

Rights of people living with HIV/AIDS in India in the light of the human immunodeficiency virus and acquired immunodeficiency syndrome (prevention and control) act,2017

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ABSTRACT

The wide spread abuse of human rights and fundamental freedoms associated with HIV/AIDS has emerged as a serious issue not only in India but in all parts of the world. The social, economic, legal and human rights dimensions of HIV epidemic has been rapidly increasing because of its significant threat not only to the fundamental rights but to the very existence of mankind. The public Health rationale states that to ensure effective HIV prevention and care, public health must include an explicit commitment to respect for human rights and dignity. Stigmatization and discrimination against people living with HIV/AIDS denies their rights to access treatment, information and other social and economic rights granted by the Constitution to its citizens. The result is that those most in need of such information, education and counselling are not benefited even where such services are available which in turn contributes to the vulnerability of others to infection and further spread of the virus. Protecting rights of those affected by HIV/AIDS is the best way of preventing the spread of HIV, as prevention, care and treatment will be accessed only if the individual is assured of the rights not only within the country but all around the globe. This paper examines the availability and adequacy of various national and international provisions with special reference to the landmark legislation, The HIV/AIDS(Prevention and control)Act,2017 which is brought on force from 10th September 2018.

Keywords:

Introduction

AIDS (Acquired Immune Deficiency Syndrome¹ or Acquired Immunodeficiency Syndrome) is a disease caused by a virus called HIV (Human Immunodeficiency Virus).² The virus attacks the immune system and leaves the body vulnerable to a variety of life threatening infections and cancers. Common bacteria, yeast, parasites, and viruses that usually do not cause serious disease in people with healthy immune systems can cause fatal illnesses in people with AIDS. The development of numerous opportunistic infections³ in an AIDS patient can ultimately leads to death.⁴

AIDS is perhaps the worst catastrophe that has struck mankind in the twentieth century. It is pandemic, a disease that is still without a cure. The scale of HIV/AIDS pandemic dwarfs the mortality rates of most of modern history's humanitarian crises, wars and periods of civil unrest. This incurable disease is capable of wiping out mankind if nothing is done to stop it from spreading. The HIV/AIDS scare on the one hand threatens the society and its cohesiveness, on the other hand it results in the denial of family and social comfort, solace and assistance to the diseased and the dying⁵. With no specific drug or vaccine yet available for its cure, there is a social stigma attached to the sufferers along with numerous myths and misconceptions about the spread of disease. In addition, the disease involves tremendous direct and indirect costs causing

¹ A syndrome refers to the concurrent symptoms or characteristics of a disease. It refers to a collection or combination of infections associated with a specific condition. AIDS is a syndrome. It consists of a combination of specific infections associated with the defective immune system.

² Rami Chhabra, *National AIDS Control Programme:A Critique*, Jan. 13 Eco & Pol Weekly103 (2007).

³ An infection that occurs more frequently or is more severe in people with weakened immune systems (such as people with HIV or people receiving chemotherapy) than in people with healthy immune systems.

⁴ Christian Nordqvist, *HIV/AIDS: Causes, Symptoms and Treatments*,(feb.2,2016,10.24AM), <http://www.medicalnewstoday.com/articles/17131.php>.

⁵ AditiTondan, *Free transport proposed for AIDS patients*, *The Tribune*, Oct 12, 2007 at 13.

great economic loss to the nation⁶. Therefore for developing countries where majority are poor, the disease can shake the very foundation of civil society.⁷

People around the world face barriers to accessing quality health care and enjoying the highest attainable standard of health. Why this occurs varies between countries and communities, but some barriers are present everywhere. These include the various forms of discrimination faced by people who are marginalized, stigmatized, criminalized and otherwise mistreated because of their gender, nationality, age, disability, ethnic origin, sexual orientation, religion, language, socioeconomic status, or HIV or other health status, or because of selling sex, using drugs and/or living in prison. One in eight people living with HIV reports having been denied health care. But examples of HIV – related stigma and discrimination go beyond denial of care or lower quality care, and include forced sterilization, stigmatizing treatment, negative attitudes and discriminatory behavior from providers, lack of privacy and/or confidentiality and mandatory testing or treatment without informed consent. In these contexts, discriminatory practices undermine people’s access to HIV prevention, treatment and care services and the quality of health-care delivery, as well as adherence to HIV treatment.⁸

The link between HIV, law and human rights is twofold. First, HIV has become a ground for denying people their rights. People living with HIV frequently face denials, discrimination and rights violations in public and private institutions, health care settings, employment, educational institutions, family and community, on the sole ground of their HIV status. Secondly, it is the denial of human rights that make certain populations more vulnerable to HIV than others. Specifically, groups and sub-populations that experience disempowerment and marginalization because they are dispossessed of rights or are unable to exercise them or are vulnerable to contracting HIV. ⁹Law, policy and judicial action that have always upheld the human rights framework, have a central role to play in effectively dealing with the spread of the HIV epidemic.¹⁰ Judiciary worldwide tends to be loaded and concerned with a few key issues. Firstly, discrimination on the ground of HIV status in the fields of employment, health care, education etc. Secondly the conditions under which this mechanism for prevention and control should be employed. Thirdly, the determination of their rights in the light of public policy. Finally, some additional issues pertaining to ‘otherwise qualified’ employees and the impact of discrimination on health care workers.¹¹

