

**The Interwoven Fabric of Human Rights and HIV/AIDS**

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**1. Abstract**

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A disease is said to be a burden upon mankind, and not that of just targeted individuals and their loved ones. HIV/AIDS is a fatal disease, not fitting within the traditional definition of 'fatal', but killing a person slowly and sadistically. However, the fact that it still remains controllable, not curable, speaks volumes about the magnitude of its seriousness. The compromised immunity makes a person susceptible to normally non-contagious ailments. Therefore, only when the whole of humanity fights it, can it be eradicated. However, stigma attached to its mode of transmission and lack of awareness about its nature has led to discrimination of those already burdened with the disease, to the extent of denying them their other various human rights, and essentially degrading them to a level lower than human. Alarming statistics prove its increased presence in vulnerable groups of women, children or poverty stricken areas, all of those also positive on the checklist of an entire continent-Africa. This research work aims at studying the basic correlation between Human Rights and HIV/AIDS and how it affects the contemporary world; further focusing on its condition in India and the resultant violation of the Fundamental Rights granted in Part III of its Constitution with an emphasis on discrimination in employment; furthermore, addressing whether the right to work of the PLHAs can be compromised on the predicament of general interest of society. The methodology used for the same is doctrinal in nature. The study aims at a world with equal humanitarian opportunities.

## **2. Introduction**

World AIDS Day is celebrated on 1<sup>st</sup> December every year. On the same day in 2002, the then United Nations Secretary General, Kofi Annan had said, “Let us resolve to replace stigma with support, fear with hope, silence with solidarity. Let us act on the understanding that this work begins with each and every one of us.”<sup>1</sup>

It’s been nearly 4 decades since the first clinical evidence of AIDS came to the forefront, and it still remains one of the most devastating diseases ever known to mankind. By 2010, AIDS was the sixth largest cause of death, worldwide. However, its concentration in the continent of Africa is significantly appalling.

While Human rights deals with inalienable rights of human beings, which every individual is entitled to, simply by the virtue of being a human, it therefore, also extends to a sick person, who, by no means, gets disqualified from availing these. In fact, weaker or more disadvantaged groups need these all the more. They need to be brought to a level playing field, so as to really make them feel equal to their fellow human beings, and then compete on equal footing.

However, over the time, as trend shows, individuals diagnosed with HIV/AIDS are discriminated against, due to stigmas attached to their conditions, and the way they got the disease, as well as the lack of or incomplete knowledge plaguing the minds of their counterparts. This not only results in the inhumane treatment of these unfortunate individuals, but also the taking away of their intrinsic human rights, also referred to as the Fundamental Rights, in India’s context, such as the right to employment, and living a life of dignity. They are often punished for a thing which is beyond their control and probably due to no fault of their own, but rather due to the lack of treatment and medication, as well as programmes for increasing social awareness and acceptance. UN experts themselves say that the AIDS

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<sup>1</sup>“Saluting World AIDS Day; Secretary-General Deplores ‘Burden of HIV-Related Stigma’”, United Nations Meetings Coverage and Press Releases, 14 Nov., 2002, <https://www.un.org/press/en/2002/sgsm8494.doc.htm> (accessed on 08/10/2018).

epidemic is till date driven by human rights violation around the world, including discrimination, violence, punitive laws, policies and practices.<sup>2</sup>

What people lack the foremost is the very basic knowledge of the two concepts of HIV/AIDS and Human Rights, and the intricate link between them.

### **2.1. Human Rights**

Human rights are inalienable rights of every human, inherent to them, irrespective of their race, sex, caste, nationality, language, religion, ethnicity or any other status.<sup>3</sup> They broadly include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, among many more, as laid down in the Charter of the United Nations and the Universal Declaration of Human Rights, 1945 and 1948, respectively, and many other international treaties and national commissions. Every person is entitled to these rights, without discrimination, simply by the virtue of being a human.

Human Rights is a cross-cutting theme in all UN policies<sup>4</sup>, and incorporates civil, political and socio-economic rights. At the international level, UN High Commissioner for Human Rights takes preventive measures in case of worldwide violations of human rights. Various states have signed, ratified and adopted such measures as prescribed by the UN to ensure international upholding of Human Rights. In India, Part III of the Constitution captures the essence of these, in the form of its fundamental rights, which are justiciable in courts of law, and considered the highest degree of rights conferred to Indian citizens, to say the least; some even extending to all persons, irrespective of citizenship.

