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HIV AND AIDS: LEGAL AND ETHICAL ISSUES**Venugopal. B. S.**

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Abstract: Acquired immunodeficiency syndrome, called as 'black death of our time'¹ caused by human immunodeficiency virus still remaining a challenge to the medical world has spread its tentacles ominously that millions of people have breathed their last and others afflicted by it are counting days in great misery and despair for pre-mature extinction of their life.² The tragedy is that it has spread from the high risk group to common population assuming a menacing proportion.³ It has not remained as a mere matter of health to bother only medical professionals. A person afflicted by it invites social stigma of a highest degree, which is worse than apartheid. It has generated such sensitive and boiling legal, ethical and social issues posing serious challenge to the medical professionals, health policy makers, law makers and common men. In this article an attempt is made to critically analyse the legal, ethical and social issues stemming from HIV/AIDS.

Keyword: HIV, Ethical Issues, Legal, medical professionals.

INTRODUCTION:

AIDS, meaning of: Acquired immunodeficiency syndrome is an infectious disease caused by the human immune deficiency virus.⁴ The two variants of HIV known as HIV1 and HIV2 eventually cause AIDS.⁵ The centre for Disease Control and Prevention (CDC) has laid down a classification system for HIV infected adolescents and adults on the basis of medical conditions associated with HIV infection and CD cells + T lymphocyte counts.⁶ The disease which can be moderately counted for causing cellular immune deficiency are classified as neoplasia and a wide range of opportunistic infections such as protozoa and helminthic fungal, bacterial and viral.⁷

ROUTES OF TRANSMISSION⁸**HIV is transmitted mainly through the following routes:**

Sexual: the most frequently encountered mode of transmission is sexual contact with an infected person. Substantially it is caused by heterosexual contact. Transmission resulting from homosexual contact is not uncommon, for eg: in 2009, in the USA 64% of the new cases of HIV infection was the result of homosexual contact. Sexual contact may be by way of coitus per vaginum, perosor per anus.

Body fluids: The second commonly encountered route of transmission is blood and blood products. Substantial number of cases emerges from transfusion of HIV contaminated blood. In addition to that blood borne transmissions can be through needle sharing during intravenous drug use, needle stick injury and medical injections through unsterilized equipments.

Mother to Child: The third most common way of HIV transmission globally is from the mother to the child during pregnancy, delivery and through breast milk. It is also known

as vertical transmission. It has accounted for 90% vertical transmission. It can be reduced with appropriate treatment to 1%. It can be avoided by mother taking anti-retroviral treatment during pregnancy and delivery, an elective caesarean section, avoiding breast feeding and administering anti-retroviral treatment to the new born. But the treatment is expensive that HIV infected patients in developing and underdeveloped countries cannot afford it.

Exposure to faeces, nasal secretions, saliva, sputum, sweat, tears, urine or vomit of an HIV infected patient do not result in risk unless they are contaminated with blood.⁹

The following results are not shown to be involved with the HIV transmission.¹⁰

Close personal contacts, including using, eating and drinking, utensils, ordinary social kissing, and household contacts, including sharing towels, toilets, using swimming pools and Jacuzzis, professional contacts with health care workers including doctors and dentists and insect bites.

H.I.V. Testing

The following tests are resorted to ascertain the presence of HIV¹¹

Elisa: The enzyme -linked immuno suppressant assay (Elisa) or enzyme immuno assay (EIA) is the routine test employed for HIV which has a high sensitivity. In this serum of a person is diluted 400 fold and applied to a plate to which HIV antigens have been attached. If anti bodies to HIV are found in the serum they may get attached to the HIV antigens. Subsequently the plate is washed to remove all other components of the serum. A specially prepared secondary antibody¹² linked in advance to enzyme is applied to the plate, followed by another wash. The proportion of enzyme depends upon the secondary antibody. Substrate¹³ is

applied to enzyme. Catalysis by the enzyme leads to colour change. The test indicates antibodies against HIV, but it does not show the presence of virus itself. There are possibilities of false positive and negative results.¹⁴ It follows that the test is not conclusive. Immediately after the entry of virus into the body, it does not show-up in the blood. It may take from 3 weeks to 3 months, which is known as window period. During the window period an infected person can transmit HIV to another person which cannot be detected immediately. Anti-retroviral treatment during the window period can be postponed by 12 weeks. More expensive tests viz., P24 Antigen Detection and Polymerase Chain Reaction (PCR) are available. They can reduce the window period by 7 days and 1 day respectively.¹⁵

Western Blot Method: As discussed above Elisa test may show false positive or negative result. It must be confirmed by the western blot method which is also like Elisa Method, is an antibody detection test.¹⁶ Unlike Elisa, in this procedure the viral proteins are well separated first and immobilized. Subsequently the binding of serum antibodies to specific HIV proteins is visualized. Once the proteins are well separated they are transferred to the membrane. There after the same procedure of viral bands confirms positive result. Absence signifies that result is negative. But there is no universal criterion to interpret the western blot method.

