2012 were obtained through legal databases systematic search.

16 sentences and 9 writs belonging to 19 cases were included; 17 judged by penal and two by civil jurisdictions. The first sentence was pronounced in 1996, 3 between 1999-2000, 4 between 2001-2005 and 18 between 2006-2012. In 10 (53%) cases there was effective HIV transmission, there was not in 6 (32%) and in 3 (15%) directionality could not be determined. Of the defendants, 15 (79%) were heterosexual males, one of which was an injecting drug use (IDU), 3 were men who have sex with men (MSM) and one was a heterosexual woman. In the 10 cases of HIV transmission, the mechanism was heterosexual sex and index cases were males in 9 occasions. Disclosure of HIV status, use of condoms and its frequency, and its possible breaks, were mentioned in only some sentences/judicial decisions and fewer mentioned the use of Antirretroviral Treatment (ART). Very few cases referred to plasma viral load (VL), and there are incorrect statements regarding HIV transmissibility. Only one 2012 sentence mentioned VL levels, adherence to ART, CD4 lymphocyte levels, concomitant sexually transmitted infections and references to pertinent literature.

The number of judicial decisions in Spain is increasing and the profile of the plaintiffs, largely heterosexual women, does not reflect the groups most affected by the HIV epidemic, largely IDU and MSM. Most judgments and writs do not reflect HIV scientific and technical advances. It is of utmost importance that these complex processes incorporate the most up-to-date knowledge on the subject.

Key words: Criminalization, HIV transmissibility, health policy, delayed HIV diagnosis, legal complains

Introduction

Since the beginning of the HIV epidemic, safe sex messages and condom use became the cornerstone of campaigns (Piot & Quinn, 2013). Studies on HIV-serodiscordant heterosexual couples in Sub-Saharan Africa in 2011 (Cohen et al., 2011) and in Western settings (Del Romero, Castilla, Hernando, Rodríguez & García) have shown that Anti-Retroviral Treatment (ART) unequivocally diminishes the risk of HIV transmission. Although a plausible hypothesis, such a conclusion has yet to be proven for Men who have Sex with Men (MSM) (Muessing et al., 2012; Rodger et al., 2014). Given HIV diagnosis is the first step to be started on ART, barriers to HIV testing have been targeted with multi-sectorial approaches (European Centre for Disease Prevention and Control [ECDC], 2010; WHO, 2010). Minimizing the negative impact of criminal law in this context has been one of them.

The use of criminal laws in alleged sexually transmitted HIV cases has concerned people living with HIV/AIDS, Non-Government Organizations, and the scientific community (Burriss & Cameron, 2008; Horvath, Weinmeyer & Rosser, 2010; Lazzarini et al., 2013; Mykhalovskiy, 2011; Weait, 2001; Weait, 2009). Even if still proportionally low, the number of cases reaching the courts has increased in the last decade (2012).

In this context, it is not known whether legal systems are incorporating recent scientific evidence in their decision making. We aim to quantify and characterize the cases in which sexual transmission of HIV has reached Spanish courts from 1981 till December 2012.

Methodology

All sentences and writs dictated by Spanish penal and civil jurisdictions between 1981 and 2012 were obtained through systematic search of Spanish civil and penal jurisdictions databases Cendoj, Aranzadi, El Derecho, and Tirant Lo Blanch .. using . As seen in Figure 1, 8.000 judgments and writs were screened according to: (1) possible transmission of HIV was judged as an individual infraction, whether or not other infractions were involved; (2) HIV was employed to increase the sentence imposed due to other infractions. The number of judgments and writs fitting these criteria were 28,. For the purpose of our analysis we excluded those in the second groupSix cases (three judgments and three writs) from the Supreme Court will be discarded for quantitative analyses (they solve appeals already included) but will be analyzed from legal and scientific points of view.

There is no HIV-specific law in the Spanish legal systems and when a person suffers a damage they can go either to the penal jurisdiction, and might end with a prison sentence and an economic compensation, or to the civil jurisdiction, which could involve an economic compensation. A judgment is the act by which the Court ends the process.. A writ is an act by which the Court solves secondary issues such as appeals concerning the need to obtain more evidence, but does not concern the central issue.