Over the years, newer topics have been increasingly covered under its mandate, including the fight against global diseases, attacking the world as a whole. HIV/AIDS in one such disease. Its socio-economic causes and consequences make it a more important issue to be addressed under the broad category of Human Rights.

### **2.2. HIV/AIDS**

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<sup>2</sup>United Nations Human Rights, Office of the High Commissioner, “*AIDS epidemic still being driven by human rights violations*”, 3<sup>rd</sup> June, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20055&LangID=E> (accessed on 19/10/2018).

<sup>3</sup> United Nations, ‘Human Rights’, <https://www.un.org/en/sections/issues-depth/human-rights/> (accessed on 07/10/2018).

<sup>4</sup>*Ibid.*

While HIV stands for Human Immuno-Deficiency Virus, a virus induced medical condition where humans become extremely vulnerable to diseases, lacking the ability to fight off infectious agents; AIDS stands for Acquired Immuno-Deficiency Syndrome, considered the last stage of infection with HIV.<sup>5</sup>

HIV is transmitted through semen and vaginal fluids; infected blood or blood products; from an infected mother to her unborn baby, or during birth or through breast feeding, after the child's born. It severely compromises the immune system of the infected to such a level that it becomes almost incapable of fighting any kind of infection in the body. At its weakest, last stage, it takes the form of AIDS.

Due to the mode of transmission of this disease, that is, *inter alia*, either sexually, indicating multiple partners, even same sex partners, at times; infected needles, associated with drugs, there is always an undercurrent of stigma running with it, due to the taboos attached with it. It's morally considered wrong to have multiple partners, same-sex relations, or taking drugs, and thus, patients of HIV/AIDS are often looked down upon, without knowledge of their definitive source of infection. Thus, these individuals face discrimination in society and the disease is often viewed as a rightful punishment of their 'sins'.

According to India's National Human Rights Commission report of 2011, unprotected sexual intercourse with an infected person accounts for close to 80% of worldwide transmission, while 3-5% is due to injections with contaminated blood and the use of non-sterilized equipment; 5-10% of the remaining due to the reuse of contaminated needles by intravenous drug users.<sup>6</sup> Such data aids to the misconceptions about this disease, in society.

Further, the 2010 Global Report on the AIDS Epidemic (UNAIDS)<sup>7</sup> estimated that globally, 33.3 million people were infected with HIV. 2009 alone recorded approximately 1.8 million deaths caused due to AIDS, and a shocking 2.6 million new HIV infections coming to the forefront. This data, however, is construed to be positive, as it shows a decrease in AIDS related deaths from the previous years, even though recording large numbers. The decrease has been attributed to larger access to antiretroviral therapy. However, disparities exist with respect to their availability in

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<sup>5</sup>National Human Rights Commission, '*Know Your Rights- Human Rights and HIV/AIDS*', 2011, available at <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf>, (accessed on 12/10/218).

<sup>6</sup>*Ibid.*

<sup>7</sup> UNAIDS Report on the Global AIDS Epidemic, 2010, available at [http://www.unaids.org/globalreport/Global\\_report.htm](http://www.unaids.org/globalreport/Global_report.htm) (accessed on 05/10/2018).

different nations; Sub-Saharan Africa still recording the largest number of deaths and least availability of treatment.<sup>8</sup> While on the bright side, 90% of the governments are addressing discrimination and stigma related to HIV/AIDS, at least on paper, in their targeted programmes, a discouraging less than 50% stat accounts for any budgeting for the same.<sup>9</sup>

### **3. Correlation between Human Rights and HIV/AIDS**

There is an undeniable link between Human Rights and HIV/AIDS. When a person is discriminated for having the disease, it is essentially his basic human rights that are being disregarded, while his status isn't considered equal to any other human and he is thus, denied his inalienable rights of living a life with dignity, of employment, housing etc. Further, statistics show a greater probability of the spread of this disease among certain vulnerable groups, such as women, children and the poor. This disproportionate incidence of occurrence, more prevalent among these groups, and more so in developing countries, as opposed to the developed countries, also shout out a disregard of human rights, especially for the disadvantaged, in this sense. The correlation can be broadly observed in 2 ways<sup>10</sup>-

**3.1. Increased vulnerability of a person to contract the disease as a result of lack of human rights-** This basically means that certain groups are more vulnerable to a disease like HIV/AIDS simply because of their lack of realization or awareness in terms of their human rights- civil, political, economic, social and cultural in nature. For instance, those being denied their right to information may be unaware of the risks of HIV/AIDS, its mode of transmission, etc., especially young women having no or partial information with respect to sexual and reproductive health, also concerned with their educational rights; those prevented from forming an association may also be kept aloof from AIDS self-help groups which help them better cope with the disease. The denying of an equal status to a person in giving consent to sexual intercourse (women, in many cultures, aren't given this very basic right),

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<sup>8</sup> United Nations Human Rights Office of the High Commissioner, "*HIV/AIDS and Human Rights*", <http://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx> (accessed on 16/10/2018).

