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OPINION

PREVENTION

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OPINION ON CRIMINALIZATION FOR THE SEXUAL TRANSMISSION OF HIV

For many months now, a number of legal proceedings, completed or underway, have dealt with the topic of sexual transmission of HIV. In little time, the variety of charges brought forth – for deliberate deception, concealment of information, or intentional transmission – fell away from public debate, as the stage was taken over by a controversy between people living with HIV/AIDS (PLWA) associations, plaintiffs and victims associations.

Conseil national du SIDA (CNS) wished to analyse the origin of the controversies and the possible impacts the proceedings might have on the concept of preventing HIV-transmission. Most notably, they expose issues with stigma and the need to reassert that individuals are responsible for protecting their own health and that of others.

LEGAL SUITS HAVE BROUGHT TO LIGHT CONTRADICTORY APPROACHES

THE BASIC PRINCIPLES OF ANTI-HIV ACTION NOT SHARED WIDELY ENOUGH

From the outset, France's policies in fighting the epidemic of HIV-infection, transmission of which is primarily sexual, have been guided by basic principles designed to protect public health. In each arena – healthcare, associations, politics – the relevant leaders have sought to mobilise the population against the epidemic, based on the concept of individual responsibility, combined with those of developing solidarity with those affected and fighting discrimination of every kind. The principle of "shared responsibility", advocated by public health players, emerged from the realisation that prevention could not be borne by the HIV-infected alone. Rather, to ensure effective prevention, it was important that the usual reactions to epidemics – namely, forceful rejection of those infected, seen as responsible for their condition and guilty of transmission – be prevented. Subsequently however, with the advent of highly active anti-retroviral therapy (HAART), general interest in the epidemic declined and the disease became viewed as commonplace. The dip in interest, accentuated by a fall-off in media coverage, contributed to limiting the "shared responsibility" message to the narrow circles of the fight against HIV. The concept, taken as the foundation for prevention, could no longer be heard by the general population. When a minority of those living with HIV, having been given a considerable voice in the media, bluntly asserted they engaged in unprotected sexual intercourse, it opened the door to sentiment that contaminated individuals behaved irresponsibly.

The setting for HIV-transmission has since changed, with transmission through heterosexual intercourse becoming preponderant. At the same time, society has moved toward greater legal regulation of relations between individuals. In addition, the values inherent in solidarity are being pushed aside by the individual desire to be portrayed as a victim, facilitated by the fact that emotion has become central to the workings of the media, the law and politics¹. The trend appears contrary to the values of PLWA associations, which built themselves on refusing victim status for those PLWA, instead showing them as a party to their disease, contributing to the response to be given to the epidemic. It is for this reason that, when newly-contaminated individuals launch legal proceedings, they must deal with head-on opposition from the anti-HIV associations, which are reluctant about such proceedings for their potential widespread effects. Meanwhile, AIDS victims associations see the opposition as an attempt to deny individual cases of deception and refuse their fundamental right to launch legal proceedings.

WHEN THE INDIVIDUAL RIGHT TO COMPENSATION IS CONFUSED WITH PUBLIC HEALTH MEASURES

Replacing private retribution, criminal law fulfils several roles: punishing offenders to compensate for the harm done to social order by their offence; influencing their behaviour and possibly that of other people tempted to commit the same offences; in extreme

¹ Salas (Denis): La volonté de punir : essai sur le populisme pénal, Hachette Littérature, 2005, 287 pages.

cases, disempowering them through incarceration intended to prevent them from doing harm, at least temporarily. The criminal sentence reflects society's condemnation of a specific behaviour, such as deception, for which appropriate punishment has been developed as legal cases have been brought forth. The other functions of criminal law, as far as sexual HIV-transmission is concerned, appear to have more serious limitations. Education in prevention assumes an understanding of the causes behind risk behaviours, but there is no indication that prison helps forward that education. Deterrents are based on a rational approach under which individuals fear legal sentencing and incarceration. The mere awareness that one can transmit the virus should be a stronger deterrent than the prospect of a legal sentence. Yet, when it comes to HIV transmission through sexual intercourse, rationality is not always part of the picture. As for incarceration, it cannot limit the spread of HIV and it has been established that prison is a place for risk behaviours, whether drug injection or sexual intercourse.

Moreover, legal proceedings may in fact heighten the stigma placed on those living with HIV. Very quickly, the merits and bounds of the cases fade out of public debate, giving way to the squabbles that continue between NGO's fighting Aids. For lack of a clear public view on such legal cases, the verdicts may ultimately be difficult to understand. As a result of that confusion, public opinion can project what it sees in the individual cases on all persons living with HIV, who then appear as a threat to society. The inherent risk of those persons' being forcefully rejected is heightened. Most importantly, the illusive hope that the law and criminal repression will protect individuals from HIV-contamination is egged on.

OBSTACLES TO TAKING RESPONSIBILITY REMAIN

SITUATIONS CAN AFFECT HOW INDIVIDUALS TAKE RESPONSIBILITY FOR THEIR OWN HEALTH AND THAT OF OTHERS

Faced with the persisting stigma on people living with HIV and the risks of greater stigma that lawsuits can bring about, CNS would like to issue a reminder of the basic principles that underpinned prevention policy. It is based both on individual responsibility and the importance of building solidarity with those living with HIV, the said solidarity requiring a fight against all forms of discrimination. It needs to be reiterated that everyone, to the extent of their powers, must watch over their own health and that of others, compelled by respect for others. While a person living with HIV has the responsibility to not transmit the virus, an uncontaminated person is responsible, when embarking on a new relationship, to ensure he or she is protected from HIV and other sexually-transmitted diseases. Consequently, the responsibility cannot be unilateral. This implies that both parties are informed of the risks and means of protection. Concern for one's own health and that of others also implies knowing one another's serological status, which requires that both submit to testing².

