

**CRIMINAL LIABILITY OF A PERSON SPREADING THE HIV INFECTION**

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*A simple answer to the question ‘whether a person can be held criminally liable for intentionally spreading the HIV infection’ would be a resounding ‘yes.’ And why shouldn’t it be? Human Immunodeficiency Virus is infamous for causing the disease of AIDS, which, in most cases, leads to the death of the person. Even while the person is living, after contracting AIDS, he/she is subjected to discrimination, stigmatization and ostracism (Hollywood made a movie titled Philadelphia about this – that’s how ubiquitous these social problems are). Thus when the tangible harms arising out of the spread of HIV are this grave, it is only natural that a person who spreads the infection voluntarily ought to be punished for the same.*

*Plenitudes of countries have done the same in one form or the other. India criminalizes spreading of infectious diseases under the Indian Penal Code, several states in the US have expressly criminalized the spread of HIV under a separate statute and in the UK, the person can be charged for causing grievous hurt or even for manslaughter or murder.*

*Despite this global recognition of the problem, loopholes exist due to an absence of legal clarity. These loopholes are also often used to punish people who ought not to be punished otherwise, merely because of the anti-AIDS sentiment present in society today. Owing to such predicaments, there is a growing movement that seeks to prevent Governments from criminalizing the spread of HIV. Reasons such as the inefficaciousness of the law, unjust punishment to the undeserving and further stigmatization of the patients are cited. Initially, this paper*

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*establishes the status quo in India and around the world, before focussing on this conflict.*

## **I. INTRODUCTION**

While there is a general acceptance of the fact that voluntarily passing the Human Immunodeficiency Virus (*hereby referred to as 'HIV'*) to another person is a crime, nebulosity still exists in the area due to a lack of jurisprudence and direct statutes that address this problem. A certain degree of uncertainty also exists in cases when the carrier is ignorant of the fact that he/she is infected and the virus is thus transferred to others.

There is a plethora of ways through which HIV can be transmitted from one person to another. While the most common way is through sexual intercourse, others also include blood donations, organ transplantations and through the use of infected needles and syringes. Regardless of the mode, most countries are in consensus over the fact that a person transmitting the virus can be held criminally liable for the same.<sup>2</sup> This list includes nations such as United Kingdom, United States of America, Netherlands, Canada and several other members of the European Union.

Within India too, the law imposes criminal liability upon a person who transmits the HIV infection.<sup>3</sup> This falls within the State's mandate of ensuring the welfare of its citizens (Welfare State) by protecting them from harmful or malignant acts of others. Through such legislation, the State is ensuring that citizens are protected from others who might carry dangerous communicable diseases that can endanger their safety and threaten their lives.

Another purpose of this legislation is to curb the growth of the HIV infection by criminalizing acts of persons who seek to do the same. However, there still exists a lacuna due to the lack of sufficient judicial clarification on the question of nature and extent of liability in such circumstances. This paper will attempt to explain the present position under the law and the statutory reasoning behind such a legal position. It also seeks to compare the situation in India with respect to other nations

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<sup>2</sup> Matthew Weait, *The Criminalisation of HIV Exposure and Transmission: A Global Review*, GLOBAL COMMISSION ON HIV AND THE LAW (2011).

<sup>3</sup> Indian Penal Code, No. 45 of 1860, PEN. CODE (1860).

and elucidate upon the social ramifications criminalization has on those infected by this dreaded virus.

