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Criminal Law and Risky Sexual Behaviour
Some Reflections on the Possible or Actual Transmission of HIV

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Abstract

Especially since the sexual revolution, we are faced with the rise of so-called risky sexual behaviour. Although often not criminalized as such, its inherent dangers and potential legal consequences make most people label that type of intimate behaviour as deviating from the ideal or normal sexual relationship.

This paper explores several criminal issues associated with a specific consequence of a sort of risky sex, namely the possible or actual transmission of hiv. Not only are hiv and aids major public health problems in the entire world, they also bring on a variety of legal difficulties. Faced with this grave challenge, governments are indeed compelled to do something. One – proliferating – response is to enact and/or fully apply laws that criminalize the aforementioned contamination. A recent UNAIDS funded report maps the rates of prosecution within signatory states of the European Convention of Human Rights and shows that at least one person has been prosecuted in Austria, Sweden, Switzerland, Denmark, Finland, the Netherlands, Norway, Azerbaijan, Cyprus, the Czech Republic, Estonia, France, Georgia, Germany, Hungary, Italy, Latvia, Portugal, Romania, Slovakia and the UK.

In addition to briefly providing some background concerning the relevance of the matter for Belgium, we therefore outline, analyze and comment on the current possibilities under Belgian criminal law for prosecution with regard to the potential or actual sexual hiv transmission. Firstly, this contribution zooms in on the applicable penal qualifications. At present, Belgium has no hiv-specific criminal law. Accordingly, the question arises as to whether the general criminal law provisions can be applied to the exposure to and/or the actual transmission of hiv. Secondly, we elaborate on the lack of action after risky sex, e.g. the persistent non-disclosure of the hiv-positive status. Can such an omission be classified as a punishable non-assistance to a person in great danger? Finally, we discuss the impact of privacy and of consent and fault of the (infected) victim on the potential criminal liability of the “contaminator”. Although this paper primarily focuses on Belgian law, it is highly beneficial to have a look at solutions other countries have reached in answering certain questions. Thus, several comparisons will be made with the Netherlands, England,...