Law, Courts and Power Dynamics in the Context of
HIV/AIDS - A Case Study of Taiwan

Chunyuan Lin*

Abstract

HIV/AIDS related stigma sometimes generates discrimination and social violence against people living with HIV/AIDS (PLWHA); therefore, whether the law shields them from an unreasonable invasion of their rights is a critical indication of the law’s function in rendering social justice. In Taiwan, despite the fact that the HIV/AIDS Regulatory Act has made progress in protecting the rights of PLWHA since the 1990s, discrimination remains. It is important to inquire how law evolves when social discrimination has prevailed, and whether the progress of legislation eliminates social discrimination and empowers PLWHAs in HIV-related disputes in the courts. This article explores the dynamics between social powers, law and courts, with a focus on the legal progress, court rulings, and the suffering of PLWHA in Taiwan. This article puts forward the following arguments: firstly, that the legal progress on HIV law is a product of elite-led social movement rather than a social consensus; and secondly, that courts reproduce social stigma and reinforce the social exclusion of PLWHA.

Keyword: HIV, AIDS, Taiwan, courts, the ‘haves’, exclusion, discrimination

I. Introduction

In February 2012 in Taiwan, a student, A-Li, studying at National Defense University (NDU) tested positive for HIV during a regular health examination. His supervisor and directors at the university repeatedly implied that he should withdraw voluntarily from school, threatening to disclose his infectious status to his parents.

* Associate Professor of the Department of Financial and Economic Law, Chung-Yuan Christian University, Taiwan; Ph.D. National Taiwan University, School of Law; LL.M. New York University, U.S.; LL.M. National Taiwan University.
Despite social workers and the Ministry of Health and Welfare reminding NDU not to discriminate against people living with HIV/AIDS (PLWHA), NDU issued an executive order and expelled A-Li in January 2013 on the grounds that he did not report the disease to the school, thereby violating school regulations.

Although the Ministry of Health and Welfare and the Executive Yuan condemned the NDU’s discrimination against A-Li and its violation of article 4 of the HIV Infection Control and Patient Rights Protection Act, NDU insisted that the order to expel A-Li was legal. The director of NDU stated that “this case was decided simply on the basis of the student’s misbehavior. The school followed procedure and made the decision according to the law.” NDU insisted on not repealing its decision and suggested that it was a “legal decision without discrimination.” Although A-Li brought the case to the court, the court dismissed it on procedural grounds.

A Li’s case recalls a similar case that occurred in 1987. A student, Tien Chi-Yuan (hereafter Tien) was found to be HIV positive and dropped out of school under pressure from National Taiwan Normal University (NTNU). At a time when society rarely understood AIDS and strongly feared PLWHA, NTNU considered the student’s rights and permitted his request to return to school. After 30 years of legal, social, and medical progress, NDU and the Ministry of National Defense still brutally discriminate against students with HIV, making the protection of PLWHA worse.

These two cases provide a view into complicated issues about power, law, and the courts in Taiwan. If discrimination prevails, what powers will mobilize the legal progress to provide protection for PLWHA? What is the function of law in the tension between PLWHA and society? Most importantly, when the courts become involved with HIV-related disputes, how do the courts exercise their power and manage cases in an imbalanced power structure? To answer these questions, this article backtracks the evolution of the HIV Control Act in Taiwan to see the how the law reflects social dominance and resistance. This article also conducts an empirical study on HIV-related judicial rulings in Taiwan to delineate the overall situation and relevant discourse. An

---


2 Ibid.
An empirical study on the court rulings in HIV-related cases will not only help us to understand the overall situation of PLWHA in society and in the legal system, but may also show whether the courts reinforce social dominance or deliver justice. In addition, this article attempts to demonstrate how judges combine specific interpretational attributes (such as AIDS metaphors or deference to medical authority) in the text of their rulings to justify social exclusion.3

II. HIV Stigma and the Politics of Exclusion/Inclusion

Diseases are common in society, yet some may reconstruct social power and alter interpersonal behaviors because of the related metaphors and stigmas that come with these diseases. AIDS is one of the most salient. The abovementioned stories of HIV-positive students indicate the politics related to HIV.

1. HIV-related Stigma and Its Power Structure

AIDS was believed to be a highly transmittable and fatal disease that was contracted by people inside various marginalized and already stigmatized groups, and thus it has been depicted using various metaphors such as a pollutant on society, a punishment to social deviance, and a lethal threat to public health. Stigma and fear reinforce each other and generate conscious and unconscious negative feelings about AIDS, which have led to the stigmatization of PLWHA. Various researches have shown that the association AIDS with socially marginalized groups, such as homosexuals, sex workers, and drug abusers, shapes the perception that PLWHA and “high-risk groups” are Others—people who are threats to the established order and who should be excluded from the community.4


4 Dominant groups tend to identify “us” and construct dominated groups as others by stigmatizing a difference, presented as a negation of identity. The discussion of “Other”, see e.g., James Duncan, Sites of Representation; place, time and the discourse of the other, PLACE/CULTURE/REPRESENTATION 39-56 (James Duncan & David Ley eds., 1993). The discussion on Other in HIV/AIDS context, see e.g., George Petros, Collins O. Airhihenbuwa, Leickness Simbayi, Shandir Ramlagan & Brandon Brown, HIV/AIDS and ‘othering’
The history, transmission, and the groups of people most affected by HIV/AIDS, all contribute to the persistence of the AIDS stigma. Nowadays, even though medical progress has identified the limited contagious nature of AIDS and has significantly reduced the death rate of PLWHA, the stigma from AIDS remains. As a result, AIDS and its associated metaphors, stigma, and fears construct an imbalanced power structure in which PLWHA are separated as Others from the public community. People with power and resource are the dominant ‘haves’ who shape social value and policy, yet PLWHA are ‘have nots’ who are dominated. This power structure affects not only interpersonal interaction but also make legislative and judicial institutions political forums in which the ‘haves’ and PLWHA are political actors struggling to attain divergent goals.

2. Law as Social Control and as Resistance

The ‘haves’ employ social control measures on PLWHA and sometimes strive to legalize and institutionalize them. As some scholars have demonstrated, the law operates routinely to control or reproduce the social order. Legislative process favors the ‘haves’, and thus the history of legal determination reflects social domination and control. Historically, societies have typically turned disease-generated fear into blame on various marginalized groups or outsiders, viewing them as a threat to the social order. The blame on these groups has typically resulted in the enactment of repressive social control and restrictions on civil liberty. Criminalization, isolation, and exclusion are all common measures. Marginalized groups are usually powerless to mobilize against legislators, particularly when they are seriously stigmatized, and this is especially so in

---


7 For example, during World War I, isolation of sex workers was a major policy response.
the context of HIV.

Yet the law can also be used to resist improper social oppression. Members of minority groups, human rights activists, and NGOs are fully aware of the oppression that an unjust law can create, and they continue to treat legislation as a primary mechanism of social justice and social change.

