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HIV and AIDS

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HIV and AIDS: some legal and ethical implications for the medical profession

K Mathiharan

This review is meant to be a starting point for discussion of legal and ethical questions faced by medical professionals in relation to Acute Immuno Deficiency Syndrome (AIDS). Existing laws and the Code of Medical Ethics require re-examination in the light of the profession's experiences.

The doctor-patient relationship is founded on mutual trust. This trust can be fostered only when information is freely exchanged between a doctor and a patient. Acceptance of this principle is fundamental to the resolution of the questions, which have been identified in relation to AIDS.

Doctor's duty to care

The Code of Medical Ethics states that the principal objective of the medical profession is to render service to humanity with full respect for human dignity.⁽¹⁾ Doctors should extend the same high standard of medical care and support to all patients. It is unethical for a medical practitioner to refuse treatment or investigation for which there are appropriate facilities on the ground that the patient suffers, or may suffer, from a condition, which could expose the doctor to personal risk. It is equally unethical for a doctor to withhold treatment from any patient based on a moral judgement that the patient's activities or lifestyle might have contributed to the condition for which treatment was being sought. Unethical behaviour of this kind may raise a question of serious professional misconduct.

Notification

The Code of Medical Ethics also states that the physician should "notify the constituted public health authorities of every case of communicable disease under his care, in accordance with the laws, rules and regulations of the health authorities."⁽²⁾ In 1987, the Goa Public Health Act was amended to include Clause (vii) of Section 53(1). Under this clause, authorities were required to isolate those found positive to serological tests for HIV. It considered AIDS as a contagious disease. It provided for compulsory collection of blood for investigation by the health officer on the grounds of "reasonable suspicion" that a person was suffering from AIDS; isolation of a person found positive for HIV by serological tests, and precautions to be taken in case of a patient suffering from AIDS.

Ms Lucy R D'Souza challenged this Section of the Goa Public Health Act in the Panjim High Court. The writ petition argued that there was no scientific foundation for isolation. It held that discretionary powers given to health officers to isolate were unguided and uncontrolled, and the provision for isolation was procedurally unjust in the absence of the right to a hearing.

In December 1989, the Bench comprising Justice P. A.

Mehta and Justice G. F. Couto upheld the Goa government's order providing for isolation of AIDS patients for three months.⁽³⁾ The Division Bench held that while "isolation was an invasion upon the liberty of a person", "in matters like this (the) individual's right has to be balanced against public interest". Second, isolation would protect an AIDS patient from himself in case he becomes "desperate and loses all hopes of survival." Third, segregation was necessary since current preventive measures had failed to check the spread of AIDS. Finally, the provisions of Section 53 of the Goa Public Health (Amendment) Act, 1987, were reasonable and valid and not in violation of either Article 14 (4) or Article 19(1) (5) or Article 21 of the Constitution of India (6).

However, World Health Organisation (WHO) guidelines strongly object to the practice of isolating AIDS patients. It states that there is no public health rationale to justify isolation, quarantine or discrimination based on a person's HIV status or sexual behaviour. In fact, the current approach to HIV positive/AIDS patients opposes mandatory testing, isolation and making the identity of affected people public. Some legal decisions also support this view. A Division Bench of the Madras High Court, on a petition filed by Ms. Shyamala Natraj in July 1990, ordered the release of four women detained at the government vigilance home in Mylapore. These women, identified as HIV positive, had completed their periods of sentence under the Immoral Traffic (Prevention) Act, 1986, but were to be held because they were HIV positive.⁽⁷⁾

The medical profession must discuss whether doctors have any public health duty to inform the authorities of people with HIV or AIDS.

Confidentiality

The Code of Medical Ethics states: "Confidences concerning individual or domestic life entrusted by patients to a physician and defects in the disposition or character of patients observed during medical attendance should never be revealed unless their revelation is required by the laws of the State. Sometimes, however, a physician must determine whether his duty to society requires him to employ knowledge, obtained through confidence as a physician, to protect a healthy person against a communicable disease to which he is about to be exposed. In such instance, the physician should act as he would wish another to act toward one of his own family in like circumstances."⁽⁸⁾

In addition, Article 12 of the Universal Declaration of Human Rights^(9,10), Article 17 of the International Covenant on Civil and Political Rights^(11,12) and Article 21 of the Constitution of India guarantee a person's right to privacy.

