

# AIDS DISCRIMINATION AND INTERNATIONAL HUMAN RIGHTS STANDARDS

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Secretary General of the United Nations stated in December 1988, "The world must make war on AIDS, not on people with AIDS"<sup>2</sup>. Many through the statement self-evident, but this has not proved true so far. Aids discrimination continues on a world-wide basis. Much is based on deeply irrational fear.

The natural response is therefore, to avoid coming into contact with an infected person at all costs. However, in the light of existing scientific empirical evidence, AIDS is not transmitted through casual contact. Therefore, there is a need to perform a difficult task, that of separating deeply irrational fear from scientific understanding<sup>3</sup>.

It has been found that the psychological, social and economic impact on the infected person's immediate circle and on society is substantial. This has led to the outbreak of what is known as the third epidemic, the epidemic of stigmatisation, persecution and discrimination of those infected or perceived to be infected because they belong to a certain cultural, ethnic economic or sexual group<sup>4</sup>.

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  - 2 Anne Petitgirard, "AIDS Discrimination still an issue," *Red Cross, Red Crescent* September-December 35 (1990).
  - 3 "AIDS and Discrimination" 41,35 in *The Review, International Commission of Jurists*, December 1988.
  - 4 *Id.* at 37

The discrimination has wide-spread and serious Consequences for public health and control of the disease. A 1991 decision of the General Assembly of the then (League) emphasised the Movement's position on AIDS and human rights. Among other things, Decision 33 specifically urges National Societies and the Federation "to take a strong stand against all forms of AIDS related discrimination, internationally and nationally, through advocacy, education and other relevant activities"<sup>5</sup>

The policies to combat and eliminate the spread of HIV virus and AIDS <sup>6</sup> must be designed within the framework of internationally recognised human rights standards. No person enjoys an absolute human right to spread the dangerous virus. The policy makers must be prepared to meet the reactions, challenges and pressures at the National and International level which may arise from the derogation of basic human rights. World Health Organisation (WHO) strategies to combat AIDS must comply with basic human norms. These strategies include the following. <sup>7</sup>

1. The International Legal norms on human rights merely state fundamental rights of human beings which derive from the very fact of humanness and the entitlement to the respect of each human being which that fact necessitates:
2. International legal norms contained in treaties many of which have promulgated by the United Nation Organisation e.g. the United Nations Charter with its opening recital which is a re-affirmation of "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women," Similarly, Universal Declaration of Human rights and the International covenant on Civil and Political Rights and Economic, Social and Cultural rights along with many regional Statements of humans rights have acquired increasing acceptability and recognition as International law applicable to the various nations. They constitute binding rules of International law, though their enforcement and application is sometimes uneven.
3. The 41st World Health Assembly of WHO (May 1988) impressed upon states "to protect the Human Rights and dignity of HIV infected people and with AIDS and

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5 Barbara Geary, " AIDS, Health and Human rights: Paving the Rold Less Travelled", **Red Cross-Red Crescent**, Sep-Dec 92, p.32.

6 The WHO estimates that during the first decade, 1.2 million men, women and children developed AIDS and between 8 and 10 million became HIV-positive. But WHO concedes that these figures may be conservative. Other experts believe true total of HIV-positive people may be nearer 20 million, atleast 80% of them in the less developed countries. Global HIV-infection is expected to double or even triple, by the year 2000, and number of AIDS cases to increase four or five year fold. See Hooper Ed., "AIDS:No-One is Immune", *Refugees*, 32 (Dec.1990).

7 Justice M.D. firby "AIDS Strategies and humand rights Obligations", 42, 47 **The Review** (1989).

of members of population group and to avoid discriminatory action against and stigmatisation of them in the provision of services, employment, travel..."

4. If ethical and legal reasons for protecting human rights are insufficient then only by strategies which respect human rights can the behaviour modifications be achieved which is essential to turning the tide of the AIDS epidemic at this stage.<sup>8</sup>

#### **Justification for Reasonable restriction on Human Rights:**

The jurisprudence of International human rights law permits reasonable restrictions upon basic human rights and fundamental freedoms. The restrictions in order to be reasonable must answer the following test:

1. They must be provided by law;
2. They must be necessary in a democratic society;
3. They are needed because of a pressing social need for them;
4. The restrictions adopted are proportional to the needs and are weighed against the adverse effects on the persons whose rights are restricted and upon the public which has its own interest in the free exercise of the rights concerned; and
5. The derogation must be for the protection of a legitimate interest of the Society. One such interest is "the protection of the rights and freedoms of others" and "the protection of public Health".

