

THE CRIMINALISATION OF HIV TRANSMISSION

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I. INTRODUCTION

In 1981 the U.S. Centers for Disease Control and Prevention identified a disease which since has grown to be one of the largest known killers in human history. Today, over 33.2 million people worldwide are affected with the HIV virus, making AIDS one of the largest growing concerns of the international community.¹ The horror of the HIV virus lies in the fact that it decimates the immunity system of an infected person making that person mortally vulnerable to even the most basic diseases such as a common cold or a flu. To this day there has been no cure discovered for this disease, though many drugs have been invented such as the anti-retroviral drugs which retard the progress of the HIV virus and slows down the entire process of Acquired Immuno-deficiency Syndrome. However these drugs are expensive and not easily available which mean that the majority of AIDS sufferers, who are concentrated in the developing and under-developed world, are denied access to them.

In response to the global threat posed by HIV/AIDS, the United Nations made the halting and reversal of the spread of HIV/AIDS, and provision of universal access to treatment for HIV/AIDS part of the 8 Millennium Development Goals to be realized by 2015.² Thus it is indeed clear that the world has finally woken up to the dangers of HIV/AIDS.

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¹Robert C Gallo, A reflection on HIV/AIDS research after 25 years, University of Maryland, 2006, <http://www.retrovirology.com/content/3/1/72>.

² United Nations Millennium Development Goals – url: <http://www.un.org/millenniumgoals/#>.

Unfortunately this has not translated into effective measures to curtail the spread of AIDS, specifically that of intentional or reckless transmission of the virus. The steps taken to criminalize the transmission of HIV/AIDS worldwide are few and faulty, and in India they are virtually non-existent. The few attempts made at imposing liability drew their legitimacy from the certain provisions of the Indian Penal Code which are too archaic and outdated to deal with as multi-faceted and serious as that of HIV/AIDS transmission. This project deals specifically with the liability for the transmission of HIV/AIDS and looks at it from the judicial standpoint.

The arguments in favour of criminalizing HIV/AIDS are numerous, but the costs of implementing it are large. However, if India wants to take steps towards the curtailing of the growth of its HIV population, then drastic measures are needed. Apart from reviewing the existing situation, this project will also seek to establish a suitable method of penalizing HIV transmission whenever they satisfy the requisites of a crime, thereby ensuring that the offender is punished and a potential offender is deterred.

But at the very outset it is essential to keep in mind that India is a nation where the majority of the people are unknowledgeable, let alone illiterate, and thus their awareness on HIV/AIDS and its associated risks is negligible. If the Indian people are not educated on all the issues relating to HIV/AIDS, criminalizing its transmission will not have any effect. Indeed, the number of AIDS cases that are reported itself are negligible compared to the official estimates of NACO³, and thus there is very little history of AIDS related suits and judgements in India. While in countries around the world the transmission of AIDS has not only attracted criminal liability, but also developed into a tort which mandates the provision of ample compensation to the victim, even in cases of no infection but only exposure, India has seen almost no development in this regard.

³National AIDS Control Organization.

It is therefore a desire of the researcher to evolve within this paper a scheme of dealing with the transmission of HIV/AIDS both as a crime and a civil offence in a manner suitable to India, but drawing inspiration from all over the world since AIDS truly is a global threat.

II. THE CASE FOR CRIMINALIZING HIV TRANSMISSION

A. *Defining HIV transmission as a crime*

There exist numerous definitions on what a crime is. Many define it as the act or omission to do an act which results in the breaking of the law.⁴ However, the definition most apt to the aims of this paper is the one given by Sergeant Stephen, which says that a *crime is the violation of a right, considered in references to the evil tendency of such violation as regards the whole community*.

It is indeed the violation of the right to life under Article 21 of the Constitution of a person when that person is infected with the HIV virus against their will or without their knowledge. But to make this act legally punishable or to fulfill the legal definition of a crime, there are three essential requirements that must be satisfied, as specified by Cecl Turner – (1) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (2) that among the measures of prevention selected is the threat of punishment; (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.⁵

As regards the first point it is clear that the onset and spread of AIDS is something that the state is bent on preventing. It is this that led to the formation of NACO, into which substantial funds have been invested. It is the second and third point of the three requisites

⁴Paul W. Tappan, Sir William Blackstone etc.

⁵J.W.C.TURNER, KENNY'S OUTLINES OF CRIMINAL LAW (Cambridge University Press: London, 1966).

specified above that this project will seek to establish – whether punishment should be applied to the act of transmitting the HIV virus and what kind of legal proceedings are instituted to determine the criminal liability and the punishment in each scenario. Essential to this is the presence of the two necessary phases of a crime – the *actus reus* and *mens rea*.

