

HIV-AIDS: SOCIO-LEGAL ASPECTS*

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Caught in the coils of HIV-AIDS, the human kind is struggling to extricate itself from this recent scourge of the 20th century. It is not an epidemic but a pandemic. Of the 15 million men, women and children already infected, 2.5 million are fully blown AIDS cases, out of which about one million are children. Every day, five thousand persons are infected by HIV. Scientists all over the world, despite the research carried out at the highest level, have admitted that this deadly disease, so far, is incurable: prevention is the only cure. Acquired Immuno Deficiency Syndrome (AIDS) is caused by Human Immuno Virus (HIV), AIDS is the certain culmination of HIV. It is not possible to say with any degree of certainty how long a HIV infected person will live. 5 to 12% may develop AIDS in about five years; 25-45% may reach the final stage after ten years and the rest may take about 12 to 15 years. A person with full blown AIDS can survive for a maximum period of 6-12 months. Blood, the elixir of life, also can destroy life. AIDS is one of the major deadly diseases transmitted through blood, the other three being Hepatitis B, Syphilis and Malaria. (1)

It is established that sexual intercourse, (ii) blood transfusion and use of needles containing infected blood and (iii) perinatal transmission are chiefly responsible for the transmission of the virus.² Multiple sex partners, long term sexual contact with infected persons, genital or anal trauma are the factors facilitating sexual transmission of HIV. In the Indian context, it is also

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(1) See: Notes on HIV/AIDS & Prevention of HIV in Health Care Settings: AIDS Control Project, Govt. of Andhra Pradesh.

² See: Law, Ethics and HIV - Robert A. Glick - UNDP Regional Project, 1993 at p.19.

recognised that the virus is also transmitted through barber's knives and tattooing. The world community through the United Nations Organisation and one of its specialised agencies - the World Health Organisation - has taken up the challenge to contain this deadly disease. The studies initiated and the solutions suggested provide guide-lines for the individual member States to effect necessary changes in their legal systems. Uniform standards throughout the world cannot be adopted in this regard. Social, economic and cultural factors play a large part in shaping the legal policies.

Traditional concepts must yield to accommodate medical developments in shaping the role of law. Law should serve social purposes and that legal institutions and doctrines should be tested exclusively from functional point of view is the well accepted modern legal theory.³ The function of law is "to maximise the fulfilment of the interests of the community and its members and to promote the smooth running of the machinery of the State".⁴ "Law secures interests by punishment, prevention, by specific redress and by substitution of redress and the wit of man has discovered no further possibilities of judicial acts."⁵ .

In our plural society, cultural contrariety is self evident: the social life, economic status and religious practices of different communities and classes and social groups display wide divergence. Plurality of cultures renders evolution of uniform values highly difficult.

Persons belonging to the scheduled castes, victims of severe social disabilities, even now continue to live in segregated areas with no minimum civic amenities. Abject poverty has contributed to high rate of illiteracy among

³ See: Roscoe Pound - Jurisprudence Vol.I p.296.

⁴ See: Salmond - Jurisprudence, 1966 Edn.pp.63-64.

⁵ See: Roscoe Pound - Social Control Through Law p.58.

these classes. Living together in clustered groups without any minimum awareness as to health care and necessary precautions to be taken, tend to increase the spread of HIV. Absence of physical symptoms as to the presence of HIV induces a false sense of well-being among these classes. It will be difficult for the health workers of Government and voluntary agencies to apprise them of the lurking dangers. What is said of members of the scheduled castes. To a great extent, applies to persons belonging to other weaker sections whose economic and social life is of similar nature. Women among these groups suffer greater injustice. If the social groups because of their social disabilities, poverty and illiteracy suffer disadvantages, the women folk groan under greater hardships. Men occupy a dominant position in these societies. Their wishes and whims rule the destinies of women. Even a sickly women cannot refuse sex with her husband. Because of the living conditions in slums, indiscriminate sexual relations among the inhabitants are not uncommon. Prostitution also thrives in such areas. Indian women, traditionally, are shy of knowing even the basic realities about sex, and this is more so with regard to women of lower strata. To talk or know about sex is considered highly immoral. They have neither the inclination nor opportunities to have a basic knowledge of sex. Weaker sections are thus in the high risk zone needing special attention.