<sup>9</sup> UNAIDS *Report on the Global AIDS Epidemic*, 2010, Joint United Nations Programme on HIV/AIDS, UNAIDS/10, 11E|JC1958E.

<sup>10</sup> *supra* 7.

also heightens the risk of falling prey to this deadly disease. Considering the nature of the treatment, it is a relatively expensive form of medication, with less certainty, as it is more so a controllable disease, not a 100% curable one, thus, making poor people more susceptible to remaining sick, especially in the absence of their basic right of healthcare etc.

**3.2. The disregard for human rights as a result of contracting the disease**-Due to the stigmatization and discrimination attached to the disease, people having HIV/AIDS often have to face the dual burden of coping with the disease and the societal reaction to it. The presumed status of those down with this is often considered unethical or immoral due to the misconception with respect to getting the disease in the first place, and thus, such individuals have to face the brunt of the society by being denied employment, housing and other such rights, and in extreme cases, even denied access to treatment. They are discriminated against in many spheres of their lives. All this, in turn, makes them even more contagious as such people are generally discouraged from contacting health and social services, either due to fear of the society or because of their own insecurities. Such stigmas and taboos in society also alienate these people from the much-needed education and counselling services, which they should be entitled to.

According to the National Human Rights Commission Report on Human Rights and HIV/AIDS<sup>11</sup>, some of the human rights in question, which are often violated when it comes to people having the disease, are rights such as the right to life, non-discrimination, equal protection, equality before law, liberty and security, freedom of movement, privacy, information, seek and receive asylum, freedom of association, work, education; the right to the highest attainable standard of physical and mental health, among others.

#### **4. Status of HIV/AIDS in the Contemporary World**

According to a November 2017 report of the World Health Organization initiative on HIV treatment and care, 'Treat All', positive results have been shown, around the world.<sup>12</sup>

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<sup>11</sup>National Human Rights Commission, '*Know Your Rights- Human Rights and HIV/AIDS*', 2011, <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf> (accessed on 05/10/2018).

<sup>12</sup> World Health Organization Report, HIV Treatment and Care, *Treat All: Policy Adoption and Implementation Status in Countries*, Fact Sheet, November 2017, available at

In 2016, Consolidated guidelines on the use of antiretroviral drugs for treating and preventing HIV infection were published, through which WHO updated and launched new policy recommendations on the clinical and service delivery aspects of HIV treatment and care, and raised the bar to treat all ‘People Living with HIV/AIDS’ (PLHIV).

According to the 2017 fact sheet of the initiative, Treat All, 70% of Low and Middle-Income Countries (LMIC) and 89% of Fast-Track countries have adopted a Treat All policy, while another 10% of all LMIC and 6% of Fast-Track countries had planned to adopt Treat All before the end of 2017. This, when seen in contrast to the 2016 data of only 33% of all LMIC adopting Treat All policy, is a progressive step ahead. However, practical implementation isn’t as good as the numbers on paper, with only 69 LMIC (i.e. 50%) having already put the policy for Treat All fully into practice and 8 LMIC (i.e. 6%) having implemented Treat All in a majority of treatment sites. Other statistics show a positive improvement in lifelong ART for pregnant women, which is now almost universally adopted and implemented. There are also targeted policies for children below 10 years of age. Newer medication techniques are being implemented. Dolutegravir (DTG) is aimed at being available at a lower price point combined in fixed-dose combination with TDF/3TC and many countries are moving to adopt DTG as part of first line treatment.

These statistics, however, do not show the level of recognition and acceptance of the those infected with the virus and their rights at the grassroots. They show governmental policies for the spreading of awareness about medicines and these reaching the masses, yet, they fail to depict the mind-sets of the people living with the disease and the society around them. No statistics captures the psyche of, and the emotional trauma faced by, the victims, neither do they capture the reaction of the society towards them.

## **5. The Universal Way of Dealing with HIV/AIDS**

We can safely say that HIV/AIDS has adequately been recognized and tackled worldwide, in its capacity as a disease and not a social issue.

