

DOCUMENT ON CRIMINALISATION CASE ON THE RISK OF HIV TRANSMISSION THROUGH EXCLUSIVE BREASTFEEDING. IN SAN LUIS, ARGENTINA 2022.¹



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1. INTRODUCTION

The purpose of this paper is to report on a recent case of HIV criminalisation that occurred in August 2022, in the province of San Luis, Argentina, where a woman with HIV was criminalised for accessing her right to choose how to exclusively breastfeed her baby.

By publicising this precedent, the aim is to raise awareness of the impact of criminalisation for the possible transmission of HIV as a practice that alters, threatens and undermines constitutional rights and guarantees, which in turn generates stigma and discrimination against people living with HIV.

It also seeks to set out the legal framework for exclusive breastfeeding. Firstly, it is argued that exclusive breastfeeding is a reproductive right of all women or pregnant women with HIV, which, like all human rights, States have a duty to respect and guarantee. Secondly, it is pointed out that this practice is legal, according to the national legislation of Argentina, and that therefore it should not be questioned but supported.

2. BREASTFEEDING AND HIV - Context

Since the beginning of the HIV-AIDS pandemic to the present day, significant advances have been made that allow a person with HIV on effective antiretroviral therapy (ART) to have a similar quality of life as a person who is not living with HIV. ART² is not only indicated to improve the health and quality of life of people living with HIV, but also as a strategy to reduce HIV transmission and incidence on a population-wide scale.

There is strong scientific evidence, such as the "Partner Study",³ that demonstrates that a person with HIV who is adherent to ART and whose viral load remains undetectable cannot

¹ This document was produced with the support of Sero Project.

² ART = Antiretroviral treatment

³ A. Rodger, V. Cambiano, T. Bruun, P. Vernazza, S. Collins, G.M. Corbelli, et al. Risk of HIV transmission through condomless sex in MSM couples with suppressive ART: The PARTNER2 Study extended results in gay men. Program and abstracts of the 22nd International AIDS Conference; July 23-27, 2018; Amsterdam, the Netherlands. Abstract WEAX0104LB.

transmit the virus sexually.⁴ This is known as the "**undetectable=untransmissible**" formula. Undetectable refers to a person's viral load, when the presence of virus in the blood is so low that it is undetectable; this is achieved when a person takes their ART consistently, i.e. remains adherent to their treatment. On the other hand, untransmissible means that when the viral load is undetectable, sexual transmission of the virus is not possible.⁵

Faced with this paradigm in which there is no doubt about the absence of HIV transmission in people on ART treatment with an undetectable viral load, discussions began on the different scopes of this concept, thinking about other aspects such as reproductive rights, specifically breastfeeding.

Since 2017, the International Community of Women with HIV, chapter: Argentina initiated the debate on the possibility of exclusive breastfeeding (EBF) in undetectable women and pregnant women. This was promoted through the numerous benefits of breast milk for both babies and for the health of women and pregnant women, which are promoted daily by various organizations, scientific societies and campaigns that encourage exclusive breastfeeding such as the United Nations Children's Fund (UNICEF), World Health Organization (WHO), Argentine Society of Pediatrics, among others.

In addition to this, in the new social context we are going through, bodily autonomy is increasingly valued through the politics of body control, which has also led to women not being able to rely on medical opinion alone, as was the case in those times when having HIV somehow conditioned family planning due to the risk of transmitting the virus.

In Argentina, at the national level, the Ministry of Health, through the National Directorate of Comprehensive Response to HIV-Its, has recommended that breastfeeding be replaced by formula milk⁶ to avoid the risk of perinatal transmission (from mother or pregnant woman to baby). Specifically regarding breastfeeding, the document states that "*Taking into account that Argentina has safe, effective and free alternatives for artificial feeding of the newborn and that breastfeeding increases the risk of perinatal HIV transmission, it is advised to CONTRAINDICATE breastfeeding*".

