



COMPLUSARY AIDS/HIV TESTING BEFORE MARRIAGE

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Abstract

Compulsory AIDS/HIV testing before marriage, which requires that the entire population, or at least certain groups of individuals which are considered as high-risks groups, are tested for HIV/AIDS, this move has got a bad reputation in recent years as human rights activists often argue for the individual's right to choose to know whether they are HIV positive or not. This right available to the individuals, is a part of 'Right to Privacy' which is contained in the 'Right to Life' guaranteed to every citizen by Article 21 of the Constitution of India. However, earlier studies have shown that usually, when a person knows he/she is HIV positive he/she will change his/her risky behaviours to avoid transmitting the disease to anyone else. Compulsory HIV testing before marriage, if not anything else it would at least hinder the spread of HIV among populations. Freedom of choice to know about oneself should be encouraged, however sufficient support should be provided to the right to live and if compulsory testing can reduce the number of people dying from AIDS in the world today, it should at least be considered by policy makers around the globe.

Introduction

As the saying goes, 'precaution is better than cure', so can this cliché be implied in the manner so as to indicate that rather than keeping mum prior to marriage and spreading the AIDS / HIV virus, more lives can be saved by a simple test. Educating the people about the disease is the only way through which the gravest threat can be countered. While most of the hazardous causes of AIDS are due to blood transfusions and repeated use of needles, syringes and blades, 80 per cent of the AIDS cases are due to extra-marital and illicit relations. It is better that people get themselves screened for HIV rather than live and suffer in denial of it. AIDS is a communicable disease and it spreads in certain ways. But most people are not really forthcoming about it even though it is very important and necessary that they should. In India, people do not even know their partners until their parents and elders bring them together in marriage. Even in cases of love marriages, it is not possible to trust anyone as AIDS is a type of disease which does not leave any noticeable signs on the body of the person infected by it, hence there is a greater risk involved even in these kinds of marriages.

Therefore the question is: How do you know about the HIV/AIDS status of you're to be spouse?

One can merely say that the test is very important for both of them. It is important for the couple to understand that neither of them is accusing each other. Either of the spouses can also offer to be tested for HIV themselves; this will make the other clear of the intentions behind taking the test. There are many couples who are increasingly taking the AIDS test before marriage. It is important for either of the spouses to realize that the test has nothing to do with him / her; it is just to allay their fears prior to starting a future and a family of their own. The law, if passed, would minimize the accidental spread of AIDS. There are countless times when a marriage has been stopped at the last minute when it has been discovered that either the bride or the groom was detected as HIV positive. This has further led to the disgrace and shame of both families aside from the financial losses. Most people go into depression after learning that their intended marriage broke, and they probably will not find a suitable partner thereby ending with a life of loneliness.

Existing Legal Situation

As per the law of divorce, every individual desiring to separate or obtain divorce from his/her partner in marriage shall fulfil the following conditions, which are basically the grounds for divorce¹;

- (1) **Adultery** - it is a ground for divorce under all personal laws. Adultery is when any person, after the solemnization of marriage, voluntarily has sexual intercourse with any other person other than his/her spouse. As a ground for divorce one act of adultery is enough.
- (2) **Desertion** - under most of the personal laws in India, desertion is recognized as a ground for divorce and judicial separation. Desertion means when one party to the marriage deserts the other without reasonable cause and without the consent or against the wishes of such other party and includes wilful neglect by the deserting party of the other party to the marriage.
- (3) **Cruelty** - under most personal laws cruelty is considered as a ground for judicial separation and also divorce. Acts of physical and mental violence on the part of one spouse against the other resulting in injury to body, mind or health or causing a reasonable apprehension thereof have been traditionally considered to amount to cruelty.
- (4) **Insanity** – Insanity is also considered as a ground for obtaining divorce under some personal laws.
- (5) **Incurable disease** - It is another important ground for obtaining divorce. If either party to the marriage contracts any form of incurable disease like leprosy, AIDS/HIV, etc., then the other party to the marriage may apply and obtain divorce based on this ground of divorce.
- (6) **Presumption of Death** - In all systems of law, it is now accepted that death dissolves a marriage. A person is presumed to be dead if he is not heard as alive for seven years or more by those persons who would naturally have heard of him had he been alive.
- (7) **Seven years Imprisonment** – Seven or more years' sentence of imprisonment is a ground for divorce and judicial separation under some Indian personal laws.
- (8) **Renunciation of World** – this is a ground for divorce if any person renounces the world by entering into any other religious order.