B. Characteristics of the Crime

Actus reus refers to the result of human conduct, either an action or an omission, which the law seeks to prevent.⁶ Thus the *actus reus* in HIV related crimes is the infection of a person with the HIV virus. In *State v. Smith*⁷, the accused was convicted of attempt to murder for biting a corrections officer while knowing that he himself was HIV+. Here, the *actus reus* is the act of biting the officer which may or may not involve transmission of the virus leading to the HIV infection of the officer. In recent times, there have been attempts to classify acts where one ‘knowingly exposes another to the risk of HIV infection’ as a prohibited act, i.e. *actus reus* even if the act does not result in infection. In the case *Smallwood v. State*,⁸ refused to follow judicial trends that sought to increase liability for all risks associated with the contraction of HIV/AIDS and held that merely committing an act that had risk accompanied with knowledge of the risk would not satisfy the condition of prohibited act/*actus reus*. However in a number of other cases it has been held that anyone who intentionally or with full knowledge does an act that could lead to the infection of another with the HIV virus is committing a prohibited act that is opposed to public health, even if the act does not result in infection. Thus there exists differing judicial opinion on this point. If all acts which cause the exposure of another to the HIV virus thereby increasing the risk of contraction of the virus are prohibited, then the personal liberty of

⁶Id. at 17.

⁷*State v. Smith*, 621 A. 2d 493, 495 (NJ Super. Ct. App. Div. 1993).

⁸*Smallwood v. State*, 680 A.2d 512 (Md. 1996).

HIV+ people will be severely curtailed. Indeed the situation will arise where HIV people are treated like criminals and incarcerated which is exactly what happened in *Lucy R. D'souza v. State of Goa*⁹ where a HIV+ person was forced into solitary confinement by the state on the ground that he posed a health risk to society at large. The Supreme Court even upheld the isolation which arose out of Section 53 of the Goa, Daman and Diu Public Health Act, 1985. Thus, if such extreme measures are to be forced upon those affected by the HIV virus it is certain that the transmission itself must be severely penalised.

The problems with the classification of the act of transmission into *actus reus* can be resolved with reference to *mens rea*, or the intention of the person while committing the act. It is established law, such as in the case of *Thabo Meli*¹⁰, that for a crime to be committed there must be concurrence of both *actus reus* and *mens rea*. In the above case, it was found that when an act was committed with the intention of causing death, it did not result in death but instead death was caused by an act which was not at all intended to cause death but merely dispose of a body which was thought to be lifeless. Hence, the conviction for murder was unsustainable. Thus the importance of *mens rea* and its concurrence is evident, and we shall not look at the corresponding portion of the transmission of HIV/AIDS.

Mens rea refers to the mental framework of the accused during the commission of the crime. It literally means guilty intention, thereby indicating that the person committing the *actus reus* must have necessarily intended to commit that very same act. In the case of transmission of HIV virus, either the intention to infect someone else with HIV/AIDS or the knowledge that through the commission of the act the victim might acquire HIV/AIDS would be sufficient to disclose *mens rea*. However, the problem of discerning *mens rea* is that it has to be inferred from the actions of the accused and in most transmission of HIV virus cases it is difficult to prove that the

⁹Lucy R. D'souza v. State of Goa, A.I.R. 1990 Bom. 355.

¹⁰Thabo Meli v. R.,(1954) 1 All.E.R. 373.

intention was that the victim be infected with the HIV virus or that the accused had the knowledge that he was HIV+. The following cases elaborate this point.

In *Doe v. Dilling*¹¹ the plaintiff accused the parents of her fiancé of intentionally concealing from her the fact that their son was HIV+, which led to her also getting infected by the virus. However it could not be proved beyond reasonable doubt that the parents knew of the HIV+ status of their son and hence the appeal was dismissed. In *Weeks v. State*¹² the conviction of the accused was upheld when he spat on a prison guard after he was confirmed as HIV+. Here the knowledge that he was capable transmitting the virus was present and the fact that he spat on them proved intention to infect them. Similarly in *State v. Haynes* the defendant had thrown blood into the eyes and mouths of police officers and paramedics who were trying to restrain him from committing suicide. He told them to leave him alone and to let him die in peace since he was suffering from HIV/AIDS. Thus once again both knowledge and constructive intention is present and the defendant was convicted of attempt to murder.

However, the problem arises in cases where the accused has no idea of his/her HIV+ status and then proceeds to commit the *actus reus* with regard to HIV/AIDS crimes. In such cases, it is against the principles of criminal law to hold the accused guilty since he/she had no intention to pass commit the offence of criminal transmission of the HIV virus. In *R v. Lee*¹³ the accused indulged in unprotected sex which led to the transmission of the virus, but he had no knowledge of the fact that he was HIV+. In most cases such as this an inquiry into the lifestyle of the accused has been used by the judiciary to determine constructive knowledge, mainly because risky, irresponsible or negligent behaviour in such matters cannot be tolerated. Thus if the accused was in the habit of indulging in

¹¹*Doe v. Dilling*, 2008 W.L. 879039 (Ill.).

¹²*Weeks v. State*, 834 W.2d 559 (Tex. Ct. App. 1992).