Rapid or Point of Care Test: Rapid antibody tests are qualitative immuno assays. They are intended to use as a point of care test to assist in the detection of HIV infection. These tests are to be used in tandem with the clinical status history and risk factor of the person infected. The positive predictive value of this test in low-risk group has not been evaluated so far. This test also may not show positive result. But it is not conclusive of the fact that the person has tested negative. In case of positive result, it must be confirmed by western blot method.

There are other tests¹⁷ which are not regularly applied. The most popular methods are Elisa and Western Blot Method. In the first instance Elisa is resorted to and the result of the former either positive or negative is confirmed by the latter.¹⁸

United Nations Guidelines on HIV and Aids and Human Rights

These guidelines venture to provide guidance to the states as to how to protect the human rights of those infected by HIV/AIDS.¹⁹ The reason is that the nexus between HIV and human rights is profound.²⁰ The impact of vulnerability to HIV feeds on violations of human rights by way of discrimination and violence against the HIV infected.²¹ It has its own repercussion on the health sector by way of an unprecedented challenge of providing medical care to the already HIV infected and on the policies to be adopted by the administrative agencies to avert the future proliferation of HIV and protect the human rights of the HIV infected which is a daunting task ahead indeed. Accordingly the guidelines seek to achieve the following objectives.

A) National frame work integrations: HIV policy programme

responsibilities across all branches of government, community support to combat the problems that has emerged from aids infection, effective review of public health legislation to address the issues raised by HIV, reformation of criminal laws to make it compatible with international human rights obligation pertaining to HIV infected, enactment of anti-discrimination laws by the members, states to protect the HIV infected and the vulnerable groups especially women and children, access to prevention of HIV infection, effective treatment, care and support of HIV infected, legal support services that will help the HIV infected to appreciate their legal rights, protection to women, children and other vulnerable groups, creating public awareness to change discriminatory attitude towards the HIV infected by way of education training and through the media, development of public and private sector standards mechanisms for implementing the same, state monitoring and enforcement of human rights and co-operation of the state to all international agencies concerned with the issue of protection of human rights of the HIV infected.

The part III of the document specifically contemplates the right to privacy of a HIV infected person. The right to privacy carries with it con-committant rights of confidentiality that all particulars relating to an HIV infected person should be strictly kept confidential. However on compelling reasons could it be disclosed, has remained a controversial question.²² Another moot question is whether compulsory HIV testing much against the wish of a person violates his right of privacy?²³

HUMAN RIGHTS PERSPECTIVE

Human Rights are those primary and inalienable rights for which every person is entitled by virtue of being born as a human being. Therefore an HIV affected person is not an exception to this. He is entitled for this right without any distinction whatsoever.²⁴ He has right to life, liberty and security of person.²⁵ He shall not be subjected to cruel, inhuman, degrading treatment or punishment.²⁶ He is entitled for recognition as a person under law²⁷ and equality before law and equal protection of law.²⁸ He shall not be subjected to arrest and detention or exile only for reason of being infected by HIV.²⁹ He can approach the tribunals if his human rights are violated.³⁰ His right of movement cannot be curtailed.³¹ He is entitled to marry and found a family³² and equal access to public service in the country.³³ He is entitled for free choice of employment, just and favourable conditions of work and above all protection against unemployment.³⁴ Above all he shall not be subjected to arbitrary interference with his privacy and attack on his honour and reputation.³⁵

GUIDELINES OF WORLD HEALTH ORGANISATION³⁶

The World Health Organisation also has raised its voice in contemplation of the right to privacy of an HIV infected and against discrimination of such persons. The guideline strongly objects the practice of isolating AIDS patients. It states that the isolation cannot be justified on public health rationale or quarantine or a person's status based on his HIV status or his sexual behaviour. HIV positive

patients cannot be refused treatment. It is the obligation of the state to build adequate infrastructure to address the special needs of HIV positive patients without secluding them from the main stream of the society. States should motivate the private hospitals to build infrastructure required for the treatment of HIV positive patients.

Specific Legal and Ethical Issues

HIV/AIDS as it appears from the available literature has given rise to the following legal and ethical issues.

1. The duty to treat an aids patient:

There exists a contractual relation between a 'doctor and patient'.³⁷ The offer which proceeds from a patient if accepted by a doctor, it culminates in a binding contract.³⁸ It is obvious then that a private doctor cannot be compelled to treat every patient who approaches him for treatment against his will as a contract is a result of mutuality of free consent.³⁹ Even an emergency is also not an exception to this.⁴⁰ The observation of the Honourable Supreme Court in *ParamanandaKatara v. Union of India*,⁴¹ that in an emergency situation the doctors are duty bound to extend medical treatment to protect the life of a patient, cannot be accepted as a proposition laying down a binding principle. It is nothing but re-iteration of the moral obligation of the doctors as contemplated in the code of medical ethics for doctors. But the doctors employed in government hospitals are bound to treat the patients by reason of their contractual obligation towards the government.⁴²

It is evident from the above discussion that there is no legal duty on the part of a private doctor to treat a patient. But code of medical ethics for doctors enjoins a moral obligation on every doctor to treat every patient without any distinction whatsoever and render service to humanity with full respect for human dignity.⁴³ It follows that a doctor cannot refuse to treat a patient because he is suffering from AIDS that the former is exposed to risk. It violates his moral obligation. Further it is unethical on the part of a doctor to refuse treatment to an aids patient on his moral judgement that it is the life style or activities of the patient which is responsible for his condition. Violation of the code of conduct results in serious professional misconduct.