¹ Paras Diwan, 'Family Law', pg 136, Allahabad Law Agency, Seventh Edition (2005).

(9) **Rape, Sodomy, or Bestiality** - Rape, Sodomy, Bestiality are special grounds on which the wife alone can sue for divorce. This ground for divorce can be invoked when the husband has, since the solemnization of marriage, been guilty of rape, sodomy or bestiality.

The law of divorce however, allows any person to obtain a divorce on the ground that either of the parties has contracted an incurable disease like leprosy, AIDS, etc. Hence, if any person has AIDS, his/her partner in marriage can obtain divorce from their partner, basically this section includes any incurable disease and the fact that AIDS cannot be cured it comes within the scope of this section. Though a person can be divorced on the basis of his AIDS status, at the same time such a person cannot be discriminated from the others on declaring his AIDS status.

Constitutional Implications

‘Right to Privacy’ is a right which is guaranteed to all persons under Article 21 of the Constitution of India, which entitles every individual a right to keep secret or prevent from being known to any other person about his affairs, which he chooses to be secret or not known to any person other than or the world at large. However, if this secret interferes with the right of any other person in any manner, then if this secret is made known it shall not be violative of the right of privacy of the person to whom the secret belongs. Thus, though right to privacy is a part of right to life, right to privacy shall not supersede right to life.

Although the Right to Privacy is a fundamental right guaranteed by Article 21 of the Constitution of India, it not an absolute right and certain restrictions can be imposed on it if it concerns disorder or protection of health or morals or protection of rights and freedoms of others associated to such person. The court has however refused to define privacy saying, “As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case”. This means that whether the right to privacy can be claimed or has been infringed in a given situation would depend on the facts of the said case, and the view the Court takes of the matter.²

² Dr. J. N. Pandey, ‘Constitutional Law of India’, Central Law Agency, 44th Edition (2007).

Right to life includes right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition. Moreover, where there is a clash of two Fundamental Rights as in the instant case, namely the patient's right to privacy as part of right to life and his proposed 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 process of Court. The Court said that moral considerations cannot be kept at bay and the judges are not expected to sit as mute structures of clay in the Court Room, but have to be sensitive, "in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day."³

Right to privacy which is a part of right to life guaranteed by the Constitution of India under Article 21, is not an absolute right in the sense that it is subject to certain restrictions which may be imposed upon it which shall vary depending upon the circumstances of each case. In other words it can be clearly said that the 'right of privacy' of one person cannot infringe the 'right to life' of another. If person having an incurable disease has the right to privacy to keep this medical condition of his a secret from the rest of the world, than the person intending to marry such a person also has a right to know what they are getting themselves into, which is their fundamental right which entitles such a person the right to live a healthy life.

Article 21 of the Constitution of India states that "No person shall be deprived of his life or personal liberty except according to procedure established by law". Article 21 of the Constitution of India guarantees to every citizen of India the protection of right to life and personal liberty. The expression 'life' was not limited to bodily restraint or confinement to prison only but something more than mere animal existence.⁴ Right to Privacy is a part of the right to life and personal liberty and it should not be violated unless there is a public emergency or is required for the greater interest of public safety.⁵

³ Dr. J. N. Pandey, 'Constitutional Law of India', Central Law Agency, 44th Edition (2007).

⁴ Kharak Singh v. State of U.P., AIR 1963 SC 1295.

⁵ People's Union for Civil Liberties v. Union of India, popularly known as 'Phone Tapping Case', AIR 1997 SC 568.

The Constitution does not grant in specific and express terms any right to privacy as such. Right to privacy is not enumerated as a Fundamental Right in the Constitution. However, such a right has been culled by the Supreme Court from Article 21 and several other provisions of the Constitution read with the Directive Principles of State Policy.⁶

Though the Constitution does not declare explicitly that the right to privacy is contained in the right to life under Article 21 of the Constitution, however, the Supreme Court has observed in *People's Union for Civil Liberties v. Union of India*,⁷: "We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed 'except according to procedure established by law.' "

Even though the 'right to privacy' is not contained in the 'right to life', it is evident that the Supreme Court has accepted that the right to privacy is most definitely a part of the right to life and it is not an absolute right and it can be controlled by certain circumstances depending upon each case. This right to privacy though not absolute shall be subjected to the procedure established by law. The right to privacy is considered as a right in India, but it is not an independent right in itself but it is part of the right to life and is not established as an individual right under the Constitution.