¹³*R v. Lee*, 3 O.R. (3d) 726 (Gen. Div) (1991).

unprotected sex with myriad people, or was in the habit of consorting with prostitutes etc. and then passed on the virus to an unsuspecting victim, the accused would be held guilty of criminal transmission of HIV/AIDS since the kind of lifestyle led by the accused necessitated caution and possible testing for the virus.

This makes the liability for HIV infections rather high, i.e. it places it on par with other crimes that attract strict liability. This is in keeping with the high risk nature of the disease, the fact that it has no cure and will in all probability result in death. The spread of HIV/AIDS is highly opposed to public order and health, and a tremendous amount of resources will have to be directed toward healthcare for the infected people by the state. The association of the spread of HIV/AIDS with other prohibited activities such as prostitution and homosexuality is undeniable thereby adding to the criminal link. Most importantly, the criminal transmission of HIV/AIDS to an innocent victim is blatant violation of human rights and akin to murdering the person. Thus, according to criminal jurisprudence, punishment must be meted for the above act.

Thus, in all cases where the accused has knowledge that he/she is suffering from HIV/AIDS and commits an act whereby someone either contracts the virus or is under the risk of contracting the virus, that person can be said to have the requisite *mens rea* necessary to make the *actus reus* a punishable offence. Rashness or negligence on the part of the accused resulting in the transmission of or exposure to the virus will also entail criminal liability.

C. The Case for criminalisation

However, there are a number of arguments both for and against the criminalization of the intentional/knowledgeable transmission of HIV/AIDS. The necessity for criminalizing any act depends on two factors – (1) the conduct must be wrongful, and (2) it must be

necessary to employ criminal law to prevent such conduct.¹⁴ As regards the first fact it is beyond doubt that the criminal transmission of HIV/AIDS is wrongful. It is with regard to the second point that the discussion will proceed, i.e. on whether it is necessary to employ criminal law to prevent the transmission of HIV/AIDS, with arguments both for and against being provided.

(1) If people liable to spread the HIV/AIDS infection are punished using criminal law, and thereby incarcerated it completely reduces the risk of them interacting with the rest of society and thereby spreading the virus.

However, it has been seen from experience that the number of HIV/AIDS infections that happen in prisons are numerous. Rather than preventing the accused from indulging in sexual activity that runs the risk of transmitting the HIV virus, incarceration places the person in a setting where high risk sexual behaviour is common and occurs with alarming frequency. The only solution then would be to place the HIV+ criminal in solitary confinement, but this would clearly violate their human rights guaranteed under A21, as per the case *Sunil Batra v. Delhi Administration*¹⁵ where it was held that some fundamental rights are available to prisoners and even those on the death row. The object behind incarceration is to rehabilitate the prisoner, but in the case of HIV/AIDS criminals the rehabilitation can never occur since they will always be HIV+ and thus the risk will never cease. They will in effect be serving out a life sentence. Thus, incarceration is clearly a double edged sword.

(2) Criminalizing HIV/AIDS transmissions would however serve the purpose of retribution. In cases of all wrongful transmissions accompanied by sufficient *mens rea*, it is clearly justified if the state

¹⁴C.M.V. CLARKSON & H.M.KEATING, CRIMINAL LAW – TEXTS AND MATERIALS 4 (4th ed. 1998).

¹⁵*Sunil Batra v. Delhi Administration*, A.I.R. 1978 S.C. 1675.

takes retributive action against the offender just as it does in most other criminal cases.

However in cases where there is no *mens rea* but only carelessness, negligence or rashness, retributive action would not be proportional and thereby become unjust. Thus, in other cases where people is not aware of their own HIV+ status the only punitive action would possibly be the compensation of the person to whom the virus was transmitted. This is a civil liability and thus opens a necessary loophole in the criminalization of HIV/AIDS.

(3) Deterrence of future HIV/AIDS related crimes is another possible benefit of the criminalization of HIV/AIDS transmissions.

Yet, there proponents against the deterrence theory that throw up the example of capital punishment for murder not being effective deterrence to the extent the murders continue to happen in plenty. Realistically speaking criminal law is going to have minimal significance in influencing conduct, and thus we cannot be very sanguine about the use of criminal law to compel changes in human sexual behaviour. The deterrence effects of law on the human psyche are very subjective and dependant on social and economic factors, which is proved by the fact that the rich man need not worry about the law since he has the resources to save himself and the poor man does not worry about the law since he either does not know it or understand it.¹⁶

Indeed the procedural difficulties of criminalizing the spread of HIV/AIDS are numerous and seemingly insurmountable. Proof of knowledge or intention will always be difficult to establish, thereby making the very basis of the criminality of the act suspect. Then there is the danger that criminalizing HIV/AIDS transmissions will lead to less number of people testing themselves for the disease. Since the disease itself is virtually incurable and the available medication is

¹⁶ Criminal Law and HIV/AIDS: strategic Considerations, www.aidslaw.ca/durban2000/crimifinal.pdf.

unaffordable for most of Indian society, people who do not test themselves and therefore do not know their HIV status will not fulfill the knowledge or intention, i.e. *mens rea*, requirement of the crime. Thus they cannot be held criminally liable and this would further lead to a stigma surrounding HIV/AIDS and portray all HIV+ people as potential criminals.

