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Sleeping with the Enemy

A criminal-law analysis of the transmission of STDs and the AIDS impasse

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ABSTRACT

The author examines the criminal-law treatment of criminally transmissible diseases in Brazilian law, focusing on the offense of danger of venereal contagion (Article 130 of the Penal Code). He explains that this is a crime of danger, whose consummation requires only the victim's exposure to risk, and analyzes the subjective element (intent), the prosecution conditioned upon a formal complaint, and the controversies over condom use. He devotes particular attention to the doctrinal and jurisprudential debate over AIDS, reviewing the evolution of theories that oscillated between homicide, bodily harm, and danger of contagion of a serious disease, culminating in the Federal Supreme Court's ruling on HC 98,712. The text advocates the creation of a new offense and criticizes the limits of criminal law as an isolated instrument of social control in the face of sexual crimes.

KEYWORDS: *criminal law; danger of venereal contagion; sexually transmitted diseases; aids; penal code; intent*

Criminally Transmissible Diseases

Among the crimes against the person—more precisely, in the chapter on endangering life and health—we find the offense that bears the heading of "danger of venereal contagion." Although this offense has been in force for as long as the Penal Code that gave rise to it, only after the first outbreak of AIDS (Acquired Immunodeficiency Syndrome) did we begin to observe a heated doctrinal and jurisprudential debate that caused the rulings of the higher courts to waver. Today, thanks to the aid of comparative law, it is already possible to glimpse a more measured and just solution for the facts that fit certain sexual offenses, although we still remain far from a settled position.

Article 130 of the Penal Code sets out the following conduct in its *caput*: "To expose another person, through sexual relations or any lewd act, to the contagion of a venereal disease that one knows or ought to know one carries." Because this is a crime of danger, the offense does not require transmission of the disease; mere exposure of the victim to the risk of contracting it suffices for the offense to be consummated. The subjective element of the offense is intent (*dolo*); the negligent form is not

punishable. Accordingly, it is essential that the agent has the awareness and the will to expose the victim, through sexual relations or any lewd act, to the risk of contracting a venereal disease.

It is unnecessary to demonstrate that the agent intended to transmit the disease, which would only justify an increased penalty through the aggravating circumstance provided for in the first paragraph. Should the agent succeed in that aim, part of the legal doctrine holds that the crime becomes one of bodily harm, in view of the legal principle whereby danger is absorbed by harm. However, a dissenting current maintains, on the premises of Finalism, that the offense cannot vary according to the outcome. Thus, if the intent was directed at exposure to danger, it remains classified as such, and the harmful result is deemed a mere exhaustion of the offense, devoid of any relevance in the criminal sphere except as regards the calculation of the penalty.

On the other hand, if the agent did not know he was a carrier of a venereal disease, nor had any grounds to suspect that condition, any attempt to fit the fact to the norm will be futile. Indeed, reports are not rare of people

afflicted with venereal diseases—as with diseases of a different nature, some of them serious—who lived for a long time with no idea of the clinical reality surrounding them. Nevertheless, for the crime to be committed it is not necessary that the agent have a diagnosis issued by a health professional, much less a technical-scientific report from laboratory analyses. In many cases, certain abnormal physiological manifestations allow the individual to conclude, or at least suspect, that he may be infected—discharge, warts, skin eruptions, and other signs. The same fate awaits the person who, even without any symptom, learns of a probable infection through the very partner with whom he had unprotected sexual relations, and who spontaneously decides to disclose the illness. In situations such as these, one may affirm that, if he did not know he had been affected by the disease, he ought to have known.

In forensic practice, a very common scenario is that of the individual who, undergoing treatment to cure a sexually transmitted disease, sees an opportunity to be intimate with a person who has long stirred his interest. And so, being devoid of character, he faces the dilemma of forgoing the much-desired encounter, which presents itself at an inopportune and unsuitable moment, or of enjoying his luck in courtship at the expense of the health of the very person to whom he ought to devote a minimum of compassion and respect. Choosing the second option, he becomes the active subject of the crime of danger of venereal contagion.