Human rights and public health share the common goal of promoting and protecting the well-being of all individuals, for that purpose various rules, guidelines policies and legislations has been passed not only to protect but also to regulate the conduct of individuals in the society so that the interest of the community as a whole can be secured. The promotion and protection of rights are necessary to empower individuals and communities to respond to HIV/AIDS, to reduce vulnerability to HIV infection and to lessen the adverse impact of HIV/AIDS on those affected. It does not matter if an individual is affected or infected by HIV, there cannot be any valid or effective response to HIV/AIDS without respect for the human rights, fundamental freedom and the dignity of human beings. It has been incorporated in various legal documents including State Constitutions and International Instruments.

1.1 International Rights

There are a number of International Conventions and treaties which have created human rights in favour of all persons generally and HIV infected persons specially. The formally recognized human rights are found in the Universal Declaration of Human Rights (1948) (UDHR)¹² and the two key international treaties namely

⁶ Gurjeet Singh, *AIDS as a Global Challenge :Some Socio-Medical-legal Issue*, 3 ISLJ 73 (2000).

⁷ P.S Sangal, *HIV/AIDS and the Law, AIDS in developed and developing countries-History And Emerging Trends*, III Souvenir, Interdisciplinary International Conference at the Indian Law Institute on AIDS –Law and Humanity 217(1995).

⁸ *Agenda For Zero Discrimination in Health Care*, (Jan.10, 2016,7.30 PM), http://www.unaids.org/sites/default/files/media_asset/Agenda-zero-discrimination-healthcare_en.pdf.

⁹ *Ibid*.

¹⁰ Kajal Bhardwaj & Vivek Diwan, *Legislating An Epidemic:Hiv/Aids In India*, 14 (1st ed. 2008).

¹¹ *Ibid* at 18.

¹² The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217(III) A as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected.

the International Covenant on Economic, Social and Cultural Rights (1966)¹³(ICESCR) and the International Covenant on Civil and Political Rights (1966)¹⁴ (ICCPR). Other important treaties further describe and elaborate human rights in particular contexts are International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹⁵, the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁶, and the Convention on the Rights of the Child (CRC)¹⁷. None of these treaties expressly identifies HIV/AIDS but human rights elaborated in these treaties can promote accountability in HIV/AIDS related issues. Human rights relevant to HIV/AIDS identified in these treaties and elaborated by other documents include the right to non-discrimination and equality, right to health, right to liberty and security of the person, right to privacy, right to seek, receive and impart information, right to marry and found a family etc. The rights may be spelt out in following style:¹⁸

1.1.1 *Right to Non-Discrimination*

The right to non-discrimination is a fundamental human right. The UDHR lays down that the principle of non-discrimination is fundamental to human rights law.¹⁹ It equally applies to people suffering from HIV/AIDS because they have to suffer a very high level of stigma and discrimination because of their HIV status.

Non-discrimination, equality in general and equality before the law in particular, have become a peremptory norm in international law. This right has become one of the fundamental principles of international human rights law. Non-discrimination and equality before the law has therefore been specified in various international instruments on human rights.²⁰

Similar provisions are found in the CEDAW, while realizing and emphasizing on the need of special protection of human rights related to women it lays down that the state parties shall take all steps to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education, health care and in the areas of economic and social life.²¹

¹³ *Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December, 1966, entry into force 3 January 1976, India acceded to the Convention on 10 April 1979.*

¹⁴ *Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, India acceded to the Convention on 10 April 1979.*

¹⁵ *Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969. India ratified the Convention on 3 December 1968.*

¹⁶ *Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, India signed the Convention on 30 July 1980 and ratified it on 9 July 1993.*

¹⁷ *Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, India acceded to the Convention on 11 December 1992.*

¹⁸ *HIV/AIDS and Human Rights – International Guidelines*, United Nations, New York and Geneva, (1996).

¹⁹ UDHR, Preamble: whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms.

²⁰ **ICCPR, Article 26 protects the right against discrimination, it says that** all persons are equal before the law and are entitled without any discrimination to the equal protection of the laws. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

²¹ CEDAW, Article 10 states that parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women;

Article 12(1): States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

Article 13: States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women,

Children who are infected and affected by HIV/AIDS face psychological distress, discrimination and stigmatization, increased malnutrition, lack of security, lack of parental guidance, loss of access to health care, fewer opportunities for schooling and education, loss of inheritance, homelessness, vagrancy, starvation, crime and exposure to other infections. Article 2 of the CRC states that all the States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family member.²² No discrimination should be suffered by children in the field of education, leisure, recreational, sports, and cultural activities because of their HIV/AIDS Status. Children have a right to access health and social services on an equitable basis, irrespective of their HIV/AIDS status or that of the members of their families.²³

The Convention against torture defines torture as any intentional act, inflicted for reasons based on discrimination of any kind, which causes severe physical or mental suffering, and is committed with the consent or acquiescence of a public official.²⁴ Mental or physical suffering inflicted on a HIV infected person based on his status is covered within the definition of torture in the Convention and hence protected by its provisions.