According to Merriam Webster's dictionary defines marriage as "the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law".⁸ It is an act or a type of rite which imposes a married status to both the individuals or parties to the marriage and thereby forms an intimate union of the individuals.

Marriage is a union of two bodies however this union requires these bodies to be two healthy bodies or individuals. For a person to be considered as a healthy person, he/she has to be fit not only mentally but also has to be physically fit. Physical fitness is not dependant only on the mere presence of an exact

⁶ M.P.Jain, 'Indian Constitutional Law', Lexis Nexis; Butterworths Wadhwa Nagpur, Sixth Edition (2010).

⁷ *People's Union for Civil Liberties v. Union of India*, popularly known as 'Phone Tapping Case', AIR 1997 SC 568.

⁸ <http://www.merriam-webster.com/dictionary/marriage> (last visited on 22nd January 2012).

number of limbs but also relies on the person to be free from all incurable diseases. Incurable diseases are diseases which render a person incapable of being cured from such a disease. Since marriage is a union of two bodies, it imposes certain rights and restrictions to both the parties of the marriage. As a result it is only fair that the parties can exercise these rights and restrictions against the each other. This requires that the parties should be compatible to each other not only in mental capabilities but also should be physically able to perform tasks and duties assigned to them in the marriage.

If either party is not able to fulfil the requirements of a healthy marriage there is likelihood of the other party to be over burdened by the unfulfilled responsibilities of his/her partner, this in turn would lead to disputes and thereby uncertainties in the marital bond itself, which in turn would disrepute the institution of marriage. Each party to the marriage should at equal level from the other and no difficulties neither mental nor physical should render either party unfit to perform marital responsibilities.

If a law is made within a State to test every individual intending to marry as a potential carrier of AIDS so as to prevent the further spread of AIDS, then there may be a situation in which a couple, being regular residents of the State that has adopted the policy but get married outside the state for personal reasons. In such a situation it is possible that society at large may conclude that they got married outside the State as one or both have indulged in risky behaviours or are HIV-positive, and did not want to undergo testing. This may lead to bias, stigma and discrimination. Hence, to prevent this there should be a nationwide law to mandatorily test for AIDS before marriage.

Usually, weddings in India are social events, with the involvement of families and friends of both sides. In other words, a wedding occurs under "social scrutiny". If a potential marriage breaks up after either one or both partners test positive, the chances of breach of confidentiality becomes more imminent. Also, if a proposed marriage does not materialise for any other reason, it may be thought that it was a result of one or both prospective partners testing positive for HIV. This may lead to stigma and discrimination as well.⁹

⁹ <http://www.ijme.in/162co70.html> .

Marriage is the process by which two people who love each other make their relationship public, official, and permanent. It is the joining of two people in a bond that lasts until death, but in practice it is increasingly cut short by divorce. Of course, over the course of a relationship that can last as many as seven or eight decades, a lot happens. Personalities change, bodies age, and romantic love waxes and wanes. And no marriage is free of conflict. What enables a couple to endure is how they handle that conflict that has occurred in their particular lives.

The dissolution of a marriage is a legal act that may not always coincide with a couple's emotional tearing apart. Divorce is typically a painful process for all concerned. While it can take adults time to regain psychological equilibrium, whether or not children ever recover a stable perspective continues to be debated. Post-divorce hostility between adults, in addition to directly harming kids, is a sure indicator that the emotional split is incomplete. Thereby, there shall always be a void within them that cannot be filled no matter how good the rest of the life goes. It shall be a part of their lives that can never be fixed and in some cases it shall also effect their future relationships.

Marriage is a sacred union, legally permissible, of two healthy bodies. Any and every system of matrimonial law provides that if a person is suffering from venereal or incurable disease in a communicable form it will be open to the other partner in the marriage to seek divorce. If a person is suffering from that disease prior to the marriage he has no right to marry so long as he is not fully cured of the disease.¹⁰

Marriage is a union of two bodies legally for the purpose of procreation of children. If one of the parties to the marriage is infected by AIDS, such a marriage is likely to end in divorce or it could lead to increase in the number of persons infected with AIDS, and if such a couple procreate and have children, then these children will also be infected with AIDS and this could lead to the further spread of AIDS. However, if individuals are tested mandatorily for AIDS before marriage by the enforcement of such an effective law, it will help detect individuals having AIDS and prevent them from spreading it further, so also it will

¹⁰ Dr. J. N. Pandey, 'Constitutional Law of India', pg.238, Central Law Agency, 44th Edition (2007).

help innocent individuals from saving themselves from the infection which they were likely to contract from their potential partners in marriage.

