

NEED FOR LAW TO CONTROL HIV/AIDS IN INDIA

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The Nature of Disease:

The first case of Acquired Immuno Deficiency Syndrome (AIDS) was reported from Los-Ageles in 1981. The period between 1981 and 1995 has witnessed a medical calamity. For which the medical community believed that it would never come again. And it did come. Over two lakhs cases of AIDS have been diagnosed in the United States so far, with more than one million cases reported world-wide. The Human Immuno Deficiency Virus (HIV) is the causative agent of AIDS. The persons infected by the HIV are far greater in number because in that case the full bloom syndrome has not yet developed. AIDS may be diagnosed when certain specific illness is found in an individual who would not ordinarily be expected to develop those particular illnesses. The presence of such a illness, within the context of known infection by the HIV-virus would suffice. In other words, infection by HIV-virus is the first stage and the AIDS is the second stage of the epidemic. HIV is transmitted by direct blood to blood contact or by sexual contact with an infected individual. The HIV-virus is capable of attaching specifically to those cells of the blood which are normally responsible for immuned function in humans. Although the immune system may compensate for some period of time, but eventually the ability of virus to destroy these cells is greater than the host's ability to protect them. Although the Modern Medical Technology may be capable of killing individual HIV-viral particles. It is beyond the technology capability of the search up to 1995 to destroy all the HIV-viral particals.'

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1 The origin of HIV is somewhat controversial, although it is known that the virus is not new. Some Expert have suggested that it has been in existence for about 200 years. Human Immuno Deficiency Virus (HIV) has been discovered in certain species of monkeys from Central Africa. It is identical to HIV-virus, and it is possible that it was transmitted from monkey to humans after a monkey bite injury, AIDS (the facts), Alexandra M. Lebina, Southern California Law Review, 1991, Volume 65 page 423 (429).

By 1986-87 it became clear that HIV-infection was, in fact a continuum of disease and the infected individual would after a given time develop ARC (AIDS-related complex) and then full blown AIDS, therefore, average duration of this period is 7 to 10 years. But a new born infant takes not more a year. In children who have acquired the infection as a consequence of deficiency and receipt of infected blood products, the latent period may be somewhat longer than the expected 7 to 10 years.

Need to control blood donation:

As has been stated above the virus is spread by direct blood to blood transmission. Thus if an individual has been transfused with the blood of HIV-infected donor, the chance of infection in the recipient is approximately 90 to 95 percent.² By law the blood donations within India could be strictly made subject to test for HIV. By doing so these chance of future transmission via blood will become essentially negligible. Blood to blood contact may also occur among intravenous drug users, who may share needles and other drug equipment with a large number of other individuals. If any one of such individuals is infected by HIV, the virus may be transmitted by injecting residual blood from the last needle user directly into their own blood skin. For this purpose law may be framed so as to strictly prohibit the sharing of needles, other equipment for preventing the blood to blood contacts.

Effect of sexual contact with person infected with HIV:

The another method of transmission of HIV is sexual contact with an infected individual. Medical Experts have reported that if men or women are infected with HIV in the blood, these men is also infected, allowing for the

2 H.A. Perkins, Risk of AIDS for recipients of blood components from donors, who subsequently developed AIDS quoted in Southern California Law Review, 1991 p. 437.

potential of transmission to any sexual partner of either sex. If a woman is HIV-infected in the blood, her cervical or vaginal secretions are also infected in which case the infected cells present in sufficient quantities may allow sexual transmission. The virus burden is increased in individuals, who have at a latter stages of HIV-infection, such as advanced stage of ARC or AIDS, and the sexual contact which such an individual may allow a greater possibility of viral transmission. A great deal of work has been done in India to prevent the sexual spread of HIV, and the method most discussed has been the use of contraceptives, such as condom. The social workers can educate the young persons to use the contraceptives for preventing the spread of HIV through the sexual contact.

Birth of HIV-infected child:

The third place for the spread of AIDS is the birth of HIV-infected infants from HIV-infected mothers. The medical experts have reported that the chance of HIV-infected women giving birth to a HIV-infected infant is approximately 30 percent. This problem would continue to increase till the epidemic is checked.