2. Duty to inform public Health Authorities:

It is the duty of the public health authorities to ensure the good health of the people and take necessary measures to that effect. It does not require any over emphasis that the doctors have a role to play in this regard especially in case of contagious disease. If required under any public health law a doctor is under an obligation to inform the public health authority any communicable disease under his care.⁴⁴ As aids is a contagious disease of diabolic nature, the obligation assumes a greater dimension. The code of medical ethics also re-iterates this obligation of divulging communicable disease to the public authorities in conformity with their rules and regulations.⁴⁵

3. Duty to obtain consent for HIV testing:

A doctor should obtain consent of a patient for performance of any medical procedure or administration of any treatment failing which he invites liability for battery.⁴⁶ Therefore it follows that blood of a patient cannot be tested for the presence of HIV without his consent. In the absence of the consent it also infringes the principle of bodily autonomy which confers an exclusive right of self-determination to determine what shall be or shall not be done with his body.⁴⁷ It will be a violation of his right to privacy also.⁴⁸ Consent may be either expressed or implied.⁴⁹ The extent of a doctor's authority depends upon the scope of the words written or spoken.⁵⁰ As the law stands now, a doctor needs to obtain only general consent, which relieves him from obtaining sectional consent for the different components of the treatment.⁵¹ The moot question is when a patient goes to a doctor for some ailment along with routine diagnostic test, can the latter prescribe blood test for the presence of HIV especially in the backdrop of the patient's condition remaining as it is. It cannot be done as presence of HIV in body invites a social stigma of a serious nature. Even otherwise it is the discretion of the patient whether to undergo HIV testing or not.

It is also well settled proposition of law that the consent obtained must be 'also informed One'.⁵² Accordingly before the test where a patient has given consent for the same a doctor should divulge the various available tests and their accuracy and must undertake precounselling of the patient failing which he invites liability for medical negligence.⁵³ But where he has informed the patient the routine tests and their accuracy he does not attract liability for deficiency in service. In *A. Amudha v. Y. Vedakumari*,⁵⁴ a general practitioner advised the complainant to undergo blood investigations. She was subjected to Elisa test which revealed that she was HIV-1 positive and HIV negative. Thereafter the doctor advised her to go to government hospital, Chennai for getting it confirmed by Western Blot Test. The blood test which was conducted there revealed that she was not afflicted with HIV. She brought an action against the doctor for deficiency in service on the ground that diagnosis of HIV was made in a negligent manner. The Tamil Nadu State Consumer Redressal Commission recording a verdict in favour of the doctor held that as Elisa test was not conclusive for the presence of HIV and it must be confirmed by western blot test.

It is obvious from the facts that the complainant with the knowledge of HIV testing submitted her for blood investigation from which her consent could be inferred. It is the general practice of doctors to suggest Elisa test at the first instance as the western blot test is expensive.

In case of minors, consent of their parents or guardian must be obtained.⁵⁵ But the moot question is whether parents would consent HIV testing of their children as they invite the trouble if their children are tested positive.

The consent of any patient for HIV testing must be voluntary. It must be done with his knowledge that he is subjected to HIV testing. But reports in India indicate that as many as 95% of the patients awaiting surgical procedures are involuntarily tested.⁵⁶

4. Duty of confidentiality:

there is a legal as well moral obligation on the part of a doctor to maintain confidentiality of medical records, the conceptual foundation for which could be located in the Hippocrates oath⁵⁷ and Code of Medical ethics.⁵⁸ Accordingly he is bound to maintain secrecy of the information confided to him by his patient and the conclusion reached by him on the basis of that information.⁵⁹ Confidences concerning his personal and domestic life confided to a doctor and defects in the disposition and character of a patient observed in the course of medical attendance shall not be divulged unless it is warranted by law.⁶⁰ However a doctor must determine whether his duty towards the society warrants such disclosure to protect a healthy person from any communicable disease to which he is above to be exposed.⁶¹ If so, he may disclose with immunity from liability. In such a situation he is expected to take action in a way how he wishes others to act with respect to his family members.⁶² For e.g., if the daughter of a doctor is getting married and the would be son-in-law is suffering from HIV, he certainly expects the would be son-in-law either to inform the fact or abandon marriage or his family members to do the same or any person who knows it to reveal it. The reason is very evident that her life will be certainly at peril as she has to lead sexual life with a HIV infected person. Accordingly if any girl is infected with HIV her duty towards the society will certainly warrant disclosure.