If such a law is made which makes AIDS testing mandatory before marriage, this will control the situation of spread of AIDS through marriage and also it would help to protect the innocent partner in the marriage from contracting AIDS unknowingly from their infected partners. So if such marriages are not solemnized, this in turn will protect the future generations from contracting AIDS/HIV from their parents, which cannot be avoided if the parents itself are AIDS/HIV. Hence a law is required which makes AIDS testing mandatory before marriage, for all individuals intending to marry.

Children born to HIV infected persons are at a high risk to be HIV infected themselves. This not only increases the number of AIDS infected persons but also decreases the life-span of the children so born. These children will not live a full life but their life-span will be shortened due to the infection. The life expectancy of such individuals is shortened and their probability of living a long life varies from slim to none. As a result these children become victims to the disease without any fault of their own.

If an entire family is infected by AIDS/HIV, the environment around them is not a healthy one. Most infected people are shunned by the society as they are considered as persons without virtue who have probably lived a promiscuous life. The stigma associated to AIDS/HIV is far more disgraceful rather than the disease itself. It is the stigma which kills the infected individuals mentally and it is the disease which kills such individuals physically.

People in the society treat HIV positive people in such an inhuman manner that people tend to not declare their AIDS status and thereby avoid getting themselves tested for AIDS/HIV. If at all they declare their AIDS status they are ridiculed and humiliated in the society due to which they end up committing suicides with a view to put an end to this worthless life.

Individuals are discriminated from other on declaring of their AIDS status. In some societies HIV positive individuals are not allowed to use public facilities like wells, village taps and other water sources. They

are publicly mocked, ridiculed and discriminated which makes their life more miserable than it actually is. This attitude of the people is irrespective of whether the person is actually HIV positive or not as long as he/she belongs to that family where some of the members are infected by the disease. She/he is assumed to have been infected with the disease prevailing in their family.

Initially HIV infection was viewed as a disease that mainly affects certain high risks groups such as gay men, injecting drug users (IVDUs) and Africans¹¹. However, in the developed as in the developing world HIV is becoming increasingly common among

the heterosexual population. The disease is not restricted to a particular group of individuals or a particular area or location. Any person can be infected by it through the various modes by which it can be contracted.

The word 'family' has different meanings. In developing countries it means the extravagance of the extended family and in the developed countries it means the component of a nuclear family. There is a powerful interactive effect between the family and the illness. A disease like HIV/AIDS has more effect on the family due to the psychological, economic and social stress which comes together with the diagnosis; also it may affect one member of the family more than any other member of the family or more than one member. However, AIDS has its most dramatic effect at the family level.

One of the major problems facing families infected with HIV infection is the social stigma associated with the disease. This social stigma basically dominates the psychological and emotional effects of the disease on the entire family. Despite the public education, awareness about the disease, the society continues to shun and penalise the persons infected by the disease and fearing such a situation of rejection by the society, the infected families feel that their HIV/AIDS status should be kept out of the knowledge as a secret from their extended family, friends and neighbours more over the society at large. Such isolation by the society increases the pressure on the relationships within the family at a time when their most basic requirement is external support and care.

¹¹ Diana M Gibb, Candy Duggan, Rebekah Lwin, Genitourin Med 1991;67:363-366.

The issues which face the infected family varies and depends partly on how the diagnosis of HIV/AIDS was first made. There are times when the child shows symptoms of the disease diagnosed later to be HIV/AIDS, parents facing the reality of a serious life threatening disease in their child also learn that one or both of them might be infected by the same disease. The parents' first focus on the child if he/she is ill before they can come to terms with getting themselves tested for the same. It is not easy to ascertain which members of the family are infected and the future of those infected as the disease is variable both in its incubation period and the periodicity of illness.¹² Furthermore, in a situation where the mother is aware of her diagnosed AIDS/HIV status before or during pregnancy, there is a period of uncertainty before knowing conclusively whether or not the child is going to be infected by the disease from the mother. Parents become constantly anxious and watchful for early signs of illness in their children.

If HIV is diagnosed in one partner, the issue of declaring the said status to the other partner also arises with regards to how and when it should be told. It can cause a dilemma to the doctor who is bound by the code of confidentiality towards his patient as also the responsibility towards the other family members of the person infected. It requires a sensitive conversation with the infected individual to aid him/her to talk to both the partner and also the other family members.