The UDHR and other human rights documents have clearly stipulated that all people shall be entitled to human rights, without distinction of any kind, on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The UN Commission on Human Rights has analyzed and considered 'other status' to include the health conditions and status, including those of HIV/AIDS infected persons. Hence the consideration of a person's HIV/AIDS status as a condition for discrimination is to be prohibited under international law.²⁵

1.1.2 Right to Liberty and Security of Person

The UDHR ensures that everyone has right to life, liberty and security of persons.²⁶ Consequently, People living with HIV/AIDS are entitled to the guarantee of their right to liberty and security of person without arbitrary interference by the authorities on the basis of HIV infection. Any measure of detention in special colonies or separation from communities shall be considered as a violation of the liberty and security of person. In cases of dangerous behavior, restrictions on liberty may be imposed but that must be handled in accordance with the law. The freedom of compulsory HIV/AIDS testing constitutes an infringement of the liberty, security and inviolability of person. As provided for in Article 9 mentioned above, there is no public health and security justification for such involuntary HIV/AIDS testing. Article 9 of the ICCPR provides:

the same rights, in particular: (a) The right to family benefits; (b) The right to bank loans, mortgages and other forms of financial credit; (c) The right to participate in recreational activities, sports and all aspects of cultural life.

²² CRC, Article 2 runs as follows: 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

²³ *Supra* note 10 at 47 ; See also UNAIDS, *Children's rights in a world with HIV/AIDS*, World AIDS Campaign, (1997).

²⁴ The Convention against Torture, Article 1(1) states that for the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

²⁵ P.S. Seema, *Human Rights of persons living with HIV/AIDS-An analysis of the International and National norms*, 24 *Cochin University Law review* 13 (2005).

²⁶ UDHR, Article 3 provides that everyone has the right to life, liberty and security of person.

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.²⁷

1.1.3 **Right to Privacy**

Privacy is a fundamental human right recognized in the UDHR, ICCPR and in many other International and Regional treaties. Privacy has become one of the most important human rights issues of the modern age. Article 12 of The UDHR clearly protects right to privacy as it provides:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Similarly, the ICCPR ensures that everyone has the right to the protection of the law against the interference with his privacy, family, home or correspondence.²⁸ Hence, everyone, including HIV/AIDS infected people shall be protected against interference with the privacy. HIV/AIDS testing and revelation of its result without the consent of the persons concerned is viewed as unlawful interference with the right to privacy, HIV/AIDS testing is considered lawful in the case of blood, organ or tissue donations as this relates to the health and security of person of other people.

1.1.4 **Right to Marry and to Found a Family**

Marriage is the most important relation in life and the foundation of the family and society, without which there would be neither civilization nor progress.²⁹ This right has been secured in the UDHR where it lays down that men and women of full age with their free and full consent have the right to marry and to enjoy all the rights with respect to marriage and its dissolution.³⁰ Article 23(2) of the ICCPR too, protects the right to marry. It says that the states shall recognize the right of men and women of marriageable age to marry and to found a family.

Everyone is entitled to this right, including people living with HIV/AIDS. The right to marry and to find a family is a fundamental right free from any discrimination. It is therefore not justifiable that pre-marital health and/or HIV/AIDS testing be imposed as a precondition for granting of marriage licenses.

1.1.5 **Right to Education**

Right to Education is one of the most important human rights protected by almost all the countries around the world. It is recognized in UDHR, ICCPR and ICESCR which include freedom of expression and information. Article 19 of UDHR lays down:³¹

Everyone has the right to freedom of opinion and expression, this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 13 of The Convention on the Rights of the Child establishes children's right to impart and receive information of all kinds.³² **The ICCPR also ensures that** everyone shall have the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers.³³

As a result, it protects the right of both adults and children to receive HIV/AIDS related education, particularly regarding prevention and care in the context of HIV/AIDS. It emphasizes the right of persons

²⁷ICCPR, art 9.

²⁸ ICCPR, Section 17 states that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation. Everyone has the right to the protection of the law against such interference or attacks.

²⁹ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

³⁰ UDHR, Article 16 provides that: (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

³¹ UDHR, art 19.

³² CRC, Article 13(1) states that the child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

³³ ICCPR, Article 19(2) states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

living with HIV/AIDS to equal access to education, including access to elementary, secondary, university, vocational and other forms of education and the responsibility of the states to promote through education, understanding, sympathy, tolerance and non-discrimination in relation to people living with HIV/AIDS. Any form of discrimination against people living with HIV/AIDS in educational institutions have been completely prohibited.

1.1.6 **Right to Work**

No person can be deprived of his right to livelihood except according to procedure established by law. Obviously, such procedure established by law has to be just, fair and reasonable.³⁴ Article 23(1) of the UDHR states:³⁵

Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

Article 6 of the ICESCR ensures that all the states parties recognize the right to work and will take all the steps in order to achieve the full realization of this right.³⁶

Hence, HIV/AIDS infected people have right to work without discrimination and they are not required to undergo HIV/AIDS testing during the process of employment recruitment; allowed to work according to their health condition; not required to undergo HIV/AIDS testing in connection with access to work compensation; pension benefits and insurance schemes.