In 'X' v. Hospital 'Z',⁶³ the petitioner was employed as a senior officer in the health service of a north eastern state. He was asked by his government to accompany a patient to Apollo Hospital, Chennai for further treatment. As the patient required blood, the petitioner donated blood which was found infected with HIV. The hospital revealed the matter not only to the petitioner but also to the patient. The patient on returning to his home divulged the information regarding petitioner's condition to his community. In effect the petitioner is subjected to severe social ostracism and his marriage was called off. He filed a complaint in National Consumer Dispute Redressal Commission for breach of the duty of confidentiality on the part of the hospital contending that he was put to mental trauma and stress. His chief contention was that as the hospital had every right to reject the HIV infected blood, it should not have revealed the fact to the patient. But the complaint was dismissed. On appeal to the Supreme Court, it made the following important observations.⁶⁴

“The right to privacy which is an essential component of Article 21 of the Indian Constitution being not an absolute right is circumscribed by certain restrictions like action that might be lawfully taken for the prevention of health or freedom or public disorder or protection of health or freedom or rights of others. The disclosure neither violated the duty of confidentiality nor the right of privacy of the petitioner as the prospective wife would have been infected with HIV if the marriage were to be solemnized and consummated. The right of a person who is suffering from communicable disease or impotency to marry until it is cured shall be treated as a suspended right. A person who is suffering from virulent venereal disease should be banned

from marrying so as to prevent him from spoiling the life of an innocent person. If there is conflict between two fundamental rights, as happened in this case, the right of privacy of the petitioner and the right of the prospective wife to lead a healthy life as envisaged under Article 21 of the Constitution one which advances the public morality or public interest would prevail warranting its enforcement by a court of law. Accordingly a doctor may incline to divulge the diagnosis to a third party other than a health professional, where there is an identifiable risk of a specific person being exposed to infection, if not disclosed or a doctor may consider it as his duty to reveal to the sexual partner irrespective of the wish of the person infected”.

The court further equated HIV with a venereal disease of communicable type. The court has further observed that HIV is a product of undisciplined sexual impulse which will not spare any one irrespective of his social strata. It is submitted that this view cannot be accepted as the discussion above shows that other than sexual contact there are other routes of transmission.

The above decision being path breaking one has laid down significant propositions of law in the sphere of confidentiality of medical records and the duty of a doctor to maintain secrecy. It should be noted that in the above case the information was not revealed directly to the prospective wife. It was revealed to the patient who accompanied the petitioner but for which the marriage could not have been called off and an innocent woman would have been exposed to risk of her health and life. It follows that if the means justifies the end that would be an acceptable proposition. But breach of duty of confidentiality must be examined in the light of facts of a particular case.

Consent of HIV infected patient either express or implied for disclosure of his condition is good defence for a doctor in an action for breach of confidentiality.⁶⁵ But an HIV infected patient generally will not give consent for disclosure if it is the result of an undisciplined sexual impulse that it exposes him to social ostracism. Even otherwise where the cause of transmission is other than sexual contact, in a conservative society like India, thinking of the people moves in the other direction of attributing exclusively sexual contact as the route of transmission. Naturally it prevents him from giving his consent. Another issue to be addressed is where the patient gives consent, what is the extent of disclosure, should it be disclosed to the entire society or to the persons who are going to be affected immediately, i.e., to use the language of *Donough v. Stevenson*,⁶⁶ the neighbour.

Another question which needs an answer is whether a doctor is justified in revealing the information to the health care professional? As contemplated by the Honourable Supreme Court a doctor may wish to reveal the information to a health care professional when failure to disclose would expose the health of any member of health care team into serious risk.⁶⁷ Otherwise where a patient does not give his consent for disclosure his right to privacy should prevail. Similar principle as contemplated above applies to the sharing of confidential information between specialists or with health care professionals like nurses, laboratory technicians and dentists.⁶⁸

RIGHTS OF AN HIV INFECTED

a) Rights to privacy: it is not specifically contemplated under the constitution. It is recognised as fundamental right as a part of judicial interpretation of right to life as envisaged under Article 21.⁶⁹ It is a right in rem. It signifies one's right to be left alone.⁷⁰ It is a right to live in a particular way one chooses for himself to enjoy his life, family life, honour and reputation.⁷¹ It confers a person the right of self-determination to determine when, how and to what extent information regarding him is to be communicated to others or not to communicate at all. It follows that an HIV infected has a right to be left alone. But right to privacy itself is not an absolute right. It is subject to reasonable fetters that under all circumstances it does not impose a corresponding duty of confidentiality.⁷² Law has recognised certain exceptions to the duty of confidentiality. Therefore subject to these exceptions only an HIV infected can enforce the right to privacy or duty of confidentiality which is imposed on the world at large. In *M. Vijaya v. The Chairman and MD, Singareni Collieries Co Ltd*,⁷³ the High Court of Andhra Pradesh has held that it is the obligation of the state to identify HIV patients to give effect to Article 47.⁷⁴ Therefore any such measure taken by the state is constitutional provided the law designed to achieve this objective does not violate the 'fair' and 'reasonable requirement' as mandated by Article 21 of the Constitution. The court further observed that the right to privacy can be circumscribed for a compelling public interest and in a situation of conflict of fundamental rights, one which advances public morality eclipses the other. It follows right to privacy must give way to any other fundamental right, which advances the cause of public interest. Therefore an HIV infected patient's right to privacy vis-à-vis confidentiality is not an absolute right and it must be read in the light of legally recognised exceptions. In *Mr 'X' v. Hospital 'Z'*⁷⁵ the Supreme Court held that an HIV infected patient's right to confidentiality is subject to exception by reason of fatal infection.