## **II. POSITION UNDER INDIAN LAW**

A plain reading of Section 269 of the Indian Penal Code, 1860 (*hereby referred to as the 'Code'*) states that whoever unlawfully or negligently does an act that is likely to spread an infection that is dangerous to life, shall be punished under the law.<sup>4</sup> Along similar lines, Section 270 criminalizes malignant acts that are likely to spread infection of disease dangerous to life.<sup>5</sup> Thus broadly, for an act to fall into either of the two sections, there are three requirements that have to be satisfied –

- The accused must have knowledge of the fact that the infection exists
- The infection must be dangerous to life
- Despite having the knowledge, the infection must be passed to another either negligently or malignantly

In both these provisions, the word act also includes an omission.<sup>6</sup> While the presence/absence of knowledge is a question of fact, it opens a Pandora's Box of possibilities that the law hasn't dealt with sufficiently. A mere absence of knowledge should not be reason enough to excuse the liability of a person who has potentially endangered another man's life by passing a dangerous disease to him.

HIV infection is merely one of the numerous diseases covered by these sections. Before eradication, this section also applied to the disease of smallpox, as was seen in the case of *R v. Vantandillo*, wherein the defendant was held liable for carrying her child along a highway while being cognizant of the fact that the act was likely to spread the disease to others. This was one of the first cases of its sort where the type of infection was classified as 'contagious, infectious and dangerous.'<sup>7</sup> A

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<sup>4</sup> Indian Penal Code § 269, No. 45 of 1860, PEN. CODE (1860).

<sup>5</sup> Indian Penal Code § 270, No. 45 of 1860, PEN. CODE (1860).

<sup>6</sup> Indian Penal Code § 32, No. 45 of 1860, PEN. CODE (1860).

<sup>7</sup> *R v. Vantandillo*, (1815) 4 M&S 73.

similar situation was addressed in *The Queen Empress v. Krishnappa and Murugappa*, whereby the accused knew that he was suffering from cholera, an infectious disease, and yet chose to travel in the train without intimating the railway authorities about the same. The case was even more important because it extended liability to a co-traveller of the accused because he was aware that the accused was suffering from the disease and yet chose not to inform the authorities about the same, bringing his omission to fulfil the responsibility under the purview of an 'act.'<sup>8</sup> Further, a person who was in contact with a plague patient was held guilty under Section 269 for travelling in public transport and thus potentially risking the co-travellers with the infection.<sup>9</sup>

An extrapolation of the same principle leads us to the question of HIV infection. On a straightforward application of the aforementioned cases, it becomes clear that even in cases of HIV, or other sexually transmitted diseases, a person should be held liable as per Section 269 and Section 270 of the Code. However, in *The Queen Empress v. Ramka Kom Sadhu*, the Court adopted a contorted interpretation and held that the defendant, who was a prostitute suffering from syphilis (a sexually transmitted disease), cannot be held liable for spreading an infectious disease because the complainant voluntarily chose to have intercourse, thus making him an 'accomplice' to the same. Since the complainant had consented to the intercourse, the defendant could not be punished under Sections 269 and 270.<sup>10</sup> The defendant was only be punished for misrepresentation because she did not reveal the fact that she was suffering from an infectious disease.

Instead of strictly interpreting the relevant provisions, as the case generally should be with regards to penal statutes,<sup>11</sup> the Hon'ble Court took a more convoluted line of thought without providing sufficient justification for the same. Instead of placing the blame upon the person for spreading such a disease, they placed the blame on the person who contracted the disease as a consequence. The argument that the person consented to the same cannot be held to be true because the person, quite clearly, consented for the intercourse and not for contracting the disease.

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<sup>8</sup> *The Queen Empress v. Krishnappa and Murugappa*, (1883) I.L.R. 7 (Mad.) 276 (India).

<sup>9</sup> *Naidar Mal*, (1902) PR No. 22 of 1902 (India).

<sup>10</sup> *The Queen Empress v. Ramka Kom Sadhu*, (1886) I.L.R. 11 (Bom.) 59 (India).

<sup>11</sup> *State of Andhra Pradesh v. Nagoti Venkataramana*, (1996) 6 S.C.C. 409 (India).