In the case *Dr. X v. Hospital Z*,¹⁷ the Supreme Court held that it was within the limits of duty of care of the doctor to reveal to the concerned persons that a patient of his was HIV+. In the given case, the doctor revealed to the fiancé of one of his patients that the patient was HIV+, thereby saving her from being infected with the HIV virus. This invasion into the privacy of the patient and breach of doctor-patient confidentiality was upheld as justified in the circumstances. Although the conduct of the doctor was admirable and a young girl's life was saved through his act, the case itself resulted in fewer HIV+ people wanting to take the test since it could lead to a disruption of their normal lives at the very least. Thus, given the civil fallouts, if criminal consequences were to be attached to HIV/AIDS then many more problems would crop up.

However it is now clear that the transmission of the HIV virus is a criminal act, especially when accompanied with the requisite intention or knowledge. Yet, the answer to whether the transmission of HIV/AIDS should be criminalized is a very difficult one to give, but the researcher is of the opinion that it must be criminalized without further delay. This is because the transmission of HIV/AIDS is one of the worst fates that can befall a human being, since they become like one of the living dead. The act of transmitting the disease should always entail liability – if there is a lack of *mens rea* then civil liability to compensate the victim must be present, and if there is *mens rea* then criminal liability must be attached. The problem that now arises is that

¹⁷*Dr. X v. Hospital Z*, A.I.R. 1999 S.C. 495 [*hereinafter X v. Z*].

To determine how to criminalise the transmission of HIV/AIDS we need to ascertain under which bracket of criminal law this crime can be placed. In the following chapter, the classification of the criminal transmission of HIV/AIDS under the various existing criminal provisions of the Indian Penal Code shall be discussed in detail.

III. TREATMENT OF TRANSMISSION UNDER INDIAN LAW

The Indian Penal Code is possibly one of the best drafted legislations in Indian history, and the fact that it has been amended so few times since its inception in 1860 stands testimony to this fact. Yet, almost 150 years after its enactment there are many provisions which do not cover situations and crimes that arise in today's context. The need to draft a Patent Law protecting intellectual property was apparent after it was realised that the ordinary provisions of theft under S.378 of the I.P.C. did not cover the offence. Similarly, today it is apparent that S.269 and S.270 of the I.P.C. which criminalize a negligent act and a malicious act (respectively) that is likely to spread infection of a disease dangerous to life, does not cover an offence as repulsive as the infection of HIV/AIDS.

The reason for this is firstly the quantum of punishment. S.269 prescribes a maximum term of merely six months while S.270 prescribes upto two years. HIV/AIDS is today the worst known disease in human history and its effects spread to all areas life. Death is almost certain but the manner of live which the sufferers are forced to lead is what makes this disease the horror that it is. There is no known cure for HIV/AIDS and the only medication available is extremely expensive and only serves to prolong life, i.e. retard the progress of the virus against the immunity system. Thus, the penal provision for this offence must be of a much higher degree.

Second, the Sections do not contemplate the differences that may arise in intention or knowledge. The same standard of *mens rea* is presumed throughout. However, in the case of HIV/AIDS transmissions many different scenarios may arise. A husband may acquire HIV/AIDS through a blood transfusion and then pass it on to his wife unknowingly. The husband may contract the disease from a third party through sexual intercourse and then pass it on to his wife unknowingly. The husband may intentionally pass the disease onto his wife because he cannot control his lust. A man may suspect that he has HIV/AIDS, but not take the test for fear of confirmation of his fears, and then he may pass on the virus to an unsuspecting victim. Can this count as knowledge? In these cases are very different from each other and cannot be covered by a single section which does not take into account the differences in degrees of intention or knowledge.

In the case of *Rakma*¹⁸ the plaintiff had sexual intercourse with a prostitute suffering from syphilis. However, the prostitute did not convey to the plaintiff that she had syphilis and thus the plaintiff unknowingly contracted the disease. The Court, using the provisions of S.269 and S.270, held that since the plaintiff was a willing accomplice in the act of sexual intercourse, all incidental results cannot be waived by the plaintiff and it is assumed that he consented to the disease. However it can never be assumed that a person voluntarily consented to contracting HIV/AIDS virus as that would be akin to suicide, and is therefore prohibited by law. Thus it is clear that while S.269 and 270 were first drafted to cover the transmission of such diseases, it lacks the depth and the foresight to combat criminal transmission of HIV/AIDS since infecting someone with HIV/AIDS is akin to causing them.

¹⁸Rakma Kom Sadhu, (1887) I.L.R. 11 Bom 59 [*hereinafter* Rakma Kom Sadhu].