Results

There were 13 judgments and six writs and an increasing temporal trend is observed (Figure 2).

Concerning the accused, 17 (89%) were men and two were women, thirteen were off age and the age of six of them is not known (we assume them to be off age since Spanish courts usually specify in the case of minors) (Table 1). As for origins, in

11 cases it was not specified, four were Spanish, and five were foreigners. We assume cases where nationality or origin is not specified to be Spanish .

Of the accusers, 14 were women (74%) and five were men - two (10%) were heterosexuals and three (16%) were gay men. Overall, five were off age, the age 12 cases is unknown—presumed to be off age— and two women were under 18 years old (table 1).

In 16 cases (84%), defendants and plaintiffs were in freely chosen stable partnerships (Table 1); 16 cases (between men and women and three (sex between men.

Sixteen defendants (84%) were aware of their HIV status, two (11%) claimed were not and it is unknown in one case . Eighteen plaintiffs claimed to be unaware of their partners' HIV status, whereas defendants claimed they had disclosed their status. The court established 14 plaintiffs (74%) were not aware of their partner's HIV status, three were and it could not be established in two cases.

HIV transmission from defendant to plaintiff could be established in nine (47%) occasions, did not take place in six cases (32%), and directionality could not be determined in four cases.

Table 2 summarizes legal aspects; the majority of cases (89%) were brought before the penal jurisdiction, with an important variation in both prison sentences imposed and economic compensation.

All judgments mentioned use of condoms, but condom use on different sexual practices is lacking; one judgment describes the frequency of condom accidents for a case where HIV transmission took place. Only four cases mention whether the defendant was on ART (years 2006, 2010, 2011, 2012) and only two mentions

compliance (Table 2). Only sentence 10 from 2012 (Table 2) mentions the defendant's CD4 cell count and plasma viral load and refers to existing scientific literature indicating that undetectable plasma viral load is associated with negligible HIV transmission risk.. Phylogenetic analyses are mentioned in one sentence and one writ. One sentence (n° 2, Table 2) from 2004– dealing with an HIV transmission episode from 1999 – bases its argumentation on pre-ART era progression rates as claims “AIDS develops within six to ten years after HIV infection and survival after AIDS is at most 10 years”.

Discussion

There has been a clear temporal increase in the number of judgments and writs dealing with the sexual transmission of HIV infection in Spain from 1996 till 2012. Numerous judgments and writs do not reflect the scientific and technical advances on HIV infection as only one case from 2012, which could be considered exemplary, made explicit reference to scientific literature. Incorrect and outdated assumptions regarding transmissibility and HIV disease progression were present in a number of cases and affected the severity of the prison sentence.

Neither judgments nor writs give a comprehensive list of all the evidence given at the stages of the process. Only those which contributed to form the judge's opinion are reflected in juridical argumentations; therefore, the fact that a piece of evidence is not mentioned does not mean it was not presented during the process. Although this is a limitation inherent to the data source, the fact that the data conforming the judge's opinion is so limited is, indeed, worrying. None of the judgments and writs gave any clear information concerning the parties' specific sexual practices or the number of sexual contacts.

The increasing trend in the number of cases is consistent with reports from other countries within Western countries (Burriss & Cameron, 2008; Lazzarini et al., 2013; Global Network of People Living with HIV/AIDS Europe [GNP+]. The numbers of plaintiffs recorded in this study do not reflect the most numerous group of PLWHA in Spain, largely IDU and MSM (Vigilancia Epidemiológica del VIH en España, 2013). Almost all 19 cases took place in the context of stable relationships, mainly heterosexual, marital or quasi-marital. We think this reflects that among IDU, partners often share injecting equipment and as parenteral HIV transmission is more efficient than sexual transmission, injection is assumed as the HIV route. The relatively low number of gay men among plaintiffs could be explained by a number of reasons but, undoubtedly, internalized stigma and fear to be out in a legal process is a deterrent (Fernández-Dávila & Morales Carmona, 2013; Fernández-Dávila & Morales Carmona, 2014; Smit et al., 2012). The presence of homophobia, misconceptions and other forms of discrimination towards PLWHA is not infrequent among sentences and writs and has been the subject of another analysis within our group (Fuster et al., 2013).