Informing other health care professionals

When a patient is seen by a specialist who diagnoses HIV

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or AIDS, and a general practitioner (GP) becomes involved in that patient's care, the specialist should explain to the patient that the GP could not provide adequate care without full knowledge of the patient's condition. However, if the patient refuses to allow the GP to be informed even after proper counselling, the patient's request for privacy prevails. The only exception to this general principle is when the doctor judges that the failure to disclose would put the health of any member of the health care team at serious risk. A similar principle applies to the sharing of confidential information between specialists or with other health care professionals such as nurses, laboratory technicians and dentists. This view has been accepted by Supreme Court of India in *Mr. X v Hospital Z*. (13)

Informing spouse or other sexual partner

When a doctor decides to inform a third party other than a health care professional, without the patient's consent, questions of conflicting moral, ethical and legal obligations arise. It is imperative that the doctor must discuss with the patient the question of informing a spouse or other sexual partner when a patient is found to be HIV positive or is diagnosed with AIDS. If the patient refuses to consent for such disclosure, the doctor may consider informing the partner in order to safeguard such persons from infection.

In November 1998, in a judgement delivered by a Division Bench of the Supreme Court of India comprising Justice S Sathar Ahmad and Justice B.N. Kirpal¹⁴, the petitioner was employed as a senior officer in the health service of a North Eastern State. While in service, he was asked by his government to accompany a patient to Apollo Hospital, Chennai. As the patient required blood, the petitioner volunteered to donate blood but it was found that he was HIV positive. Besides informing the petitioner, the hospital revealed the information to the patient. When the patient went home, he publicised information on the petitioner's condition within his community. The petitioner's wedding was called off and he was socially ostracised. As a result, the petitioner was put to mental trauma and stress.

The petitioner moved the National Consumer Disputes Redressal Commission and claimed damages from Apollo Hospitals for breach of privacy. His contention was that the hospital had every right to reject his blood but it should not have revealed to the patient the identity of a possible donor who was HIV positive. The Commission dismissed his case and he moved the Apex court.

The Division Bench dismissed his appeal, holding that the right of privacy - an essential component of the right to life under Article 21 of the Constitution — is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedom of others. Secondly, disclosure of the petitioner's HIV status did not violate either the rule of confidentiality or his right to privacy, as the woman to whom he would have been married would have been infected if marriage had taken place and consummated. Thirdly, so long as a person is not cured of a communicable venereal disease or impotency,

the right to marry cannot be enforced through a court of law and shall be treated to be a "suspended right". Fourthly, a person suffering from "virulent venereal disease" must be banned from entering into marital ties to prevent him from spoiling the health and life of an innocent person. Fifthly, where there is a clash of two fundamental rights, as in the instant case (the appellant's right to privacy as part of his right to life and his prospective wife's right to lead a healthy life, which is her fundamental right under Article 21), the right, which would advance the public morality or public interest would alone be enforced through the court. Finally, a doctor may wish to disclose a diagnosis to a third party other than a health-care professional. "The only grounds for this are when there is a serious identifiable risk to a specific person who, if not informed, would be exposed to infection. ... A doctor may consider it a duty to ensure that any sexual partner is informed regardless of the patient's own wishes." (Emphasis added)

The question that remains unresolved in this case is whether it is ethical of hospitals to reveal identities of blood donors who are HIV positive to third parties (and in the present case the patient).

In addition, this judgment equated HIV to a 'venereal disease in a communicable form'. It further observed, "AIDS is the product of undisciplined sexual impulse. This impulse, being the notorious human failing if not disciplined, can afflict and overtake anyone how high so ever or for that matter, how low he may be in the social strata." These observations fail to take note that HIV also spreads through other non-sexual means. Further, it treats the person who is HIV positive on a par with an AIDS patient, which is incorrect.