Starting with the adoption of the International Guidelines in 1996 by the Second International Consultation on HIV/AIDS and Human Rights, we've reached a position to term HIV as a manageable health issue, once considered a hopeless condition. In 2001, the Commission on Human Rights adopted a resolution by which access to antiretroviral therapy for HIV was also included within the ambit of the right to the highest attainable standard of health. 2002 saw the Third International Consultation on HIV/AIDS and Human Rights, sponsored by OHCHR and UNAIDS, which reflected the human right dimensions of access to HIV prevention, treatment, care and support.<sup>13</sup> However, other than the basic medical amenities being provided worldwide, with respect to the treatment and prevention of HIV/AIDS as a global initiative, some other programmes taken up by governments all around the world including the coverage of interventions to educate people about HIV, providing them with HIV prevention commodities, services and treatment, protecting them from discrimination and sexual violence and empowering them to participate in the response and live successfully in a world with HIV is unacceptably low in many places in the world.<sup>14</sup>

There were 12 guidelines adopted internationally in 1996; Guideline 6 was revised in 2002. Their purpose was to assist the States in creating a positive, rights-based response to HIV; to effectively reduce transmission and impact of the disease and ensure its consistency with human rights. These are mainly divided in 3 parts- (i) Guidelines for state action; (ii) recommendations for dissemination and implementation of them; and (iii) defining the International Human Rights obligations w.r.t. HIV. However, it's an undeniable fact that these are merely persuasive and have no legal sanction attached to it, other than international convention and moral backing of the society. Further, it might not be universally applicable, at all times, with many variables coming into play. However, States are expected to respect and implement these to the maximum level possible.

The fifth of the guidelines is anti-discriminatory in nature, while the eighth talks about an environment free of inequalities manifested in the communities, by the virtue of being infected with the disease. The ninth tackles stigmatization and discrimination through creative education, media training and other such programmes.<sup>15</sup> These are a proof that rights

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<sup>13</sup> Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *International Guidelines on HIV/AIDS and Human Rights 2006 Consolidated Version*, available at <http://www.ohchr.org/Documents/Publications/HIVAIDSGuidelinesen.pdf> (accessed on 08/10/2018).

<sup>14</sup> *Ibid.*

<sup>15</sup> *supra* 12.

of people with HIV/AIDS is recognized internationally and also provided for. They just lack implementation.

### **1. Magnitude of the Problem in India**

India, over the years, has been extremely vulnerable to the epidemic caused due to HIV/AIDS. With a huge population, poverty in abundance, socio-economic status, as well as the religious orthodox taboos related to sex and homosexuality, and a disadvantaged position that has been awarded to the women since times immemorial, it can be considered a perfect host to the HIV parasite.

The first case of HIV/AIDS was reported back in 1986, in Chennai; since then, there has been no stopping. India, unfortunately, has the third largest number of people living with HIV/AIDS in the world, while the maximum of them still reside in Sub-Saharan Africa. Also, considering the diverse nature of India, in all aspects, the epidemic too is as heterogeneous as it gets. There are multiple sub-epidemics within different classes and communities and thus, various kinds of vulnerabilities, making it harder for targeted policies and their effective implementation. It almost accounts for 60% of the cases alone in Asia and Pacific Region.<sup>16</sup>

Some of the vulnerable groups in India who have reported the concentration of this disease are the sex workers, homosexuals and the relatively younger people indulging in drugs, in the age group of 15-24 years, with over 35% of the reported cases being from this bracket. Prevalence among the cream of the society, i.e. 15-49 age group is statistically very high; 88.7%. This means the primary working age group is the most affected.<sup>17</sup>

HIV in India can be classified in to a few phases. The first was back in 1986, up till 1992. This period saw a transition from national denial to acceptance and the beginning of research-based programmes. Although 3 states, covering 55 cities, had surveillance systems installed for the purpose of monitoring the epidemic, central control was weak, indicating lack of centralized effort.

The second phase, 1992-97, saw the creation of National AIDS Control Organization (NACO), under the department of Health, with the backing of World Bank funding and

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<sup>16</sup> Chandrika Bhattacharyya and Himanie Katoch, NLIU Bhopal, "*Human Rights perspective on HIV/AIDS Vis-À-Vis Right to employment of persons living with HIV/AIDS*", available at [http://www.legalserviceindia.com/articles/hu\\_aids.htm](http://www.legalserviceindia.com/articles/hu_aids.htm) (accessed on 10/10/2018).