In the context of AIDS, legislation is just one battlefield. The dominant general public seeks to justify measures of social control and exclusion, whereas PLWHA seek to protect their liberty through rights and anti-discrimination doctrines. The dynamics of AIDS-related legislation crystalize the tension between the larger general public and PLWHA, as well as the struggle between claims to exclude and to include.

3. The Role of Courts

Although legislators have established the framework and principles of HIV law, the courts are called on by individuals and institutions to bring order to the flurry of competing claims generated by HIV cases. Courts become the second battlefield for HIV-related politics. An analysis on the rulings of courts helps to clarify the reality of PLWHA, as well as the role that courts play in managing social tensions about AIDS.

Analysis on how the courts manage HIV-related cases is grounded in strands of socio-legal study on judicial decision making. Under this view, courts are political institutions and judges are political actors. Although courts make decisions on a legal basis, more than doctrines, it is society, culture, and politics that provide the contextual basis for shaping judgments.

According to numerous observers, judicial response typically parallels the dominant ideology of legal doctrines. For example, Galanter argues that the courts rule in favor of power advantages and reinforce asymmetrical power relationships in society.

---


9 See generally, Rogers Smith, Political Jurisprudence, the New Institutionalism, and the Future of Public Law, 82 AM. POL. SC. REV. 89 (1988).

10 Marc Galanter, Why the 'haves' Come out Ahead: Speculations on the Limits of Legal Change, 9 L.
Gordon suggests that courts employ legal doctrines to uphold a set of dominant social norms and social arrangements as being natural and just.\textsuperscript{11} Musheno suggests that in managing disputes related to fears of disease, courts rarely challenge cultural bias and stigma; instead, they defer to legislative authority and to the administrative bodies that legislatures entrust to manage disease outbreaks.\textsuperscript{12}

Yet it is also believed that marginalized groups can find new opportunities for defiant action and often use legal mechanisms to resist social control. When courts rule on a case-by-case basis against social hegemony, they may gradually decrease injustice in society. In the context of disease, studies indicate that courts have on occasion legitimated the struggles of marginalized groups seeking to protect their rights when facing crises initiated by the fear of disease.\textsuperscript{13} Courts, like the law, are an institution of duality. They tend to maintain existing power structures, but are also sites of resistance and can be used to trigger social change.

In the context of AIDS, both the ‘haves’ and PLWHA struggle to win legal judgments. How, then, do courts make judgments between disease control and the protection of rights? Do courts fight discrimination against PLWHA or reinforce social stigmas? For example, if the invention of highly active antiretroviral therapy (HAART) significantly reduces the risk of infection from, and the deaths of PLWHA, will the courts adjust their jurisprudence to be in line with this medical progress? These questions need to be further explored.

\section*{4. The Method}

This article explores the power dynamics between PLWHA and ‘haves’, providing both a brief historical review to demonstrate how ‘haves’ enacted law to control HIV and how PLWHA resisted the oppression of the ‘haves’ and improved the law with the


\footnotesize\textsuperscript{12} Michael C. Musheno, Peter R. Gregware, and Kriss A. Drass, \textit{supra} note 1, at 737.

help of civil society.

This article then conducts an empirical study on the Taiwanese court rulings in HIV-related disputes. Among the HIV-related judicial rulings prior to October 2016, in the database established by the Judicial Yuan of Taiwan, including civil, criminal, and administrative cases, a total of 548 cases were found that directly involved PLWHA. For this study, an HIV-related case must consist of two features: PLWHA involved as a party in a dispute; the court specifically addresses the claims of parties in situations where HIV infection is central to the court’s decisions. This study analyzed and coded these 548 HIV/AIDS-related cases to obtain discrete and textual measures of the characteristics of the contesting parties, the types of the cases, and the results of cases. Descriptive statistics are used to document and to provide an overview of the reality and development of HIV-related cases in Taiwan.

To understand the relational attributes of HIV-related judgments, this article analyzes the claims from PLWHA and opposing parties. The state, institutions, and individuals are the ‘haves’ who seek to enforce regulatory schemes and social control measures in the name of public health. On the other hand, PLWHA are represented as the “Have Nots” who seek social inclusion by using legal mechanisms and who fight against social control imposed by the ‘haves’. With this picture in mind, we can better understand how the courts manage these disputes. This article also notes the interpretational attributes specific in the reasons behind rulings and reads into the ways that the courts refer to legal doctrines of rights, HIV-related metaphors, and medical authorities when making judgments. Using relational and interpretational analysis, this article attempts to represent the power dynamics in the legal framework and the role of courts.

III. The History of HIV Law and Politics in Taiwan

Legal action in Taiwan to control the spread of HIV started to be implemented in 1987. At that time, AIDS was not an epidemic because there were less than 50 PLWHA; however, metaphors spread rapidly to depict HIV as a disease that was foreign, highly infectious, deadly, and caused by sexual abuse. Authorities and the media saw HIV as an alien and fatal threat to the purity and innocence of Taiwanese
society.

With fears caused by HIV-related stigmas, the authorities attempted to persuade the public that AIDS is a disease only infectious to certain marginalized groups. For example, in 1987, when the first Taiwanese HIV carrier was discovered, newspapers described him as a “highly sexually active gay person having sex with thousands.” On World AIDS Day in 1988, the director of the Department of Health publicly declared that “people leading normal lives have no risk of being infected by AIDS and should not be afraid of it.” The collective societal fear of HIV/AIDS was multiplied and institutionalized into the HIV Control Act of 1990, which was essentially a law of exclusion, excluding foreign carriers from crossing Taiwanese boarders and excluding domestic PLWHA from society. Yet this Act also became a starting point for resistance and justice as NGOs, human rights activists, scholars, and medical professionals challenged this regulatory scheme of exclusion, asking the government and society to treat PLWHA as equal citizens. The progress of HIV law in Taiwan can be understood as an elite-led struggle fighting for inclusion in the face of social exclusion.

1. HIV Control Act: Control and Exclusion

The primary goal of the 1990 HIV Control Act was for Taiwan to remain a “clean territory” through border control and criminalization of PLWHA who could infect others. The rights of PLWHA have not been taken seriously by the society.

Because the first reported case of HIV infection in Taiwan was from a foreign traveler, AIDS is understood as a foreign disease. The first bill of the HIV Control Act requested that all foreigners and Chinese people from overseas be subjected to an HIV test, and if found to be HIV positive, they would need to leave Taiwan immediately. The only concern of the government was the reputation of Taiwan in international society. Because compulsory examination may deter short-term tourism, the HIV


16 In the 1990s, the Taiwanese government claimed itself as the legitimate government of China.
Control Act authorized administrative agencies to test foreign travelers at their discretion, and foreigners who were refused entry to Taiwan or who were forced to exit had no opportunities to appeal. In addition, because of the prevailing fear and stigma of AIDS, the HIV Control Act criminalized PLWHA if they passed HIV on to others, with a prison sentence of seven years if transmission was deliberate. This is the first and only law in Taiwan to criminalize people who transmit a virus. As one legislator explained, “The aim of the Act is to put PLWHA in jail, preventing more infections.”