b) Right to treatment without discrimination:

An HIV positive patient is entitled for treatment without any discrimination whatsoever. He is also a human being that the cause of his HIV positive status is immaterial. In *'X' v. Hospital 'Z'*, the Supreme Court observed,⁷⁶ "..... People with HIV/ AIDS deserve full sympathy and are entitled to all respects as human beings..... Their security cannot and should not be avoided, which otherwise would have had psychological impact upon them. They have to have their avocation and government jobs or service cannot be denied to them."

c) Right not to be isolated;

An HIV infected patient cannot be isolated by reason of his HIV positive status. In *South India AIDS Action Programme Represented by Shyamala Natraj v. State*,⁷⁷ four HIV infected women were indicted under the Immoral Traffic (Prevention) Act, 1986. Even though they had completed their periods of sentence, they were detained in the government vigilance home Mylapore. The petitioner filed a petition challenging the validity of such detention. A

division bench of Madras High Court allowing the petition ordered for their release.

It is evident from the facts that their detention was unlawful, which curtailed their personal liberty. Once if a person undergoes the prescribed sentence, continuation of his detention in the jail amounts to an inroad into his personal liberty which can be deprived of only in accordance with the procedure established by law. The continuation of the detention of HIV infected even after the completion of sentence would further amount to their isolation. There is a possibility of the HIV infected persons intentionally transmitting HIV to innocent persons through sexual contact, at times by way of revenge against the society to return it where from he got it. On the other hand, public interest demands that spreading of HIV should be arrested. Therefore it appears through a proper legislation the HIV infected patients can be secluded from the rest of the society. In *Lucy R. D'souza v State of Goa*,⁷⁸ under the Goa Public Health Act, 1987, the health authorities were required to isolate those found HIV infected as HIV under the Act is considered as a contagious disease. It provided further that a health officer on the ground of reasonable suspicion that a person was suffering from HIV could compulsorily collect blood for investigation and isolation of a person found HIV positive. The above provision was challenged by the petitioner. It was contended on her behalf that there was no scientific foundation for isolation, the discretion conferred upon the health authorities was unguided and uncontrolled and the provision for isolation was unjust as it did not contemplate right to hearing. Rejecting the contention of the petitioner, the High Court upheld the order of Goa Government ordering for three months isolation. In this regard, it observed,⁷⁹

'while isolation was an invasion upon the liberty of a person, in matters like this (the) individual's right has to be balanced against public interest.....isolation would protect an AIDS patient from himself in case he becomes desperate and loses all hopes of survival.....segregation was necessary since current preventive measures had failed to check the spread of AIDS.....the provisions of Goa Public Health (Amendment) Act, 1987 were reasonable and valid and not in violation of either Article 14 or Article 21' of the Constitution of India.

There is a difference between the first and second case that in the first case the detention did not have any force of law. But in the second case the segregation had force of law. The decision of the Bombay High Court that segregation does not violate any fundamental rights is laudable. It should be accepted, that one should enjoy his fundamental right, but not at the cost of others fundamental rights. The Public interest cannot be put into oblivion. It follows from the decision that mandatory HIV testing on reasonable suspicion is legally permitted. There is no other alternative. But the suspicion should be based on genuine factors like undisciplined sexual life, women involved in prostitution, father or mother suffering from HIV that children may be subjected to testing, any spouse suffering from HIV that the other spouse may be subjected to testing, a decision arrived at by a doctor in good faith that a patient is unable to recover from the ailment due to immune deficiency syndrome etc.

d) Right to marry: The right to life contemplated under Art 21 of the Constitution encompasses the right to marry and procreate. The same position is taken under various international covenants on human rights. But the right of an HIV infected to marry gets suspended during the period when he is HIV positive.⁸⁰ Knowingly that he is HIV positive, if he marries keeping the woman in ignorance of the truth, it invites criminal liability under Indian Penal Code.⁸¹ On marriage it is transmitted to the other spouse by way of sexual contact. The right of an HIV infected person should be balanced with the right of healthy life of a prospective spouse as contemplated under Article 21. Public morality warrants the protection of the right of the latter that it trumps the right of the former. If a HIV infected person reveals the truth to the prospective spouse and if still she/he determines to marry it cannot be prevented. But one of the roots of HIV transmission is mother to child. Therefore it curtails the freedom a child so born to lead a healthy life. Therefore right of a HIV infected person is not a matter of principle but of policy.

e) Right to employment: HIV infected person is entitled to opt for any employment of his choice. He must be protected against unemployment. He must be provided with fair conditions of work. The constitution also re-iterates the position by laying down equality provision and provisions against discrimination subject to the exception envisaged therein. Hence, it follows that an HIV infected person cannot be discriminated against with respect to his right to claim public employment⁸² but safety of the co-employees is also an essential component of this right.⁸³ Another factor that needs to be reckoned is whether he is physically and mentally capable of discharging his duties as required under the terms of the employment.