Medical records

When patients have undergone tests for HIV, their doctors must maintain separate records to prevent test results from being inadvertently disclosed with other records. They can be guided by existing regulations for medical termination of pregnancy concerning the custody of consent forms and maintenance of admission registers.⁽¹⁵⁾

Consent for testing for HIV infection

Justice Cardozo offered what has become perhaps the best-known statement on the principle of informed consent in the 1914 New York case of *Schloendorff v. New York Hospital*.⁽¹⁶⁾ He held: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body: and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages..."

Consent may be express or implied. Express consent is an oral or written authority by the patient to render the proposed treatment. In HIV testing, written consent should be obtained.

Both criminal and civil law, in particular laws relating to battery and negligence, are relevant to the legality of testing. The testing should only be performed on clinical grounds.

Pre-test counselling is essential prior to HIV antibody testing. Pre-test counselling is to be confidential and must explain the following points: ELISA (Enzyme Linked Immuno-Sorbent Assay) test indicates the presence of antibodies against HIV and it does not register the presence of virus itself. There are possibilities for false positive/negative result and a positive result should be confirmed by Western blot method. The antibodies to HIV take three weeks to three months from infection to show up in the blood - known as the 'window period'. Finally, more expensive sensitive tests such as P24 Antigen Detection and Polymerase Chain Reaction (PCR) are available which reduce the 'window period' to 7 days and 1 day respectively.

These steps are essential because of the serious social and financial consequences the patient may face for the mere fact of having been tested for HIV.

Post-test counselling should be done when the test results become available. When the test result is positive, the person should be informed of the physical complications caused by HIV, possible treatments, and measures to avoid transmitting the infection to others. Adequate psychiatric counselling and other supportive measures should also be provided. People who are HIV negative should be educated on high-risk behaviour and on preventive measures.

A particular difficulty arises when a child must be tested for HIV infection. Consent of a parent or guardian is normally sought. However, in some instances, the parent's judgement may be distorted by the possibility that the parent may have infected the child. The parent may withhold consent to protect the parent's own position. In such a situation, the doctor should see if the child is competent to give consent, and if so, obtain consent from the child. Otherwise, the doctor should decide whether the interest of the child should override the wishes of the parent. It is not unethical if a doctor performs such a test without parental consent provided always that the doctor is able to justify that the action was in the best interests of the patient.

Right to treatment without discrimination

The obligation of the State to ensure the creation and the sustaining of conditions congenial to good health is cast by the Constitutional directives contained in Articles 38, 39(e) (f), 42, 47 and 48 A in Part IV of the Constitution of India. The Preamble and Article 38 of the Constitution of India envision as its arch to ensure life to be meaningful and liveable with human dignity. (17)

The State has to direct its policy towards securing that health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength (Article 39 (e)) and that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment (Article 39 (f)). The State is required to make provisions for just and humane conditions of work and for maternity benefit. (Article 42)

It is the primary duty of the State to endeavour the raising

of the level of nutrition and standard of living of its people and improvement of public health and to bring about prohibition of the consumption, except for medicinal purposes of intoxicating drinks and of drugs, which are injurious to health. (Article 47) Protection and improvement of environment is also made one of the cardinal duties of the State. (Article 48 A)(18) (Abichandani 1998 at 1-2)

Article 25(1) of the Universal Declaration of Human Rights guarantees the right to a standard of living adequate for health and well-being.(19)

The Supreme Court of India in *Mr. X v. Hospital Z* (20) states that people with HIV/AIDS "deserve full sympathy and are entitled to all respects as human beings. ...Their society cannot, and should not be avoided, which otherwise would have had psychological impact upon them. They have to have their avocation and government jobs or service cannot be denied to them."

In *Vincent Panikulangara v. Union of India* (21), the Supreme Court of India had this to say on the right to health care: "... maintenance and improvement of public health have to rank high as these are indispensable to the very physical existence of the community and on the betterment of these depends the building of the society of which the Constitution makers envisaged. Attending to public health in our opinion, therefore, is of high priority - perhaps the one at the top."

In *Paschal Banga Kheta Mazdoor Samity v. State of West Bengal* (22), the Supreme Court of India stated: "The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare state, the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres, which provide medical care to the person seeking to avail those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person, Preservation of human life is thus of paramount importance. The Government hospitals run by the State and the Medical Officers employed therein are duty bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21."