The scenario is different to some extent in the case of Muslims. The Muslim women of the economically lower strata suffers to a great extent the same disabilities like that of her Hindu counterpart of the same strata Male domination among the economically poorer sections of Muslims renders the woman helpless. Generally, Muslim women at the lower level are not allowed by their men-folk to go for work and thus augment the family's income. Family life, although stable, is not always a smooth affair. Poverty related conditions coupled with lack of education and awareness make these groups vulnerable to HIV infection.

Relatively, Christians - other than dalit Christians - are in a better position. Absence of prejudice against women taking up employment and high degree of literacy have contributed to the economic stability of the christian family. In the case of economically better off segments of Indian society, irrespective of the religion to which they belong, neither preventive measures nor steps for identification of HIV-AIDS encounter serious problems. Economic well-being compels attention to contemporary realities. Programmes drawn up by the Government or voluntary organisations in relation to containing HIV receive full co-operation from these classes.

Societal reaction to HIV-AIDS is almost hysterical. When it is known that a person is infected with HIV, not only he, but the family members attending on him also become targets of social ostracism. A feeling of gloom and a sense of shame descend on the victim's family. Apart from social boycott, the family suffers economic repercussions. If the victim is the sole bread-earner, he will lose his employment. The prospects of marriages of the children recede. The psychological depression that engulfs the family acutely affects the educational and career prospects of the other members. The attitude of the public towards HIV infected persons depends upon the degree of awareness in that community about HIV-AIDS and its repercussions. Until a HIV infected person reaches the end stage of AIDS, it is possible to lead a normal life. The disease is transmitted not through casual contact but through sexual contact and so living together with a HIV victim does not pose any health hazards .⁶

A disease prevalent at a special time is called an epidemic. Nearly one century ago, legislation entitled "Epidemic Diseases Act, 1897 " (Act 3 of 1897) was enacted "for the better prevention of the spread of dangerous epidemic diseases in the country". Although the term "epidemic" is not

⁶ See : "Aids Law Today" Yale University Press. 1993 P.29

defined in the Act, we must understand it according to its natural meaning. HIV-AIDS being far more lethal than any other dangerous epidemic, it can be safely presumed that the power vested in the he State Government to take special measures when ordinary provisions of the law are insufficient for preventing the outbreak or the spread of the disease is available under Section 2 of the Act in relation to HIV-AIDS. The Government, therefore, may take or require any person to take measures necessary in this behalf. That power may be delegated to any person or persons. The type of special measures that can be taken and in respect of which regulations can be framed are :

"Sec.2(2) (b): The inspection of persons travelling by railway or otherwise and the segregation in hospital, temporary accommodation or otherwise of persons suspected by the inspecting officer of being infected with any such disease".

Under Section 2-A, the Central Government is vested with like powers in relation to inspection or detention of any ship or vessel sailing to or arriving at any port or detention of any person intending to sail therein or arriving thereby. Requiring any person to submit for medical examination compulsorily is an ingredient of the statutory power under Section 2(2)(b) and Section 2-A and the same is also available in respect of persons suspected of HIV infection.

Sex workers, known in common parlance as prostitutes, are in the high risk category known for transmission of HIV. Overwhelmingly, sex workers are from poorer sections of the society. The communist cause that drives them to prostitution is poverty. Sometimes, due to unhappy domestic compulsions, women are driven to prostitution. Sex with a prostitute renders one vulnerable to the disease.

The definition of 'brothel' under section 2(a) of the Immoral Traffic (prevention) Act, 1956 includes any place used for sexual exploitation and when it is done for commercial purposes, it is prostitution within the meaning of clause (f) of Section 2. The Act, which contains detailed provisions for prevention and suppression of immoral traffic will be of little use in combating the spread of HIV. Even if a place where prostitution is carried on is notified as a brothel, it may prove ineffective in stopping the people from contracting HIV; prostitutes are not confined to one place nor are they easily identifiable. Periodic medical examination of suspected sex workers also cannot continue the spread of HIV; there is no guarantee that between one medical examination and another, the prostitute would be free from infection. If the Act is amended suitably to enable the authorities, whenever a brothel is raided, to subject the arrested persons to medical examination for HIV screening, it may serve the purpose of identifying the HIV infected persons. What further steps should be taken to stop the spread of this infection depends upon such identification. The conclusions reached by the National Aids Research Institute, Pune based on a study of 2,800 patients who received treatment at clinics for sexually transmitted diseases between 13-5-1993 and 15-7-1994 are very relevant: "In India, the prevalence of HIV infection is alarmingly high among female sex workers and men attending clinics for sexually transmitted diseases, particularly in those who had recently had contact with sexual workers. A high prevalence of HIV infection was also found in monogamous married women presenting to the clinics who denied any history of sex working. The HIV epidemic in India is primarily due to heterosexual transmission of HIV-1 and in other countries, HIV infection is associated with ulcerative and non-ulcerative sexually transmitted diseases."⁷