To better illustrate this, let us look at an incident which took place in 2004 in Maharashtra.¹⁹ A medical practitioner in the Nashik district of Maharashtra was accused of injecting his wife and baby daughter with the HIV virus because he wanted to marry another woman. The wife affirmed that she had been constantly tortured for dowry, and that her husband was in love with another woman but had married her only for monetary purposes. Soon after the birth of their baby girl, the husband – Ajay Sharma – gave both the mother and the daughter an injection which he said was a routine hepatitis shot. A few days later both the mother and the daughter tested positive for the HIV virus. Criminal proceedings against Ajay Sharma were instituted but he avoided capture by the police. In such a case Ajay Sharma would clearly invite the provision of S.270, which provides for the punishment of a malignant act likely to spread infection of disease dangerous to life, under which he would receive a maximum punishment of 2 years. However, the act is more akin with that of murder or attempt to murder, given the heinous nature of the offence and the surety of eventual death of both the victims. This proves the need for a new approach to dealing with HIV/AIDS related crimes.

A. Possible Solutions under the existing framework

We shall now examine the existing provisions of Culpable Homicide – Murder, Attempt to Murder and Grievous Hurt vis-à-vis the criminal transmission of HIV/AIDS.

a) Culpable Homicide

All murder is culpable homicide but all culpable homicide is not murder.²⁰ Thus for an act to be proven as murder, it must first satisfy the requirements of culpable homicide. The difference between the two is the degree of knowledge and intention in both cases. With regard to Culpable Homicide, the requisites are that the act must be done with:

¹⁹Dnyanesh Jathar, A Dose of Death, THE WEEK (May 23 2004), 14-16.

²⁰Vishnu v. State, (1997) Cri. L.J 2430 Bom.

- i) the intention of causing death.
- ii) the intention of causing such bodily injury as is likely to cause death.
- iii) the knowledge that he is likely by such an act to cause death.

The problem with the first postulate is that the accused must have committed the act which transmitted the HIV virus to the victim with the intention of killing the victim by that act. However, in most cases the intention is not to kill but merely to have sexual intercourse with the victim. If a doctor unknowingly administers infected blood to a patient during an operation, the intention is not to kill but the act is merely negligent. It is the same argument that holds good for the second postulate, since the intention is invariably not to cause bodily injury but to satisfy carnal appetite.

As regards the knowledge mentioned in the third postulate, the only thing to be proved here is that the accused had knowledge of his/her positive HIV status. This is an extremely difficult proposition for the prosecutors since an affirmation of HIV+ status can only be given through a medical test and in most cases the accused did not undergo a medical test or even if they did, proving it is an uphill task.

However, the most fundamental problem with classifying the criminal transmission of HIV/AIDS within the genus of homicide is that the death of the victim takes so long to occur that if the actual intention was to cause death then the accused would have used a much more direct method of killing. Transmitting HIV/AIDS does not always fulfill the motive of killing since in some cases it can take upto twenty years for the virus to kill the victim. Thus in most cases, the victim would be alive and well while the prosecution would be making its case for conviction of the accused on the grounds of culpable homicide/murder and this would amount to a logical inconsistency.

b) Attempt to Murder

The next provision is that for Attempted to Murder. Under S. 307, the intention or knowledge to cause death is required, just as it is under S.

299 and S. 300. However in this case the act does not result in death, but could result in bodily injury. What is important in this case is not the effect on the victim, though extent of injury will determine the sentence, but the intent of the accused and the act carried out. Thus the accused can be charged for attempt to murder as long as he commits an act with the intention of causing death, though the death of the victim has not been caused immediately. Thus, S.307 would cover instances where the accused has intentionally infected the victim through some overt act, and would also extend to situations where the accused commits the act but it does not infect the virus. For e.g., if the accused indulges in sexual intercourse with the victim with the intention of transmitting the virus to the victim but after the sexual act it is found that the victim is not infected, the accused would still be liable. The only problem with the application of this section is that there exists a qualitative difference between murder and transmission of HIV/AIDS. Murder is the expunging of life of the victim while transferring HIV/AIDS destroys the quality of life of the victim without killing him/her.

Yet, the provision of Attempt to Murder has been applied in many HIV transference cases by judiciaries around the world. In *Weeks v. State*²¹ the Texas Court of Appeals upheld the conviction for attempt to murder when the accused had spat on a prison guard after knowledge had been brought to him that he was HIV+. In *State v. Haines*, the defendant had tested positive in a HIV test previously and as a result attempted to commit suicide. When prevented from doing so by prison guards and paramedics, he threw blood into the eyes and mouths of those restraining him. He was convicted of Attempt to Murder. The same principle was upheld in *State v. Smith*.²²

²¹*Weeks v. State*, 834 W. 2d 559 (Tex. Ct. App. 1992).

²²*State v. Smith*, 621 A.2d 493, 495 (NJ Super. Ct. App. Div. 1993).