It is considered a risk situation when the infant has recently transmitted HIV, or a high viral load. In these situations the risk of transmission through breastfeeding ranges from 15% to 45% depending on the timing of feeding, but this does not mean that people with HIV cannot breastfeed!⁷

Despite the Ministry of Health's recommendation, it should be noted that although our country has no recorded evidence on the risks of HIV transmission through undetectable STIs⁸, there are studies such as Promise⁹ which reveals that **the probability of HIV transmission in women with an undetectable viral load is 0.3- 0.7%, which** is extremely low. There are also studies and guidelines for people who choose SCI in other countries, such as the guidelines from England and Australia.¹⁰

⁴ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)30418-0/fulltext#seccestitle10](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)30418-0/fulltext#seccestitle10)

⁵ I=I INDETECTABLE EQUALS UNTRANSMISSIBLE, Absence of sexual transmission of HIV in people on antiretroviral treatment and with undetectable viral load (2019) National Ministry of Health.

⁶ Diagnostic and treatment algorithms for the control of perinatal HIV, Syphilis, Hepatitis B and Chagas infections. "ETMI-PLUS Initiative. Argentina 2022. Recommendation as per the "*Consolidated Guidance on Sexual and Reproductive Health and Rights of Women Living with HIV. WHO.2017.*"
<https://www.paho.org/es/documentos/guia-consolidada-sobre-salud-derechos-sexuales-reproductivos-women-who-live-with-vih>

⁷ " Mariana Iacono (2022) Breastfeeding and Women with HIV
<https://volcanicas.com/lactancia-y-mujeres-con-vih/>

⁸ EBF= Exclusive breastfeeding.

⁹ Link to the Promise study : <https://clinicaltrials.gov/study/NCT01061151>

¹⁰ In England: General information on infant feeding for parents living with HIV
<https://www.bhiva.org/file/5bfd308d5e189/BF-Leaflet-2.pdf> . In Australia: Breastfeeding for women.

According to WHO guidance on HIV and infant feeding,¹¹ people with HIV can breastfeed for at least 12 months. However, the Argentinean Community of Women with HIV/AIDS recommends breastfeeding for a period of 3 to 6 months, during which time infants are exclusively breastfed. According to the evidence¹² the risk of HIV transmission through breastfeeding is 0.3% if the person with HIV is on antiretroviral treatment with an undetectable viral load and 30% if not.

3. FACTS OF THE SAN LUIS CASE

In 2023, there was a case of criminalisation of a woman with HIV for communicating her plans to opt for exclusive breastfeeding in the Argentinian province of San Luis.

The 26-year-old woman had been diagnosed with HIV for nine years and, thanks to good adherence to antiretroviral treatment, had achieved an undetectable viral load. When she became aware of her pregnancy status, she began to seek information about the possibility of breastfeeding her unborn child. Together with her partner, she accessed the recommendations of the World Health Organization (WHO) and the guidelines for breastfeeding support for women with HIV in England and Australia, and on the advice of her infectologist decided that the best way to feed her daughter would be through exclusive breastfeeding.

As a result, the woman expressed her decision to breastfeed, and presented the clinic "La Maternidad" with a respected birth plan, with the relevant indications, requesting that the Breastfeeding Inhibition Protocol not be carried out, in accordance with the ETMI initiative.¹³ The accompanied plan included citations of scientific evidence (such as the Promise study) and reports that reveal the low probability of transmission of the virus in cases of breastfeeding. In addition, it cited current regulations and contacts of experts in the field for consultation. She also included her medical history, updated viral load and cd4 controls, and guidelines on breastfeeding support for people with HIV from Australia and England. She also included the details of the team accompanying her in her decision (her infectious disease specialist, a paediatrician and a paediatric nurse) for consultation. However, despite the fact that the woman communicated in a formal, complete and detailed manner, and in full exercise of her right to choose how to feed her daughter, through EML, this was not enough for the medical team of the medical institution, who told her at all times that she should reverse her decision by making moral reproaches for her choice to breastfeed.