Further, WHO guidelines hold that AIDS patients or those who test positive for HIV cannot be refused treatment. The State should establish adequate infrastructure to tackle the special needs of HIV positive persons / AIDS patients without segregating them from mainstream society. Private hospitals should also be encouraged to invest in adequate facilities to treat HIV positive/AIDS patients.

Duties and rights of health workers with HIV

Considerable public anxiety has been aroused by suggestions that HIV positive health workers may endanger their patients. The risk is very small; to date there is only one known case in the world of HIV having been transmitted

by a health care worker to patients, in the course of dental treatment.

Still, it is imperative; both in the public interest and on ethical grounds, that health workers who think they may have been infected with HIV seek appropriate diagnostic testing and counselling. If found to be infected, they must be under regular medical supervision, and also seek specialist advice as to whether they should continue in clinical practice or limit their practice in any way.

Similarly, health workers who know that a colleague is infected with HIV and know this colleague has not sought specialist advice to modify his/her professional activities have a duty to inform the appropriate regulatory body.

Health workers who become infected with HIV are entitled to the same confidentiality and support afforded to other patients. Their HIV status should be disclosed only if the protection of patients is at peril. The transmission of Hepatitis-B virus (HBV) is similar to that of HIV. In this context, two judgements may be of relevance.

In September 1994, a Dr Mesh Gaud, who had been working in hospitals in the UK assisting heart and chest operations, was sent to prison for 12 months. He was convicted by Justice Blofield on the criminal charge of causing a public nuisance - in that he had knowingly put patients at risk over a period of some three years by working when he knew he was infected with Hepatitis B. (23)

In a landmark judgment, the Rajasthan High Court awarded a compensation of Rs 5,00,000/- to the father of Dr Veena Chhajer, a resident doctor who died of Hepatitis B contracted while working in the Mathuradas Mathur Government Hospital, Jodhpur. It also directed the state government to appoint a committee to inquire into the circumstances leading to her death and to suggest measures to prevent their recurrence in the future. The Court also directed the state government to provide adequate infrastructure facilities to resident doctors working in hospitals dealing with Hepatitis B and HIV, and to provide adequate preventive measures such as disposable gloves, syringes, needles, etc. (24)

Iatrogenic HIV infection

People who are infected with HIV through medical treatment can seek claims under tort law either in a Civil Court or in a Consumer Disputes Redressed Forum. In a case reported in *The Hindu* (25), a woman who was transfused with HIV-contaminated blood when she was admitted to a naval hospital in 1992 for childbirth was found to be HIV positive six days later. Her husband and newborn child were free from HIV. This clearly showed that she contracted the HIV through the blood transfusion. When the case was taken to the court, she obtained a 'suppression of identity' order because of her HIV status. It is the first such case in India to get such an order.

Criminal law can also be invoked in this context. Sections 269 and 270 of the Indian Penal Code have provisions to punish those whose negligent or malignant acts are likely to spread dangerous diseases. Section 304-A of IPC (causing the death of a person by a rash and negligent act,

not amounting to culpable homicide) can be invoked against a blood bank if the blood supplied results in the death of a person due to HIV infection.

A comprehensive law on AIDS

At present, in India there is no legislation integrating all issues concerning HIV and AIDS. In the UK, The AIDS Control Act, 1987, provides for the collection and reporting of statistics relating to HIV infection and AIDS and the availability of facilities and staff for testing, consulting, treatment and other measures designed to prevent the spread of HIV infection. Section 23 of this Act prevents the sale, supply or administration of any equipment or reagents to detect HIV antibodies (test kits) in centres without medical supervision and the availability of competent pre-and post-test counselling. Similar legislation is needed in India.

Further, Section 377 of the Indian Penal Code, which makes non-procreational sexual acts a criminal offence, should be deleted. Section 377 of the IPC is in violation of the constitutionally guaranteed rights of right to life, liberty and equality.

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2. Ibid.
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5. Article 19 (1) All citizens shall have the right (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; (f) to practice any profession, or to carry on any occupation, trade or business.
6. Article 21 Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to the procedure established by law.
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