DUTIES AND RIGHTS OF HEALTH WORKERS

Another delicate issue is whether the health professional infected with HIV should withdraw themselves from the clinical practice and employment. There is a suggestion that they may endanger their patients. It has generated a considerable amount of public anxiety. The instances of transmission from health professionals to the patients are rare, unless it is intentional. But when a health professional thinks that he is infected with HIV in the public interest and on ethical ground he should undergo appropriate diagnostic testing and counselling. He should be under constant medical supervision. Further he should seek specialist advice as to whether he should continue in the clinical practice or employment as the case may be.⁸⁴ As the health professionals infected by HIV do not constitute a class by themselves, they are also entitled to the same rights and subject to same duties as that of any other HIV patient. If any health care professional contracts HIV by reason of his employment for the care of HIV infected patients, she is entitled to claim compensation. The Rajasthan High Court in a case,⁸⁵ where a lady doctor who died as a result of contracting hepatitis while in employment in a government hospital awarded Rs. 5,00,000 compensation to her father. The court also directed the Rajasthan Government to provide adequate infrastructure facilities and preventive measures

such as disposable syringe, disposable gloves, needles etc. to the resident doctors entrusted with the care of HIV/AIDS patients.⁸⁶ It follows from the above judgement that if a health care professional contracts HIV by reason of his employment he is entitled for compensation. But any amount of compensation cannot undo the fatal consequence

OBLIGATION OF BLOOD BANKS

One of the causes of HIV transmission is transfusion of HIV infected blood. There is an obligation on the blood banks and the hospitals to ensure that the blood is free from infection failing which if a patient contracts HIV they invite liability.⁸⁷ But the functioning of blood banks in India is so shocking that it will certainly create a tremor in the spine of any person.⁸⁸ It may prevent any patient from undergoing medical surgery with contaminated blood. Rather he may prefer to endure the agony without operation and voluntarily invite death instead of being infected with HIV which makes his life perpetually agonising for the rest of life. The naked truth is that the blood banks which are functioning throughout the country are collecting blood from the professional donors who are mostly drawn from people who are more susceptible to infection, without screening it for the presence of any infection. On being drawn its attention the Honourable Supreme Court of India in *Common Causev. Union of India*,⁸⁹ laid down valuable directions to the government for implementation to prevent the collection and transfusion of contaminated blood.

Criminal liability for intentional transmission of HIV

Any person who is infected with HIV either intentionally or with the knowledge that he is HIV infected transmits the same to any other person invites criminal liability under the Indian Penal Code.⁹⁰ A doctor may also similarly invite criminal liability if he is responsible for such transmission provided it falls within the ambit of a voluntary act.⁹¹

The Delhi Artificial Insemination Act, 1995

There is no comprehensive legislation in India integrating all ethical and legal issues that has emerged from HIV/Aids. The Delhi Artificial insemination Act, 1995, a piecemeal effort in this direction, enjoins an obligation on the semen banks to screen the donor for the presence of HIV 1 and 2 antibodies by 'Elisa Kit test'.⁹² At the end of three months once again, the donor of semen must be tested for HIV 1 & 2 antibodies to exclude the window period.⁹³ As the Elisa test is not conclusive, the written consent of the recipient of semen must be obtained where insemination is to be done on the basis of one Elisa test which shows absence of HIV infection.⁹⁴ The recipient must be informed of the non-conclusive nature of Elisa test and go for Western Blot Test which is conclusive. Yet, if the recipient persists for the performance of artificial insemination or implantation of an embryo created by such sperm based on the result of one Elisa test being negative on occurrence of any risk, the health professional or doctor cannot be held liable.

The English AIDS (Control) Act, 1987

The above Act provides for the collection and reporting of statistics relating to HIV information and AIDS, availability of facilities and staff for testing, consulting, treatment and measures framed for arresting spreading of HIV/AIDS.⁹⁵ The sale, supply or administration of any equipment or reagents to detect any HIV antibodies i.e., test kits without medical supervision is prohibited.⁹⁶ Pre-counselling of suspect HIV infected and post-counselling of HIV infected are contemplated under the Act.⁹⁷

CONCLUSION

AIDS which is more dreadful than a nuclear bomb making its presence all over the world has exposed the mankind to a horrendous ransom. The reason is that HIV/AIDS being a fatal infection still remaining a riddle to the medical science pushes the victim to a pre-mature death generally with a tag of social stigma of the price paid for an undisciplined sex life even though apart from sexual contact there are other routes of HIV/AIDS transmission. There are certain things which cannot cause transmission. Unfortunately a person ignorant of the real causes attributes it to involvement of an infected in prostitution for gratification of lust and promiscuity which may be true or may not be. Therefore it is submitted that very intensive and rigorous programmes must be conducted nationwide using all effective and available means to create awareness among people the roots of infection and consider an HIV infected person as a human being.