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The dispute was finally resolved in *Mr. X v. Hospital Z* whereby the Hon'ble Supreme Court held that 'if a person suffering from AIDS (the disease caused by the HIV infection) knowingly marries a woman and thereby transmits the infection to that woman, he would be held guilty of offences indicated in Section 269 and Section 270.'<sup>12</sup> While deciding the case against the AIDS-patient, the Court sympathized with him and recognized that he possesses all the other rights as a normal person does, such as accessing Government jobs, getting due respect and not avoiding their society. The Court drew these from judgments of other jurisdictions.<sup>13</sup> However, the judgment further held that intercourse with such people has to be avoided as otherwise they would infect and communicate the dreadful disease to the others, which was something that the Court could not assist the person in doing.<sup>14</sup>

### **III. UNDERSTANDING THE LEGISLATIVE INTENT**

The spread of HIV has, for long now, been perceived as a threat to the society – not just because of the life-threatening nature of the infection, but also because of the rapidness with which it is proliferating.<sup>15</sup> In trying to understand the legislative intent, the question that must be answered is – why has the voluntary spreading of HIV been criminalized in the first place? As per the Report of the Presidential Commission on Human Immunodeficiency Virus Epidemic, 'Just as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behaviour, HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions.'<sup>16</sup>

Broadly speaking, criminalization serves four primary functions. The first of these is to incapacitate the offender to prevent him from causing harm to others in the society. The second is to rehabilitate the offender by giving him the opportunity

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<sup>12</sup> *Mr. X v. Hospital Z*, (1995) 5 S.C.C. 296 (India).

<sup>13</sup> *School Board of Nassau County, Florida v. Airline*, (1987) 107 S. Ct. 1123.

<sup>14</sup> *Supra* note 11.

<sup>15</sup> DEPARTMENT OF AIDS CONTROL, MINISTRY OF HEALTH AND FAMILY WELFARE, ANNUAL REPORT 5 (2011-2012).

<sup>16</sup> REPORT OF THE PRESIDENTIAL COMMISSION OF THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130 (1998)

to change his/her behaviour so that the offence may not be repeated in the future. Thirdly, sanctions are categorical in nature because they seek to punish a wrong for the fact that it has been a wrong; that is, it is retributive wherein it provides punishment for the violation of promulgated rules.<sup>17</sup> Hart summed it up when he said 'This conception of punishment... makes primary the meting out to a responsible wrongdoer of his just desert.'<sup>18</sup> And the final purpose is to be a deterrent, so that the offender, along with other possible offenders, is prevented, through fear of punishment, from perpetrating the wrong again.<sup>19</sup>

Such criminalization is also just when seen under the microscope of various provisions of the Constitution of India. The reason also falls right in the lap of the right to live in a pollution free environment,<sup>20</sup> as has been enshrined within the expansions of the right to life under Article 21.<sup>21</sup> Thus by terming the possible spread of the HIV infection as a 'pollution' the law seeks to protect the Fundamental Right of people to live in an environment that is free from such pollution. As per Article 47 of the Directive Principles under the Constitution, the State has a duty to raise the level of nutrition and standard of living and to improve public health.<sup>22</sup> Public health can only be improved when it is protected from possible harms – and criminalizing a potential harm aids in the protection of peoples' health. While it is true that the Directive Principles are not enforceable in the Court of law, they are nevertheless fundamental in the governance of the country. By reason of expansive interpretation of "life" in Article 21 of the Constitution of India in various Supreme Court judgments, which is now the law of the land, right to life includes the right to all reasonable health facilities.<sup>23</sup> Another prong of the rationale also seems to be to enable to State to fulfil its mandate of being welfare state. It was observed in *Vincent Parikurlangara v. Union of India* that a healthy body is the very foundation of all

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<sup>17</sup> Baier, *Is Punishment Retributive?*, THE PHILOSOPHY OF PUNISHMENT 131-132 (H. Acton Ed. 1969).

<sup>18</sup> H. Hart, PUNISHMENT AND RESPONSIBILITY 158-159 (1968).

