

HIV/AIDS AND THE LAW

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HIV (Human Immunodeficiency Virus) which in course of time develops into AIDS (Acquired Immunodeficiency Syndrome) and causes death has become a great curse for the human race in the later part of the 20th century and the intensity of the problem is increasing as we are approaching nearer to the 21st century. Medical science with all its advances has not been able to check mate the problem. It appears that God Almighty wants to compel human beings on pain of death to change their behaviour pattern towards drugs and sex.

BRIEF HISTORY AND IMPACT

Since the onset in the early eighties of the HIV/AIDS pandemic nearly all the countries of the world have by now reported to the World Health Organisation (WHO) Global Programme on AIDS. As of the middle of this year (1995), 18.5 million adults and more than 1.5 million children are estimated to have been infected by HIV/AIDS throughout the world.²⁴ What is further agonising is that among the adults, it is taking a heavier toll of younger people between the ages of 20 to 35.

HIV A DEVELOPMENT PROBLEM AS WELL

Therefore, there is no doubt now that HIV/AIDS is not just a health problem but a development problem as well. The fact that the disease affects the most productive segment of society (ages 20-35) and is incurable and debilitating, makes it a threat to the country's economic growth. Its impact is felt more seriously by the poor whose number is very large in this region comprising South and South East Asia. In the context, therefore of developing countries of this region where the majority are poor, the disease can shake the very foundation of civil society.²⁵

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24 See Shamala Velu's report, "Why Testing is Vital", published in The Star of October 2, 1995, page 8/Section 2.

25 See also "Foreword" of Mr. Justice Michael Kirby in Law, Ethics and HIV (Proceedings of the UNDP Inter Country Consultation CEBU, Phillipines 3-6 May 1993) published by United Nations Development Programme Regional Project on HIV/AIDS, New Delhi, India.

HOW IS HIV TRANSMITTED?

Let us also at the outset remove some unfounded prejudices against persons suffering from HIV/AIDS so that law may achieve the desired result of containing and curbing the menace without inflicting any undue hardships on the victims.

The widely spread prejudices which have no real basis is that HIV/AIDS can be transmitted by travelling together, by studying in school/college together, by attending a place of recreation like Cinema Halls together, by being treated in the Hospital together etc. Because of these baseless prejudices, the life of a HIV/AIDS victim is made miserable by people around depriving him/her virtually of all human rights²⁶ and thus in many cases driving the victim to commit suicide.

It is now well known that HIV is transmitted by (1) having unprotected sexual contact or (2) sharing needles to inject drugs, or (3) smearing one's infected blood or body fluid upon ruptured skin surfaces of the other which may be by biting also, or (4) donating infected body tissue (blood) to be injected into the other person.

Thus it is absolutely unnecessary but a serious violation of human rights of the HIV/AIDS victims to eject them from (1) aeroplanes, trains; (2) Work places like factories, offices; (3) Hospital; (4) Schools/College, etc.,

ROLE OF LAW

In these circumstances, law has to play its role at two planes:

(1) By ensuring that there is no discrimination against HIV/AIDS victims, based on blind prejudices and (2) by planning a legal strategy for containing and curbing the spread of HIV.

VIEWS ON ROLE OF LAW

With the experience of more than a decade of different legal responses to HIV/AIDS being with us, it is thought²⁷ that three main models for the role of law emerge. The first is the traditional proscriptive model that penalises certain forms of conduct. The second model focuses on the protective function of the law and the need to uphold the rights and interests of particular classes of people notably those infected with HIV or at risk of infection. Both these models have been widely used in response to HIV/AIDS The third

26 See e.g. a write-up, "AIDS and Human Rights" published in The Star of October 2, 1995, page 4 section 2.

27 See Julie Hamblin, "The Role of the Law in HIV/AIDS Policy", in Law, Ethics & HIV, page 2, op. cit., note 2 supra.

model which propounds the instrumental role of law, however, has been explored less fully. This model seeks to use the law actively to promote the changes in values and patterns of social interaction that lead to susceptibility to HIV infection.²⁸

These models are not always mutually exclusive and there may also be considerable overlapping in between them. However, an understanding of the distinctions is important in order to identify closely what is sought to be achieved by a proposed legal intervention. This understanding can guide any decisions about when we should intervene using the force of law and when, in the interest of certain policy objectives, we should refrain. Unless these different roles are recognised, there is a risk that the full potential of the law to assist HIV/AIDS policy will be overlooked or worse, that the law may actually obstruct an appropriate response to HIV/AIDS.²⁹

Let us now take up these models of role of law one by one :

I. THE PROSCRIPTIVE ROLE OF THE LAW

Law in its proscriptive role is coercive in nature, which often imposes criminal sanctions for non compliance. The approach may actively impede prevention efforts alienating those people who are at risk of HIV and making it less likely that they will cooperate in prevention measures.