<sup>17</sup> National Human Rights Commission, '*Know Your Rights- Human Rights and HIV/AIDS*', 2011, available at <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf> (accessed on 05/10/2018).

support from World Health Organization Global Programme on AIDS (WHO GPA). It aimed at creating greater awareness among the population, establishing strong state level structures for effective implementation of policies related to HIV/AIDS, as well as improving blood safety and strengthening of infrastructure. The phase also saw the launch of successful Individual projects such as the innovative intervention in Sonagachi amongst commercial sex workers. Breakthrough efforts were also made in reaching out to college youth through "University Talks AIDS (UTA)".<sup>18</sup>

The third phase, 1988 onwards, a two-fold drive was initiated, focusing on the vulnerable groups such as sex workers and injecting drug users; and making the programme increasingly multi-sectoral. The way the policies were formulated was largely decentralized in nature, with major responsibilities resting with the states. Also, Flexible State AIDS Societies were formed with stronger mechanisms for state level programme management.<sup>19</sup> Further, a network of 12 Technical Resource Groups (TRGs) was launched, covering different thematic areas of the epidemic, to assist the states, at the technical level.

In 2006, the NACO estimated National Adult HIV prevalence in India at approximately 0.36%; numerically amounting somewhere between 2 and 3.1 million people. This has fallen from the earlier estimates of approximately 5.2 million people.<sup>20</sup>

Further, prevalence rate is higher in men, as compared to women; 0.43% as against 0.29%, i.e. for every 100 PLHAs, 61 are men, while 39, women.<sup>21</sup>

The vulnerable groups that were spoken about earlier, where concentration of HIV is maximum, are referred to as the High-Risk Groups, including the female sex workers, injecting drug users, men who have sexual intercourse with other men and Transgenders. Prevalence among these is 20 times higher than the general population. Further, 2008 report showed that out of the 2.27 million infected people, 39% are women, while 3.5% are children. Unprotected sex (87.1% heterosexual and 1.5% homosexual) is the major route of HIV transmission, followed by transmission from Parent to Child which is 5.4% and use of infected blood and blood products is 1.1%<sup>22</sup>.

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<sup>18</sup>Chandrika Bhattacharyya and HimanieKatoch, NLIU Bhopal, "*Human Rights perspective on HIV/AIDS Vis-À-Vis Right to employment of persons living with HIV/AIDS*", available at [http://www.legalserviceindia.com/articles/hu\\_aids.htm](http://www.legalserviceindia.com/articles/hu_aids.htm) (accessed on 12/10/2018).

<sup>19</sup>*Ibid.*

<sup>20</sup>*supra* 16.

<sup>21</sup>National Human Rights Commission, '*Know Your Rights- Human Rights and HIV/AIDS*', 2011, available at <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf> (accessed on 11/10/2018).

<sup>22</sup>*Ibid.*

The fourth phase in India's struggle against HIV/AIDS was launched by the Government of India on 12 February, 2014, coinciding with the National AIDS Control Programme's fourth phase (NACP VI). This programme had better budgetary allocation system, and strengthened response system in India through testing and counselling, along with targeted policies for the HRG. Prevention mechanisms were promoted through measures like free distribution of condoms, including female condoms.<sup>23</sup>

Further, ART was launched in India in 2004. ART stands for Antiretroviral Therapy, also known as Highly Active Antiretroviral Therapy (HAART), and is a WHO recommended way of treatment. It is a suppressive drug treatment to enhance longevity of infected persons and also to reduce fatality in many cases. It is administered in lines of treatment viz. first line, second line and third line and includes a combination of drugs.<sup>24</sup> India currently has 400 ART centres, with about 16 thousand patients registered in HIV care, out of which six thousand are currently on ART (approximately).

## **2. Abridged Fundamental Rights of People with HIV/AIDS**

Our Constitution guarantees certain basic, intrinsic rights to every citizen which are considered inalienable. These are known as the Fundamental Rights, imbued in the dominant theories of human rights and explicitly laid down in Part III of the Constitution of India. Often referred to as the conscience of the Constitution<sup>25</sup>, these are not absolute<sup>26</sup> and are subject to reasonable restrictions; however, without them a life of a citizen is considered incomplete. They provide a human with certain basic necessary conditions to survive in a society, and are considered binding upon every authority. In India, they provide protection against arbitrary invasion by the State<sup>27</sup>.