The commonly-accepted idea that couplehood is an objective and effective form of prevention, as both parties are assumed to be faithful, has shown it is far from foolproof. As experience has recently revealed, being in a couple does not automatically protect from HIV-infection. For this reason, when an individual engages in extra-marital intercourse, his or her responsibility is to use protection, in order to protect the regular partner. Should that tacit agreement fail to be upheld by one of the partners, the other loses all means of protecting him or herself, unless told of possible contamination by the partner.

In certain couples, the domination of one partner over the other can preclude any negotiations regarding means of prevention. That domination can be based on physical or moral ascendancy, but can also be ascribed to economic reasons. People in insecure situations, dealing with difficult material circumstances, as is the case with certain women, are less inclined to reveal their disease, as shown by epidemiological data³. Due to their economic dependency on their partner, or in certain communities, the social demise that results from the disease's being revealed, they find themselves forced to suffer in painful silence, and more specifically, be unable to suggest the use of a condom. In contrast, it is often difficult for the dependent partner to request testing and means of protection.

THE DIFFICULTY OF COMING TO TERMS WITH HIV-INFECTION: FROM DENIAL TO STIGMA

Learning or knowing that one is infected with HIV by no means implies that one understands or accepts its consequences. The shock of being announced that one is HIV-infected can be difficult to overcome. For instance, it appears difficult for some people to realise they are infected by a virus, when aside from the serological results on a piece of paper, no physical signs are present. Current treatment can make the virus undetectable in certain people, who then think that the virus is no longer present in their body, making

² In Chapter 21 (on "Prevention and Sexuality in Persons Infected with HIV"), of its 2002 Report, entitled *Prise en charge des personnes infectées par le VIH*, the expert group working under the leadership of Mr Delfraissy gives a detailed description of its pre- and post-testing recommendations.

³ Survey on HIV-positive individuals (ANRS-VESPA).

it no longer necessary to engage in any prevention whatsoever. In their case, denial becomes a means of psychological protection, sometimes taken so far that the individuals believe that a form of absolute protection has arisen from their sheer willpower. In this situation, certain patients fail to take all of the precautionary measures necessary to protect their partners. In addition, the use of protection can seem like a form of acknowledgement or the visible sign of a risk, which can give rise to additional negotiations and complicate the relationship. Unable to deal with that difficulty, many contaminated individuals have developed imaginary forms of protection. This has led to paradoxical attitudes based on denial and avoidance of preventive measures. In contrast, many people living with HIV prohibit themselves from any form of sexual activity whatsoever, for fear of contaminating others.

Revealing one is contaminated to one's partner is more than merely stating a fact: such a "confession" can be painful to both parties, and the issue is not so much whether it should happen, as when and how the conversation should take place⁴. For certain women, repeated rejection is a major obstacle to the desire to become pregnant, and lying by omission becomes the only option for successfully becoming a mother. In contrast, pregnancy is also often experienced as the time to announce the infection. The lives of people living with HIV is strenuous and the lack of social acceptance pushes them not to inform others of their serological status, fear of exclusion and discrimination outweighing all other factors. Many surveys clearly show that fear of being excluded (from the workplace, family, the community, etc.) remains a significant issue⁵. In our society, the ability to tell of one's contamination is closely tied to the public image of the individual living with HIV. The greater the stigma and the rejection resulting from it, the less the person has the option of revealing his status.

In certain types of transmission, the criminal liability of the person transmitting HIV appears clearly in play, as the French Supreme Court has ruled. Yet it would be disastrous were those individual cases to lead to the feeling that the mere fact of living with HIV makes a person a potential criminal and heightens an existing stigma. Beyond the criminal realm, CNS wishes to assert the principle of dual responsibility: the responsibility of the contaminated persons not to transmit HIV and the responsibility of all persons to protect themselves so as to not be contaminated.

Therefore, CNS recommends that:

- all parties involved in the fight against HIV work to spread the principle of dual responsibility, through suitable field actions;
- true education in sex and intimacy be implemented, covering topics such as STD prevention and HIV transmission, in lower and upper secondary schools;
- persons living with HIV be helped to tell of their condition and negotiate means of prevention;
- care providers be educated in the value of offering HIV testing as part of a prevention strategy, backed by true counselling, before and after testing;
- prevention campaigns be promoted, targeting different generations of the population, placing emphasis on the responsibility of every individual where sex is concerned;
- prevention campaigns devote attention to people living with HIV who take measures to protect others and protect themselves;
- campaigns against stigma be stepped up, to make it easier for individuals to tell their sexual partner of their HIV-positive status.

⁴ In Chapter 21, (on "Prevention and Sexuality in Persons Infected with HIV"), of its 2002 Report, entitled *Prise en charge des personnes infectées par le VIH*, the expert group working under the leadership of Mr Delfraissy gives a detailed outline of how to deal with this problem.

⁵ Sida Info Service 2005 Discrimination Barometer.