However, the difficulties in using this section to criminalize all HIV transmissions are amply demonstrated in *Smallwood v. State*²³. In this case the defendant, D.R. Smallwood was convicted of raping and robbing three women. The trial court had also convicted him of attempted second degree murder and assault with intent to murder for exposing the women, through rape, to the risk of contracting HIV/AIDS. Although there was no extrinsic evidence of intent behind the crimes, the prosecution used Smallwood's knowledge of his own HIV+ status, his awareness that sexual intercourse could transmit the disease and his failure to use a condom during the crime. The Maryland High Court however held the evidence insufficient to justify intent to murder since there was no reasonable proof that Smallwood intended to kill his victims. Mere circumstantial evidence, such as Smallwood not using a condom, was not good enough to sustain an attempt to murder charge. While holding the death is the natural result of HIV/AIDS, it is not the most probable results since the victim could go on living for twenty years during which he/she could be killed in an air crash or an earthquake, thereby defeating the charges against the accused. It also pronounced that knowledge of his HIV status did not betray an intention to kill, especially if that was the only evidence available that adduced intention. Thus, going according to legal provisions the accused could not be held guilty of Attempt to Murder.

A fallout of this decision is that it underplayed the knowledge angle in criminal HIV transmissions. That is to say that since Smallwood had sexual intercourse with the victims in spite of the fact that he knew he was HIV+, it betrays an utter disregard for the safety of the victims, an careless indifference as to whether his victims contracted the HIV virus or not. Thus, this opens up the charge of causing death by a rash and negligent act punishable under S. 304A of the I.P.C. However, this rules out all cases with intention, since under S. 304A there can be no intention or knowledge to commit murder or to transmit the

²³680 A.2d 512 (Md. 1996).

HIV virus. Thus, S. 304A can only apply to instances where the accused has no idea of his HIV+ status and thus unwittingly transfers the virus onto an innocent victim, but his conduct is backed up by a rash and negligent lifestyle which ordinarily would lead to the high risk of acquiring the virus, such as frequenting brothels, indulging in extra-marital sex etc.

c) *Grievous Hurt*

Finally we come to causing Grievous Hurt. The offence of Simple Hurt is not being considered since in no way does the infection with the HIV virus qualify as Simple Hurt. Apart from the same problems of intention and knowledge, the inapplicability of Grievous Hurt to the criminal transmission of HIV/AIDS is that all instances of grievous hurt are laid out in a list comprising eight clauses.²⁴ The first seven clauses require the showing of immediate injury and the eighth clause requires the showing of injury within twenty days, thereby excluding HIV/AIDS from its ambit since in most cases the virus takes years to show a symptom. Thus, the offence cannot be classified under S. 319 or S. 320.

This leads us to the conclusion that the present criminal statutes are not capable of criminalizing an offence such as the transmission of HIV/AIDS. The legislatures should enact criminal statutes that specifically designate as a felony the knowing exposure of another to HIV and thus the offence requires a new legislation enacted specifically for this purpose, or else requires a new approach from the judiciary which lays down the guidelines in the absence of any law from the legislature. The following chapter will discuss the necessary steps to be taken both by the judiciary, and by the legislature in enacting an anti-AIDS legislation that would cover all aspects of AIDS and effectively serve to retard its growth.²⁵

²⁴The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), § 320.

²⁵Jennifer Grishkin, *Knowingly Exposing Another to HIV: Smallwood v. State*, 106 THE YALE L.J., 5, 1617-1622 (Mar., 1997).

IV. CRIMINALISING HIV – THE JUDICIAL AND LEGISLATIVE ACTION REQUIRED

A. *The Indian Judicial Approach*

The importance of having a pro-active judiciary towards the issues of HIV/AIDS and a legislation that effectively addresses the related problems cannot be undermined. The aim of the legislation should be to curb and curtail the spread of HIV/AIDS through various civil and criminal provisions that would effectively stop the transmission of the virus from person to person. The judiciary should be able to provide relief and succour to all HIV patients themselves, and interpret each case scenario so that justice and equity is delivered and maintained respectively.

The first important HIV related case was that of *Lucy R. D'souza v. State of Goa*²⁶ wherein a HIV positive person was forcibly put in solitary confinement. In the subsequent court proceedings brought about by the mother, the court found isolation necessary in the case of HIV+ people although it was a violation of personal liberty, and a suspension of principles of natural justice. It completely ignored credible material such as the WHO report on AIDS which clearly demarcated the dangers of HIV infected people making it clear that they could lead normal lives with ordinary contact with the rest of society. This case particularly marked the highpoint of insensitivity of the Indian judiciary towards HIV/AIDS patients.²⁷

This was later corrected in *Indian Inhabitant v. M/s ZY*²⁸ wherein a labourer who was selected to be regularised as a permanent employee of the corporation for which he worked, was disqualified because a medical test revealed him to be HIV+. The Courts here laid down two important points of law with respect to HIV infected people. Firstly,

²⁶*Lucy R. D'souza v. State of Goa*, A.I.R. 1990 Bom. 355 [*hereinafter* Lucy R. D'souza].

