

INSURANCE BETWEEN RISK SELECTION AND SOCIAL DISCRIMINATION. THE NORMATIVE ACTIONS OF NEW AGENCIES

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1. Phobia and Law State

AIDS is a disease, an epidemic and a phobia. Because of the discriminatory effects that it produces, this phobia constantly requests intervention of law.

Let us consider in each country the long list of dilemmas and disputes that have confronted law since this epidemic was first recognized: segregation, restriction of circulation and immigration, compulsory abortion, refusal of marriage, divorce, homosexual cohabitation, refusal of children adoption or custody, of artificial insemination; lack of confidentiality concerning compilation, storage and communication of medical data; partner notification, compulsory screening and testing, public identification of groups potentially at risk, exclusion from insurance and so on.

The list of challenges confronting the legal profession shows that AIDS is not a mere challenge to public health but is a challenge to the guiding principles of our society¹. Every aspect of private life is concerned.

Therefore there is no evidence that a global law, a specific law may cover the whole range of legal issues raised by the HIV epidemic. How does a state governed by law manage social fears? That is the question.

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Public policy in France has been until now to contain the problem within the frame and limits of common law - in spite of pressures from some politicians to edict specific discriminatory measures against persons with AIDS.

HIV/AIDS was not even included within the medico-legal classification of venereal diseases.²

Four main venereal diseases are ruled and controlled by old specific health statutes that infringe upon rights for privacy guaranteed by our Constitution, through such procedures as nominative sickness declaration, possibility of contact tracing, mandatory medical treatment. Even if these measures have been given up within medical practice in order to keep its patronage.

Constitution and legislation do protect French people against discriminations related to religion, race and gender; and since 1982, related to sexual orientation. Until 1989 we had no specific protection against discrimination related to disease and handicap. Such protection was proposed by the government in 1989.³ It was the time when the American legislation extended

Professor of Sociology, Universite Paris VIII - Founding Chair of AIDES Federation Nationale - Member of the French National AIDS Council. The Rehabilitation Act issued in 1973 to protect persons with Aids through the Americans with Disabilities Act, this extension tried to link both loss of equal chances due to handicap and loss of equal chances due to prejudice and phobia.⁴ While the French Parliament was discussing the project, insurance companies which had been rather silent, even pretending in 1986 that AIDS was a disease to be dealt with like any other, expressed a strong opposition to the Government's project.

Companies were concerned with a paragraph according to which they had to prove "legitimate grounds based on objective data and not on prejudice" to refuse contracts.

This phrasing of the future law intended to make judges and courts the arbitrators of selective practices between insurance companies and their patronage, opening a public space to discuss the HIV issues.

Due to the economical weight of insurances in terms of savings and investments, the Parliament and Government had to suppress these "legitimate grounds" and explicitly to acknowledge that "certain exceptional services" were based on private contracts between independent parties not concerned with this law.⁵

2. What is the pattern of the French insurance system?

To account for a rather long silence - until 1987 - from insurance companies we have to dress a picture of the French insuring system. It is divided into three major areas:

I The Welfare State, which includes what we call "social security", a system of national solidarity that covers medical expenses.

French social security is a mix of elements of the Beveridge system from Great Britain and of the Bismarck system from Germany:⁶

- 1) it is not a voluntary but a compulsory system of insurance;
- 2) it is not based on taxes but on social contributions collected from employees and employers up to 80%;

- 3) it is not a universal system, it is linked to activity, work, but it concerns nearly 95% of the population;
- 4) it is not a uniform system but an aggregation of professional subsystems; 5) it reimburses medical expenses for 50 to 70% of their amounts. A few chronic diseases can benefit of a 100% reimbursement, such as AIDS - and since 1989, seropositivity to HIV;
- 6) until November 1995 social security expenses escaped Parliament discussion and control, being managed by trade unions;
- 7) no pathology is discarded by this welfare system. But unemployed people lose their rights after a year of unemployment.

II Mutual insurance policies. The majority of the population now has a private mutual insurance to pay for the medical expenses not included in the national system. These mutual insurances are generally not individual ones but group insurances linked to your trade corporation. No medical examination is requested for subscription.

III Commercial insurance. Most of them have been nationalized, but are slowly going back to private ownership. They follow market rules of competition. But most aspects of social and economic life request an insurance, a life insurance. It is an obligation in order to drive a car, to rent a flat, to borrow any amount of money from a bank.

This is the real domain where risks selection by insurance companies become social discrimination from economic activities.

Between 1987 and 1993 French insurance companies have been facing a new context for three main reasons.

- 1) an alarm started by Reinsurance companies;
- 2) the blood safety affair;

- 3) the opening of the broad European market to national companies.

1) Reinsurance companies were alarmed by North American data.⁷ Their actuarians started to scrutinize the famous cohorts of gay men constructed in the 80's by VD clinics of San Francisco, New York and Los Angeles for a follow up of hepatitis. These cohorts proved to be during the first period of the epidemic the best opportunity to observe the natural history of the HIV epidemic. The actuarians started to treat these cohorts like bills of morbidity and mortality amongst young male adults.