In the protection of "legitimate interests" there can be derogation from basic human rights. But the "Legitimate interests" do not provide a blanket derogation from basic human rights. In each case, it must be shown that the derogation is necessary to meet the pressing social need and is proportional to the risks involved. This a total quarantine for all persons infected with HIV would be grossly disproportional to the risk of further transmission of the virus (except possibly in the case of a person proved to be guilty of repeated deliberate transmissions). Similarly, universal testing or even widespread testing of particular groups will be disproportional to the benefits secured thereby. The risks of discriminatory use of the data secured, uncounselled notification of infection, false results with consequent diminution of precautions and diversion of scarce health funds, all render such strategies unnecessary in a democratic society, inappropriate to the pressing social needs of containing HIV/AIDS and disproportional to the limited benefits attained.<sup>9</sup>

#### **Right to liberty and Security of Person:**

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8 *Ibid* at 48.

9 *Id.* at 49

Article 9(1) of the International Covenant on Civil and Political Rights guarantees Right to Liberty and Security. It reads "Everyone has the right to liberty and security of a person. No one shall be subjected to arbitrary arrest and detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Thus, deprivation of liberty complete or partial except in accordance with the procedure established by law would militate against this human right mandate. One can only be deprived of his liberty by a procedure established by law which must be just, fair and reasonable. Liberty cannot be taken away in an arbitrary manner. Hence imposing a strict quarantine for HIV infected person would be violative of Human Rights. Some countries have adopted policies of expulsion of persons who are found to be HIV infected. People who have tested positive for HIV in Cuba are sent to a special HIV Sanatorium outside Havana. A Bangkok based organisation working on behalf of prostitutes, reported that 20 Burmese sex workers who had been deported from Thailand were found to be HIV positive upon their return and as a result, were killed.<sup>10</sup> Many countries have laws providing for compulsory detention of AIDS patients. The compulsory detention of such persons is absolutely disproportionate to the benefits which the states want to achieve. The AIDS infection lasts till a person dies, it may take a period of ten years or more before a person faces death. If a person is detained for a period of 10 years, he and his family is ruined both psychologically as well as economically, therefore, laws and restrictions should be directed at the activity of the individual which is harmful rather than the individual himself.

### **Right to Privacy:**

Article 17(1) of the ICCPR provides: "No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence nor to unlawful attacks on his honour and reputation"

Article 17(2) reads "everyone has the right to the protection of the law against such interference or attacks;

In order to combat AIDS a number of strategies have been proposed e.g., mandatory testing for HIV, compulsory registration of suspects, mandatory collection of data on suspects, making HIV or AIDS notifiable diseases, the provision of test result to third parties and the criminalisation of behaviour considered likely to spread HIV/AIDS. These strategies or measures in respect of AIDS would appear to conflict with the right to privacy of an individual. Consequently, persons infected with the virus are entitled to the same privacy, confidentiality and human treatment as that granted to persons suffering from other fatal disease. It would therefore, be relevant to consider the issues of necessity, proportionality, legitimacy and reasonableness of the strategy used or proposed in the context of the right to privacy of HIV or AIDS suspects.

### **Right to Marry and Found a Family:**

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10 *Supra* note 4.

Article 10 of the International Covenant on Economic, Social and Cultural Rights recognises that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of Society, Marriage is recognised so long as it is "entered into the free consent of the intending spouses". Article 12 of the European Convention on Human Rights recognises "men and women of marriageable age have the right to marry and to found a family, according to the National laws governing the exercise of this right".

These provisions nowhere prohibit pre-marital HIV testing. Hence if pre-marital HIV testing is made mandatory that will not derogate from this right. But a prohibition on the marriage for persons found positive would clearly be violative of these Human Rights mandates. Whether Laws forbidding women infected with HIV from bearing children would be infringing such human rights stipulations needs a thoughtful consideration. Therefore, what is important to be considered is the necessity, legitimacy, proportionality and reasonableness of such restrictions contained in various laws.

### **Freedom of Movement:**

Article 12(4) of the ICCPR provides for everyone lawfully within the territory of a State, liberty of movement and freedom to choose his residence. This article further provides to the individual, freedom to leave any country including his own. Such freedoms are subject to restrictions necessary *inter-alia* for "public health". This means that no one has to be arbitrarily deprived of the right to enter his own country. These rights are available only to the nationals and persons who are lawfully within the countries. Aliens and Stateless persons do not enjoy any such right.

Recently some countries have introduced restrictions on the entry and movement of persons with HIV/AIDS. No such restrictions should be placed upon its own nationals. Those placed upon other persons lawfully within the territory of a country must be justified on the ground of necessity, legitimacy and proportionality. Such restrictions must emanate from the law of the concerned country and may not be imposed arbitrarily. The blanket restriction on the movement of HIV infected person is mostly disproportional to the risk of spreading the infection. Many scientific arguments have been put forth showing the ineffectiveness of visa restrictions as regards international travellers who are HIV positive.<sup>11</sup> The Right to go abroad/International travel is an important attribute of one's personal freedom. It is a contribution to International peace and brotherhood by bringing the nationals of different countries closer to each other.