1.1.7 **Right to the Highest Attainable Standard of Physical and Mental Health**

The right to health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.³⁷ The right to health contains both freedoms and entitlements. Freedoms include the right to control one's health, including the right to be free from non-consensual medical treatment and experimentation. Entitlements include the right to a system of health protection (i.e. health care and the underlying determinants of health) that provides equality of opportunity for people to enjoy the highest attainable standard of health. The right to health is a broad concept that can be broken down into more specific entitlements such as the rights to: maternal, child and reproductive health; healthy workplace and natural environments; the prevention, treatment and control of diseases, including access to essential medicines.³⁸

The right of everyone to enjoy the highest attainable standard of physical and mental health has been recognized in Article 12 of the ICESCR. Article 12 also states that the State shall have the obligation to prevent, treat and control epidemics and endemic diseases and to create conditions that would assure medical service and attention in the event of sickness. It states:³⁹

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
 - (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

³⁴ *MX of Bombay Indian Inhabitant v. M/s ZY*, AIR 1997 Bom 429 (India).

³⁵ UDHR, art 23.

³⁶ ICESCR, Article 6 runs as follows (1) that the the States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. (2) The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

³⁷ *United Nations Human Rights office of the high commissioner, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, (Aug. 12, 2016, 12:50AM), <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>,

³⁸ *Ibid.*

³⁹ ICESCR, art. 12.

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.⁴⁰

In order to meet these obligations with regard to people living with HIV/AIDS, the State shall ensure that the provision of information, education and assistance in the context of HIV/AIDS, including access to services for sexually transmitted diseases, to means of prevention, such as clean injecting equipment and to voluntary and confidential HIV/AIDS testing with pre and post test counseling, in order to enable individuals to protect the health of themselves and others. The State should also ensure a safe blood supply and implementation of 'universal precautions' to prevent transmission. Access to adequate treatment and medication, within the overall context of public health conditions and policies to enable people living with HIV/AIDS to live as long and successfully as possible. By special measures, equal access of all groups in society, particularly marginalized groups to prevention, care and treatment services. The State is required to ensure that no one is discriminated against in access to healthcare services on the basis of HIV/AIDS status.

1.1.8 Right to an Adequate Standard of Living and Social Security

The right to an adequate standard of living is recognized as a human right in International human rights instruments and is understood to establish a minimum entitlement to food, clothing and housing at an adequate level.

Article 25(1) of the UDHR states that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁴¹

Article 11 of the ICESCR states that:⁴²

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed.

The right to an adequate standard of living is of special importance for people living with HIV/AIDS and their families as most live in difficult economic and social conditions. The State, in introducing priority policies to assist vulnerable groups, should adopt comparable favorable conditions for people living with HIV/AIDS. The State is also required to prevent all forms of discrimination to people living with HIV/AIDS in achieving an adequate standard of living and social security services.

1.1.9 Right to Enjoy the Benefits of Scientific Progress and Its Applications

Nowadays, within a world that is increasingly turning to science and technology for solutions to persistent socio-economic and development problems, the human dimension of science also receives increased attention. One of the avenues to reinforce the link between science and human rights is the elaboration and implementation of the human right to enjoy the benefits of scientific progress and its applications.⁴³

The UDHR recognizes the right of everyone to share in scientific advancement and its benefits.⁴⁴ This right became the basis for Article 15 (1)(b) of the ICESCR which provides that the States Parties to the Covenant shall recognize the right of everyone to enjoy the benefits of scientific progress and its applications;

In the context of HIV/AIDS, this right is reflected in the enjoyment of the benefits from Scientific medical advances in the safety of the blood supply and other medical activities, advances in the treatment of HIV/AIDS. As people in developing countries find it difficult to obtain access to such benefits this right should therefore be understood at the international level. Countries should share and assist one another in the access to drugs and other less expensive treatment.

⁴⁰ *Ibid.*

⁴¹ UDHR, art 25.

⁴² ICESCR, art 11.

⁴³ Yvonne Donders, *The right to enjoy the benefits of scientific progress: in search of state obligations in relation to health*, (May 1, 2011, 7:30PM) <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3190088/>

⁴⁴ UDHR, Article 27(2) : Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

1.1.10 Freedom of Expression and Information

Right to freedom of expression shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The freedom and pluralism of the media shall be respected.⁴⁵

This right is contained in Article 19 of the UDHR⁴⁶ and Article 19 of the ICCPR⁴⁷. Accordingly, everyone has the right to seek, receive and impart information related to HIV/AIDS prevention. This includes the right to receive and impart educational materials and information related to HIV/AIDS transmission risks and prevention measures among groups including special behavior groups such as injecting drug users or those engaged in same-sex sexual activity without censorship, or liability for aiding or abetting criminal offences. The mass media has the responsibility to respect human rights and dignity, specifically the right to privacy. The mass media should use appropriate language when reporting on HIV/AIDS, avoiding stereotyping and stigmatization.