Despite some scholars and activists expressing their objections, the Act was passed. The only provision granted was the protection of privacy for PLWHA, requiring doctors and other personnel in the medical process not to disclose the infectious status of their patients, though this was due to a respect for medical ethics and not out of respect for the rights of PLWHA. On the basis of the HIV Control Act, authorities further constructed the notion of a “high-risk group” of potential PLWHA, asking all fishermen, sex workers, homosexuals, prisoners, draftees, and drug abusers to be tested for HIV.

2. Resistance from PLWHA

The 1990 HIV Control Act has undergone several revisions and has gradually improved the legal status of PLWHA. However, this progress was not achieved by PLWHA because they are understandably reluctant to exposing their identity; instead, the progress has been the development of democratization and globalization that has empowered NGOs and scholars to initiate legal change.

(1) Democratization Promoting Rights of PLWHA

The 1990s were the beginning of Taiwan’s path to democratization. Human rights NGOs found themselves in a similarly difficult situation and rallied together to fight
against governmental oppression. One activist, Chia-Wei Chi, disclosed information about various PLWHA because he believed they had unsafe sex without first making their infectious status clear. This event invited numerous objections, with some NGOs, including the Professional Medical Academy and feminist organizations, publicly emphasizing that the “HIV Control Act mistakenly regards infection as a crime and treats PLWHA as criminals.” Several scholars and NGOs lobbied to revise the Act.

The first NGO aiming to promote the rights of PLWHA was established in 1997, the Persons with HIV/AIDS Rights Advocacy Association (PRAA), and successfully led the 1997 revision of the HIV Control Act. The most important aspect of this revision was the amending article 6-1; prohibiting discrimination against the rights of PLWHA to education, to medical service, and to work. It was the first time that PLWHA’s rights were recognized. However, the provisions on the criminalization of PLWHA and the regulations on foreigners were not revised. Even worse, the 1997 Act criminalized the attempted offense of so-called “high-risk behaviors”. PLWHA who are fully aware that they are infected and who have unsafe sex, supply blood, or provide organs, tissues, body fluids, or cells for transplantation or use by others, would be sentenced for a prison term of 5 to 12 years, even if they do not infect others.

Compared with foreigners, the rights of domestic PLWHA were relatively ignored until 2006 when the relocation controversy of the Harmony Home Association (HHA) raised concerns about discrimination against PLWHA. Interestingly, this case not only successfully ended unfair treatment of PLWHA, it also led to a paradigm shift in the HIV Control Act. The HHA case involved legal action to exclude a PLWHA shelter from a residential community. The district court held that the Tsai-Hsing Community Management Committee’s decision to expel the HHA was legal. The judgment invited serious criticism from civil society, and even the director of the Department of Health

---

18 A Statement of NGOs -- HIV Carriers are not Criminals, 147 AWAKENING MAG. 4, (1994).

19 The HHA is an NGO that provides space, clothes, and food temporarily for PLWHA who have difficulty earning a living. In 2006, a sponsor (Wang Qi-Tung) provided a free apartment to the HHA in the Tsai-Hsing Community in Taipei, yet encountered severe resistance from other residents. Residents insisted that according to the Household Statute of the Tsai-Hsing Community, no residents shall lease the apartment to people “who might threaten the safety of other residents.” When the HHA refused to move, the Tsai-Hsing Community Management Committee brought the case to the court. Taipei District Court [Taipei Dist. Ct.], 2006 Chung-Su 542 Civil Judgment, Oct. 11, 2006 (Taiwan).
and the Mayor of Taipei City expressed their concerns about the plight of the HHA and PLWHAt. The PRAA and other human rights groups claimed that the judgment violated the constitutionally-protected freedom to live and the property rights of PLWHA.

The Department of Health, NGOs, and two legislators mobilized to revise the law in order to ensure that the constitutional rights of PLWHA would be protected in the future. The 2007 amendment provides “the right to residence and health care”21 for PLWHA, and changed the title from the HIV Control Act to the HIV Infection Control and Patient Rights Protection Act, emphasizing that rights protection should be equally as important as HIV infection control. The amendment directly reversed the judgment of the Appeal Court, stating that since the newly enacted law directly protects the rights of PLWHA to residence and health care, the Household Statute of the Tsai-Hsing Community cannot violate the law and thus confirmed the right of the HHA to remain inside the Tsai-Hsing Residential Community.22 Although democratization raised the level of right-consciousness and empowered human rights advocates, the 2007 amended article also provided a strong legal basis for the court to make decisions in favor of PLWHA.

(2) Globalization and the Lifting of Bans on Foreign PLWHA

Another driving force for the progress of HIV law has been international pressure. Due to its unique international status, Taiwan has been attempting to become a recognized member of international society, and particularly after 2000 when the newly-elected President Chen Sui-Bian of the formerly opposing DPP party faced threats from China when strategically distinguishing Taiwan on its democracy and human rights. As a result, Taiwan carefully manages its human rights reputation in international society; any criticism of its human rights record would undermine this effort. As globalization brought more foreigners to Taiwan, the ban on foreign PLWHA

20 NGOs protested the decision and some officials also supported the HHA to appeal. The vice-director of the Center for Disease Control Lin, Ding (林頂) publicly support the HHA.

21 HIV INFECTION CONTROL AND PATIENT RIGHTS PROTECTION ACT art. 6-1 (2007) (Taiwan).

22 Taiwan High Court [Taiwan High Ct.], 2006 Shang Yi 1012 Judgment, Aug. 03, 2006 (Taiwan)
gained more critics and became a driving force for legal reform. The authorities in 2000 amended an “innocent foreign victim” provision in the HIV Control Act, stating that if foreign PLWHA can prove they were infected with HIV/AIDS by their partner, or from a medical process in Taiwan, then they can be treated as domestic carriers. Article 14-1 also provides an opportunity to appeal for foreigners who were ordered to exit Taiwan within six months. Even if foreigners successfully appeal, the authorities are only required not to take HIV infection as the only consideration against granting a visa or permanent residence. These revisions seemed to loosen regulation against foreigners, yet considering the economic, cultural, and linguistic difficulties faced by foreign PLWHA, the 2000 revision did more to respond to international criticism than to genuinely protect foreign PLWHA. Globalization brought an increasing number of tourists and immigrants to Taiwan, causing the rationality of the “clean territory” policy to be questioned. To follow the global trend established by WHO regulation, the Legislative Yuan ultimately lifted the ban on foreign PLWHA in 2015.