In the case of proscriptive and punitive laws, therefore, an appropriate legal response to HIV/AIDS, will most often be the absence rather than the presence of law.

So far as the India law is concerned some criminal sanctions against spreading infection exist for a very long time in the Indian penal code 1860

They are sections 269 and 270 which are as follows:

269 *Negligent act likely to spread infection of disease dangerous to life:* - Whoever unlawfully or negligently does any act which is and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months or with fine or with both.

270 *Malignant act likely to spread infection of disease dangerous to life:* -Whoever maliciously does any act which is and which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both.

Thus spreading infection either negligently or deliberately is an offence under the Indian Penal Code.

28 See *ibid.*

29 See *ibid.*

Though writers on Law and HIV/AIDS generally think that before invoking criminal sanctions, much home work needs to be done on the desirability of declaring selected forms of behaviour to be offences. Let them also say that it cannot be said that Criminal law has no place whatsoever, particularly in case where spreading of HIV infection is deliberately done?³⁰

II THE PROTECTIVE ROLE OF THE LAW

A second model for the role of law in HIV/AIDS policy focuses how the law can protect individuals or classes of individuals from harmful and undesirable occurrences. This model has been of central importance in the context of the legal response to HIV/AIDS because of the proliferations of discrimination against people with HIV and also because of the recognition of interplay between human rights. There has been considerable international interest in the protection of human rights in the HIV/AIDS context as demonstrated by World Health Assembly Resolution of 13th May 1988, entitled, "Avoidance of Discrimination in relation to HIV-infected people and people with AIDS", the Paris Declaration of 1st December 1994 and the 51st Session of the Commission on Human Rights Resolution on the Protection of Human Rights in the Context of HIV/AIDS, adopted without a vote on 28th February 1995. and AIDS.

The legal response to HIV/AIDS has drawn on the protective role of the law in many ways, but two protective functions of the law have been dominant, namely, (i) protection against discrimination, and (2) the protection of confidentiality for people with HIV or suspected HIV infection.

There is a close relationship between discrimination and privacy, as the pre-requisite for discrimination is knowledge of other persons's HIV status, and the reason people want their HIV status to remain confidential is fear of discrimination.

30 See Dr. T.K.K. Iyer, "HIV and Criminal Law", mimeographed.

The type of discriminatory treatment ranges from avoidance, humiliation, harassment, rejection, denial of services, vilification and even violence.³¹ With time there is another wave of HIV related discrimination which is much more sophisticated and pre-emptive³² and therefore difficult to address³³. This is all the more reason to carefully draft anti-discrimination legislation which cannot be avoided by subterfuge, especially given longer productive life expectancy of HIV infected with growing advances in treatment.³⁴

In a regime of law with a protective role that we are discussing has the type of laws like those restricting the availability of condoms, censorship and broadcasting laws that restrict dissemination of information about safe sex, laws that permit HIV testing without consent or the detention of people with HIV and immigration and travel laws that restrict the movement of people with HIV from one country to another, should have no place; whereas the following type of laws should definitely find a place³⁵:

a) Human rights laws that give legal effect to right such as the right to privacy.

b) Anti-discrimination laws that will provide redress in the event of discrimination in employment, housing, access to health care, etc., against people with HIV or their family or friends.

c) Legal provisions that protect the confidentiality of a person's HIV status.

d) Laws requiring a person's consent to be given before HIV testing is undertaken, and

e) Laws that encourage appropriate work place practices, e.g. infection control procedure and HIV education for employees.

III Law as an Instrument of Behaviour Change

It is well-known that law does not exist for its own sake. State has always used the law as an instrument to shape and influence human behaviour along the desired lines like e.g. the criminal laws are enacted to dissuade and deter people from adopting criminal behaviour. Those who are not dissuaded and adopt the criminal path are punished so as to create deterrence in their own minds for the future as well as in the minds of others.