Effect of AIDS epidemic on family members, physicians and social workers:

Although HIV cannot be transmitted by casual or intense contact with the HIV-infected person but the society as a whole has not accepted this fact that HIV-infected individual can continue to exist within the home, work-place, classroom, etc., without any danger of transmission to those who may come in casual contact. Even the family members who shared their razors, tooth pastes, brushes, eating utensils, glasses and plates, bathroom and kitchen facilities with the AIDS patients, researches have shown that none of the family members developed AIDS, ARC or HIV-infection. Where the health care workers or physicians came in contact with hundreds of HIV or AIDS-

patients for about a decade, the researches have shown that no health care worker or physician has developed HIV-infection or AIDS, despite being coughed upon, sneezed upon, hugged and so forth for many years. In spite of this, it was reported that in U.S.A. many physicians and health care workers do not provide care to all patients of HIV or AIDS and many of the physicians or medical students have planned their future professional lives to avoid contact with HIV-infected patients. Therefore, the legislators felt that a comprehensive legal remedy was necessary to compel health care workers to provide quality care to the HIV-infected patients.¹

Laws in U.S.A.:

In 1990, the Americans with Disabilities' Act, was passed which provided comprehensive rights, precautions and legal remedies to HIV infected individuals seeking health care in both the private and public sectors. In enacting the said Act, the Congress sought to protect HIV-infected health care workers also from discriminatory employment practices. If Courts determined that risk of transmission from patient to physician is not significant and that the exclusion of HIV-infected patients from exposure prone procedure constitutes unlawful discrimination, it must follow that the risk of transmission from physician to patient is also not significant. In that case the HIV-infected physician who follows infection control precautions would be a victim of discriminatory conduct under the standards laid down in the Americans with Disabilities Act. By preventing discriminatory exclusion of HIV-infected persons from health care services, the Act is expected to help alleviate the severe shortage of health care professional willing to provide care to HIV-infected patients. The main provisions of the Americans with Disabilities Act are as under:

¹ The Americans with Disabilities' Act, Joel Megugarten, Brooklyn Law Review, 1992, 1277.

such a moral duty. About 4 States in U.S.A. have framed statutes so as to prevent the birth of infected child. A brief survey of those statutes could bring us to some conclusion:

i. A women in Illionois State who knows that she is infected with HIV/AIDS and becomes pregnant could be prosecuted. A man who knows that he is infected with HIV/AIDS and engages himself in sexual contact with another woman commits criminal transmission of HIV if such woman becomes pregnant and gives birth to a child infected with HIV.

ii. The Indian-stature of 1992, provides that a woman who knowingly or intentionally transfers blood that contains the HIV commits an offence of transferring contaminated body fluids. Even if the child does not test positive for HIV-infection after the birth, the woman who knows that she is HIV-positive and becomes pregnant, is guilty of transferring contaminated body fluids.

iii. Under the Arkanhaha statute of 1991, a person who knows that he or she has tested positive for HIV and exposes any person to such viral infection through the parenteral transfer of blood or blood products, has committed a felony.

iv. Under an Idaho statutes of 1992 "any person who exposes another in any manner with the intent or, knowing that he or she is or has been afflicted with AIDS related complexes or other manifestations of HIV-infection, transfers or attempts to transfer any of his or her body fluids, body tissue or organs to another person is guilty of felony and shall be punished by imprisonment in the State prison for a period not exceeding 15 years, by fine not exceeding Rs. 5000/-dollars or by both such imprisonment and fine". The definition of the Act says that the term 'body fluids' means semen blood, saliva, vaginal secretion, breast milk and urinal. The Idaho statute, however, saves a person who transfers such fluids after being advised by a physician

that he or she is non-infections. It also protects a woman who discovers that she is infected after she has begun her pregnancy.

In *Roe v. Wade*, the Supreme court of U.S.A. held that the right of privacy with respect to one's body was broad enough to cover the right to choose whether to terminate a pregnancy. If the State begun prosecuting HIV-infected woman who transfers her infection to her child through the pre-natal transfer of blood to blood products, the State would have to demonstrate that :

- i. Its regulation is justified by a sufficiently compelling State interest, and
- ii. The regulation is narrow enough in scope so as not to extend beyond boundaries of that legitimate interest.

However, in order to ascertain that a woman could have HIV/AIDS before pregnancy a law could be passed which should restrict a woman's right to procreate and that she should pass through the strict scrutiny test. A law could be passed that whenever a woman becomes pregnant it shall be compulsory for her to get her blood tested whether it contains HIV/AIDS-virus and if it is found that such a woman has AIDS/HIV-virus then abortion should be made compulsory for such a woman. If a woman fails to get herself tested within that period and thereafter gives birth to an HIV-infected child, she should be made criminally liable and should be punished. There are certain difficulties in the implementation of such a law. A woman whose religious beliefs to not permit abortion would essentially be forced to abandon her religious values. If the Act of transferring HIV/AIDS during pregnancy are made punishable, abortion would become only the alternative available to an HIV-positive woman who becomes pregnant.