⁷ See : Selection from British medical Journal - Oct. 1995 p. 723

The case of Dominic D'Souza-a HIV infected person (published in the Deccan Herald, November 28, 1993) brings to the fore the mental-torture a person undergoes when he is put in solitary confinement by authority of law. Under the Goad Public Health Act, in February, 1989, Dominic D' Souza was arrested by police and held in forced isolation for 64 days. In his own words:

"If you have a law that allows the testing of people without their consent and which forcibly isolates people with HIV, you can be sure that anyone who suspects themselves of having HIV-positive will go underground - and when you go underground without medical counselling, without being advised on measures of having safe sex, you are going to transmit the virus to others".

When he was released from custody and went home, he received enthusiastic welcome. To use his own words:

"Friends and neighbours showed up enmasse to welcome me. I felt elated".

The case of a young Micro-biologist from Hyderabad⁸ who died of AIDS in 1987 reveals a different story. While doing Ph.D. in Micro-biology in a reputed American University, he met with an accident. In the hospital, after blood transfusion was given, it was detected that he contracted HIV. He came back to India and his last wish was to have a peaceful end in his native city of Hyderabad. Although his family looked after him very well, his presence was objected to in the locality by the neighbours, who were ignorant of the nature of the infection. The attitude of the neighbourhood compelled the young Micro-biologist to join the Infectious Diseases Hospital, Hyderabad as an in-patient. The end came to him in the hospital a few days later - sooner than anticipated because of the mental depression caused due to social attitudes.

⁸ As narrated to me by Dr. Dinesh Raj Mathur, Joint Director, AIDS Control Project, Government of Andhra Pradesh

Certain diseases are defined as Infectious Diseases under the Public Health Act of A.P., 1939 by Section 52 and certain other diseases are notified under Section 62. HIV-AIDS is not one of the notified diseases presumably due to the reason that it was not considered to be an infectious disease in the traditional sense as neither casual contact nor even living together without sexual contact can result in the transmission of the disease . The measures contemplated under the Act will be of no use for arresting the spread of the infection. Bu the provisions relating to the obligation of the medical practioners to give information of infectious diseases to the specified authorities (vide Sec.56) and the duty on the part of the health officials to remove infected persons to a hospital (vide Sec.58) can be invoked usefully in the case of HIV-AIDS also, if it is notified under the Act. One serious problem concerning HIV infected persons is that they do not display any outward symptoms and until the infection reaches a fairly advanced stage, no physical impairment or depletion of strength is noticed. The period between detection of the virus and its culmination into AIDS being fairly long - about 10 to 12 years - it may not be desirable to confine the infected persons in hospitals. They will be deprived of their livelihood and their families also will suffer. The more important aspect is as to who will bear the burden of looking after the HIV infected persons in hospitals and also support their families. The State will not come forward to undertake this task. The only course open appears to be to educate the public about the HIV-AIDS , identify the persons affected and take proper precautions to stop further infection. The virus is spread overwhelmingly by hetero-sexual contact. "71% of the cases world-wide account for this mode of transmission while 15% due to male to male (homo-sexual) contact. 5% of the cases are due to blood and blood products, 7% due to injection drug use and 2% of the cases due to unknown reasons. The use of contraceptives is the best known

preventive".⁹

In order to prevent the spread of AIDS through blood transfusion, the Drugs and Cosmetics Rules were amended inserting the following provision :

"Every licensee of a Blood Bank shall get sample of every blood unit tested for freedom from HIV antibodies from such laboratories as may be specified for the purpose by the Central Government. The data of performing such test shall be recorded on the label of the container also".