This paper has discussed the intricate relationship between HIV/AIDS and Human Rights. Many of these rights are overlapping with, and are in fact covered within, the scope of Fundamental Rights, as granted in the Constitution. Some of these include the Right to Life, Liberty and Privacy (as under Article 21), Right Against Discrimination (Article 15),

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<sup>23</sup>*National AIDS Control Programme: 4th Phase Launched by NACO*, 11 April, 2014, available at [http://www.erewise.com/current-affairs/national-aids-control-programme-4th-phase-launched-by-naco\\_art5347dac085774.html#.Wx0TFrZ7HUo](http://www.erewise.com/current-affairs/national-aids-control-programme-4th-phase-launched-by-naco_art5347dac085774.html#.Wx0TFrZ7HUo) (accessed on 12/10/2018).

<sup>24</sup>*Ibid.*

<sup>25</sup>G. Austin, *The Indian Constitution* (1966) 50.

<sup>26</sup>*Constituent Assembly Debates*, Vol. VII, 41.

<sup>27</sup>*State of W.B. v. Subodh Gopal Bose*, AIR 1954 SC 92: 1954 SCR 587.

Equality Before Law (Article 14), Right to employment (Article 19(1)(g)), Freedom of Movement and Forming Associations (Article 19(1)(d); 19(1)(c)) etc.

The biggest and most reported case of discrimination arises in the work-environment. In today's time, a contemporary right being abridged affecting the modern working citizen in a great manner is the right to employment. This is extremely relevant considering that the targeted age bracket often coincides with the working population's age bracket. Further, it is closely linked to the other overlapping rights of a human, that is a life of dignity, the freedom of choice, and the right to lead one's life on one's own terms. It also interferes with the concept of rewards based on merits in society, and creates an unreasonable classification, discriminating those who fall within the ambit of those infected by the disease. Therefore, this multi-faceted violation of a contemporary yet intrinsic right is studied in detail in the following section.

### **3. Right to Employment in the Constitution and HIV/AIDS**

Article 19(1)(g) of the Constitution of India grants each citizen the right "*to practise any profession or to carry on any occupation, trade or business.*"<sup>28</sup> It is a fundamental right as well as an internationally recognised human right being violated in the case of people infected with HIV/AIDS across the globe.

Due to the stigma attached to the affected people, and the discrimination they have to face, many-a-times they are also denied employment opportunities. This is a matter of much concern in a country like India, where the most affected tier of population is the working class or the employed and employable age group, between the ages of 15 and 49. Therefore, in the last decade or so, important steps have been taken by the government to evolve policies for implementation in the public as well as private sector, w.r.t. employment of those infected with HIV.

This is to counter not only the denial of jobs to those having the HIV positive status, but also those who are discriminated against at their workplace, by their co-workers or employers, along with frequent, unreasonable termination of their jobs. Sometimes discrimination is in

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<sup>28</sup>Art 19(1)(g), The Constitution of India.

subtler forms, such as demotion, or formal name on pay-roll but no real employment, or refusal of benefits such as provident funds.<sup>29</sup>

Some of the legal questions that have been deliberated since the issue of HIV and workplace rights has come up are whether being negative for HIV can even be a criterion for employment or whether an employer is entitled to test prospective or current employees for the disease; whether a person's right to privacy is violated if asked by an employer to disclose such personal, medical information; can statutory protection awarded to government employees having HIV/AIDS be extended to the private sector as well, etc. The issue is somewhat graver in the private sector, as there are no legal bindings stopping the employer from demanding an HIV/AIDS test, and neither is the employee bound to oblige; however, the employment can be terminated if the employee doesn't disclose such medical reports and there isn't any legal remedy for the same. Also, many a times, removal from job on the grounds of lack of fitness is considered a legitimate reason, as jobs require a minimum fitness level, beyond which employing the individual might be disadvantageous for a firm/organisation. HIV screening is also justified with the argument that special care and facilities can only be provided to such employees when the employers obtains such knowledge. Then there are also specific jobs such as those in the armed forces, where testing for HIV becomes a prerequisite for employment, and is considered legitimate, especially because of their confidentiality policy. The only form of redressal available to an employee is in the form of Labour Laws, which are also relatively weak in India. Further, HIV scanning is mostly prevented in many organisations on ethical grounds, as well as not being cost effective, as compared to preventive measures and healthy working environments, where no rights of the workers are violated, thus, not attracting any unnecessary labour union-attention. Furthermore, the Indian Constitution also protects the rights of these individuals, as under Articles 14, 16 and 21<sup>30</sup>, which grants every individual fundamental right to equality and against discrimination, in employment and any other concerned sector, as well as a right to dignified living. However, these rights are again restricted to Governmental bodies and does not extend to private employers. Certain progressive judicial precedents, although, have been established in the recent years which have brought about a positive change in the context of prevention of the rights of people suffering from HIV/AIDS, in the employment sector.