The disease of HIV/AIDS lays a lot of stress on family relationships of the infected person. Conflicts are frequent in a family where the child/children are ill with the disease,¹³ as such children tend to require greater care which can result in less attention being paid to the needs of the other family members. As a result this gives rise to sibling rivalries and discrimination among the children at home itself. So also the dismay of not knowing about the risky behaviours of the partner, no definite cure, secrecy or lack of communication builds gaps and problems in the relationship.¹⁴ Other issues like guilt, blame, etc. also play an important role in causing misunderstandings. There could be other conflicts if one partner is

¹² Diana M Gibb, Candy Duggan, Rebekah Lwin, *Genitourin Med* 1991;67:363-366.

¹³ Chessler AM, Barbarin OA. *Childhood Cancer and the Family: Meeting the Challenge of Stress and Support*. New York, Burnner/Mazel 1987;83-177.

¹⁴ Septimus A. *Psycho-social aspects of caring for families of infants infected with human immunodeficiency virus*. *Seminars in Perinatology* 1989;13:49-54.

positive and the other is negative which could lead to disparity due to sexual, psychological and emotional factors.

If a woman discovers her HIV status early in the pregnancy, decisions have to be taken to terminate the pregnancy. The decision is tougher due to the fact that even though either parent is HIV positive there is a possibility that the child can be born without the infection. Hence, most parents are hesitant to terminate the pregnancy. If the woman continues with the pregnancy there is a possibility of the child being infected by the disease, and the mother is left with the guilt of infecting the child. These feelings and conflicts if unresolved could lead to various problems within the family.

Nowadays many families have disintegrated into single parent families as a result of the break-up of the partnership or one parent may have already died with some disease like AIDS. It is very difficult and stressful to cope as a single parent if one or more of the children are ill with the disease. Also the social and emotional isolation by the society plays a strong role to demoralize the parent and it may also happen that the surviving parent may also become ill with the disease. The death of a child infected by AIDS/HIV also brings with it other problems within the parents.

Telling both within the family and outsiders are major concerns for the family living with HIV/AIDS and often becomes a source of worry and stress. Children are usually not told about the family's diagnosed status as there is a fear that they may disclose the same to others who were not to be told about the family's status. It takes a lot of effort to keep information like this secret from the entire society for a very long time and it somehow ends up being out in the open one way or the other.

It is generally said that most and almost all diseases affect mainly the old and the very young; whereas HIV predominantly affects those in their prime of life as a result most bread-winners are not able to provide for their family due to their deteriorating medical conditions. Extended families, which are able to cope with the normal traumas of their life, often start to fray when a number of orphans of broken and disease struck families are dumped on them and that when they are not able to support themselves let alone anybody else.

Most infected persons spend their meagre resources on healthcare for themselves and their family members. In other situations care of infected individuals is added to the burden of the government in terms of health and social services.¹⁵ It is not easy to provide services for families with HIV/AIDS infection as it requires an understanding into the needs of individual families and this depends on each case of AIDS and their social and economic conditions. Each family is likely to have their own sets of needs and requirements and the same are not applicable in every case. The Public Health facilities come under strain when private doctors and clinics refuse to provide treatment for HIV/AIDS infected persons.

The overall income of the household decreases, and whatever money remains is spent to meet the needs of the sick individuals. The expenditure of the family shows an increased amount which is spent on healthcare, and finally savings and other resources of the family are consumed to keep death at bay, and pay for the funerals when the battle of life is lost.

The children in the family who are not infected by the disease are greatly affected by the disruption of adult relationships and by the deaths in the family of parents and siblings. Grand-parents who are in their old age are left sustaining and supporting their grand-children who are left without parents, when actually they are the ones who should be taken care of. All those children who are not absorbed by their extended family end up on streets putting themselves at risk of other threats within the society. Some orphaned children are likely not to be accepted by any member of their family who is willing to take care of them. This also results in the loss of knowledge which is generally transferred from generation to generation, thereby reducing socialization.

In most countries and cultures the family is the major unit of society and it is at the family level that change must be affected, both in the attitude towards those infected and the behavioural change required to stop individuals putting themselves at risk. Such change has been shown to be much more than just

¹⁵ Diana M Gibb, Candy Duggan, Rebekah Lwin, Genitourin Med 1991;67:363-366.

the acquisition of knowledge;¹⁶ it requires a fundamental change which includes a new and more cooperative way of thinking and of taking individual responsibility of every situation.