1.1.11 Freedom of Assembly and Association

Freedom of assembly and association is the ability of people to come together and collectively express, promote, pursue, and defend their ideas. The right to freedom of association is recognized as a human right, a political right and a civil liberty.⁴⁸

This right is provided in the UDHR, Article 20(1) provides that everyone has the right to freedom of peaceful assembly and association.⁴⁹ The ICESCR and ICCPR protect the freedom of Assembly and Association.⁵⁰

Freedom of assembly and association among people living with HIV/AIDS is understood as an essential human right. The freedom of assembly and association is to ensure that people living with HIV/AIDS can get together and fight for their collective rights and contribute towards fellow community by taking part in the formation of HIV/AIDS related policies and laws.

Besides these, some other rights like freedom of movement, right to seek asylum, freedom from cruel, inhuman or degrading treatment or punishment, shall be generally understood in accordance with the relevant articles of the international instruments.

1.2 Constitutional Rights

The contagious and fatal nature of HIV/AIDS has not only made people in general to discriminate, but also medical personnel afraid and wary of providing prompt treatment to HIV/AIDS patients. This has raised the questions about the rights of HIV/AIDS patients. Whether it is with regard to marriage, treatment, education or employment, there is no national legislation for persons living with HIV/AIDS, therefore, the issues related to them are protected by various other statutory provisions and more so under the Constitution. The founding fathers of the Constitution cognizant of the reality of life wisely engrafted the Fundamental Rights and Directive Principles in Chapters III and IV for a democratic way of life to everyone in India.⁵¹

1.2.1 Fundamental Rights

The Fundamental Rights under the Constitution of India are the basic human freedoms that every Indian citizen has the right to enjoy for a proper and harmonious development of personality. These rights

⁴⁵ EU Charter of Fundamental Rights, art 11.

⁴⁶ UDHR, Article 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

⁴⁷ ICCPR, Article 19(2): Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

⁴⁸ Freedom of Assembly (Aug. 10, 2016, 3:30 PM) https://en.wikipedia.org/wiki/Freedom_of_assembly.

⁴⁹ UDHR, art 20.

⁵⁰ **ICCPR, Article 21:** The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (order public), the protection of public health or morals or the protection of the rights and freedoms of others.

ICCPR, Article 22(1): Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

ICESCR, Article 8(1) ensures the right of everyone to form trade unions and join the trade union of his choice.

⁵¹ *MX of Bombay Indian Inhabitant v M/s ZY*, AIR 1997 Bom 429 (India).

universally apply to all citizens, irrespective of race, place of birth, religion, caste or gender. They are enforceable by the courts, subject to certain restrictions. In the absence of specific legislation, these constitutional rights available under part III of the Constitution have been proved very helpful in securing the basic rights against all form of discrimination and other human rights violations.

1. 2.1.1 *Right to equality*

Discrimination is antithetical to equality, Article 14 embodies the general principles of equality before law and prohibits unreasonable discrimination between persons and guarantees the right of equality of treatment to the HIV/AIDS patients, hence any kind of discrimination based on ones HIV status is violation of one's right to equality⁵². Thus, no person can be deprived of his right to livelihood except according to procedure established by law. Obviously, such procedure established by law has to be just, fair and reasonable. In other words, such procedure also must pass the rigour of Article 14.⁵³ Hence, denial of employment to the HIV infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at workplace is clearly arbitrary and unreasonable and infringes the wholesome requirement of article 14 as well as Article 21 of the Constitution of India.⁵⁴

1.2.1.2 *Equality of opportunity in matters of public employment*

Article 16 of the Constitution of India provides for equality of opportunity in public employment.⁵⁵ A government/ public sector employer cannot deny employment or terminate the service of an HIV positive employee solely because of his HIV-positive status, and any act of discrimination towards an employee on the basis of their HIV-positive status is a violation of fundamental rights. The state and public corporations cannot take a ruthless and inhuman stand that they will not employ a person unless they are satisfied that the person will serve during the entire span of service from the employment till superannuation. The most important thing in respect of persons infected with HIV is the requirement of community support, economic support and non-discrimination of such person. This is also necessary for prevention and control of this terrible disease. Taking into consideration the widespread and present threat of this disease in the world in general and this country in particular, the State cannot be permitted to condemn the victims of HIV infection, many of whom may be truly unfortunate, to certain economic death. It is not in the general public interest and is impermissible under the Constitution.⁵⁶

1.2.1.3 *Protection of life and personal liberty*

Because of the vibrant interpretation given by the Apex Court to Article 21,⁵⁷ it has become the thrust and throb of the Constitution itself. Courts in India have responded to the rights based claims brought by people who are HIV infected. While the Indian Judiciary is looked at as the protector of the disadvantaged and the poor, Article 21 has been extended in order to secure the rights of those living with HIV/AIDS.⁵⁸

It has been judicially interpreted that the word life does not mean mere animal existence – it has to mean a life befitting human dignity. Hence it is a fundamental right of persons living with HIV to live life with full dignity without any discrimination⁵⁹. While giving a wide interpretation to life in Article 21, Supreme Court explicitly held that the right to health is an integral facet of a meaningful right to life.⁶⁰ In a series of cases, the court held that it is an obligation of the state not only to provide emergency medical services but also to ensure the creation of conditions necessary for good health, including provisions for basic curative and preventive health services and the assurance of healthy living and working conditions.⁶¹

⁵² Atiya Bose and Kajal Bhardwaj, *Legal Issues that arise in the HIV Context*, Infochange News and Features, 2 Feb 56 (2008).