Consequently, two concerns bothered insurance companies:

- to determine the rate of seropositive people amongst their applicants;
- to eliminate what is called "anti-selection", that is to say a massive resort to insurance by people the most at risk, a practice that changes the homogeneity of the insured population.

They had two strategies against these two economic dangers:

- a) screening their candidates to discover whether they were already infected;
- b) to isolate through questionnaires those who may be at risk of being infected during the period of their contracts.

So a traditional actuarian technique of sorting out groups of risks was being turned into a social discrimination of individuals according to presumptions and social profiles.

Compulsory testing and construction of psycho-social profiles were both techniques that raised ethical issues that insurers at first underestimated.

At the same time insurance companies were facing the heavy burden of contracts they had signed for years with state blood banks. They refused to pay for a lack of control from the health authorities and demanded a financial contribution from the state.

They phrased their position in these terms: if a society wants to fight discrimination it has to pay for it through a national contribution and not to impose this burden of solidarity to commercial companies.

These companies were preparing themselves to canvass for clients within the new broader European Community market that was be opened in 1993. They anticipated a huge economic competition they wanted to face without the burden of bad risks.

3. The normative action of new agencies

In 1995 the situation is different from what could have been expected in 1989. To understand that shift in attitudes we have to consider the normative action of new agencies in the field of AIDS and medical ethics.

I roughly identify:

- the national press;
- the courts of justice;
- the ethical committees created by the State, first the National Committee on Medical Ethics in 1981 to produce ethical norms on bio-medical issues and in 1989 the National AIDS Council on AIDS issues;⁸

- the AIDS organizations, in particular AIDES, the largest one in France;
- the normative action of international agencies such as the European Court for Human Rights, the European Parliament, the European Communities, WHO.

Under such social pressures, first in 1990 the insurance companies signed a convention with the Government: they accepted to insure HIV-positive people with a 5% increase of the rate of the regular premium; they did oblige people to be tested but they obtained the right to know if the applicant was HIVpositive or to pay for his testing.

This was limited at first to life insurance requested for certain important loans.

Nevertheless, companies made no information about the convention they had signed neither to their local branches nor to the banks until summer 1995; they extended the possibility to inquire about serological status to smaller loans. Under pressure, slowly they had to the over premium from 5 to 2% and to extend the type of loans they protected.

The next step is now to initiate disability pensions for people with AIDS.

These transformations of the condition for eligibility are connected to two series of data:

- l) actuarial data: the life expectancy of HIV-positive people in Western countries is more and more compatible with the interests of insurance companies. The financial impact of AIDS on their budgets is limited;⁹

- 2) social data: public opinion does not consider insurance companies as purely commercial enterprises. They are supposed to achieve some social functions. When they use testing as a discrimination tool, their financial interests are contradictory to public health interests because they induce people not to know their serological status. This had a derogatory effect on the public image of the insurance companies.

The political and ethical pressure of normative agencies has had a real impact on the balance of powers between the States and the companies.

As a conclusion:

1. There is no real discontinuity between risk selection by insurance companies and social discrimination. So we have to pay permanent attention to this issue.
2. In Western countries nowadays, actuarial data are not catastrophic for insurance companies that insure HIV-positive people. Consequently, they can afford it.
3. In absence of pressure of the law, the normative action of AIDS organizations and of ethical agencies, national and international, is effective in the changing of attitudes of insurance companies. We have to pay attention that their financial interests are neither in contradiction with public health issues, nor with the management of confidentiality.

References

¹ Defert, D. "AIDS and freedoms: Regulation of an Epidemic in a State governed by law", in *International Digest of Health Legislation*, 1992, 43 (2), pp. 447-449.

² Journal officiel, 31 juillet 1987, "Creation du titre VII par l'article 29 de la loi n° 87-588 du 30 juillet 1987".

³ Loi n° 1182 relative a la protection des personnes malades ou handicapees contre les discriminations, votee le 17 avril 1990.

⁴ Parmet, W., "AIDS and the limits of discrimination Law", in *Law, Medicine and Health Care* 15 (Summer 1987), pp. 61-72.

⁵ Lascoumes, P., "De la selection des risques a la discrimination - les pratiques des compagnies d'assurances vis-a-vis du sida", in *Sida et Droits de l'Homme*, Strasbourg, Universite L.Pasteur, 1990, pp. 159-185.

⁶ Majnoni d'Intignano, B., *La Protection Sociale*, Paris, Livres de Poche, 1993.

⁷ Chuffart, G., *Sida et assurances des personnes*, Zurich, Compagnie Suisse de Reassurance, 1987.

⁸ Rapport et avis du Conseil National du Sida relatifs aux assurances, Paris, mars 1989.

⁹ Lloyd' s list 30/3/90, "Insurers breathe easier over AIDS".