These judgments and writs reflect the existence of a confrontation between two fundamental rights; the right to privacy and the right to life and health. The Courts have, in general, applied the legal figure known as *Dolus Eventualis*¹, which will be applied in those cases in which the defendant was aware there was a high probability that his/her actions would cause harm to the plaintiff and yet, did nothing to avoid it. Under this legal figure, the sentences are equated to those established for a willful and conscious act and are, therefore, much higher than those concerning a reckless or negligent behavior. Hence, the fact it has been scientifically proven that the risk of transmission is

¹ The current interpretation of *Dolus Eventualis* in Spain was set forth by the Supreme Court on its judgment of April 23, 1992, known as the case of the Colza Oil.

much lower in patients on ART should be taken into account by the courts to establish whether or not there actually was a high risk of transmission.

In the light of the increasing number for alleged HIV sexual transmission expected to reach the Spanish courts in the forthcoming years, it is of utmost importance these complex processes incorporate the most up-to-date scientific knowledge. The HIV community should engage with the various key actors to limit the negative consequences of the use of criminal and civil law in the cases of allegedly transmission of HIV.

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Table 1. Descriptive characteristics of the plaintiffs and the defendants

Variable	Plaintiffs n=19 (%)	Defendants n=19 (%)
Sex		
Men	5 (26)	17 (89)
Women	14 (74)	2 (11)
Age		
Off-age	8 (42)	13 (68)
Underage	2 (11)	0 (0)
Unknown	9 (47)	6 (32)
Origin		
Spain	1 (5)	4 (21)
Latin America	3 (16)	2 (11)
Sub-Saharan Africa	0 (0)	1 (5)
Europe	0 (0)	1 (5)
Asia	0 (0)	1 (5)
Unknown	15 (79)	10 (53)
HIV transmission route		
MSM	3 (16)	3 (16)
MSW	16 (84)	16 (84)

MSW, men who have sex with women

Table 2. Summary of the thirteen judgements of alleged sexual transmission of HIV, crime under which it was judged, verdict, sentences and economic compensations

Nº	Judgment	Summary	Crime*	Verdict	Sentence	Economic Compensation
1	Provincial Court of Tenerife 20/01/1996	HIV+ man who initiates a relationship with a woman, does not disclose his status and, at least in several occasions, does not use a condom. Months later he initiates another relationship and does the same thing.	Bodily Harm (article 420 of the Penal Code of 1973)	Guilty	1 year in prison	1 million pesetas (around 6,000€) and 8 million (around 48,000€) if she developed AIDS
2	Provincial Court of Madrid 1/2004, of January 2	HIV+ woman who does not disclose her status for over a year to partner whom with she has sex without condoms. The man had mental problems his condition complicates ART	Greivous Bodily Harm (article 149)	Guilty	6 years in prison	€ 100,000
3	**Provincial Court of Cádiz 1629/06, of March 15	HIV positive man who during a period of four months raped his thirteen year old daughter twelve times without using a condom, resulting in her being infected with HIV and pregnant, although she had an abortion.	Greivous Bodily Harm (article 149)	Guilty	10 years	€ 180.000 as a global compensation for all crimes.
4	Criminal Court of Barcelona 18/2006, May 26	HIV+ man who did not use a condom during sexual intercourse nor did he disclose his status to his partner, whom he infected. She died as a consequence of the infection and it was her heirs who presented the complaint.	Bodily harm (article 147) and reckless homicide (article 142)	Guilty	3 years in prison	€ 36.000
5	Provincial Court of Madrid 261/2010, of June 17	HIV + man who did not disclose his status and who, despite always using a condom, is considered negligent given they broke on several occasions, leading to the pregnancy and HIV infection of his partner and unborn child. The woman presented the complaint nine years later, two years after the divorce.	2 counts of Reckless bodily harm (article 152.1)	Not guilty, but the Supreme Court changed the verdict and declared him guilty.	N/A 2 years of prison	N/A 20.000€ wife 30.000€ daughter

