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HIV Patients' Right To Marry: Indian-Bangladeshi laws in perspective

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One of the hotly debated legal issues of the present time is whether HIV patients should have right to marry. Though a good number of countries have already enacted laws giving legal right to marry to the AIDS patients, it is still undecided in most of the countries of the globe. India and Bangladesh are two neighbouring countries which do not have any specific legislation settling the issue, though HIV/AIDS is considered to be a great threat to both Indian and Bangladeshi society. This write-up examines the present legal position regarding this issue in both the countries.

According to Islamic law and other modern laws, marriage is a civil contract which permits two persons of opposite sexes to live together. A successful marital life requires both mental or psychological and physical union of two persons. That is why the conditions for contract of marriage include both mental and physical elements. For entering into a marriage contract, a person has to attain a specified age, has to be mentally and physically healthy. Like any other contract, if any of these mental or
physical conditions is not fulfilled, a person cannot marry. Even after marrying, if any of the conditions becomes absent, for example, if any of the spouses becomes insane or sexually incapable, the spouse is allowed to come out of that contract marital bondage. All these issues are regulated by laws of marriage and divorce.

Almost all marriage laws - for example, personal laws of Muslim, Hindu, Christian, Persian, as well as Special Marriage Act - provide the 'venereal disease' or 'sexually transmitted disease' as a ground for divorce to either husband or wife. HIV positive or AIDS is also a 'sexually transmittable disease'. Hence, legally HIV positive is also treated as a valid ground for divorce. (However, when recently an Indian court allowed divorce on the ground of HIV, it created huge controversy among the citizenry. In an earlier article titled 'whether HIV should be a valid ground for divorce' -- which can be found in The Daily Star, 17 Nov 2007 or at www.thedailystar.net/law/index.htm - I discussed about the controversy.) Now, if HIV positive is treated as a valid ground for divorce, it might also be treated as a legal incapacity to enter into a marriage contract. Then comes a question whether an HIV patient has right to marry.

Neither the Indian nor the Bangladesh Constitution has specifically recognised right to marry as a fundamental right. Though some legal experts argue that the right to marry is constitutive of one’s right to life and that this right cannot be qualified on the basis of the health status of the person, seemingly, it is a legal right for only those who are mentally and physically capable. This, however, does not mean that a person suffering from a disease that makes him/her sexually incompetent loses his/her right to marry. When a person suffers from sexual disease, his/her right to marry becomes suspended only, and it revives again when the person recovers from the disease.
But when the disease is HIV positive or AIDS, which is medically treated as rarely recoverable, does the AIDS patients lose their right to marry? Suppose, an innocent 25 years youth is in some way infected with HIV positive and there is no possibility to recover from it, should his/her right to marry be suspended lifelong? These are questions to which there are no clear-cut answers in Indian or Bangladesh laws.

Legally, every young person has right to marry and to enter into a marriage contract. But unlike any commercial contract, responsibilities of the contract of marriage are not limited only within the contractual parties. Marriage is the foundation of a family as well as social relations. A couple owes a great responsibility to the family and society. In other words, right to marry is not an absolute one; it has to correspond to some other duties. For example, among the various objectives of a marriage, two prime objectives are to legalise the sexual intercourse between two persons of opposite sexes, and to procreate children. But through marriage, law does not only give right to two adult persons to satisfy their biological needs and to give birth to legitimate children, but also does impose a duty not to harm their life partner and children in any way. If a person is not able to perform this duty, he/she cannot exercise his/her right to marry.

Undoubtedly, HIV/AIDS is a deadly disease which can easily be transmitted to husband from wife and vice versa through sexual intercourse and it may infect the baby in the womb. Apparently, both Bangladeshi and Indian laws do not permit an HIV/AIDS patient to marry a healthy person and to infect their future innocent generation. These laws not only disallow it but also regard it as an offence. The penal provisions regarding this are same in both countries.

Section 269 of the Penal Code provides that whoever unlawfully or negligently does any act which is, and which he knows or has reason to
believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Again, section 270 of the Penal Code also states whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Hence, if a person suffering from the dreadful disease AIDS, knowingly marries a man or woman and thereby transmits infection to that person, he/she would be guilty of offences indicated in sections 269 and 270 of the Penal Code.

But if the global character of AIDS, its spread, infections, and human rights of the AIDS patients are taken into consideration, such a swiping legal decision cannot be made. And logically, the above mentioned legal provisions should not be applicable to a case of HIV/AIDS. In fact, these legal provisions were made at a time when HIV/AIDS was not detected. These provisions were made taking in consideration the other common diseases that are curable by proper treatment.

However, in absence of clear statutory provisions or policy guidelines, it is the court to decide whether these legal provisions will be applicable to a case of HIV/AIDS. So far as I know, no Bangladeshi court has faced the issue till today. But Indian courts faced this issue almost a decade ago. In November 1998, a Division Bench of the Supreme Court of India held that if an HIV patient after knowing that s/he has been suffering from such dreadful disease decides to marry s/he shall be punishable under section 269 & 270 of the Indian Penal Code.
This judgment not only equated HIV to a ‘venereal disease in a communicable form’ but also observed that “AIDS is the product of undisciplined sexual impulse. This impulse, being the notorious human failing if not disciplined, can afflict and overtake anyone how high so ever or for that matter, how low he may be in the social strata.”

Of course, the court observed that the patients suffering from the dreadful disease AIDS deserve full sympathy. They are entitled to all respects as human beings. They should not be avoided, which otherwise, would have bad psychological impact upon them. But, sex with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The court cannot assist that person to achieve that object.

At least one point is clear from these observations that the honourable Supreme Court Bench failed to take note that HIV also spreads through other non-sexual means, and any innocent person can be a victim of HIV/AIDS anytime.

The decision of the Supreme Court sent shock waves in the HIV community throughout the world. Subsequently another petition was filed before the Supreme Court against this judgment. A three-Judge-Bench decided that the earlier above decision was made without hearing all concerned groups (especially the NGOs) who are active in this field. Therefore, the learned three-judge-bench expunged the observations made in the abovementioned judgment and restored the rights of an HIV infected person to marry.

Nevertheless, the debate whether HIV/AIDS patients should have right to marry is not over. However, the overwhelming opinion world wide is that law should not take away the right of an HIV/AIDS patient to marry, as it is a basic human right. What law can do is to provide guidelines how they
should exercise their right to marry. For example, as Indian Supreme Court guided, an HIV positive person must disclose his/her status to the other party. Then, if an infected or uninfected person knowingly wants to marry an HIV/AIDS patient, law should not bar them. Again after marriage, their right to parenthood shall be suspended; so long scientific development ensures that HIV/AIDS parents can give birth to an uninfected baby.

In fact, HIV/AIDS is not just a disease. It is a global problem. So, all the issues related to AIDS should be decided globally. The world community should come forward to adopt a unique policy based upon human rights of HIV patients. Hopefully, UNAIDS has already been working for this purpose. Among the 12 International Guidelines on HIV/AIDS and Human Rights provided by UNAIDS, guideline 3 is very much pertinent here. It says, states should review and reform public health laws to ensure that they adequately address public health issues raised by HIV/AIDS, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV/AIDS and that they are consistent with international human rights obligations.

When it is important to see how much of these guidelines are being followed by the states, it must be kept in mind that law and policy is never a complete solution of any problem, but a partial solution only. As it is claimed by AIDS activists, the basis of discrimination against people living with HIV/AIDS is fear, and this fear comes mostly from wrong or distorted information. So, along side law and policy but with the same gravity, these countries must adopt a sufficient measure to correct misunderstandings about HIV.