At the same time, the HIV/AIDS response programme in the province of San Luis contacted the National Directorate for HIV/STI response of the Ministry of Health, which indicated that although the recommendation is not to breastfeed, if the parents decide to exclusively breastfeed, they should be accompanied in this decision,¹⁴ warning of certain recommendations to ensure that the practice is safe. At the same time, the clinic consulted

<https://napwha.org.au/wp-content/uploads/2021/08/NAPWHA-Living-Well-Breastfeeding-for-Women-living-with-HIV-Community-Resource-2021-web.pdf>

¹¹ "HIV and Infant Feeding"

<https://www3.paho.org/hq/dmdocuments/2009/VIH-y-Alimentacion-Infantil-Actualizacion-2006.pdf>

¹² <https://clinicaltrials.gov/study/NCT01061151> For more information, visit [ClinicalTrials.gov](https://clinicaltrials.gov) using study identifier NCT01061151 and NCT00955968.

¹³ PMTCT = Elimination of mother-to-child transmission. In 2016, Argentina renewed its commitment by adhering to the "Action Plan for the Prevention and Control of HIV and Sexually Transmitted Infections 2016-2021".

¹⁴ "Given the decision of the pregnant woman to breastfeed after having received several instances of counselling, prioritising the benefits of breastfeeding over the possible risk of transmission in the context of viral suppression, we understand that it is the obligation of the teams involved in the care of both the woman and her daughter to accompany this family decision".

with the Ethics Committee of the Garrahan Hospital, which maintained that **breastfeeding in women with HIV was a risky practice, that it was a whim of the parents and that therefore the best interests of the unborn child should be prioritised**. As a result, a social worker from the clinic filed a complaint with a Family Court, where a judge ordered an injunction stating that if they did not follow the clinic's recommendations, both parents would face civil and criminal consequences.

At the time the mother was notified of the precautionary measure, she was having contractions, but she still had to present herself with legal representation, appear and appeal the decision before the family court. ICW Argentina worked with a fellow feminist lawyer from San Luis, and it was from ICW Argentina's legal department that we were able to work with her to advise on breastfeeding and HIV (in the appeal for review, with an appeal in subsidy). This happened within hours of the birth. Note that there is no legal norm that prohibits breastfeeding, nor is it legal to coerce a person with HIV to decide how to feed their baby. Finally, with regard to the appeal for review, the judge decided¹⁵, partially upholding the appeal, making a subtle change in the wording of the precautionary measure, as follows: in the event that the recommendations of the clinic are not followed, action will be taken "*under penalty of law*".

Within hours, the baby was delivered vaginally and was fed by LME. However, in the clinic there were numerous situations of violence, stigma and discrimination by the medical staff of the institution. From the moment the baby was born, just moments after the birth, the neonatologist struggled with the baby's father, trying to take him away from the mother who was about to suckle the breast to prevent her from breastfeeding her baby.

"The neonatologist said she couldn't breastfeed, and that it was wrong. My partner intervened. We argued and finally I was able to do it."¹⁶

Thus, from the moment of the baby's birth until the subsequent check-ups, different situations of stigma and discrimination occurred, which have been reported to the INADI¹⁷ delegation of the province of San Luis.

Regarding the judicial file, initiated by request of the clinic "La Maternidad", four months after the birth of the baby, the resolution of the appeal that had been presented in subsidy to the appeal for review was notified, in which the Chamber of SALA CIVIL AFNAY¹⁸ of San Luis, rejected the appeal lodged by the progenitor.

The judges of the Chamber considered, as did the Family Court and the Children's Ombudsman, that the appeal should not be successful, in view of the protection of the rights and integral protection of the child because "*the risk of vertical transmission through breastfeeding is not equal to zero*".

In addition to the above, the intervening judge ordered informative measures, which involve a social worker going to the parents' home to find out the family's status and for the maternity hospital to communicate the status of the mother and her baby.

¹⁵ textual quotation of the judicial resolution "I) To partially reject the revocation filed on 17/08/2.022. II) To revoke the warning to initiate legal and penal actions, providing in its place: Under warning of law".

¹⁶ First-person account by the parent.

¹⁷ National Institute against Discrimination, Xenophobia and Racism.