Given that the crime in question is subject to public criminal action conditioned upon a formal complaint by the victim, criminal prosecution will depend on the injured party's expressed wish to see the fact investigated. If that step is not taken, no proceeding in this regard may be initiated—that is, there can be no action by the representative of the Public Prosecutor's Office or the judge, nor by the police chief, who is usually the principal recipient of the *notitia criminis*. And it is not at all difficult to imagine situations in which the victim never even considers making any effort to prompt public authorities to act, or even goes so far as to conceal what happened. This would be the case, for example, of a victim exposed to the risk of contracting a venereal disease in the course of an extramarital affair. For that person, worse than the danger to which she was subjected would surely be the marital crisis arising from a police investigation or judicial proceeding. The same would occur if the injured party suffered the attack on his health through lewd acts performed in a homosexual relationship, without ever having disclosed to anyone details of his most intimate preferences. Not wishing to do so at that moment, he would have no choice but to forgo the requisite complaint, for otherwise, in addition to being exposed to the risk of contracting a venereal disease, he would see his private life laid bare by those to whom he owes no explanation.

In the doctrine, some defend the thesis that the use of a condom by an agent aware of the disease would preclude the crime for lack of intent and, consequently, for lack of the offense's constituent elements. In contrast, another current holds that everything will depend on the concrete case, since the use of a condom does not entirely eliminate the risk of transmission, for a number of reasons—among them, rupture of the material owing to air bubbles generated by faulty handling; poor product quality; deficiencies in the manufacturing process; insufficient lubrication; and other incidents that are more than foreseeable. It must also be considered that improper use of a condom would be equivalent to dispensing with it, as can be seen in the behavior of some individuals who use it during vaginal penetration but dispense with it when turning to other practices. Apart from pregnancy, what exactly would they think they were preventing?

In the 1980s, when scientists first succeeded in isolating HIV, the virus that causes AIDS (Acquired Immunodeficiency Syndrome)—bringing the old prophecies about the end of times back to haunt humankind—criminal doctrine could obviously not remain immune. At the time, telling a patient about the presence of the virus in his body was tantamount to sending him to the scaffold. The climate of extreme fear affected legal scholars to such a degree that the prevailing view soon became that the crime of danger of venereal contagion would not apply to an agent carrying the HIV virus who performed the conduct described in the offense, except where he was unaware of that situation. The thesis was grounded in the fact that AIDS—besides not being regarded by jurists as a venereal disease, given that there are other means of contamination—is a fatal disease. Accordingly, the intent would be directed at destroying another's life, and the agent should answer for the crime of homicide, attempted or consummated, depending on the victim's condition at the time of trial.

The force of these arguments, combined with the panic instilled by constant news about the epidemic—which even claimed victims among the great celebrities, and continues to do so—contributed to the higher courts embracing the idea of homicide. In this context, many defendants were tried and convicted before the jury court (Tribunal do Júri). However, as science advanced and the life expectancy of carriers of the virus increased, legal scholars began to reconsider their positions and to weigh a number of factors that had not been taken into account until then. The first would be to regard AIDS not as a fatal disease, as had already been settled, but rather as a serious and incurable illness. In this sense, sexual relations or any other lewd act performed by an HIV carrier would fit far more properly the provision of Article 131 of the Penal Code (danger of contagion of a serious disease), which reads: "To perform, with the aim of transmitting to another a serious disease of which one is infected, an act capable

of producing contagion." And should the victim contract the virus, even without its manifesting in the body, the fact would fit Article 129, § 2, II, of the same statute (bodily harm aggravated by the resulting incurable disease).

In 2010, the Federal Supreme Court (STF), by majority, embraced this doctrinal innovation in the ruling on HC 98,712. It stressed that Brazil should follow the decisions of its neighbors more traditional in criminal matters, most of which do not classify the case so severely as to permit fitting the fact to the crime of homicide. On this basis, the court set aside jurisdiction to try the defendant before his peers in such circumstances.