This, to a large extent, ensures, if implemented strictly, prevention of transmission of the virus through blood and blood products.

Whether HIV infected persons can be prosecuted for any penal offences? Under Section 269 Indian Penal Code, performance of a negligent act likely to spread infection of a disease dangerous to life is an offence punishable with imprisonment for a term upto six months or with fine. To render a person liable for punishment under this section it must be established that he acted unlawfully or negligently which he knows or reason to believe to be likely to spread the infection. If a HIV infected person after he was tested positive indulges in sex without taking the precaution of using contraceptives, it can be said that he is liable for the offence under Section 269 IPC. The offence assumes an aggravated form if the act is done malignantly i.e., intentionally without just cause or excuse for which the punishment prescribed under Sec.270 IPC is imprisonment for a term upto two years or with fine. A blood bank which negligently supplies blood containing HIV also can be brought within the purview of Secs.269 and 270 IPC if the ingredients thereof are established. It is doubtful whether the act would amount to culpable homicide as defined in Section 299 IPC. Section

⁹ See : Justice Michael Kirby- AIDS AND THE LAW - OPPORTUNITIES AND LIMITATIONS - Paper presented at the International Conference organised by the Indian Law Institute in March 1994 on "Shaping the Future by Law" at New Delhi.

304-A IPC also can be invoked against a blood bank if the blood supplied by it results in HIV infection.

Any discussion concerning HIV-AIDS cannot overlook the right of privacy of the HIV victims. Without an element of compulsion, it may not be possible to carry out tests on persons suspected to be infected with HIV. Questions like discrimination and breach of right of privacy will surface. Right of privacy is always understood as an aspect of human dignity¹⁰. It finds expression in Article 12 of the Universal Declaration of Human Rights and Article 17 of the International Covenant on Civil and Political Rights, to which India is a signatory. Article 21 of the Constitution of India guarantees protection of life and personal liberty. The fundamental right guaranteed by Article 21 encompasses the right to live with dignity, of which the right to privacy is a necessary ingredient. More than 100 years ago, Samuel D. Warren and Louis D. Brandeis in their article in Harvard Law Review, 1890 defined right of privacy as "the right to be let alone". The British Section of the International Commission of Jurists-"Justice" felt that it is difficult to define privacy, the scope of which depends upon the standards, fashions and mores of the society of which we form part. Privacy is used in the sense "of that area of a man's life, which, in any given circumstances, a reasonable man with an understanding of the legitimate needs of the community, would think it wrong to invade."

In the American Constitution, the right of privacy finds expression in the First, Fourth and Fifth Amendments. The American Supreme Court in *GRISWOLD Vs. CONNECTICUT*¹¹ held:

¹⁰ See : A.I.R. 1981 S.C. 716

¹¹ 381 U.S. 479

"A State statute which makes it a criminal offence for a married couple to use contraceptives is invalid as invading their right of privacy, a right older than the Bill of Rights"

There is an apparent conflict between the right of privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus. There appears to be no decided case touching upon this aspect. In the resolution of the conflict between the two competing interests, the scales of law must tilt in favour of the State. In the interests of the general public, it is necessary for the State to identify HIV positive cases and any action taken in that regard, I think, cannot be termed unconstitutional. A law designed to achieve this object, if fair and reasonable, will not be in breach of Article 21 of the Constitution of India.

Looking at the depressing scenario of HIV-AIDS, it is difficult to overlook one important aspect. Homo-sexuality and unnatural sex, which are penal offences under the Indian Criminal Law (Sec.377 IPC) have almost gained social acceptance in the west especially in the Scandinavian countries. Even in England, a 300 year old law prohibiting these acts was repealed in the sixties. It is now firmly established that homosexuality and unnatural sex are also responsible for transmission of HIV. It is generally believed by the medical profession that such acts now have decreased to a great extent because of the fear of contracting HIV-AIDS.

The existing legal provisions will not be of any significant help in the formulation of an effective legal framework for arresting the spread of HIV-AIDS. A comprehensive legislation incorporating the State's responsibility, the duties of the medical profession, the role of the voluntary agencies, the rights of the HIV infected persons and the penalties for violations of the provisions is immediately needed to tackle the problem.