¹⁸ Chamber of Appeals in Civil, Commercial, Environmental, Family, Childhood, Adolescence, Violence and Labour of San Luis.

For more details about the events, please see the video produced by ICW Argentina with the support of Sero Project.¹⁹

4. VIOLATED RIGHTS

Overall, looking at the St. Louis precedent, it can be seen how the subjection to prosecution contradicted international guidelines on HIV and human rights from UNAIDS, the World Health Organisation (WHO), the Global Commission on HIV and the Law,²⁰ the UN Committee on the Elimination of Discrimination against Women (CEDAW) and the Office of the UN High Commissioner for Human Rights.

When a case of criminalisation of a person with HIV occurs because of the risk of transmission of the virus, as in the present case, numerous violations of rights of all types of legal hierarchy arise, but for the sake of brevity, the following is a summary of the main norms that were undermined in the San Luis precedent.

-Reproductive rights:²¹

These are human rights, which have to do with reproductive health and more broadly with all human rights that have an impact on human reproduction.

*"The possibility of making free, sovereign and responsible decisions about one's own body is an indispensable condition for the enjoyment of human rights"*²² and yet this was attempted to be denied to the parent who decided to exercise her right to choose how to feed her daughter.

"Women's human rights include their right to have control over and decide freely and responsibly on matters related to their sexuality, including their sexual and reproductive health, free of coercion, discrimination and violence".²³ In other words, it includes the right to make decisions concerning reproduction free of discrimination, coercion and violence, as set out in human rights documents.

The right to sexual and reproductive health is included in the *"priority measures of the Montevideo Consensus on Population and Development"*²⁴ by establishing the duty to implement programmes aimed at young people and adolescents so that they can make free, informed and responsible decisions regarding their sexual and reproductive lives.

- *Right to health*, enshrined both in the Argentine National Constitution and in international human rights treaties. The coercion suffered by the mother to prevent her from breastfeeding endangered her access to health. At no time did the Maternity Hospital clinic or the judicial

¹⁹ "Breastfeeding and HIV: this is the story of a woman with hiv who decided to breastfeed and was denounced". Video available <https://www.youtube.com/watch?v=JzbFeayMHOQ>

²⁰ The Global Commission on HIV and the Law is an independent body, convened by the United Nations Development Programme (UNDP) on behalf of the Joint United Nations Programme on HIV/AIDS (UNAIDS). More information at <https://hivlawcommission.org/>

²¹ It was at the 1994 World Conference on Population and Development in Cairo that the term "reproductive rights" was coined to designate the set of human rights that relate to reproductive health and more broadly to all human rights that affect human reproduction as well as those that affect the population-sustainable development nexus.

²² "Reproductive Rights are Human Rights" IIDH Inter-American Institute of Human Rights. UNFPA-ASDI.2008

²³ In line with the Fourth World Conference on Women in Beijing.

²⁴ <https://consensomontevideo.cepal.org/es/priority-measures>

system take into account the health benefits of breastfeeding for the mother. Nor did they take into account the fact that she was a young, first-time mother, who had to face legal proceedings and that this had an impact on her mental health.

On the other hand, the discrimination that arose endangered access to health care by being constantly questioned by the medical staff, who made value judgements at every stage instead of accompanying the EML procedure. That the accompaniment was carried out in a particular way, by a team made up of health professionals (paediatric infectious disease specialist, childcare worker and psychologist).

A word of caution is in order to ensure that the risk of transmission is low, according to the recommendations of the evidence cited above, the practice of SCI requires the accompaniment of medical professionals.

Argentine National Constitution: Art. 19²⁵ Principle of legality:

Primarily, the guarantees of due process were affected, in terms of the warning given through the injunction issued, which recommended refraining from not following the clinic's recommendations, and suppressing breastfeeding. The parents were warned that otherwise they would face civil and criminal proceedings. **But there is no legal regulation in Argentina that prohibits breastfeeding in people with HIV.** Although there is a recommendation not to breastfeed, this cannot be interpreted as an obligation. A recommendation issued by the Ministry of Health cannot be construed as a prohibition.