Law in Russia :

On 29th August, 1987 regulations were framed in USSR on the medical test for the detection of infection by AIDS-VIRUS. On 4th October, 1990 regulations were also framed for medical testing for the detection of the HIV. In 1987, text of compulsory test has used the term 'risk group' in reference to persons engaged in prostitution. The woman engaged in prostitution were made subject to compulsory screening. The USSR Law of 1990 listed 17 categories of men, women and children who were required to under-go screening. For example, (i) pregnant woman upon being recorded as pregnant and at 30 weeks of pregnancy, (ii) pregnant women undergoing examination for artificial termination of pregnancy, (iii) persons engaged in prostitution, (iv) children born of HIV-infected mothers up to the age of 12 months, (v) children admitted to intensive care, cancer, chest and hydrologist units.

Costa Rice Law:

In 1987, the Costa Rican Decree of 1986 was replaced by new Decree of 1987, which prohibited persons belonging to the 'high risk' groups 'from donating blood, blood derivatives and other issues and organs'. The following have been placed under the high risk groups by the Costa Rican Decree of 1987: (i) homosexual or bisexual men (ii) female prostitutes (iii) promiscuous men (iv) drug injecting, intravenous drug users (v) persons receiving blood or blood products (vi) women who have had sexual relation with men belonging to groups one, three, four and five above.¹

1 Decree No. 15733-3 of 8th May, 1987 quoted by BC Jaya Soriya, AIDS-related legislative strategies relating to women and infants, *International Journal of Law and Family*, 7 (1993) 1-17.

Hungarian Law:

In Hungary, the sexual partners of persons with AIDS or HIV-infection are placed under medical surveillance and are required to undergo a blood test. ¹ Persons with sexual transmitted diseases are also required to be compulsory tested for HIV. In addition to it a law requires the testing of infants of seropositive mothers.

Swedish Law:

IN Sweden, in accordance with the recommendations made by the National Board of Health and Welfare, screening of pregnant women is done as a matter of routine along with other tests, but it is not compulsory. ² In 1987, the National Board of Health and Welfare recommended that breast milk received from donors who are considered to be belonging to a group at risk from HIV-infection should not be used. A medical certificate is required before the milk could be used for feeding purposes. In 1989, the Council of Europe recommended the mandatory screening of those donating mothers milk. ³ Such screening had to comply with the mandatory requirement of informed consent and keeping the confidentiality of donors.

New South Walew (Australia) Law:

In 1985, the Australian State of New South Wales passed a law on the prohibited persons with AIDS or associated conditions from carrying out

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- 1 Ibid. Circular No. 53636, 28th Dec. 1986 of the Ministry of Health on the Standardised Procedure for the Detection of HIV.
 - 2 Ibid. General Recommendations No. 22 of 9th October, 1987 of the National Board of Health and Welfare, on the screening of pregnant women for HIV-infection, Ibid.
 - 3 Recommendation No. 8(85) 12 on the screening of blood donors for the presence of AIDS-adopted by the Committee of Ministers of 13th September, 1985, Ibid.

activities such as acupuncture, piercing and tattooing or from permitting such activities to be carried out on them.¹

Norwegian Law:

In 1986, the Norway made it compulsory for hospitals maternity departments and milk banks to screen breast milk.²

German Law (Bavaria):

The German Law of 1987 provided that the residence permits of foreign prostitutes can be terminated even if they are not seropositive. Prostitutes have also been prohibited from displaying on their premises, medical certificates showing their HIV-tests. there is a prohibition of women with HIV-infection from breast feeding children or providing their milk for feeding purposes.³

Need for Law in India:

On 18th August, 1989, the AIDS Prevention Bill⁴ was introduced in the Rajya Sabha which gave sweeping powers to the health authorities and the Government to control the liberty of private citizens. The Bill was referred to Joint Select Parliamentary Committee. Clause 6 of the Bill permitted the health authorities to subject prostitutes and their customers to compulsory testing and if found positive they be kept in isolation. The Bill also prohibited the professional blood donors, who know that they are infected, from donating