An HIV infected person is also a human being. By virtue of being a human being he is also entitled for human rights as contemplated by the Universal Declaration of Human Rights, United Nations Declaration and World Health Organisation's guidelines. Accordingly they cannot be secluded from the main stream of the society. They cannot be discriminated against. They are also entitled for right to life which encompasses the right to privacy. An essential component of right to privacy is right to confidentiality. Accordingly a corresponding duty is imposed on the doctors and health professional's not to divulge his HIV status. But a HIV infected person should not be allowed to enjoy his life at the cost of violation of human rights of others. Therefore public interest warrants disclosure especially to a person who is above to be exposed to infection. That is the situation where a HIV infected person enters into a marriage relationship. Under such circumstances the individual interest must give way to the public interest. Commendably the courts also taking stock of the dangerous situation have carved an exception to the right to privacy to accommodate public interest circumscribing it in favour of a disclosure to render law sensitive and vibrant.

Intentional transmission of HIV invites criminal liability. No doubt the perpetrator invites punishment. That does not alleviate the condition of an innocent victim of infection. What is done cannot be undone, as still medicine for HIV is in experimental stage. HIV infected person may spread the disease in order to take revenge against the society. What is required is to prevent him from spreading the disease rather than to wait for the committing of an offence and then to punish him. In such a calamitous situation there is

no option but to place shackles on his personal liberty. Inevitably he needs to be secluded from the main stream of the society. All available literature on the rights of an HIV infected must be read in conjunction with the demands of public interest and morality.

Law as stands now does not permit testing of a patient for HIV without his consent. Nothing should be concealed from a doctor. In order to ascertain the true condition of a patient, a doctor needs to use all diagnostic tests that he can decide the right course to be adopted. Therefore it is submitted that discretion must be conferred upon a doctor to subject a patient for HIV testing taking into consideration his condition. The obvious reason is that any patient suffering from Immuno Deficiency Syndrome will not respond to any treatment.

Doctors and health professionals should do proper pre-counselling before subjecting any person for HIV testing in a conducive way using their experience. Once it is found that a person is HIV positive post-counselling assumes greater importance that one has to fill confidence in him that he lives his rest of life positively. He should be properly advised not to transmit it to others and look at the society as an enemy.

HIV infected persons are entitled for their human rights. Others are also entitled for their rights. Exercise of human rights by the HIV infected should not be at the cost of undue encroachment on the human rights of others. Therefore a balance must be struck between the two.

The present Indian scenario of infrastructure, monitoring and treatment of HIV infected presents a dismal picture. There is a need to strengthen it at government as well as private hospitals. Further safety measures must be taken to protect the health of health professionals. The existing legal framework from which certain provisions are applied to the issues arising from HIV is not sufficient and effective to deal with them. Therefore it is submitted that a comprehensive legislation to address the delicate issues which have emerged from HIV/AIDS must be enacted at the earliest.

Sexual contact is one of the routes of HIV infection which substantially accounts for among the existing routes. The undisciplined sex life is the root cause for that. A disciplined sex life will go a long way in arresting the other routes of transmission as they are inter related. It warrants self-command and self-denial from vulgar indulgences. There should be discipline within from which law cannot supply. Law is not the panacea for all societal maladies. The change should come from within. The attitude of an HIV infected towards the society should be positive that they should not blame the society for what has befallen on him. As an expression of sublime thinking, the rest of the world, whatever may be the cause of transmission, must have sympathy towards the HIV infected which law cannot infuse. Blood banks have a positive role to play in curbing the spreading of HIV infection by ensuring that the blood is not contaminated one. All blood donors must be screened for all communicable diseases. In this regard it is submitted that all the directions and guidelines given by the Honourable Supreme Court must be implemented effectively.

To conclude, without ruminating what has already befallen, steps must be taken to prevent the progeny from

becoming the victims of AIDS- the Black Death.