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<sup>29</sup>Chandrika Bhattacharyya and HimanieKatoch, NLIU Bhopal, "*Human Rights perspective on HIV/AIDS Vis-À-Vis Right to employment of persons living with HIV/AIDS*", available at [http://www.legalserviceindia.com/articles/hu\\_aids.htm](http://www.legalserviceindia.com/articles/hu_aids.htm) (accessed on 12/10/2018).

<sup>30</sup>The Constitution of India, 1950.

3.1. Case study: *MX v. ZY*<sup>31</sup>

This case was a landmark anti-discriminatory case in the Bombay High Court, where the ruling was in favour of the rights of PLHAs, in places of employment. In the case, the petitioner was a casual labourer working in the public sector, up for regularization into a permanent position. Prior to that, however, he was tested positive for HIV, as a result of which he wasn't regularized and his contract was terminated. He was fit to be regularized, in all other aspects. MX filed a petition in the Bombay High Court, challenging the company's rules of mandatory HIV testing and denial of employment to those having the disease, to be in violation of Articles 14, 16 and 21 of the Indian Constitution.

The court ruled in favour of the plaintiff. The ruling held that a public-sector employer cannot deny or terminate employment of an individual solely because of his/her HIV positive status; such discrimination would be held in violation of that individual's fundamental right. The services of such an employee can only be terminated if they pose a substantial risk of transmission to the other employee or they've become unfit to carry out their job duties, in which case an individual inquiry shall be carried about for determining the same, based on the facts of the case. The court also held that in such cases, the HIV positive person can use a pseudonym for fighting the court cases, in order to protect themselves from any discrimination.<sup>32</sup>

3.2. Case study: *Mr. Badan Singh v. Union of India & Anr*<sup>333435</sup>

In this case, the petitioner, enrolled in the Border Security Force on June 1990, was tested positive for HIV in March 1997. He subsequently appeared before a Medical Board in April 1998; was considered unfit for further service. On his request, a Review Medical Board was convened in September which gave the same decision.

In the petitioner's writ petition, the BSF authorities responsible for carrying out the investigation against the petitioner were accused of being biased due to the ill-conceived notion that his infection was a consequence of the immoral acts he had participated in. Further, the writ petition asked for reinstating the petitioner in the

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<sup>31</sup>*MX v. ZY (1997)*, AIR 1997 Bom 406 (India).

<sup>32</sup>National Human Rights Commission, "*Know Your Rights- Human Rights and HIV/AIDS*", 2011, available at <http://nhrc.nic.in/Documents/Publications/KYR%20HIV-Aids%20English.pdf> (accessed on 08/10/2018).

<sup>33</sup>*Mr. Badan Singh v. Union of India & Anr*, 2002 VIII AD Delhi 553 (India).

<sup>34</sup>*Mr. Badan Singh v. Union of India & Anr*, 97 (2002) DLT 986 (India).

<sup>35</sup>*Mr. Badan Singh v. Union of India & Anr*, 2002 (64) DRJ 849 (India).

services or providing him with alternative employment with pension provision; alternatively, that he be granted all pensionary benefits as admissible to persons with 100% medical disability attributable to service.<sup>36</sup>

The respondents (BSF) resisted the petition on various grounds. Further accusations were made on the petitioner to have contracted HIV in order to avail a disability pension.

The court held that the Respondents were liable to pay the petitioner pension with interest at the rate of 6% per annum.

#### **4. Restrictions on the Right to Employment as per the Constitution**

Article 19(1)(g) is subject to the restrictions as under clause (6)<sup>37</sup> of the article, which empowers the state to legislate such that- 1) imposes reasonable restrictions on this right in the interest of the general public; 2) prescribes professional or technical qualifications necessary for carrying on any profession, trade or business; and 3) enables the state to carry on any trade or business to the exclusion of private citizens, wholly or partially<sup>38</sup>. The third is obviously not applicable in the current discussion. The first two, however, are also not being imposed in this case.

4.1. Reasonable restrictions in the interest of general public: 'In the interest of general public' here is defined as public order, public health, public security, morals, economic welfare of the community and the Directive Principles of State Policy.<sup>39</sup> Usually the test of reasonableness pertains to the nature of the trade or profession; if they are illegal or immoral in any way. However, for the people living with HIV/AIDS, they cannot be restricted from carrying on their profession as the disease in no way makes them incompetent to carry out a profession, neither does it make the profession against the interest of the community in any way. Peace and order of the public would not be disturbed and neither would the public health be affected by letting those having the disease carry on the occupation of their choice. HIV/AIDS is not an easily

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<sup>36</sup>*supra* 28.