1 The Public Health (Sixth Penetration) Regulations, 1985, New South Wales Australia, *ibid*.

2 Circular IK-13/86 of 12th February, 1986, *ibid*.

3 Notification dt. 19.9.1987 of the Bavarian, Ministry of the Interior *Ibid*.

4 Gazette of India (Extraordinary) 18.8.89, Part-II S-2 at 43.

their blood or any organ. Clause 10 (2) also required them to get them self-tested for HIV-infection before making a donation. The Bill did not provide for compulsory AIDS-test of foreign students or other foreigners coming to India particularly the Africans and Americans. The Bill did not provide for any kind of ban on the blood donors. However, the AIDS clearance certificate was made necessary for each blood donor. Since the above Bill has not been passed by the Parliament, it is suggested that on the basis of experience of law and practice in other countries and the decisions of the Courts of other countries, it is necessary that the law may be passed in India on the following lines :-

- (1) The donation of blood should be strictly made subject to test for HIV. The sharing of needles and other equipment should be strictly prohibited so as to prevent the blood to blood contacts.
- (2) The intravenous drug users, who share needles and other drug equipment with other individuals should be given sever punishment.
- (3) The act of physicians and health care workers who do not provide care to patients suffering from HIV or AIDS should be declared an unlawful act. The risk of transmission of diseases from patient to physician is negligible. By preventing discriminatory exclusion of HIV or AIDS-infected persons from health care services, the statute would help alleviate the shortage of health care professionals willing to provide care to HIV-infected patients.
- (4) Persons suffering from AIDS or HIV-virus be declared disabled within the meaning of the statute and be made entitled to all protections under the Act.

- (5) Persons refusing to provide health care to homosexual or bisexual males or intravenous drug users may be deemed to have violated the provisions of the law, if such a refusal is based on the possible risk of HIV-infection. If a physician refusing to care the HIV-infected patient, the burden of proof will lie on the patient to establish that he is disabled within the meaning of the statute. If the patient refuses to furnish medical information, which is pertinent for the treatment to be rendered by the physician, the patient will not be treated as a disabled person within the meaning of the statute. If the HIV-infected individual who knowingly conducts himself in such a way which poses significant risk of transmission to other individual, then he must be made accountable for his actions. For example, if a person knows that he is HIV-infected individual and thereafter he comes in sexual contact with another or transfers his blood or body fluids or tissues, he should be made subject to punishment.
- (6) The law should declare that a child has a legal right to begin life with a sound mind and body. The child deprived of that right and born infected with AIDS or HIV- should be given remedy under the law. In order to prevent the birth of an infected child, the following provisions be made in the proposed statute:
- (a) a woman who knows that she is infected with HIV/AIDS and becomes pregnant should be prosecuted and punished.
 - (b) a man who knows that he is infected with HIV/AIDS and engages himself in sexual contact with another woman, he may be deemed to have committed criminal

transmission of HIV, if such woman becomes pregnant and gives birth to a child infected with HIV.

- (c) even the child does not test positive for HIV-infection after the birth, the woman who knows that she is HIV-positive and becomes pregnant should be declared contaminated body fluids.

- 6-A) Any person who knows that he or she is infected with HIV or AIDS related complexes and transfers or attempt to transfer his or her body fluids, body tissues or organs to another person, he be declared guilty of felony and should be given punishment of life imprisonment and fine not exceeding Rs.10,000/- or both.

The term 'body fluids' would mean semen, blood, saliva, vaginal secretion, breast milk and urinal. The following persons should be saved from the above punishment:

- (i) A person who transfers such body fluids after being advised by a physician that he or she is not suffering from HIV or AIDS.
 - (ii) A woman who discovers that she is infected with HIV or AIDS after she has began her pregnancy.
- (7) Whenever a woman becomes pregnant it should be compulsory for her to get her blood tested within a period of three months from the date of pregnancy whether it contains HIV/AIDS-virus and if it is found that such a woman has HIV/AIDS-virus then abortion should be made compulsory for such a woman. If she fails to get herself tested within what period and thereafter,

gives birth to an HIV-infected child, she should be made criminally liable and should be punished.

- (8) The woman engaged in prostitution should be made subject to compulsory screening.
- (9) The following persons may be placed under the high 'risk group' and should be made subject to compulsory screening for HIV/AIDS-infection.
 - (i) homosexual or bisexual men.
 - (ii) woman engaged in prostitution.
 - (iii) promiscuous men.
 - (iv) drug injecting or intravenous drug users.
 - (v) persons receiving blood or blood products.
 - (vi) women who have had sexual relations with men belonging to above categories.
- (10) The sexual partners of persons infected with HIV or AIDS be placed under medical surveillance and should be required to undergo a blood test.
- (11) The blood of the infants should also be tested whose mothers are sero-positive.
- (12) (i) The infants should not be given breast milk of such mothers who are infected with HIV or AIDS.