(3) Legal Change under Democratization and Globalization

The above-mentioned history reveals three power relationships: the general public vs. PLWHA; international society vs. excluded Taiwan; social elites vs. the public. Generally, the law reflects the prevailing attitude of the Taiwanese society to treat PLWHA as Others, with the attempt to exclude them from a clean society. Under the power structure reinforced by law, human agencies and marginalized groups have the capacity to organize and resist. Because of high levels of stigmatization, PLWHA face increased difficulties when fighting against oppression; however, democratization and globalization have facilitated their struggle for resistance. When Taiwan is excluded from international society, it desperately strives to earn international recognition. Thus, the government released the ban on foreign PLWHA once they began to receive international criticism for violating human rights.

Democratization promoted human rights and a stronger civil society. When most PLWHA in Taiwan hesitated to disclose their infectious status to the public, human rights activists, medical professionals, and scholars initiated efforts to revise the HIV

---

Their overall agenda was to ask the law to treat PLWHA as equal citizens who should be included in society. Had not these social elites with their higher social status advocated for PLWHA, HIV law would not have made progress against serious discrimination.

After 25 years, the law has significantly improved the legal status of PLWHA. Despite the fact that the provision to criminalize PLWHA remains, the new HIV Infection Control and Patient Rights Protection Act has lifted the ban on foreigners and provides more comprehensive protection for PLWHA. Yet questions remain. Does the progress of law reduce discrimination against PLWHA? Does the law facilitate PLWHA to fight against discrimination? The answer to these questions should be grounded in empirical evidence.

IV. The Courts in HIV-Related Disputes

This article conducts an empirical study on HIV-related cases and analyzes them from statistical, relational, and interpretational aspects. The following analysis reveals a systemic exclusion of PLWHA in Taiwanese society.

1. Statistic Overview

The annual quantity of legal cases in Taiwan involving PLWHA started to increase in 2004. Prior to this 2004, there were less than five cases involving PLWHA a year. In 2005, the number suddenly increased to 36, and then in 2006 to 68 cases. After 2006, there remained a steady 20-40 cases per year (FIGURE 1).

The sudden increase in cases of PLWHA can be attributed to the Reducing HIV/AIDS Infection of Drug Abuser (RHAIDA) project, which commanded that all suspects of illegal drug abuse receive an HIV test. In other words, the high statistical connection between drug abusers and PLWHA is a result of a policy that forces disclosure of illegal drug abusers and their infectious status. This data suggests that the increasing number of PLWHA does not necessarily cause the growth of judicial cases; however, the recent progress of rights-awareness and medical treatment has also not effectively reduced the number of HIV-related cases. The overview also reveals that
most PLWHA with criminal charges go to courts unwillingly, and only when they are sued or already in prison.

Litigation cases in Taiwan are categorized as civil, criminal, or administrative and assigned to different types of courts and procedures. This study indicates that among all 548 HIV-related cases surveyed, there were 22 administrative cases, 66 civil cases, and 460 criminal cases (FIGURE 2).

The huge volume of criminal cases can be attributed to the RHAIDA project because drug abuse remains a crime in Taiwan. Interestingly, the legal attributes of parties indicate that most HIV-related cases in Taiwan occurred between PLWHA and people who are not HIV positive. Only four cases exist in which both parties are PLWHA who conduct high-risk behavior that may cause the risk of infection. In the other 544 cases, only one party was infected with HIV/AIDS, and that was typically the defendant. The three primary causes that make PLWHA defendants in a case are drug abuse, divorce, and intentional infection in others. Even more interestingly, almost all PLWHA defendants did not voluntarily go to court. PLWHA rarely bring a case to court as plaintiffs, and among some limited cases, most PLWHA plaintiffs are foreigners who were forced to leave the country because of their infectious status.
three cases exist in which PLWHA initiated a suit as a plaintiff to protect their legal rights from discrimination. Among all cases, only 96 decisions were ruled in favor of PLWHA; leaving 452 cases that were ruled against PLWHA (FIGURE 3).

FIGURE 2. The distribution of cases.

FIGURE 3. Results of courts' rulings.
Among cases decided in favor of PLWHA, most involve drug abusers asking for probation or commutation. Among 226 cases involving illegal drug abuse, 72 cases were ruled in favor of PLWHA. At first glance, the courts appear to be sympathetic to them, yet the courts rarely state the extent to which PLWHA are favored. The court only states that it “considers the infectious status and other situations, and the court decides the sentence as follows…” 24 Therefore, it may be overestimating to conclude that there were 96 cases ruled in favor of PLWHA.

The anti-discrimination provision appears to be a failure from the point of view of this statistical analysis. The provision does not facilitate PLWHA to protect their rights, and neither does it push the courts to render judgments in favor of PLWHA.

2. Systemic Exclusion of PLWHA

If the progress of HIV law reflects a struggle between exclusion and inclusion, the rulings in these cases reveal a full defeat of PLWHA.

As statistics have shown, most cases occur because the ‘haves’ sue PLWHA. The state, social institutions, or individuals assert claims to legitimate regulation and social exclusion, seeking to secure the “health and safety of the uninfected public.”25 These efforts for exclusion evoke counterclaims for protection of rights and for inclusion of PLWHA or so-called high-risk groups. Numerous PLWHA are a part of existing marginalized groups, such as homosexuals, sex workers, and criminals, and their HIV infection further stigmatizes them, making them the most discriminated against and subordinated groups in Taiwanese society. Therefore, these cases represent a concrete dominance for the ‘haves’ who initiated a motion to exclude and caused subordinated PLWHA to struggle for inclusion and equal treatment.

This qualitative study of 548 HIV-related cases in Taiwan reveals a systemic exclusion of PLWHA in four ways: territorial exclusion, institutional exclusion, family exclusion, and imprisonment.

24 Supreme Court [S. Ct.], 2008 Tai-Shang 1596 Criminal Judgment, Apr. 11, 2008 (Taiwan).

25 Michael C. Musheno, Peter R. Gregware, and Kriss A. Drass, supra note 1, at 750.
(1) Territorial Exclusion

The first systematic exclusion of PLWHA was a territorial exclusion by the state. HIV was believed to be a foreign disease; therefore, preventing foreign carriers from immigration, or expelling them from the country were two major measures taken for the “clean territory” policy. PLWHA were not allowed to enter Taiwan, or forced to exit immediately, when found to be HIV positive. Before its repeal in 2015, the law was effectively enforced by all agencies; all immigrants were required to test for HIV, with some being ordered to leave Taiwan.

Article 18 of the 2000 HIV Control Act allowed authorities to order all HIV positive foreigners to exit from Taiwan’s territory. Most foreign PLWHA who received this order have been Southeast Asian women who married Taiwanese men. Although many of them have children and were infected by their husbands, the authorities ordered them to exit without exception. Their effort to appeal for inclusion contributed to the majority of HIV-related administrative cases. There are 18 out of 23 administrative cases that involved ordering foreign PLWHA to leave Taiwan.