Nº	Judgment	Summary	Crime*	Verdict	Sentence	Economic Compensation
6	Provincial Court of Madrid 101/2010, of December 22	HIV+ Swiss man who maintains a stable relationship with a Peruvian woman whom he infects, without disclosing his status and not using a condom in several occasions.	Reckless grievous bodily harm (article 152.2) Modified to Grievous Bodily Harm by the Supreme Court (article 149)	Guilty	2 years 9 years and 1 day	€ 90.000
7	Provincial Court of Madrid 17/2011, June 27	Colombian HIV+ man who, within a quasi-marital relationship, infects his partner, without having disclosed his status and not having used a condom previously.	Grievous Bodily Harm (article 149)	Guilty	9 Years	€ 60.000
8	Provincial Court of Navarra 140/2008, July 31	Brazilian FSW maintains several unsafe sexual encounters with her Pakistani pimp who becomes aware of his HIV status after the aforementioned contacts, although no HIV transmission occurred.	Exposure to Grievous Bodily Harm (149, 15 and 16)	Not Guilty	N/A	N/A
9	Provincial Court of Seville 274/2012, of May 23	HIV+ male sex worker from Cuba accused by his partner of exposing him to HIV for having sexual intercourse without a condom on several occasions. The plaintiff claimed he was unaware of the defendant's status but the court considered otherwise. The court also considered that the accused was on ART and his viral load was suppressed so the risk of infection was minimal.	Exposure to Grievous Bodily Harm (149, 15 and 16)	Not Guilty	N/A	N/A

Nº	Judgment	Summary	Crime*	Verdict	Sentence	Economic Compensation
10	Provincial Court of Madrid 36/2011, of March 21	HIV+ man from Togo who claims he disclosed his status, is accused of infecting his partner, but the Court considered that there was not enough evidence to prove that it was him who infected her.	Grievous Bodily Harm (article 149)	Not guilty	N/A	N/A
11	****SAP Balears 585/2001	Man unaware of his HIV+ status is held liable for infecting his female partner under the assumption that he should have taken greater precautions due to the fact that he had had sexual intercourse with at risk populations.	Tort (art 1902 of the civil code)	Guilty	N/A	5 millones de pesetas
12	**SAP Madrid 653/2007	HIV+ man who does not disclose his status to his fiancée but claims lacunar amnesia based on the fact he did not visit a doctor and fell ill following a visit to a tropical country for his honeymoon. He is held liable for not using a condom and, thus, exposing the plaintiff to the infection.	Tort (art 1902 of the civil code)	Guilty	N/A	€ 30.000
13	SAP Tarragona 24/10/2000	HIV+ man is accused of infecting his 14 year old female partner, with whom he had sex without a condom, in spite of both knowing of HIV status. The court dismissed the case as there was not enough evidence to support the claim the defendant had actually infected the plaintiff.	Bodily Harm (article 147)	Not guilty	N/A	N/A