-Law 27.675 on "Comprehensive Response to HIV, Viral Hepatitis, Tuberculosis and other sexually transmitted infections". Art 2; Art. 6 inc a, b, c; Art. 11 inc a;

Right to treatment with dignity and freedom from criminalisation: Article 6 inc b establishes the **right of every person with HIV to be treated with dignity and free from criminalisation on the basis of their health status.** This normative framework is consistent with international consensus. To judge the decision of a woman with HIV, who has an undetectable viral load and decides to breastfeed her baby with the judicial warning that she will be criminally liable for possible transmission, is CRIMINALISATION.

Comprehensive care: Comprehensive assistance and care for all people with HIV is a right that was also affected.

The right to confidentiality: this right was violated on several occasions by health personnel who questioned the mother about her decision to breastfeed when she was HIV-positive, both pre- and post-natal.

Right to information: According to Art. 11 inc a, every pregnant woman or person capable of bearing a child with HIV has the right to "be provided with the necessary health information related to her health and that of her child, both during pregnancy and after delivery. Such information should be up-to-date, clear and evidence-based". This did not happen, as it was the mother herself who provided all the updated information on STIs together with the National Directorate of Comprehensive Response to HIV and its.

-Law 26.539: on Patients' Rights, which recognises the right to care without discrimination, dignified and respectful treatment, privacy, confidentiality, autonomy of will (including for children), health information and medical interconsultation. It regulates informed consent and medical records.

²⁵ Art. 19 National Constitution: "No inhabitant of the Nation shall be obliged to do what the law does not command, nor deprived of what the law does not prohibit".

-Law 26.529 "Derechos del Paciente en su Relación con los Profesionales e Instituciones de la Salud": This law establishes the rights that patients have in their relationship with health professionals and institutions, and recognises the rights of all persons to: assistance, dignified treatment, privacy, confidentiality, autonomy of will, and health information that people should have when undergoing treatment.

- *National Law 26.873 on "Promotion and Public Awareness of Breastfeeding"*: which aims to promote and raise public awareness about the importance of breastfeeding and optimal safe nutrition practices for infants and children up to two (2) years of age.

- Law on institutional violence INTEGRAL WOMEN'S PROTECTION LAW Law 26.485

- Law 25.673 National Programme of Sexual Health and Responsible Procreation, within the scope of the Ministry of Health. Article 2° - The objectives of this programme shall be:

(a) To achieve for the population the highest standard of sexual health and responsible parenthood so that it can make decisions free of discrimination, coercion or violence;

5. CONCLUSION

Criminalisation of HIV transmission, or the risk of transmission, is a discriminatory practice as it, among other things, fosters stigmatisation, undermines the human rights of people living with HIV and public health response efforts, and increases people's vulnerability by exposing them to a wide range of human rights violations, violence, stigma and discrimination.

In the event that there had been transmission of the virus, the parents would have faced criminal charges according to the final court decision. It is clear at this point how criminalisation does not prevent HIV transmission, but rather fosters stigma, discrimination and violence. In the present precedent, the medical institution repeatedly tried to expel the parents from the institution, through the judicial complaint, and through the treatment and suggestions of the medical staff who constantly judged the parents' decision instead of accompanying them. In cases such as the one described above, as indicated by the expert health authority (National Directorate of Comprehensive Response to HIV and its), the accompaniment of health care providers is key, following certain guidelines so that the EML can be carried out with information and in a safe manner. This is nothing more than the fulfilment of a reproductive right.

It is important to emphasise that reproductive rights are human rights. Failure to provide information on the choice of infant feeding is a violation of the right to information.

The International Community of Women Living with HIV advocates for the rights of women living with HIV, and is mobilising on this issue and advocating at all levels: local, national, regional and global to defend rights.

UNAIDS has repeatedly expressed concern about the overuse of criminal law in such cases, urging States to limit it. UNAIDS (2013). Ending over-criminalization of HIV non-compliance, exposure and transmission: important scientific, medical and legal considerations. Geneva