<sup>19</sup> Richard Elliot, CRIMINAL LAW, PUBLIC HEALTH AND HIV TRANSMISSION 6 (2002).

<sup>20</sup> *Enviro Legal Action v. Union of India*, 1999 A.I.R. S.C.W. 1069 (India).

<sup>21</sup> INDIA CONST. art. 21.

<sup>22</sup> INDIA CONST. art. 47.

<sup>23</sup> *M. Vijaya v. Chairman and Managing Director*, 2002 A.C.J. 32 (India).

human activities and in a welfare state it is the obligation of the State to enforce creation and sustenance of conditions of good health.<sup>24</sup>

If resort is to be had to the criminal law as a social policy response to the HIV/AIDS pandemic, then the single most important objective in doing so must be preventing the spread of HIV.<sup>25</sup> Criminal policy should not sacrifice HIV prevention in pursuit of other criminal goals, such as retribution.<sup>26</sup> However, such coercive measures are deemed to have a limited utility. Laws and public policies on HIV/AIDS can only have a minor part to play in the reduction of the spread of the virus and putting too much faith in coercive to serve this purpose might not be justified.<sup>27</sup>

While deterrence has been cited by many as a reason behind the criminalization, the same has been challenged on several occasions. The effectiveness of such deterrence can be questioned since criminal law cannot be termed as a vehicle that can successfully deter such behaviour. As has been observed, in most cases where the criminal law has been used against people with HIV there was no motive or advance planning. Spontaneous behaviour driven by human anguish, despair or passion is difficult to prevent.<sup>28</sup> Deterrents are only effective when there is a prior motive in the commission of an act. Such a motive, in most circumstances, is absent because the most common modes of passing of HIV (intercourse, using infected needles) are not premeditated – but spontaneous – against which a deterrent is ineffective.

#### **IV. CLASH WITH THE RIGHT TO PRIVACY**

There exists an apparent conflict between the right to privacy of a person suspected of HIV not to submit himself forcibly for medical examination and the power and duty of the State to identify HIV infected persons for the purpose of stopping further transmission of the virus. In the interests of the general public, it is

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<sup>24</sup> Vincent Parikurlangara v. Union of India, (1987) 2 S.C.C. 165 (India).

<sup>25</sup> Richard Elliot, *Criminal Law and HIV/AIDS: Strategic Considerations*, Canadian HIV/AIDS Legal Network, pg. 5, 2000.

<sup>26</sup> Id.

<sup>27</sup> M Kirby, *The Ten Commandments*, [AUSTRALIAN] NATIONAL AIDS BULLETIN 30-31 (1991).

<sup>28</sup> Gostin, *The Politics of AIDS: Contemporary State Powers, Public Health and Civil Liberties*, 49 OHIO ST. L.J. 1017 (1989).

necessary for the State to identify HIV positive cases and any action taken in that regard cannot be termed as unconstitutional as under Article 47 of the Constitution, the State was under an obligation to take all steps for the improvement of the public health.<sup>29</sup> The citizen's right to healthy life and the State's compelling constitutional obligation to protect other citizens from attacks of AIDS presents a situation where the right to privacy and public interest conflict each other.<sup>30</sup>

Privacy is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others and his control over the time, place and circumstances to communicate with others. It means his right to withdraw or to participate as he sees fit. It also means the individual's right to control dissemination of information about himself; it is his own personal possession.<sup>31</sup> The right of privacy was recognized as a Fundamental Right in *Kharak Singh v. State of Uttar Pradesh*,<sup>32</sup> therefore its importance cannot be overstated. Section 269 and Section 270 clearly clash with this right of an individual to maintain his privacy because they require him to disclose the fact that he carries the HIV infection and as per the Constitution, any law that is inconsistent with statutory provisions cannot be a valid law.<sup>33</sup> Also, they fail to consider that difficulties that a person suffering from the infection has to go through while disclosing such an intimate detail about himself to the public.

