

Criminal Procedure Code

From 1 January 2012: Forced Hiv-Testing

Rechtskomitee LAMBDA supports case in the Constitutional Court

The Prevention of Terrorism Act 2011 also amended the Criminal Procedure Code. It makes forcible Hiv-testing legal as of 1 January 2012, despite the fact that the Constitution prohibits taking blood by force. A case has already been brought to the Constitutional Court.

The Prevention of Terrorism Act 2011, passed by federal parliament in October 2011, legalizes taking blood by force in order to prove the *misdemeanor* of Endangering Human Beings by Transmittable Diseases (§ 178 Criminal Code). Up to now forcible blood taking (in the case of not intoxicated defendants) had been restricted to *sexual felonies* or other *felonies* incurring a maximum penalty of five years.

Since 1 January 2012 this changed, despite the fact, that the Constitutional Court prohibits forcible blood withdrawals, as no one may be forced to supply his body as evidence against him. The first case challenging this new power of the criminal police has already been taken to the Constitutional Court.

The applicant, who has no criminal record, is Hiv-positive and asks the Constitutional Court to strike down the amendment. The state prosecutor has started proceedings against him under § 178 CC after another Hiv-positive man had accused him of infecting him with Hiv. Indeed the two men had sex with each other years ago, but in accordance with the safer sex rules propagated by the Ministry of Health and the Aids Service organisations (oral sex without ejaculation into the mouth).

Blackmailed and reported to the police

The accuser, who has a massive criminal record of violent, drug and property offences, reported the defendant to the police years after the sexual contact and only after the man refused to fulfill his considerable financial demands. In addition the accuser admitted during his interrogation that he had unprotected sex with others, and he had searched for casual sex ("sexdates") in the internet displaying in his profile the information "Safer Sex: Never". Even more so the man, according to his own depositions, is addicted to heroin and thus had been exposed also to other ways of transmission than the sexual one.

The case against the accuser (for aggravated blackmail) has been dropped immediately after the interrogation of both men due to „conflicting depositions“. Not so the case against the defendant for endangering by transmittable diseases (which offence is fulfilled just by engaging in unsafe sex without the necessity of causing infection). Also in regard to this offence there were „conflicting depositions“ but the prosecutor wanted a blood test (phylogenetic analysis).

Potential for conviction of innocents

A phylogenetic however cannot prove an infection. And phylogenetic analyses bear the risk of false results and misinterpretation to the expense of a defendant. There are no standards (guidelines) so far for such analyses in forensic context and its results unfortunately again and again are misunderstood and misinterpreted by the courts. UNAIDS and the EU-Fundamental Rights Agency for years have been highlighting this.

So the man did not agree to blood withdrawal from him as he fears to get, as an innocent, wrongfully convicted on the basis of such a blood test. Since 1 January he now is facing the danger of forced blood taking at any time. Therefore he has addressed the Constitutional Court.

„It is incredible that the governing coalition passed this unconstitutional law“, says president of *Rechtskomitee LAMBDA (RKL)* and defence counsel of the man, *Dr. Helmut Graupner*, “As too often we again have to hope for the Constitutional Court”.

Rechtskomitee LAMBDA (RKL), founded in 1991, on a supra-partisan and denominational level is working for the implementation of human rights for homo- and bisexual men and women. In its honorary board it convenes as prominent members as former Prime Minister *Dr. Alfred Gusenbauer*, President of Federal Parliament *Mag. Barbara Prammer*, former Minister of Justice *Mag. Karin Gastinger*, the Honorary President of the Parliamentary Assembly of the Council of Europe *Peter Schieder*, Federal Ombudsman *Mag. Terezija Stoisits*, Senator *Marco Schreuder*, former Director of Public Security *Dr. Erik Buxbaum*, the former President of National Judges Association *Dr. Barbara Helige*, the Chairwoman of the National Judges Association’s Working Party on Fundamental Rights *Dr. Mia Wittmann-Tiwald*, the Vice-President of the Vienna Bar-Association *Dr. Elisabeth Rech*, the former President of D.A.S.-legal expenses insurance company *Dr. Franz Kronsteiner*, the President of *Weisser Ring* *Dr. Udo Jesionek*, the Secretary General of Amnesty International Austria *Mag. Heinz Patzelt*, the Vice-Chairperson of the Executive Board of the European Union Agency for Fundamental Rights *Univ.-Prof. Dr. Hannes Tretter*, and the well-known human-rights experts *Dr. Lilian Hofmeister* and *Univ.-Prof. Dr. Manfred Nowak*, the constitutional law professors *Univ.-Prof. Dr. Christian Brünner*, *Univ.-Prof. Dr. Bernd-Christian Funk*, *Univ.-Prof. Dr. Heinz Mayer* and *Univ.-Prof. Dr. Ewald Wiederin*, famous child- and adolescent psychiatrist *Univ.-Prof. Dr. Max Friedrich* and the Vienna Child- and Youth-Ombudspersons *DSA Monika Pinterits* and *Dr. Anton Schmid*, sexologists *Univ.-Prof. Dr. Josef Christian Aigner*, *Univ.-Prof. Dr. Rotraud Perner* and *Univ.-Lekt. Mag. Johannes Wahala*, Life-Ball-Organisator *Gery Keszler* and many more. October 2nd, 2006, RKL’s 15 years anniversary has been celebrated in historic Ceremonial Act “Against Sexual Apartheid” in the lower chamber of Austrian federal parliament. This first honouring of an LGBT organisation in the plenary session hall of a national parliament worldwide took place in attendance of over 500 guests including highest representatives from the judiciary, administration and politics (<http://www.rklambda.at/festakt/index.htm>). Since 2010 RKL is a member of the Fundamental Rights Platform of the European Union Agency for Fundamental Rights (www.fra.europa.eu).

More information: *Rechtskomitee LAMBDA*, (+43 1 876 30 61, +43 676 309 47 37), office@RKLambda.at; www.RKLambda.at

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