There is a need to bring about a change in the social scenario with regards to AIDS infected individuals and their infected or uninfected family members. All infected individuals should be given equal status with other individuals and should not be discriminated in any way. There should be social awareness about the disease and its effect on the society at large so also people should be made aware as to how the disease spreads and how it does not as most people are unaware of how the disease cannot spread. People think that AIDS is spread by using a common water source or any other public services, this is not so. Hence, individuals should be given an understanding into the lives of such infected persons, the troubles they face and go through, and the damage discrimination causes to them emotionally, financially and socially.

By giving the people a closer look into the lives of infected individuals it will put an end to the discrimination of such people by the society as they shall understand what these infected people are going through. This in turn will help people to come forward to get themselves tested and declare their AIDS status, thereby preventing the spread of AIDS innocently to others. People shall be more open to the idea of AIDS testing before marriage and shall come forward to accept it as a law beneficial to the society at large. Thus, if a law is made promoting this idea of mandatory AIDS testing before marriage, the people will not oppose it and they shall accept it as a compulsorily enforceable law.

AIDS stigma and discrimination exist worldwide, although they manifest themselves differently across countries, communities, religious groups and individuals. They occur alongside other forms of stigma and discrimination, such as racism, stigma based on physical appearance, homophobia or misogyny and can be directed towards those involved in what are considered socially unacceptable activities such as prostitution or drug use.

¹⁶ Harris A. Treating the uninfected sibling. Abstracts of the VIth International Conference on AIDS 1990; Th.D.123.

Stigma not only makes it more difficult for people trying to come to terms with HIV and manage their illness on a personal level, but it also interferes with attempts to fight the AIDS epidemic as a whole. On a national level, the stigma associated with HIV can deter governments from taking fast, effective action against the epidemic, whilst on a personal level it can make individuals reluctant to access HIV testing, treatment and care.

"Stigma remains the single most important barrier to public action. It is a main reason why too many people are afraid to see a doctor to determine whether they have the disease, or to seek treatment if so. It helps make AIDS the silent killer, because people fear the social disgrace of speaking about it, or taking easily available precautions. Stigma is a chief reason why the AIDS epidemic continues to devastate societies around the world."¹⁷

The National AIDS Prevention and Control Policy¹⁸ states that testing for HIV infection should be done voluntary, and it should only be done if it is agreed upon by an individual after pre-test counselling. But there are instances in which the government, at the state or national level, has either subjected individuals or has proposed to subject certain groups of individuals, based on their origin or their occupation, to mandatory testing for HIV infection¹⁹:

(a) Students from foreign countries coming to India: Foreign students intending to study at any institution in India for a period of one year or more had to undergo mandatory HIV testing, at least till 2002. The present status of this policy is unclear as different sources give different views. The National AIDS Prevention and Control Policy states that this testing is voluntary²⁰, and other sources state that mandatory

¹⁷ <http://www.avert.org/hiv-aids-stigma.htm> [Last visited on 14 October 2011].

¹⁸ NACO. National AIDS prevention and control policy. New Delhi: NACO, Ministry of Health & Family Welfare, Government of India; undated. [Last Visited on 5th November 2011].

¹⁹ Jayaraman KS. Indian state plans compulsory HIV testing, segregation and branding. *Nat Med* 1998 Apr; 4(4):378. [Last Visited on 5th November 2011].

²⁰ NACO. National AIDS prevention and control policy. New Delhi: NACO, Ministry of Health & Family Welfare, Government of India; undated. [Last Visited on 5th November 2011].

testing for students existed only till 2002²¹. But information on the websites of the Indian²² and the United States governments²³ suggest that such a policy may still be in place.

(b) Military recruits and soldiers: The intent of subjecting individuals either being drafted into or already in the military and paramilitary forces to mandatory HIV testing has been announced from time to time, though not implemented²⁴.

(c) Other groups: The government of Maharashtra ordered mandatory HIV testing for all girls 12 years and older living in designated "destitute homes"²⁵.

An addition to the controversy surrounding mandatory HIV testing in the recent years has been the announcements by different state governments, including those of Goa, Karnataka and Andhra Pradesh, of their intention to introduce mandatory premarital HIV testing²⁶. The National Commission for Women also recommended the adoption of a similar policy at the national level by amending the Special Marriage Act 1954 and the Hindu Marriage Act 1955²⁷. The government of India announced at the World AIDS Conference in 2005 its intention to introduce premarital testing for HIV at the national level, a statement that was subsequently retracted after the reaction of the international community²⁸.