However, this concern was addressed by the Apex Court of the country in *Mr. X v. Hospital Z*. The court established that as one of the basic Human Rights, the right of privacy is not treated as absolute and is subject to such action as may be lawfully taken for the prevention of crime or disorder or protection of health or morals or protection of rights and freedoms of others.<sup>34</sup> Moreover, when there is a clash of two Fundamental Rights, the right that would advance the public morality and public interest, would alone be enforced through the process of the Court.<sup>35</sup> It was further held in *R. Rajagopal v. State of Tamil Nadu*, a case where guidelines were

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<sup>29</sup> *Supra* note 22.

<sup>30</sup> *Id.*

<sup>31</sup> Adam Carlyle Breckenridge, *The Right to Privacy*, UNIVERSITY OF NEBRASKA PRESS 1.

<sup>32</sup> *Kharak Singh v. State of Uttar Pradesh*, 1963 A.I.R. 1295 (India).

<sup>33</sup> INDIA CONST. art. 13.

<sup>34</sup> *Supra* note 23.

<sup>35</sup> *Id.*



laid down for exceptions to the right to privacy. The Court held that the right to privacy is subject to exceptions when an issue becomes a matter of public interest.<sup>36</sup> While the case was one that concerned the freedom of the press and the media, these guidelines and their exceptions were extrapolated to cases of HIV infection in defence of Sections 269 and 270 in *Alika Thomas v. Thomas Mathew and Anr.*<sup>37</sup>

The Latin principle of '*salus populi est suprema,*' which can be literally translated to regard for the public welfare is the highest law, will also come into play in such a circumstance. This maxim is based on the implied agreement of a member of the society that his own individual interest and welfare shall in cases of necessity yield to that of the community and that his life and liberty under certain circumstances be placed in jeopardy or even sacrificed for the public good.<sup>38</sup> Applying this maxim, the Supreme Court held that in case of a conflict between individual Fundamental Rights and larger interest of the society, the latter would prevail.<sup>39</sup>

While the purpose of the law is to protect individuals, the law can also adopt a utilitarian nature at times and strive towards protecting the society while encroaching upon the civil liberties of individuals. It is a simple game of numbers in which the law seeks to cover as many people as possible under its ambit. In cases of HIV infection, Sections 269 and 270 do infringe upon the privacy of an individual but such an infringement is still legally justified owing to the larger public interest that is served.

## **V. POSITION UNDER BRITISH LAW**

There is no direct law to make a person criminally liable for exposing others to the risk of HIV infection in the United Kingdom. However, it is possible to charge the person under Section 20 of the Offences Against the Person Act, 1861 (*the 'Act'*), for intentionally causing grievous bodily harm.<sup>40</sup> The foremost criterion in determining the liability of a person under Section 20 is whether the accused had knowledge of

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<sup>36</sup> *R. Rajagopal v. State of Tamil Nadu*, 1995 A.I.R. 264 (India).

<sup>37</sup> (2002) 62 D.R.J. 851 (India).

<sup>38</sup> *BROOM'S LEGAL MAXIMS* (10<sup>th</sup> ed. 1989).

<sup>39</sup> *S. Mohan v. Government of Tamil Nadu*, (1998) 9 S.C.C. 485 (India).

<sup>40</sup> *Offences Against the Person Act 1861* § 20 (24 & 25 Vict. c. 100).

the fact – which could come in the form of a prior diagnosis or medical tests – that he/she was suffering from the infection. In *R v. Dica*, the House of Lords stated that the law should not be a barrier against the successful prosecution of those who, knowing that they are suffering HIV or some other serious sexual disease, recklessly transmit it through consensual sexual intercourse, and inflict grievous bodily harm on a person from whom the risk is concealed and is not consenting to it.<sup>41</sup> Therefore knowledge was a relevant factor and a person who knowingly transmitted HIV upon someone could be held liable under Section 20 of the Act.