END NOTES

- 1.K.Mathiharan&Amruth K.Patnaik(Edt.),Modi's Medical Jurisprudence,23rdEdn,2006,p.2006
- 2.According to the August 2008 Report issued by the Joint United Nations Programme on HIV/AIDS as of 2007approximately33 million worldwide are HIV positive, Sub-Saharan Africaand SouthEast Asia accounting substantially,medical-dictionary.the freedictionary.com \HIV+Aids
3. See supra n.1
4. See supra n.2
5. Ibid.
6. See supra n.1 at p.203. CD4 cells are those cells which have a glycoprotein called cd4 on the surface. These cells do not neutralise infection, but initiates response of the body to infection. They are the host cells that helps HIV in replication. HIV attached to CD4 cells eventually causes damage. See en.wikipedia.org visited on 19-6-2013. Lymphocyte is a kind of white blood cell in the vertebrate immune system. Ibid.
7. Ibid. Neoplasia signifies a pathological process that results in the formation and growth of a tumour, protozoa are a diverse group of unicellular eukaryotic organisms which are motile, helminthic means an agent that expels or destroys parasitic worms; see www.freedictionary.com visited on 19-6-2013
8. en.wikipedia.org/wiki/HIV/AIDS, visited on 19-6-2013.
9. Ibid.
10. See supra n.1 at p. 204
11. En.wikipedia.org/wiki/diagnosis of HIV/AIDS visited on 20/06/2013. These tests are conducted to detect HIV that causes aids in serum saliva or urine. They may detect antibodies, antigens or RNA.
12. antibody which binds to human antibodies.
13. see supra n.1 at p 20
14. Ibid.
15. Ibid.
16. In USA even though Elisa test shows positive result, it's not accepted unless it is confirmed by the Western Blot Method; see supra n-11
17. Like antigens test, nucleic acid based test. CD4 cell count, see supra n-11
18. Ibid.
19. See the 2006 consolidated version of international guidelines on HIV/AIDS and Human Rights. See data.unaids.org/publication/IRC-pub_07/jc_1252_international_guidelines-on.pdf visited on 20/6/3013
20. Ibid.
21. Ibid.
22. See for a discussion infra
23. See for a discussion infra
24. See Art 2 of the Universal Declaration of Human Rights, 1948
25. Id at Art. 3
26. Id at Art.5
27. Id at Art.6
28. Id at Art.7
29. Id at Art.9

30. Id at Art. 10
31. Id at Art.13
32. Id at Art. 16
33. Id at Art. 21(1)
34. Id at Art. 23
35. Id at Art .12, see also Art. 17 of the International Covenant on Civil and Political Rights.
36. See supra n.1 at p.206.
37. See I Kennedy & A. Grubb, 'Medical Law', London 2nd Edn, (1994)p.129
38. Ibid.
39. J Hurley v. Eddingfield, 59 N.E.Ind.1901
40. Ibid.
41. AIR 1989 S.C. 2039
42. Ibid.
43. See Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002; See also Hippocrates Oath.
44. See Goa Public Health Act, 1987.
45. See Supra n.43
46. I. Kennedy & A. Grubb, "Medical Law", London, 2nd Edition (1994) p.174
47. M. Arunachal Vadivel v Dr. N. Goplakrishnan (1992) 2 C.P.J.764 (Tamil Nadu S.C.D.R.C)
48. See for a discussion, infra.
49. Nathan, "Medical Negligence; London, (1957) P.159.
50. See supra n.46
51. For e.g. consent for operation involves consent for administration of anaesthesia, manipulations and the other incidental procedures.
52. Alan Meisel & Loren H Roth; "Towards an Informed Discussion of Informed consent; A review and Critic of the Empirical Studies" 25 Arizona L.R. 268 (1983)
53. Gerald Robertson, 'Informed Consent to Medical Treatment', 97 L.Q.R. 102 (1981)
54. Tamil Nadu SCDRC, OP no 96/98 dated May 21, 2002
55. Gillick v. West Norfolk and Wisbech Area Health Authority, (1985) 3 All E.R.402 (H.L)
56. Malavade J.A.B. et al (2002) Ethical and Legal Issues in HIV/AIDS and testing
57. Emily Jackson, Medical Law, Oxford, (2006) p.314
58. Id at p 320
59. Ibid
60. See supra n.1 at p 207
61. Ibid.
62. Ibid.
63. (1998) 8 S.C.C. 296
64. Ibid.
65. See supra n. 57 at p 337
66. (1932) AC 564
67. See supra n 1 at p 207
68. Ibid.
69. Karak Singh v State of U.P. & others, AIR 1963 SC 1295
70. Ibid
71. Art. 12 of UDHR
72. See for a discussion, supra
73. AIR 2001 AP 502
74. Art 47 of the Constitution imposes an obligation on the State to protect and improve the public health.
75. See supra n.63

- 76.Ibid
- 77.Madras High Court WP 3321/90 dtd 19th July 1990 (unreported)
- 78.AIR 1990 Bom 355
- 79.Ibid
- 80.See supra n. 63
- 81.See sec 269 of the IPC
- 82.See supra n.63
- 83.See supra n.83
- 84.See supra n.1 at p. 212
- 85.The Hindu 28th Aug 1998
- 86.Ibid
- 87.Naresh Kumar v Sunil Blood Bank &ors (1991) CPJ 645; SauSunithaVasantHeganawar&ors v Meraj Medical Centre (1994) II CPJ 504
- 88.See Common Cause v. Union of India AIR 1996 SC 929
- 89.Ibid.
- 90.See supra n. 80
- 91.Ibid.
- 92.See sec. 10 of the Act
- 93.Id at sec. 12
- 94.Id at sec. 14
- 95.See the schedule to the Act
- 96.See the relevant provision
- 97.Ibid.

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