Although the solution is imbued with reasonableness, some questions are still raised by the more attentive scholars. One concerns the fact that the crime of danger of contagion of a serious disease applies only if effective transmission does not occur. This current argues that the offense cannot vary according to the outcome, since what must be borne in mind is the agent's intent, just as was said regarding the crime of danger of venereal contagion under a finalist conception. If the agent directed his conduct toward transmitting a serious disease, he should answer only for this crime, even if transmission comes to occur—which would be considered an unpunishable *post factum*. Conversely, if the agent's intent was to transmit an incurable disease, which need not necessarily be serious, the correct legal-criminal classification is that of very serious bodily harm, in its attempted or consummated forms. What cannot happen is the binding of the offense to the naturalistic outcome produced. The agent's liability must be guided by one of the hypotheses mentioned.

The most complex aspect to be addressed by the doctrine lies in the difficulty of establishing the dividing line between the conduct of "performing, with the aim of transmitting to another a serious disease of which one is infected, an act capable of producing contagion" (Article 130 of the Penal Code) and that of attempting "to harm the physical and bodily integrity of another" (Article 129 of the Penal Code). Although many understand the former as a more specific provision of the latter, and therefore as prevailing in application to the concrete case, in deference to the Principle of Speciality, the explanation has not been able to bring about consensus.

The time has long passed for the creation of a new offense consistent with the transformations of recent decades. The expression "venereal disease" is not even used today, having been replaced by "sexually transmitted disease" or simply "STD." And on any page on the *internet* where one searches for the list of sexually transmitted diseases, AIDS always appears prominently. The argument that it should not be so classified because of other means of contagion lacks logical reasoning. The fact that the virus can be acquired through a blood transfusion, for example, does not exclude its most common form, which

occurs through sexual relations. Moreover, other diseases such as Hepatitis B, which can also be transmitted by means other than the sexual route, have never ceased to be part of the list of sexually transmitted diseases maintained by the Ministry of Health. It is not the first time that the Law has overstepped its limits and invaded the field of Medicine.

Still on this subject, it is worth noting that Law 12,015/2009 had already added to Article 234-A of the Penal Code a ground for increasing the penalty for sexual offenses, provided for in item IV: "if the agent transmits to the victim a sexually transmitted disease of which he knows or ought to know he is a carrier." Recently, that provision underwent a further amendment with the entry into force of Law 13,718/2018, retaining the expression "sexually transmitted disease." One notes that the nomenclature "venereal disease" has long ceased to be used, giving way to "sexually transmitted disease," which consequently encompasses AIDS.

Although the creation of a new offense proves necessary, one cannot suppose that the measure will have an educational and guiding effect on social relations. Indeed, Criminal Law has never performed this task, and it would be no different when it comes to sexual offenses. In the very decision handed down by the Federal Supreme Court in HC 98,712 discussed above, Justice Ayres Britto very aptly highlighted a passage from the work of the renowned jurist Paulo Queiroz: "The criminal norm is not the beginning of socialization, but its culmination. It is not the whole of social control, nor even its most important part; it is, more properly, as Muñoz Conde says, the visible part of an *iceberg*, in which what is not seen (the other formal and informal instances of control) is perhaps what truly matters, all the more so because the criminal norm neither creates values nor constitutes an autonomous system for motivating human behavior." (QUEIROZ, Paulo. *Direito Penal. Introdução crítica*, São Paulo, Saraiva, p. 09.)

In this schizophrenic world we are living in, not long ago the press was reporting a new form of "Russian roulette," adapted to modern times. The traditional form consists of the macabre and psychotic amusement in which two or more people gather with the purpose of firing a firearm at their own head after spinning a cylinder loaded with a single bullet. As the revolver clicks on empty chambers, the participants take turns until the mathematical formulas of probability come to be proven empirically. Should death or serious bodily harm occur, all will answer for the crime of participation in suicide (Article 122 of the Penal Code)—except, of course, the unlucky one, already punished by his own stupidity. The more modern version of this bestial spectacle has replaced the gunshot with sexual penetration, and the bullet with seminal fluid. People who have never seen one another before crowd together in an orgy without the use of condoms. For the

participants, orgasmic pleasure, heightened by the risk of infection, leads them to the true climax.

In the fight against sexual offenses, as with all other crimes, the criminal norm will serve merely as one more instrument of the State. On its own, it will be incapable of producing any effect other than piling up prisoners within an agonizing penitentiary system. In a world made up of

people endowed with ethical values and a minimum of universal love, debates of this nature would never even arise.

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