⁵³ *Supra* note 51 at 429.

⁵⁴ *Id.* at 430, para 54.

⁵⁵ The Constitution of India, art 16, cl.2.

⁵⁶ *Supra* note 51 at 430, para 56.

⁵⁷ INDIA CONST. Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law.

⁵⁸ Sameer Boray, *Rights of persons living with HIV/AIDS and Article 21 of the Indian Constitution*, Oct (2011), (Jan.29,2016,10:05AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1942995.

⁵⁹ Menaka Gandhi v. Union of India, AIR 1978 SC 597.

⁶⁰ Consumer Education and Research Centre v. Union of India, 1995 3 SCC 765.

⁶¹ Vincent Panikurlangara v. Union of India, 1987 2 SCC 165; Paschim Bangal Khet Mazdoor Samity v. State of W.B., 1966 4 SC 37; Murli S. Deora v. Union of India (2001) 8 SCC 765; Consumer Education and Research

It has been recognised by the Supreme Court in *Olga Tellis v. Bombay Municipal Corporation*,⁶² that the right to livelihood is an important facet of the right to life. Deprivation of the means of livelihood would denude the life itself under Article 21. Therefore The right of HIV/AIDS patients to livelihood is their fundamental right under Article 21 of the Constitution.

In *C.E.S.C Ltd. v.S.C. Bose*,⁶³ it was held that the right to social and economic justice is a fundamental right. The right to live with human dignity at least with minimum sustenance and shelter and all those rights and aspects of life which would make a man's life complete and worth living, would embrace the protection and preservation of life guaranteed by Article 21.

Article 21 of the Constitution also casts an obligation on the State to preserve life. A doctor at the Government hospital positioned to meet this state obligation is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life. The obligation being total, absolute and paramount, laws or acts whether in statutes or otherwise which would interfere with the discharge of this obligation cannot be sustained and must therefore give way.⁶⁴

Article 21 is wide and is of far reaching consequences. As and when life in any form or to any extent is taken away or endangered by any functionary of the State, for example by transmitting HIV negligently by blood transfusion or otherwise, a duty is cast upon the State to compensate the victim by granting adequate compensation. Not only this, the maintenance of law and order and providing adequate facilities to HIV patients in the Government hospitals is the responsibility of the Government.⁶⁵

Similarly the right to bear children of persons living with HIV/AIDS is also a fundamental right under Article 21 of the Constitution and the said right can only be taken away by a statutory law, and no Court of Judicial Authority can take away this right.⁶⁶

Hence, the interpretation given to the words life and personal liberty in various decisions of the Apex Court, it can be said that the protection of life and personal liberty has got multi-dimensional meaning and any arbitrary, whimsical and fanciful act of the State which deprived the life or personal liberty of a person would be against the spirit of the provision of Article 21 of the Constitution.⁶⁷

1.2.2 The Directive Principles of State Policy

The Directive Principles of State Policy contained in Part IV of the Constitution set out the aims and objectives to be taken up by the states in the governance of the country. The Directive Principles of State Policy lay down certain economic and social policies to be pursued by government of India. They impose certain obligation on the state to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.⁶⁸

The Directive Principles of State Policy are therefore non justiciable. However, this restriction has not hindered its implementation effectively at national level. The courts in India, especially, Supreme Court of India, has time and again widened the scope of Directive Principle of State Policy by linking economic, social and cultural rights with the Fundamental Rights. Thus in India the Constitution elevates the right to health of the highest attainable standards under Directive Principles of State Policy to a guaranteed fundamental right under article 21, which is enforceable by virtue of the Constitutional remedy mentioned under Article 32 of the Constitution. The court has held that the right to live with human dignity enshrined in Article 21 derives its life and breath from the Directive Principles of State Policy particularly Articles 39, 41 and 42 and 47. Hence rights and interests of persons living with HIV/AIDS are to be protected and secured by making them part of various policies and programs by the State Governments as given under part IV of the Constitution. Important articles pertaining to HIV infected people include:

Centre v. Union of India, 1995 3SCC 42; M.C Mehta v. Union of India, 1999 6SCC 9; Parmanand Katara v. Union of India, 1989 4 SCC 286.

⁶² AIR 1986 SC 180.

⁶³ (1992) 1SCC 441; AIR 1992SC 573.

⁶⁴ James Vincent, *AIDS Patients and their Fundamental Right to Medical Services*, 6SCC 21 (1997).

⁶⁵ *Ibid.*

⁶⁶ Kharak Singh v. State of U.P. AIR 1963 SC 1295; Gobind v. State of Madhya Pradesh AIR 1975 SC 1378; R. Rajagopal v. State of T.N. AIR 1995 SC 264.