Although foreign PLWHA who have appealed typically grounded their claims on their innocence, family obligations, or the need for mediation, administrative agencies have insisted that the order to expel is legal and necessary for the sake of public interest. Among the 18 cases, the court granted the opportunity to appeal in only two cases, and none successfully remained with their families in Taiwan. In all cases involving foreign carriers, the court justified all decisions to expel on the grounds that “AIDS prevention is important to the public interest” regardless of the way they were infected, their family, or their need for medication. With the tension of territorial exclusion, it is obvious that the court legitimated the state’s deportation order and the

---

26 Now repealed article 18 of the HIV Control and Rights Protection Act (originally article 14 of the HIV Control Act) authorizes agencies to examine foreign passengers’ infectious statuses and may order them to leave Taiwan once they are found to be HIV positive.

27 The two cases are Kaohsiung High Administrative Court [Kaohsiung Adm. High Ct.], 2006 Ting 15, May 15, 2006 (Taiwan) and Taipei High Administrative court [Taipei High Adm. Ct.], 2005 Ting 70 ruling, June 07, 2005 (Taiwan).

28 Kaohsiung High Administrative Court [Kaohsiung High Adm. Ct], 2006 Ting 15, May 15, 2006 (Taiwan).
request for a “clean territory.” The rights of PLWHA were under-evaluated and sacrificed.

(2) Institutional Exclusion

It is surprising that, despite prevailing discrimination against PLWHA, only three cases exist that directly present institutional exclusion against PLWHA. These three cases were all initiated by PLWHA or associated institutions; however, the courts ruled in their favor in only one case.

The previously mentioned HHA case was the first one to represent exclusion against PLWHA in a residential setting. The plaintiff, the Tsai-Hsing Community Management Committee, claimed that they decided collectively at a residents’ meeting that any HHA should move because it violated the Household Statute of Community and threatened the safety of other residents. The HHA argued that it was never informed about any meetings related to this case and thus questioned the legality of its decision. The HHA also suggested that even if the meeting was legally held, its conclusion violated the HIV Control Act and the constitution. The Taipei District Court ruled that the HHA needed to move, suggesting that it violated the Household Statute and the meeting’s decision. Despite the court recognizing that AIDS is not transmitted in ordinary public settings, it insisted that the “Tsai-Hsing Community is a residential community where residents live close to each other and therefore the contact opportunities are high. The disposal of medical waste from PLWHA also forms a serious threat for the mental and physical security of residents.” The Appeal Court reversed the decision on the grounds of the newly amended article 6-1 of the HIV Control Act. Thus the HHA controversy resulted in two rulings, and the ruling of the High Court has been the only case in favor of PLWHA in the context of institutional exclusion.

The second case, the Yongkang Hospital’s Bonus Controversy (hereafter Yongkang

---

29 For the facts of the case, see Taipei District Court [Taipei Dist. Ct], 2006 Chung-Su 542 Civil Judgment, Oct. 11, 2006 (Taiwan).
30 Taipei District Court [Taipei Dist. Ct], 2006 Chung-Su 542 Civil Judgment, Oct. 11, 2006 (Taiwan).
31 Taipei District Court [Taipei Dist. Ct], 2006 Chung-Su 542 Civil Judgment, Oct. 11, 2006 (Taiwan).
32 Taiwan High Court [Taiwan High Ct.], 2006 Shang Yi 1012 Judgment, Aug. 07, 2007 (Taiwan).
Hospital case), revealed the exclusion faced by PLWHA in the workplace and in professional institutions, and resulted in at least four judicial rulings. In June 2002, after a doctor in Yongkang was found to be HIV positive, his outpatient clinic and all surgery duties were immediately suspended, thus depriving him of a relative bonus payment. On the basis of the anti-discrimination provision of article 6-1, the doctor claimed that the Hospital Dean and Department Director violated the law because they disclosed his infectious status to others and suspended his duties out of discrimination. The Dean and the Director denied this and claimed that all decisions were made to protect the public health, and were thus legal. Yet the court dismissed all claims brought forward by the plaintiff.

The previously mentioned recent case involving A-Li revealed discrimination at a university against PLWHA. NDU insisted that the decision to expel A-Li was based on his violation of the school’s policy to inform security of his status; however, an investigation by the Minister of Health and Welfare suggested discrimination was behind this unusual punishment. The court did not substantively examine the legality of the discriminatory decision, but to rule against A-Li for his failure to file a petition within the relief period.

Because of serious stigma, most PLWHA who suffer from rights-infringements do not take legal action because the disclosure of infection may cause additional discrimination. Three cases, although limited, reflect the prevailing social exclusion of PLWHA in residential settings, workplaces, and schools. Despite PLWHA and associated NGOs striving for equal treatment, the courts have refused to rule in their favor. Again, the courts have supported the exclusion of PLWHA by using the dominant social institutions and reinforcing social inequality.

33 There were four judicial rulings made because of this controversy. Kaohsiung District Court [Kaohsiung Dist. Ct.], 2004 Shang-Sheng-Yi 832 Judgment, Apr. 15, 2004 (Taiwan); Kaohsiung District Court [Kaohsiung Dist. Ct] 2004 Sheng-Pan 77 Rulings, Apr. 15, 2004 (Taiwan); Kaohsiung High Administrative Court [Kaohsiung High Adm. Ct.], 2008 Su 318, Sept. 10, 2008 (Taiwan); Kaohsiung District Court [Kaohsiung Dist. Ct.], 2003 Chung-Su 421 Judgment, Aug. 30, 2003 (Taiwan).

34 The bonus payment consisted of an important part of the doctor’s income. Yet the doctor initiated the suit mostly because of the unfair discrimination he suffered from his supervisors and colleges.

(3) Family Exclusion

Surprisingly, the families of PLWHA have contributed to the third form of exclusion. In addition to three cases of institutional exclusion, 24 out of all 68 civil cases related to HIV were about divorce. The spouses of PLWHA typically petitioned for a juridical decree of divorce on the basis of article 1052 of the Civil Act, which permits divorce if one’s spouse has a loathsome and incurable disease. The number of cases indicates that when a person finds his/her spouse to be HIV positive, the reluctance to the disease typically outweighs family ties or love, resulting in a motion for divorce. On the other hand, PLWHA usually claim their willingness to maintain the marriage and provide medical evidence to challenge the insurability of HIV.36

Yet, the courts ruled against PLWHA in all 24 cases of family exclusion. In contrast to cases involving other types of incurable diseases, such as cancer or heart disease where the courts were more reluctant to permit divorce, the courts in HIV-related cases rarely question whether HIV is incurable and loathsome. Again, in the tension between exclusion and inclusion, the courts have legitimated the motion to exclude PLWHA from their spouses and hence reinforced the social exclusion.