31 See Helen Watchirs, "HIV/AIDS Discrimination and Privacy: The Need for Legislative Protectory, mimeographed.

32 American Civil Liberties Union, Epidemic of Fear: A Survey of AIDS Discrimination in the 1980 and Policy Recommendations for the 1990s, New York, page 46.

33 See Helen Watchirs loc. cit, note 9 supra.

34 See *ibid*.

35 See "People Living with HIV: The Law, Ethics and Discrimination", Issues paper 4, HIV and Development Programme, UNDP, New York (November 1993)

Though we have argued above that criminal sanction should be sparingly used in this area, yet civil law changes together with some input of criminal sanctions can definitely influence behaviour of concerned people and thus help prevent spread of HIV, e.g. in the following cases :

One example of this is the experience with laws requiring brothel owners to insist upon condom use by their clients. On a practical level, such a law is difficult to enforce. However, there is some evidence that such a law can assist in condom use, if only because it makes it easier for prostitutes to insist upon condom use by their clients. The legislation can be instrument for bringing about behaviour change in this way.³⁶

Another example may be that where poverty and economic dependence lead to vulnerability to HIV, such as where the sale of sex is the woman's only source of income or where women are denied economic right independently of the family unit, laws that address these issues, e.g. by changes in land ownership or credit regulation, may assist in the change of behaviours that spread HIV.³⁷

Conclusion

A U.N. Study³⁸ entitled, "Economic Impact of the HIV Epidemic", arrives at the following conclusions :

1. The economic and social costs of HIV are truly colossal. The epidemic, if unchecked, could transform the developmental performance of many countries. Not simply in terms of national economic growth rates, but also in terms of those broader social indicators that more accurately reflect improvements in the standard of living. No sectors of the economy are immune to the impacts of the epidemic, and all social strata will be affected.
2. Low prevalence countries are in a position to act now with effective policies to prevent the spread of HIV, and thus avoid its economic, social and psychological costs. Section 2 of this paper makes it clear why it is crucial to act now, and not to wait until a point where these costs become unavoidable. The returns from effective HIV

36 See *ibid.*

37 The incidence of HIV is much much higher in poor developing countries than elsewhere. In some areas of Sub-Saharan Africa, the rate of new infections is estimated to be almost three times higher among women than among men. At this point in the epidemic, the people who remain more vulnerable are those who are denied the means of protecting themselves against the risks of HIV because of economic need or powerlessness to control the basis upon which their sexual relationships take place.

38 See "Economic Impact of the HIV Epidemic" Issues Paper No.2 HIV and Development Programme, UNDP, New York (Nov. 1993).

prevention activities in all countries, with high or low seroprevalence, will in most cases substantially exceed those from other investments.

3. Major shifts in attitudes and policies are required if effective policies for prevention are to be implemented, and there can be no place here for delicate sensibilities. This means grappling with sensitive issue of sexuality and gender relationships, where major fundamental changes are required. Such changes will be extremely difficult to bring about, but there are no alternatives.
4. There are obvious limits to what governments can achieve in this area, but they can be expected to provide resources and leadership. However, effective action will often depend on non- governmental organisations and community based organisations. They can reach those engaging in high risk behaviours, and provide for those infected and affected by HIV. In most developing countries, if not all, the resource costs of caring for the infected and the affected will inevitably have to be borne more or less entirely by households and communities.

It is difficult not to agree with these propositions particularly in the light of what we have discussed before.

Therefore, it has become imperative and even urgent to make the maximum use of law in the manner suggested above apart from other strategies, to defeat this monster of HIV/AIDS.

But, whereas, I have pleaded above for ending discrimination against victims of HIV/AIDS, I am not for treating them above the law, as they had done in Italy which has recently been reversed by the Constitutional Court of that country³⁹

39 See a news item, "Italy Closes Legal Loophole", published in The Star of October 20, 1995, which is as follows: Italy on Wednesday closed a legal loophole, repeatedly exploited by a bank-robbing trio dubbed the "AIDS Gang" that allowed terminally-ill crooks to commit crimes with impunity. The constitutional court ruled that judges were no longer obliged as they had been until now to free criminals suffering a terminal illness. Judge Guiliano Vassalli ruled that they would not be allowed to use their discretion to free or imprison sufferers. The AIDS Gang, three men in the final stages of full-blown AIDS, have robbed banks in the Turin area unmarked, in broad daylight and without worrying about security cameras.