<sup>37</sup>The Constitution of India, 1950.

<sup>38</sup>Mahendra Pal Singh, *V. N. Shukla's Constitution of India*, Eastern Book Company, Lucknow (13<sup>th</sup> edition, 2017).

<sup>39</sup>*Municipal Corporation of the City of Ahmedabad v. Jan Mohammed Usmanbhai*, (1986) 3 SCC 20, 31: AIR 1986 SC 1205.

communicable disease and doesn't affect the productivity or efficiency of any person or their co-workers, thus, not harming the society.

4.2. Technical Qualifications: No condition of reasonableness as to the professional/technical qualifications prescribed by law for carrying out any profession, trade or business has been laid down. It follows that the courts would not have the power or authority to decide whether these are reasonable or not<sup>40</sup>. However, a medical qualification as to being negative for HIV cannot be interpreted as a 'technical or professional qualification', as it does not deal with the nature of the job and a person's technical competence to complete such a job. It merely talks about a physical medical condition which should not be a deterrent in the path of choosing one's occupation and making a livelihood. These questions have also been dealt with by the courts in many of its landmark cases, 2 of which were quoted and discussed in the previous section.

## **5. Conclusion**

Human Rights and HIV/AIDS share a close connection. When a person is already vulnerable, being infected with this disease, the protection of his Human Rights becomes all the more essential. Further, HIV needs to be approached with compassion, as well as an effective, rights-based response system, consistent with international human rights standards. HIV positive individuals are also essentially human beings, entitled to basic public health, and public health interests can never be in contradiction with Human Rights. The higher the protection of every individual's human rights, the higher is the chance of him not contracting the disease, and even on contraction, the higher are his survival chances, as well as his family's chances of coping with this catastrophe of a disease.

An effective response system to the HIV epidemic can only be achieved when States fulfil their commitments towards establishing proper governmental institutions and infrastructure to tackle the problem, implementing law reforms and taking progressive statutory and judicial steps; by providing support services, as well as rehabilitation opportunities to those coping with the disease. Promoting a healthy and accepting environment, free of stigmatization and discrimination, supportive of the vulnerable groups, is the need of the hour. Only with an

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<sup>40</sup>Mahendra Pal Singh, *V. N. Shukla's Constitution of India*, Eastern Book Company, Lucknow (13<sup>th</sup> edition, 2017).

open-minded attitude and changing mind-set of the society can they be accepted, equal to any other ordinary human, and integrated within the society, helping them to deal better with HIV/AIDS.

Further, special attention needs to be paid to the more susceptible groups, also considered more controversial in the eyes of the society. Women, children, sex workers, injecting drug users and homosexual men are all included in this category. It is not only the high probability of these groups contracting the disease that is alarming, but also how they are socially more vulnerable to being ostracized or subject to extreme discrimination. In such times, it becomes the responsibility of the states to make them feel safe and protected, like any other citizen, and also identify policy methods to meet their human right obligations in the best way possible, and granting them political, cultural, economic and civil rights, that they are anyway entitled to. In India, it is the State's duty to safeguard each citizen's fundamental rights, irrespective of their medical status.

HIV/AIDS is currently one of the biggest medical challenges the whole world faces, and therefore, it is the responsibility of the whole world to fight it. The more affected areas such as the poor and developing countries of Asia and Africa are more threatened as the disease is most widespread here, but they also are weaker and have lesser resources, to win the war against this deadly disease. Therefore, the more well-off countries need to come out in their support, and then only can the world be free of this universal plague.

While India has taken large steps in its recent past to tackle the disease and control it in the best possible manner, it still could use better infrastructure, as well as more innovative policies including education and media, to tackle the problem. Further, the biggest war still lies in the mind of an average human, who still tends to discriminate his fellow-human, and consider him subordinate to him because of him having HIV. Only when this stigma and the constant internal, mental resistance is fought can every human expect to be treated equally and fairly and not discriminated on a day-to-day basis, in the smallest yet the most basic things, like right to dignity at one's workplace and the right to follow the profession of one's choice, not restricted by a burdensome medical issue.

Human Rights and HIV/AIDS are an interwoven fabric, and while it is medically impossible in today's time to eradicate the disease in its totality, it is possible to keep the fabric in the best possible condition, by treating it to the best possible medications, while not tearing it apart and leaving the individuals affected by the disease in an even more miserable condition than they already are in. A healthy fabric makes for a healthy society.