²¹ Haerry D, Lemmen K, Wiessner P. Travel and residency restrictions for people living with HIV/AIDS: legal discrimination, recent developments; undated. [Last Visited on 5th November 2011]. : Reddy RR. No mandatory HIV test for foreign students. *Hindu* (online edition) 2002 Dec 7. [Last Visited on 5th November 2011].

²² Government of India. Study in India: frequently asked questions (FAQs). New Delhi: Government of India; 2005. [Last Visited on 5th November 2011].

²³ Bureau of Consular Affairs, US Department of State. Human immunodeficiency virus (HIV) testing requirements for entry into foreign countries. US Department of State; 2003 Mar. [Last Visited on 5th November 2011].

²⁴ Kashyap SD. CRPF suggests HIV testing for its recruits. *The Times of India* 2005 Dec 15. [Last Visited on 5th November 2011].

²⁵ Jayaraman KS. Indian state plans compulsory HIV testing, segregation and branding. *Nat Med* 1998 Apr; 4(4):378. [Last Visited on 5th November 2011].

²⁶ Tandon T. Mandatory testing, HIV/AIDS and marriage: discordant bedfellows? New Delhi: *Lawyers Collective HIV/AIDS Unit*; 2002 May. [Last Visited on 5th November 2011]. : Lawyers collective HIV/AIDS Unit. Mandatory premarital testing. *Positive Dialogue* 15. *Lawyers Collective HIV/AIDS Unit*; 2002 Dec. [Last Visited on 5th November 2011]. : Vaidya-Yadav N. Mandatory testing: playing politics with AIDS. *India Together* 2006 Oct 12. [Last Visited on 5th November 2011]. : Rajendran S. Pre-marital HIV test may be made mandatory. *Hindu* (online edition) 2004 Jan 29. [Last Visited on 5th November 2011]. : Reuters. Indian state plans obligatory pre-marriage HIV test. London: Reuters; 2006 Dec 20. [Last Visited on 5th November 2011]. : Ahmad K. Goa proposes mandatory HIV tests before marriage. *Lancet Infectious Diseases* 2006; 6(5):267. [Last Visited on 5th November 2011].

²⁷ Tandon T. Mandatory testing, HIV/AIDS and marriage: discordant bedfellows? New Delhi: *Lawyers Collective HIV/AIDS Unit*; 2002 May. [Last Visited on 5th November 2011].

²⁸ Vaidya-Yadav N. Mandatory testing: playing politics with AIDS. *India Together* 2006 Oct 12. [Last Visited on 5th November 2011]. : Rennie S, Mupenda B. Ethics of mandatory premarital HIV testing in Africa: the case of Goma, Democratic Republic of Congo. *Developing World Bioethics (Online Early Articles)* 2007 Jun 5.

Conclusion

The AIDS epidemic in the society is not just a health crisis that affects certain individuals; it also poses a major threat to development in the society and so also to the human society. While it creates havoc in the present generation, it also jeopardizes the future generation in ways which are not apparent immediately but tend to come forward accidentally. HIV/AIDS damages not only the human body of an individual but the society as well, it starts by killing all those parts of society which are responsible for building it in the first place. These include women, breadwinners or head of the family and the children contain and sustain the society as a whole.

AIDS/HIV is a disease which is well known in our world today due to its very nature and the effective rate at which it is growing. These diseases can spread so easily that most people are not even aware as to when they were infected by the disease and as a result of that some people end up spreading the disease further to their near and dear ones unknowingly as they are unaware that they themselves have it. HIV/AIDS cuts the life expectancy by half at birth, if children are born to such infected persons.

In this study it is found that if AIDS/HIV testing is made compulsory before marriage, it will help in protecting the future generations from contracting the disease from their parents and it will also protect individuals from contracting the disease innocently from their partners in marriage.

Marriage is a union of two bodies into one; however this union should be of necessarily of two healthy bodies. For a person to be healthy he/she should be free from all incurable diseases. One of these diseases AIDS/HIV, which is known to be life threatening disease in the society today and it vastly, affected the institution of marriage and the children born thereby. This makes mandatory AIDS testing before marriage an important step in protecting the future generations. As a result of which marriages which are supposed to be a sacred union do not end up being a disaster, families tend to remain unbroken and children are born free from diseases and thus are not subjected to ridicule and humiliation among their peers in the society.