⁶⁷ Vidhan Maheshwari, *Article 21 of the Constitution of India – The Expanding Horizons* (Jan 5, 2016, 4:15PM), <http://www.legalserviceindia.com/articles/art222.htm>, visited on 5.01.2016.

⁶⁸ J.N. Pandey, *Constitutional law of India*, 153(42ed, 2005).

Article 39 of the Constitution directs the States to ensure that all the citizens including the HIV/AIDS patients have an adequate means of livelihood.⁶⁹

Article 41 directs the State to ensure the people within the limits of its economic capacity and development, employment, education, public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want. Hence under Article 41 State has duty to provide employment, education etc to the persons living with HIV/AIDS to the extent possible.⁷⁰

Article 42 casts a duty upon states to make provisions for securing just and humane conditions of work.⁷¹ States have been entrusted with the duty to improve public health vide Article 47 of the Constitution.⁷²

1.4 Judicial Interpretations

Denial of social, economic, legal and human rights are amongst the various consequences faced by people living with HIV/AIDS. Law, Policy and judicial action have always upheld the human rights framework and are doing their best to restore as far as possible, their status in the society keeping in view the public interest which is also a key consideration while analyzing and interpreting various issues regarding the status of HIV/AIDS patients in the society.⁷³ Judicial handling of such issues can be briefly summed up in the following way.

1.4.1 Right to Privacy

Although right to privacy is a fundamental right under Article 21 of the Constitution but in the context of HIV/AIDS patients, in *Mr. Xv. Hospital Z*, it was held that it is not an absolute right and restriction can be imposed on it for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.⁷⁴

1.4.2 Right to marry

HIV positive persons cannot be said to have absolute right to marry. Keeping in mind the larger interests of the society, there is a reasonable restriction on the HIV positive person's right to marry because the object of securing right to health of the society at large is to be protected.⁷⁵

1.4.3 Right to work

In *MX of Bombay Indian Inhabitant v ZY*, it was held that denial of employment to the HIV infected person merely on the ground of his HIV status irrespective of his ability to perform the job requirements and irrespective of the fact that he does not pose any threat to others at the workplace is clearly arbitrary and unreasonable.⁷⁶

1.4.4 Right to Treatment

A person suffering from any ailment has the right to get treatment for his suffering. In *LX v. Union of India*, the High Court of Delhi observed that treatment cannot be denied to a patient on the basis of his HIV/AIDS status. If any HIV/AIDS patient is denied treatment, it amounts to discrimination.⁷⁷

1.4.5 Right to use Pseudonym

The person who is infected with HIV is likely to be exposed to several embarrassments, including bad publicity and consequential discrimination making it difficult for him to prosecute the proceedings before a Court of law. High Court in proper cases and in the interests of the administration of justice can always permit the plaintiff or the petitioner or the party before it to suppress its identity at proper stage and to prosecute or defend the proceedings in the assumed name.⁷⁸ whether a particular petitioner should be

⁶⁹ The Constitution of India, art 39.

⁷⁰ *Ibid*, art 41.

⁷¹ *Id*, art 42.

⁷² *Id*, art 47.

⁷³ Srinivas Gupta & Preety, Misra, *Growing Menace of HIV/AIDS: A Socio Legal Study*, V Maharashtra Law Journal 45 (2007).

⁷⁴ 1998Supp(1) SCR 723 (India).

⁷⁵ See *X v hospital Z* AIR 1995 SC 495; (1998) 8 SCC 296 (India).

⁷⁶ AIR 1997 Bombay 430, para 54; see also *Badan Singh v. Union of India*, 97(2002) DLT 986; *X v. State Bank of India*, writ petition no. 1856(2002)-Bombay High Court; *G v. New India Assurance Co. Ltd.*, writ petition no. 1562 of 1999; *X v The Chairman, State Level Police Recruitment Board and others*, 2006(2) ALD 513 (India).

⁷⁷ CWP-7330/2004, Delhi High Court (India).

⁷⁸ *Supra* note 51 at 414.

allowed to prosecute his petition by suppressing his identity will depend on the facts of each particular case.⁷⁹

1.6 The Human Immunodeficiency Virus And Acquired Immune Deficiency Syndrome (Prevention And Control) Act, 2017

The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017 came into force on September 10, 2018. It aims to prevent and control the spread of HIV and AIDS in the country and provides for penalties for discrimination against those affected by the virus. Introduced in 2014, the Bill was passed by the Rajya Sabha on March 22, 2017, and a month later by the Lok Sabha on April 12. It received the assent of the President on April 20, 2017.