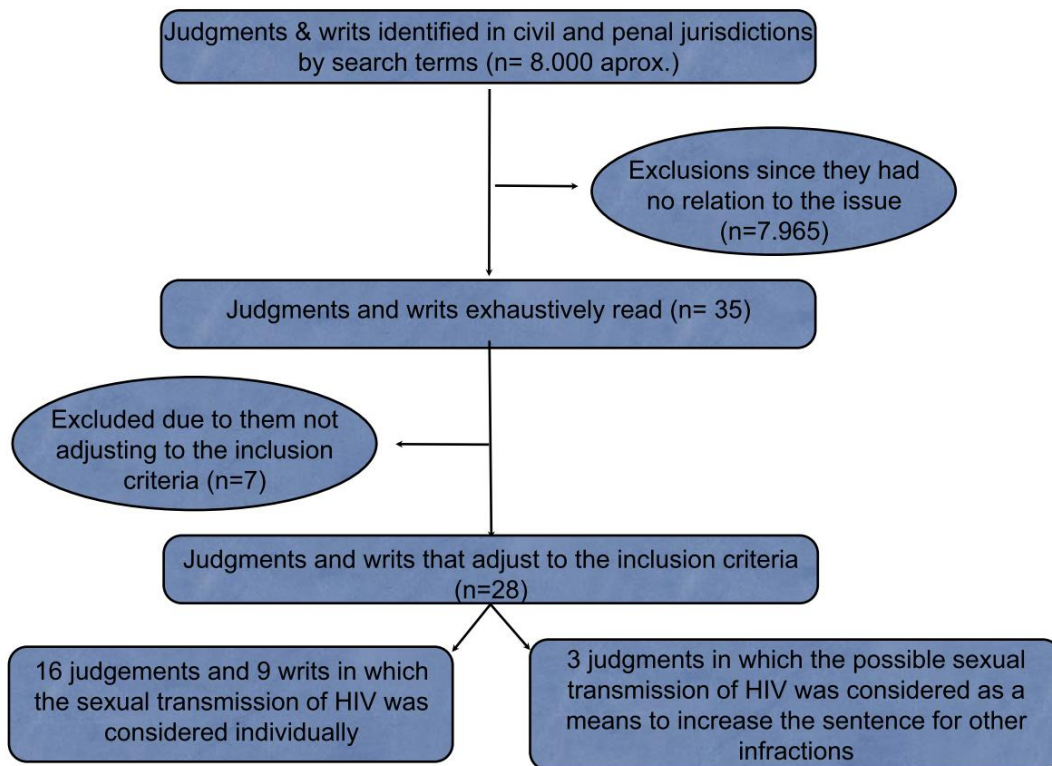


Figure 1. Flow chart

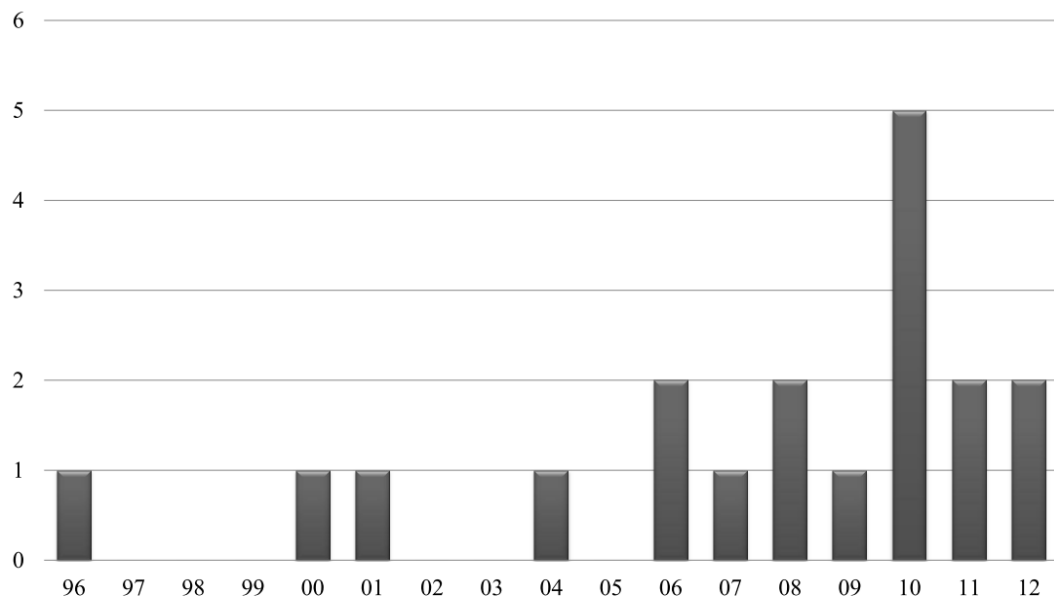


Figure 2. Number of judgments/writs per year