(4) Imprisonment

Empirical data of judicial decisions indicate that most PLWHA are imprisoned or detained during a trial.

Two major reasons contribute to this imprisonment. One is the “intentional infection provision” of article 21 of the HIV Infection Control and Patient Rights Protection Act, which criminalizes PLWHA who are aware of their infectious status and conduct behavior that might infect others. There are 20 cases involving the intentional infection provision. The courts ruled not guilty in only six cases on the basis of a lack of evidence.

The majority of criminal cases involved the previously mentioned RHAIDA project.

36 For example, in the Taiwan Taichung High Court 94 Chia Shang 57 Judgment, the plaintiff argued she mistakenly married the defendant because he maliciously hid his HIV infection. Taichung High Court [Taichung High Ct.], 2005 Chia Shang 57 Judgment, June 21, 2005 (Taiwan).
There were 226 cases involving illegal drug abuse, and in 59 of those cases, the HIV/AIDS defendants or prisoners claimed release on bail, medical parole, commutation, or probation. These claims can be understood as pleas for inclusion or for less strict social exclusion. However, the courts rejected almost all of the claims; they seemed to show more sympathy for claims of commutation, but it is difficult to evaluate to what extent the courts actually ruled in favor of PLWHA. For example, in the Supreme Court 97 Tai-Shang 1596 Judgment, the court stated that “the defendant agreed to traffic illegal drugs because he is young and unable to deal with the impact of HIV infection. Considering his HIV infectious status, the court decides the sentencing as follows...” 37 The number of cases in which the courts ruled in favor of PLWHA is 72.

(5) Social Dominance and the Discontent of Law

It is clear that HIV-related judicial decisions reflect the tension between PLWHA and the ‘haves’ who believe that they are entitled to deprive PLWHA of their rights in the name of public health or morality. Regardless if from administrative agencies, social institutions, individuals, or prosecutors, the most frequent claim raised by the ‘haves’ is to exclude PLWHA from their domains. PLWHA, on the other hand, establish counterclaim against exclusion. In many cases, PLWHA claim for inclusion by suggesting that they are either morally innocent or medically harmless to others and that they should be treated inclusively. The following table reveals how the ‘haves’ and PLWHA bring claims to the courts, as well as the attitude of the courts (See TABLE 1). Yet in cases where they are readily or already imprisoned, PLWHA took advantage of their infection and physical weakness, asking the courts for sympathy. These claims can also be understood as pleas for social inclusion. In other words, social dominance in the context of HIV is specified in judicial disputes as a tension between a motion to exclude and a plea to be included.

In addition, despite various legal grounds and contexts, courts have ruled in favor of the ‘haves’ in the majority of cases. In all cases involving exclusion, the courts ruled against PLWHA 70% of the time, and seem to be more sympathetic to

---

37 Supreme Court [S. Ct.], 2008 Tai-Shang 1596 Judgment, Apr. 10, 2008 (Taiwan).
imprisoned PLWHA who develop their claims on the basis of their sickness. Analysis has indicated that the courts do not believe that PLWHA should remain in normal social settings. Instead, they endorse the belief that PLWHA are sick, guilty, and should be isolated in institutions, such as prisons. Contrary to the belief that the courts grant remedies to those who suffer from unjust treatment, it is fair to say that the courts tend to take sides with the 'haves' and sacrifice the rights of PLWHA. The courts are aware of the legal doctrine to protect PLWHA from unlawful discrimination, yet they do not sincerely apply it or rule in favor of PLWHA. NGOs, social workers, and medical authorities occasionally facilitate PLWHA in litigations, yet their involvement does not change the power balance. Only in rare cases where PLWHA draw sympathy and mobilize the public to push the courts, such as in the HHA case, do the courts stand along with the powerless PLWHA.

Does the amendment of the anti-discrimination clause bring social change and eliminate rights-invasion against PLWHA? The answer seems to be no. After 17 years

### TABLE 1. Legal claims and results between the ‘haves’ and PLWHA

<table>
<thead>
<tr>
<th>Pattern of exclusion</th>
<th>Amount of cases</th>
<th>The claim of the ‘haves’</th>
<th>The claim of the PLWHA</th>
<th>Results (the ‘haves’ win/ total)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Territorial exclusion</td>
<td>18</td>
<td>Foreign PLWHA should exit TW</td>
<td>Innocent PLWHA with family ties or medical needs should be included.</td>
<td>16/18</td>
</tr>
<tr>
<td>Institutional exclusion</td>
<td>3</td>
<td>PLWHA threaten public health and should be excluded.</td>
<td>PLWHA should be treated equally and should be included.</td>
<td>5/6</td>
</tr>
<tr>
<td>Family exclusion</td>
<td>24</td>
<td>HIV infection is a proper cause for divorce.</td>
<td>PLWHA need to be protected and included in the family</td>
<td>24/24</td>
</tr>
<tr>
<td>Imprisonment</td>
<td>20+226</td>
<td>Behavior raising the risk of infection is a crime; HIV infection deserves no special treatment.</td>
<td>Behavior raises no risk or unintentional risk. PLWHA should be treated differently because of their difficulty.</td>
<td>6/20, 154/226</td>
</tr>
</tbody>
</table>

Total 205/294
of its enactment, the anti-discrimination clause does not effectively reduce discrimination against PLWHA, who continue to suffer from systemic exclusion in society, yet neither does it effectively empower them, since PLWHA rarely initiate legal action on the basis of the anti-discrimination clause when they are discriminated against. In the abovementioned cases, only three examples of institutional exclusion have PLWHA developed their claims based on the article. It seems fair to say that legislative progress does not effectively empower PLWHA and that the most persuasive explanation is the prevailing stigma against and fear of AIDS in Taiwanese society that deters PLWHA from going to the courts.

V. Courts in Managing HIV Disputes

An analysis on relational attributes of HIV-related cases reveals a systemic exclusion of PLWHA, which indicates that the courts stand with the ‘haves’ in most cases and legitimate the exclusion. Yet the question remains as to how AIDS-related norms are encoded in court rulings and reproduce the ideological basis for social dominance. The courts might invoke legal doctrines regarding HIV/AIDS, yet legal doctrines are not determinable for judicial decisions. Dominant social norms may shape social consciousness about the disease and appropriate responses to it.38 How the courts deploy social norms and legal doctrines to justify dominant social ideology, and how they reinforce this information, is important to see.39 This empirical study on Taiwanese court rulings confirms the theory. In order to reveal possible cultural bias in the court decisions, the following section analyzes how metaphors associated with HIV penetrate these rulings.