²⁷Arun Roy, *Judicial Response to HIV/AIDS in India – A Critique*, 87 A.I.R. 1039, 100 (2000).

²⁸*Indian Inhabitant v. M/s ZY*, A.I.R. 1997 Bom. 406.

that they would have the right to maintain their anonymity in Court cases, thereby giving their right to privacy a major boost. Secondly, after intensive study on the matter it brought about a distinction between a HIV+ condition and a condition of fully blown AIDS, finding that the former condition would in no way affect a person's ordinary work habits. Thus there would be no difference between a HIV+ person and a normal person apart from the fact that the HIV+ person could spread the virus. It was only on the onset of AIDS that the physical condition of the person started to deteriorate, but this would normally occur many years after the infection, in some cases over 20 years later. Also, there was no way that the virus could spread in the ordinary course of employment. Thus the Court struck down the action of the corporation and gave succour to millions of HIV+ people in the country.²⁹

In the case *Dr. Tokugha Yephthomi v. Apollo Hospital Enterprises Ltd.* also known as *Dr. X v. Hospital Z*,³⁰ the Supreme Court put the protection of citizens against the HIV virus over and above the right to privacy of the HIV+ people. In this case a doctor revealed to his patient that he was HIV+. On learning that the patient was engaged to a girl and set to marry her in the due course of time, the doctor informed the girl of the HIV+ status of her fiancé thereby saving her from falling prey to the virus herself. In this case the Court held that if anyone with the knowledge that they are HIV+ marries another, then that person commits the offence laid out under S. 270 of the I.P.C. The decision itself was commendable apart from the usage of S.270 and S.269 to address the problem of criminal transmission of the HIV virus.

However there have been few cases in Indian jurisprudence relating to the criminal aspect of HIV/AIDS and all of them are still pending, such as the *Bharati Sharma case*.³¹ There is also no HIV/AIDS

²⁹Lucy R. D'souza, *Supra* note 27.

³⁰X v. Z, *supra* note 18.

³¹ Rakma Kom Sadhu, *supra* note 19.

specific legislation in India leaving a void in matters regarding the transmission of this disease. Thus, for purposes of this project this chapter shall focus on foreign jurisprudences and their experiences with anti-AIDS legislations and judgements.

B. The judicial approach in the United States

In the state of Iowa, United States, the intentional transfer of the HIV virus is termed as murder. The special difference here is that the courts have equated the indifference that a HIV+ man exhibits towards his victim when he indulges in sexual intercourse with her, with the intent to kill and thus the same punishment for murder is attracted for criminal HIV transmissions, as seen in *State v. Hunter*.³² This is judicial fiction created by the courts to serve the purpose of criminalizing the HIV infections. In rape cases, intention is derived from the depraved heart of the accused who proceeds to indulge in forcible intercourse with the victim even though he knows that this will inevitably result in the victims death, as seen in *State v. Schrier*.³³ Indeed the court here has seen the HIV virus as a dangerous weapon. Attempt to Murder is used in cases where the person wilfully tries to infect someone with the HIV virus, irrespective of whether they are infected or not.³⁴

In other states in the U.S. the police are given the right to arrest any woman they find who is indulging in prostitution, take her to a police station and force her to give blood samples for HIV testing. If she is confirmed positive, then she will be arrested again on the grounds of felony, since she was attempting to solicit customers to have paid sexual intercourse which would have led to her passing on the HIV virus. Indeed the freedom of many people are now being curtailed because they are seen as high risk HIV individuals and therefore the state is empowered to take action by either isolating them or testing

³²*State v. Hunter*, 51 N.W.2d 409 (1952).

³³*State v. Schrier*, 300 N.W.2d 305 (Iowa 1981).

³⁴Linda K. Burdt & Robert Caldwell, *The Real and Fatal Attraction: Civil and Criminal Liability for the Sexual Transmission of AIDS*, 37 *DRAKE L. REV.* 657 (1987/1988).

them for the virus. However this is not the way to go forward, as curtailing the freedom of people is always a regrettable measure.³⁵

The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990 was a catalyst which sparked legislative action to provide a means to prosecute for the intentional transmission of HIV. This Federal Act provides emergency AIDS relief grants if a State has statutes which allow a person to be prosecuted for intentionally transmitting HIV to another person. The States can fulfill this federal requirement by: amending their public health statutes to include HIV on their list of sexually transmitted diseases; using traditional criminal law statutes to punish HIV transmission; or enacting specific criminal statutes targeted at HIV transmission.

The Article 12-16.2 (a)(1) of the Illinois Constitution itself specifically provides that one can commit the felony of criminal transmission of HIV only “when he or she, knowing that he or she is infected with HIV engages in intimate contact with another”. In the case *People v. Russell*³⁶ the validity of this provision vis-à-vis many constitutional rights was challenged. The debate itself is beyond the scope of this project since it is a constitutional law issue, but the Article itself was held unconstitutional showing the anti-AIDS legislations need to be given a lot of care and attention so that they do not trample upon the rights of the people infected with the HIV virus in an attempt to prevent its spread to non-infected people.