If people get themselves tested for AIDS before marriage, this will help in keeping a check on the disease and the spread of it. If such a step is taken it will also help protect the life of others as well. This in turn will help in providing for a healthy life along with a healthy marriage. This in turn would decrease the rate of divorces in the society which occur due to such diseases and also due to disclosure of having such diseases from their partners.

If such a step is taken so as to make AIDS testing mandatory before marriage, it will also help maintain the institution of marriage and family. These institutions will remain protected so that they can be replicated by the future generations. The number of divorces in the society will also be reduced, thereby encouraging marriage and family life in the future.

‘Right to Privacy’ is right which is available to all individuals, which is contained in the ‘Right to Life’ guaranteed by Article 21 of the Constitution of India. This right to life guarantees to every individual the right to live a healthy life, free from disease. The right to privacy of one person cannot over-ride the right to life of another. So if it is the duty to keep the AIDS status of a person secret due to right to privacy of one person then disclosing the same to his/her partner or family members is a part of their right to life.

Right to Privacy is often referred to as the right to be left alone. If a person chooses to keep a part of his life secret from the world than no law can force him to disclose such a secret provided it does not threaten the life of another. Hence, the right to life of a person has greater force than the right to privacy of another. Most people do not declare their AIDS/HIV status and thereby would like to be subjected to law which makes the testing of AIDS compulsory before marriage.

When a law is made which makes AIDS/HIV testing mandatory before marriage, all individuals will be subjected to such a law irrespective of their choice to do so or not. This could bring about chaos within the society as people will be forced to take the test as per law. However, such a step will bring about social development as it will put an end to the spread of AIDS not only in the present generation but in the future generation as well. This law will benefit the society largely and will also give concepts like marriage and family a better understanding.

Some may argue that a mandatory premarital HIV testing policy would empower women, as often they are not aware of any risky behaviour on part of their prospective spouses. Having such a test taken would empower individuals to refuse marriage and save themselves from a troubled life in the future which is the result of the HIV/AIDS. This can be done but again the issue is obstructed with the fact that there comes window period of the disease and premarital HIV testing can be done only as a one-time measure.

Premarital AIDS/HIV testing may reduce premarital risky behaviours to some extent, but the real question is whether either or both partners would be restrained from repeating the same behaviour in the future i.e., after marriage. An excellent example of such a situation is a male migrant worker who contracts AIDS/HIV through unsafe sexual contact in the place of employment and then transmits the disease to his unsuspecting partner back at home on return to his village. This would require the State to consider a mandatory HIV/AIDS testing policy on an annual basis or more regular basis, for all couples so that this measure may deter them from indulging in risky sexual behaviours. Such an action, autocratic in nature is likely to go against the spirit of democracy in a state like India.

If a couple subjected to such law has tested negative during mandatory premarital testing, and then either of the partners are detected positive, this will nullify all the effort put in for the formulation of the law and its enforcement thereof. The mandatory premarital HIV/AIDS test will not be of any use in preventing the partner from indulging in risky behaviours after marriage, thus defeating the very purpose for which the law was created. In fact, instead of putting a check on the individual's ability to indulge in risky behaviours, it may further encourage the individuals to indulge in such behaviours as they will declare themselves "officially free from infection" to their unsuspecting partners, and thereby transmit the infection to them.

The National AIDS Prevention and Control Policy of the government of India states that testing for HIV infection should be voluntary in nature. But from time to time various state governments and the central government have announced their intent of introducing mandatory premarital testing. Though this intent has not yet been translated into action, there is a need to do.

If such a policy is formulated it would only be able to target a limited population considering the early age of marriage in India; problems in implementation due to the low marriage registration rates in India; the stigma and discrimination associated with the disease; issues relating to the window period and the positive predictive value of the test after it is taken; its limited impact on certain groups of population which are considered as high risk groups for HIV infection; the limited role that the policy will play in changing unsafe behaviours of individuals; its raging conflict with the existing human rights; and the adverse experience of other countries which tried to present a similar policy. In many ways the devastation caused by AIDS affects not only the individuals and families but it also ultimately affects the country's overall development. There is an apparent lack of experienced workers and skilled professionals due to the large number of deaths and the illness which diminished the ability to work. AIDS erodes people's morale, destroying their confidence and undermining their willingness to work to provide a better future for themselves. It is evident that AIDS can seriously slow down the economic growth of a society

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