1. HIV Metaphors and Judicial Rationality

AIDS was believed to be a highly transmittable and fatal disease that was contracted by certain marginalized and already stigmatized groups, thus it has been

38 Michael C. Musheno, Peter R. Gregware, and Kriss A. Drass, supra note 1, at 743.

depicted with metaphors of pollution, punishment, and death. People see AIDS as a pollutant on society, as a punishment to social deviance, and as a death sentence. In Taiwan, stigma against people with HIV is still pervasive and PLWHA may actually face even more severe types of discrimination than other traditionally marginalized groups in the country. The history of the disease, the means through which it is transmitted, and the populations most affected contribute to the persistence of such stigma. In HIV-related disputes, it is important for the courts to see the effects of this stigma and its related metaphors, not because they are the sources of social discrimination, but because it is easy for them to penetrate decision-making process and to legitimate social oppression.

In order to reduce the effects of these metaphors, the amendment of the HIV Infection Control and Patient Rights Protection Act of 2007 requires the courts to carefully assess the risks of HIV contagion and the rights of PLWHA. The amendment requires the courts to rationally assess the risk to public health along with the rights of PLWHA and to make a proportionate decision. If the risk or potential for damage is high, the restriction or infringement on the rights of PLWHA could be legitimate. If the risk is low, then the courts should be aware of the vulnerability of PLWHA and protect them against unreasonable discrimination. To fulfill the law’s mandate, the courts should carefully examine the risk to the public, or an individual, and the need to protect the rights of PLWHA.

First, the courts should assess how much risk or damage a person with HIV/AIDS creates in the context of a concrete case from the medical point of view. Investigation into how PLWHA were infected, their lifestyles, whether they received appropriate medical treatment, and the number of viruses in their bodies in order to more thoroughly assess the risk of transmission might be necessary. The courts should also take medical progress into consideration. With medical progress, the limited approach of HIV infection has been identified and HAART has successfully lengthened the life expectancy of PLWHA, as well as significantly reduced the risk of sexual transmission. In other words, if an HIV carrier receives proper medical treatment, he/she will

---

40 According to the Center for Disease Control and Prevention of the United States, “Scientific advances have shown that antiretroviral therapy (ART) preserves the health of people living with HIV. We also have strong evidence of the prevention effectiveness of ART. When ART results in viral suppression, defined as
pose a much smaller risk to the public. Medical progress that significantly reduces the risk of contagion, or even eliminates it, should be taken seriously in court decisions.

Second, the courts should also consider the need to protect PLWHA against unreasonable discrimination, the impact of exclusion, and in particular, how a judgment may exaggerate discrimination or cause undue burdens on PLWHA. The courts should additionally consider how the party became HIV positive to determine culpability. However, this is not what happens in Taiwan.

The question is, in reality, whether the courts make decisions on a rational or stigmatized basis? To answer this question, we may need to further examine how the courts manage HIV-related disputes at the intersection of law, HIV-related social norms, and medical authority. After a careful reading of the courts’ decisions, this article finds that they downplay medical authority and the rights of PLWHA and justify their decisions with three HIV-related metaphors: pollution, punishment, and death.

2. HIV as Pollution

Cases involving foreign PLWHA vividly reveal how the metaphor of pollution is used to justify exclusion. From the very beginning of the enactment of the HIV Control Act, HIV has been associated with the metaphor of pollution. As mentioned above, article 18 of the 2000 HIV Control Act allowed authorities to order foreign PLWHA to exit Taiwan’s territory, and the 2000 amendment of article 14-1 allowed foreign PLWHA to appeal for a suspension this execution. The law authorizes the courts to assess to what degree the concerned PLWHA threaten public health and the impact in context of the order on the rights of PLWHA. However, the courts never explain their assessments. Instead, they repeatedly stated that “the regulation is necessary to prevent an HIV epidemic and is important to public interests.”

less than 200 copies/ml or undetectable levels, it prevents sexual HIV transmission. This means that people who take ART daily as prescribed and achieve and maintain an undetectable viral load have effectively no risk of sexually transmitting the virus to an HIV-negative partner. Information from Dear Colleague: September 27, 2017, Centers for Disease Control and Prevention (last visited Oct. 9, 2017), https://www.cdc.gov/hiv/library/dcl/dcl/092717.html.

41 See e.g., Supreme Administrative Court [S. Admin. Ct.], 95 Tsai 1609, July 27, 2006 (Taiwan); Taipei High Administrative Court [Taipei High Admin. Ct.], 2005 Ting 134, Apr. 19, 2005 (Taiwan).
The courts tend to overemphasize the possibility of HIV transmission and ignore the method of infection and the needs of foreign PLWHA. One such case involved a married Vietnamese woman who was infected with HIV by her husband. The authorities asked her to leave Taiwan two months after giving birth while still on medication. She appealed to the court by arguing that suspending her medication would endanger her life, but the court refused to rule in favor of her appeal. While this could depict foreign PLWHA as a threat to the health or lives of Taiwanese citizens, on the other hand, it fails to examine the risks of HIV transmission after appropriate medical treatment, and also ignores the fact that this woman was infected while married in Taiwan, which makes her more of a victim than an external threat. The court also downplayed the possible damage by exclusion on the plaintiff. The court stated that “suspending medication will not threaten the life of the appellant. The appellant can purchase medicine for one month before she leaves Taiwan and ask her family in Taiwan buy pills at their own expense. The appellant can also see a doctor in Vietnam.”

The court did not consider the economic ability or the willingness of “family in Taiwan” to support the appellant, nor did it consider medical accessibility in Vietnam before it concluded that there would be no irreversible damage to the exit order.

In some cases, the courts have known that the risk of infection to others is close to zero if PLWHA receive appropriate treatment, but they have downplayed medical authority in the name of the public interest. For example, in the rulings of Supreme Administrative Court 95 Tsai 1609 and Taipei High Administrative Court 94 Ting 134, the courts confirmed that the virus in the bodies of the appellants were rare because of proper medical treatment; however, the courts insisted that the risk of infection still existed and justified the agency’s decisions.

Only in one case did the court investigate the medical status and risk of transmission of the concerned PLWHA. The court noted the limited transmission approach and declared the appellant a minor risk.

42 Supreme Administrative Court [S. Admin. Ct], 2006 Tsai 1609, July 27, 2006 (Taiwan).

43 Supreme Administrative Court [S. Admin. Ct.], 95 Tsai 1609, July 27, 2006 (Taiwan); Taipei High Administrative Court [Taipei High Admin. Ct.], 2005 Ting 134, Apr. 19, 2005 (Taiwan).

toward neighbors and the public. The court also found that the appellant was infected in Taiwan and suggested that she might not be entitled to sufficient medical resources if she were expelled back to Vietnam.

The above analysis indicates that the courts continue to view HIV as a highly infectious disease and to justify almost all decisions for exclusion in the name of the public interest. It is fair to say that the courts still perceive foreign PLWHA as a pollutant to its clean society and are reluctant to conduct rational assessments on the risks of infection and the rights of PLWHA. The metaphor of pollution makes the procedure to suspend execution and the doctrine of non-discrimination unable to protect PLWHA from unreasonable exclusion.