C. Recommendations for a Suitable Legislation

To draft an entire criminal legislation here is beyond the scope of the project, but essential points shall be taken from all of the examples provided above to put together key points that need to be included in any legislation that seeks to criminalize and thereby prevent the spread of HIV/AIDS.

³⁵Stephanie Kane & Theresa Mason, AIDS and Criminal Justice, 30 ANNUAL REV. OF ANTHROPOLOGY, 457-479 (2001).

³⁶*People v. Russell*, (1993) W.L. 13016169 (Ill.).

First, the penal provisions of intentional HIV/AIDS infection must be high, making the punishment on par with that of murder, i.e. a maximum of life-imprisonment where the prisoner would be isolated from the other prisoners. This is because of the depravity of the crime itself, wherein the accused does not take away the life of the victim but instead destroys the life in a slow and excruciating manner. An example of such a case is the *Bharati Sharma* case wherein the maximum punishment possible must be meted out to the accused.

Second, steps must be taken to protect the spouse from transmission of the HIV virus. For this, testing of the HIV virus prior to the marriage must be made statutorily compulsory. Also, the spouse must be given the right to withdraw from sexual relations in the event of suspicion of marital unfaithfulness or a STD/HIV-AIDS. Currently, the available remedies to one spouse when the other spouse gets infected with HIV/AIDS are provided in the specific marriage acts they got married under. These cases also deserve some criminal liability and thus the new statute must provide for that.

Then, distinctions must be made between degrees of intention and knowledge and the principle of constructive knowledge must be applied. For example since Adultery is a crime under S. 497 of the I.P.C., if a spouse contracts the HIV virus through an extra-marital affair and then unknowingly transmits the virus to his wife, constructive knowledge must be applied to his case and thus he must be made criminally liable. If a person indulges in high risk sex, i.e. with prostitutes or many different people who have the probability of having the virus, and that person unknowingly passes on the virus to an innocent third party, then by virtue of the kind of life he leads criminal liability devolve upon him through the principle of constructive knowledge.

Even the Attempt to infect a person with HIV/AIDS must be made punishable since they have the same intention as a person who succeeds in infecting a person. This would in fact be covered by S. 511 of the Indian Penal Code. The only case wherein criminal liability

is not entailed must be in situations where the accused contracts the virus through no fault of his own and then unknowingly passes it on to an innocent victim. There must also be civil liability entailed upon the transmitters of the HIV virus to the extent that they must pay compensation to the persons they infected. Such liability can be enforced upon their estate and need not be liquidated in the Act itself, but depending on the circumstances and facts of each case. The entire specifics of the statute cannot be laid down here but in the above mentioned provisions lie the bare essentials that must go into the statute. This would sufficiently penalise all cases of HIV/AIDS related crimes depending on the degree of *mens rea* and also seek to protect the victim. As India currently has one of the largest HIV+ populations in the world, the need for the legislation cannot be undermined. It is a national priority to do all in our power to prevent the progress of this dreaded disease.

V. CONCLUSION

The criminality of the wilful HIV/AIDS transmissions is beyond doubt. Unfortunately, the majority of the transmissions occurring in the country are those without criminal intent. It is the uneducated and unaware part of the population that contracts this disease through high risk sexual encounters and then pass them on to their families. Studies in India have shown that truck drivers that ply our national highways are one of the main carriers of this disease, since they visit sex workers in locations across the country. The criminalization of this offence will not make too much difference to them unless they can be made aware of HIV/AIDS and all its related consequences.

The larger questions that this issue throws up are numerous. For example, would it then come within the ambit of a crime if two adults who are HIV+ decide to have a child between them, with the undeniable result that the child itself will be HIV+? These are questions that cannot be answered immediately and require the application of legislative and judicial thought.

However, the crux of this paper is that the criminal transmission of HIV/AIDS cannot be ignored and must be penalised. Existing penal provisions are not capable of dealing with this offence and thus a new legislation catering specifically to the needs of an anti-AIDS legislation is required. Judicial intervention in this area will fill the gaps that a statute will always leave in redressing the issues that crop up in society.

It is possible that in the future HIV/AIDS would have risen to become such an important global issue that the governments will have to take stern measures to control it. People with the virus would have to be rounded up and isolated. Perhaps they would have to wear an identification symbol on their bodies so that people can identify them and thereby abstain from having any interaction with them that could lead to a transmission of the virus. If the issue goes out of hand and infections begin to rise drastically, the governments may be forced to initiate a movement to wipe out all HIV/AIDS infected people and thereby rid the world off the disease, bringing back memories of the holocaust. Indeed hope only remains in two scenarios – 1) that a cure is discovered, or 2) that the spread of HIV/AIDS is retarded effectively with the requisite legislations and enforcement mechanisms. Unless either of these occur, a situation where the virus kills off most or all of humanity is not unforeseeable.