India has the third largest HIV-infected population with an estimated 2 million people. The country aims to decrease new infections by 75 per cent between 2010 and 2020 and eliminate AIDS by 2030.⁸⁰

Following are the key provisions as to the rights of people living with HIV/AIDS under the Act:

1.6.1 Informed consent:

Except certain cases the Act mandates informed consent for undertaking HIV test or treatment. It seeks to provide that no HIV test shall be undertaken or performed upon any person or no protected person shall be subjected to medical treatment, medical interventions or research, except with the informed consent of such person or his representative and in such manner, as may be specified in the guidelines. The informed consent for HIV test shall include pre-test and post-test counseling to the person being tested or such person's representative in the manner as may be specified in the guidelines. Informed consent for a HIV test will not be required in case of screening by any licensed blood bank, a court order, medical research, and epidemiological purposes where the HIV test is anonymous and not meant to determine the HIV status of a person.⁸¹

1.6.2 Disclosure of HIV Status:

The Act recognizes a person's right to privacy and confidentiality of HIV status with certain exceptions. It provides that no person shall be compelled to disclose his HIV status except by an order that the disclosure of such information is necessary in the interest of justice for determination of issues in the matter before it and no person shall disclose or be compelled to disclose the HIV status or any other private information of other person imparted in confidence or in a relationship of a fiduciary nature, except with the informed consent of that other person or a representative of such another person. Establishments keeping records of information of HIV positive persons shall adopt data protection measures.⁸²

1.6.3 Access to treatment:

The Act seeks to provide that the measures to be taken by the Central Government or the State Government for providing, as far as possible, Anti-retroviral Therapy and Opportunistic Infection Management to people living with HIV or AIDS and the Central Government shall issue necessary guidelines in respect of protocols for HIV and AIDS relating to Anti-retroviral Therapy and Opportunistic Infection Management which shall be applicable to all persons and ensure their wide dissemination.⁸³

1.6.4 Promotion of risk reduction strategies for groups at higher risk of HIV infection:

Targeted interventions like distribution of clean needles to people who inject drugs have proven to prevent HIV transmission. Certain criminal laws, however, impede these services by threatening providers and recipients with prosecution. The Act provides legal immunity to risk reduction programmes, thus strengthening efforts to prevent HIV.⁸⁴

1.6.5 Right of Residence:

The Act provides that every protected person, who is a woman or who is a person below the age of eighteen years, shall have the right to reside in the shared household, the right not to be excluded from the shared household or any part of it and the right to enjoy and use the facilities of such shared household in a non-discriminatory manner.⁸⁵

⁷⁹ *Id.* at 415.

⁸⁰ What is the HIV/AIDS Act, Indian Express, 23rd Dec, 2018

⁸¹ Sec 5, The Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Prevention and Control) Act, 2017.

⁸² *Ibid*, Sec 8 and 9.

⁸³ *Id.* Sec 14.

⁸⁴ *Id.* Sec 22.

⁸⁵ *Id.* Sec 29.

1.6.6 Persons in care or custody of State:

The Act seeks to provide that every person who is in the care or custody of the State shall have the right to HIV prevention, counseling, testing and treatment services in accordance with the guidelines issued in this regard.⁸⁶

1.6.7 Special Procedure in Court:

Cases relating to HIV positive persons shall be disposed off by the court on a priority basis. In any legal proceeding, if an HIV infected or affected person is a party, the court may pass orders that the proceedings be conducted by suppressing the identity of the person; in camera and to restrain any person from publishing information that discloses the identity of the applicant.⁸⁷

1.7 Concluding Remarks:

States all around the world has recognized that without the protection of human rights of people, who are vulnerable and afflicted with HIV/AIDS, the response to HIV/AIDS epidemic will remain incomplete. Where general rights given in international instruments have secured and protected human rights important to people infected and affected by HIV/AIDS globally. The Constitutional rights like right to equality and varied interpretations given to right to life under article 21 gives new meaning and recognition to the cause of HIV/AIDS patients in India in the absence of specific legislation as to the rights of such people. Government of India along with National Aids Control Organization under the auspices of International organizations like World Health Organization and Joint United Nations Programme on HIV and AIDS (UNAIDS) has been framing various policies and guidelines pertaining to various areas which affect the status of people living with HIV/AIDS in the society. Not only this, courts in India also have responded to the rights based claims brought by people who are infected with HIV. Courts have made sure that most liberal interpretation to the law should be given in order to secure various rights of such individuals.

Despite of this there is darker side of the picture too, HIV has revealed the inadequacies of existing laws as well as of the health infrastructure in India in an unprecedented way. It has highlighted most particularly the tensions and conflicts between health, human rights, state power and wealth. For example, in a health care setting, the lack of adequate resources pits the rights of a person living with HIV to treatment against the rights of doctors and healthcare workers to universal precautions, making everybody vulnerable and exacerbating discrimination. It is only by protecting the rights of the people who are infected with HIV or are vulnerable to it, that we can effectively fight the epidemic.⁸⁸

The Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS) (Prevention and Control) Act, 2017 aims to strengthen the rights of the people who have been suffering from HIV or AIDS. It is the first national HIV law in South Asia. India has the third largest HIV epidemic in the world with estimated 2.1 million people living with HIV in India. Unfortunately, HIV and AIDS are still considered as a taboo in India and therefore, let's hope that this new Act brings a fresh lease of hope and respite to those who are living with the least rights so that the fight against the disease can be made easier.

⁸⁶ *Id.* Sec 31.

⁸⁷ *Id.* Sec 34.

⁸⁸ <http://www.lawyerscollective.org/hiv-and-law/draft-law.html>, visited on 3rd November, 2015, Positive Dialogue: Lawyers Collective HIV/AIDS unit, July 2007.