3. HIV as a Punishment

Metaphor is also attached to diseases that are seen as “the carrier’s responsibility.” Because HIV is often contracted through sexual interaction and illegal drug use, it is often believed to be the responsibility of the carriers to prevent transmission. The criminalization of PLWHA is one salient example of the function of HIV/AIDS stigma. Article 21 of the HIV Infection Control and Patient Rights Protection Act criminalizes PLWHA who are aware of their infectious status and who conduct high-risk behaviors with others. Under the law, an HIV carrier who has sex without a condom commits a crime that is punishable by law because he/she is risking the life and health of others. The article itself is controversial regarding its effectiveness and constitutionality. On the one hand, the law may cause undue burden on PLWHA; on the other hand, it may deter efforts to prevent and control the spread of HIV.

In order to examine whether the defendants commit the crime, the court should evaluate how much risk was actually created by the behavior in question. In the context of “unsafe sex,” the courts typically refer to the definition provided by the World Health Organization (WHO) when applying article 21, section 4 of the HIV Infection Control and Patient Rights Protection Act. According to the WHO, sexual interaction between a susceptible person and a partner who has a sexually transmitted infection is unsafe because 1) the sex is performed without preventive measures and 2) the behavior has the risk of being transmitted. In other words, sexual behavior
performed without preventive measures can be safe if it causes no risk of transmission.

However, the courts define unsafe sex solely by the lack of preventive measures, regardless of how risky they are. For example, despite medical authorities suggesting that the risk of transmitting HIV through oral sex is low (below 0.04 percent), the courts insist that oral sex constitutes “unsafe sex” and should be punished. In one case, although the courts recognized that the defendant received medical care so that “the chance to transmit the HIV virus is close to zero” it still insisted that the defendant’s behavior was unsafe and punishable.

If the courts seriously assess the risk, sex performed by PLWHA who pose no risk of transmission is not unsafe sex. Particularly in cases where no person was actually infected with HIV by a PLWHA’s behavior, it is illegitimate to subject him/her for criminal punishment. In these cases, the courts blame the sexual behaviors of PLWHA who do not take protective measures and consider them to be punishable crimes, regardless of the level of harm or risk they might pose. These judgments reflect and reinforce the metaphor of punishment on PLWHA, making all legal protection on the rights of PLWHA rhetorical.

Compared with recent progress in California, which lowered the legal classification from a felony to a misdemeanor of a person knowingly exposing a sexual partner to HIV without disclosing the infection, the courts in Taiwan should be more aware of medical assessments about these types of risks and protect PLWHA from unnecessary criminal punishments.

4. HIV as Death

Incurability and death are other common metaphors for AIDS. In numerous court rulings in Taiwan, the metaphor of incurability is used to justify family exclusion and other decisions to refuse the claims of release on bail, medical parole, commutation, or

45 HIV Infection Control and Patient Rights Protection Act prescribes art. 21-4 (2006) (Taiwan): The definition of unsafe sex shall be formulated by the central competent authority following the relevant regulations outlined by the World Health Organization.

46 Taipei District Court [Taipei Dist. Ct], 2013 Su 221 Criminal Judgment, Sept. 03, 2013 (Taiwan).

47 Ibid.
probation by PLWHA. Article 1052 I (7) prescribes that if a husband or wife has a loathsome disease that is incurable, his/her spouse may petition the court for a juridical decree of divorce.

The courts have been reluctant to regard cancer, stroke, or diabetes as “loathsome diseases that are incurable” and appropriate for divorce when applying this article. Yet in cases of petition for divorce because of HIV infection, the courts have suggested AIDS to be an incurable disease, which undermines the foundation of marriage and rules all cases against PLWHA without exception.

In earlier cases, the courts depicted AIDS as a “black death” of the 20th century. In most cases, the courts directly state that “AIDS is an incurable disease and constitutes a legitimate basis to petition for divorce” without providing any further explanation. In recent cases, the courts have been more aware of the medical progress for HIV, yet still associate AIDS with its social reputation and continue to label HIV infections as a “loathsome and incurable disease.” The courts state that the general public is disgusted by AIDS and that it thus undermines the foundation of marriage.

While the metaphor of incurability justifies a petition for divorce, it is used to justify imprisonment as well. In the criminal judgment of Supreme Court 97 Tai-Kang 218, a person with HIV/AIDS petitioned for medical parole but was rejected by the court. The court dismissed the petitioner’s request on the grounds that “AIDS is incurable, and thus it is impossible to regain health through medical parole.” In another case, when a suspect petitioned to suspend detention, the court rejected it and suggested that the petitioner be held in a special detention center for PLWHA where medical professionals deliver regular assistance. In this case, the court ignored the incurability and regarded the regular medical assistance as adequate. The court did not assess the person’s health condition and need for further medical care, suggesting that suspending detention was unnecessary because HIV is incurable.

---

48 Taoyuan District Court [Taoyuan Dist. Ct], 2002 Hun 441 Civil Judgment, Apr. 08, 2002 (Taiwan).
49 Taipei District Court [Taipei Dist. Ct], 2000 Hun 22 Civil Judgment, Mar. 22, 2000 (Taiwan).
50 Taipei District Court [Taipei Dist. Ct], 2000 Hun 351 Civil Judgment, June 28, 2002 (Taiwan).
51 Supreme Court [S. Ct], 2008 Tai-Kang 218 Judgment, Apr. 18, 2008 (Taiwan).
52 Taiwan High Court [Taiwan High Ct.], 2006 Sheng 988 Criminal Judgment, June 14, 2006 (Taiwan).
Again, the metaphor of death is used by the courts inconsistently, sometimes over-emphasizing the level of fatality and sometimes downplaying the need for medical treatment. Either way, the metaphor of death is used to justify social exclusion.

VI. Conclusion

This is a world of power. Powerful groups attempt to control others, yet the powerless struggle for inclusion. In the dynamics of power, laws and the courts can be a double-edged sword that are either used to enforce dominance or fight for those who are weaker. In the context of HIV/AIDS, both social dominance and PLWHA resort to using the law and the courts to enforce their powers. How the powers are deployed in the processes of lawmaking and adjudication is important for understanding the dynamics of power and law.

This article explored the evolution of HIV-related law and adjudication in Taiwan, suggesting that the elite-led legal system does not systemically eliminate the suffering of PLWHA. Instead, by using an empirical study of court rulings, this article suggests that PLWHA suffer from systemic exclusion and that the courts tend to endorse social dominance. By analyzing the reasons for various rulings, this article further argued that the failure of the courts is a direct result of power dominance because courts stand with the ‘haves’ and are influenced by social stigma and HIV-related metaphors when making decisions.

From this study, this article urges the Taiwanese courts to be more aware of the operation of stigmas and metaphors inherent in their power structure, and to deploy the law to protect PLWHA from unreasonable infringements on their rights.

Received: July 30, 2018
Accepted: August 6, 2018