There is no right to spread an infection internationally but the widespread requirement of border checks, health certificates of the post entry examinations of aliens would seem in the present state of the epidemic at least to be disproportional to the benefits secured thereby. In the present scenario AIDS have become rampant and exist in all countries. the requirement of AIDS-free certificates would add enormously to the cost of travel to impede greatly the travel of poorer persons and provide no sure protection because of false positives, the "window period" before anti-bodies appear and the need for constant re-testing at disproportional cost to the benefit gained.

11 *Supra* notes 1 & 6.

### **Right to work and Gain a Living:**

Article 6(1) of ICESCR stipulate that the "State parties to the present Covenant recognise the Right to work, which include the right of everyone to the opportunity to gain. In Cambodia, some prospective employers require applicants to be tested for HIV and a positive result precludes any possibility of being hired. People who have tested positive for HIV in Cuba are sent to a special HIV Sanatorium outside Havana. <sup>12</sup>The ILO has condemned the blanket requirement of such testing as a pre- condition to employment and is of the view that such a screening would be disproportional to the benefits obtained except in such occupations where there is a very high risk of spreading the infection.

### **Other right: Social, Economic and Political:**

there are many other human rights which are going to have an impact on the policies on AIDS e.g the right to education, social security and assistance and freedom from inhuman or degrading treatment or punishment. Derogation from human rights in situations of "public emergency" and "public Health" is permissible because those who design legislations, strategies and policies on AIDS/HIV should familiarise themselves with the basic rights so secured and the limited circumstances in which derogations from them will be permissible under the International law.

Examples of discriminations and violations of rights at national level include compulsory testing for foreign students in Germany, Belgium, Russia and Czechoslovakia; Africans seeking work permit in Cyprus; foreigners other than Europeans who seek to work in South Africa; applications for immigration visas and refugees and aliens seeking residence permits in USA (but not tourists, students and business visitors) <sup>13</sup> Persons who are HIV positive or thought to be infected have been refused life insurance and marriage licences, and children have been barred from schools. In Brazil, Costa Rica, Puerto Rico, UK and USA such persons have been denied medical or dental treatment and reportedly segregated and abused in hospitals and clinics. <sup>14</sup>

Violations of civil rights in the criminal justice system include court appointed attorneys refusing to represent persons thought to be infected and many courts demand testing for the virus as a condition of bail, parole or probation for defendants accused of sex or drug related crimes. The imposition of prison sentences for persons having infected another even unintentionally has also been reported. <sup>15</sup>

### **The Case of Thailand:**

Breaches in human rights in the context of HIV/AIDS are quite common in Thailand. The Thai Red Cross has helped defeat proposed legislation that would have made HIV

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12 *Ibid.*

13 WHO Foreign Office Document "AIDS related restrictions apparently in force - April 1983."

14 "The third Epidemic : Repercussions of the Fear of Aids", *Supra note 2* at 36.

15 *Supra note 2* at 36.

testing mandatory for all those belonging to a risk group and would have quarantined all those who tested positive. They were also instrumental in the repeal of a law prohibiting entry of foreign travellers who are HIV positive. The Thai Red Cross was given the special permission to set up an HIV testing and counselling clinic that would not be obliged to divulge the names and addresses of HIV positive people. In October 1991 the Ministry of Health's reporting regulations which were unable to ensure confidentiality were abolished.

## **Conclusion**

Experiences have shown that inequity and discrimination are as important to combat as the virus itself. They constitute the stumbling blocks on the road of prevention and have proved counter-productive in preventing the spread of AIDS. An informed, equitable treatment of people with AIDS or HIV is fundamental of the care require.

Unfair legislation, discriminatory practices and often completely irrational behaviour towards people with HIV or AIDs exist all over the world. impartiality and humanity must guide the activity towards AIDS to end discriminatory practices.

Each nation must recognise, the magnitude and impact of HIV infection. The battles will not always be legal, the question of human rights is much larger than law because discrimination can creep into every crack, crevice and corner of society.

It is not only an issue of mandatory testing or confidentiality of test results. It includes access to health care, gender issue and sexual orientation. National societies of the Res-corss have been given the mandate to fight for human rights in the context of HIV/AIDS. They must make this their first priority and see to it that all their AIDS related activities encompass or contribute to the promotion of human rights. People with HIV or AIDS have the right to lead a dignified life. Anything that denies them that dignity must be declared as violative of Human Rights. The fight against AIDS should never be used as a pretext to undermine the respect of human rights and fundamental freedoms.

States should reinforce the existing international treaties for the protection of human rights and fundamental liberties of HIV infected persons or conclude new ones within the frameworks of the organisations for multi-lateral, regional and sub-regional cooperation. All information on AIDS must be scientifically verified before it reaches to the public, it will contribute to the avoidance of discrimination.

In the past behavioural changes have often proved a significant factor in disease control and at present, this seems to be the only major hope in preventing the spread of AIDS. thus "the only vaccine we have at the moment... is knowledge".