In doing this, the *Dica* case overturned a longstanding judgment where the majority of the Queen's Bench had held that where the harm (which was gonorrhoea, another sexually transmitted disease, in that case) had occurred as a result of a lawful sexual intercourse, there was no assault and therefore no offence.<sup>42</sup> However, consent plays an important part in determining the liability of the accused. When there is a 'conscious' or 'willing' consent on part of the complainant then the accused cannot be punished. 'Conscious' and 'willing' means more than just a disclosure of the infection. A complainant may be regarded as being 'informed' for the purposes of giving consent where a third party informs the complainant of the defendant's condition, and the complainant then engages in unprotected sexual activity with the defendant. Similarly, a complainant may be regarded as being 'informed' if they become aware of certain circumstances that indicate that the defendant is suffering from a sexually transmitted infection, such as visiting the defendant while he or she is undergoing treatment for the infection in hospital.<sup>43</sup>

The prosecution of such a person is based on the grounds that he/she was reckless in the act of transmitting the infection to another person.<sup>44</sup> If the accused, however, has taken sufficient precaution to prevent such a transmission then the ground of recklessness is not met and the person can be prosecuted. Evidence that the defendant took appropriate safeguards to prevent the transmission of their infection throughout the entire period of sexual activity, and evidence that those

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<sup>41</sup> *R v. Dica*, [2004] 2 Cr. App. R. 28 (U.K).

<sup>42</sup> *R v. Clarence*, [1888] 22 QBD 23 (U.K).

<sup>43</sup> *R v. Konzani*, [2005] 2 Cr. App. R. 14 (U.K).

<sup>44</sup> *Criminal Law: Legislating the Criminal Code : Offences Against the Person and General Principles* 15.15 – 15.17 (U.K).

safeguards satisfy medical experts as reasonable in light of the nature of the infection, will mean that it will be highly unlikely that the prosecution will be able to demonstrate that the defendant was reckless.<sup>45</sup> Only in the rarest of rare cases can a person who has taken all reasonable protection can be prosecuted for the transmission of the infection. Only in cases where defendant knew that the safeguards were inappropriate can he be held guilty for transmitting the HIV infection.

While the laws are largely similar, one of the essential differences between English law and the law in India is the fact that under the former, the criminalization takes place on the ground that grievous hurt was caused to the person by the act of transmission of the infection. There is no separate provision that criminalizes the transmission of diseases. In the Indian scenario, Sections 269 and 270 specifically criminalize the passing of such diseases. While the consequences of both might be the same, the ‘crime’ that is supposed to have been committed is different in the two countries.

By and large, the English law goes relatively easy on potential HIV transmitters than the laws of several other jurisdictions. There is no liability for merely exposing someone to the risk of transmission – a tangible harm (actual grievous hurt) needs to be shown. Neither is there an HIV-specific legislation that directly deals with such transmission cases. Possibly, this could be done to prevent further stigmatization of HIV positive people.<sup>46</sup>

## **VI. ARGUMENTS AGAINST CREATION OF AN ANTI-HIV LEGISLATION**

One of the defences that a person accused of spreading the HIV infection is that he/she did not know of the fact that he/she was carrying the infection since knowledge of the infection is a pre-requisite for prosecution as per the Code. Extending this fact, criminalizing spreading of HIV infection can become enough

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<sup>45</sup> *Intentional or Reckless Sexual Transmission of Infection*, THE CROWN PROSECUTION SERVICE (CPS), (Feb. 23, 2014, 5:51 P.M.), [http://www.cps.gov.uk/legal/h\\_to\\_k/intentional\\_or\\_reckless\\_sexual\\_transmission\\_of\\_infection\\_guidance/](http://www.cps.gov.uk/legal/h_to_k/intentional_or_reckless_sexual_transmission_of_infection_guidance/).

<sup>46</sup> Matthew Weait, *Criminal Liability for Sexually Transmitted Diseases*, CRIMINAL LAW AND JUSTICE WEEKLY 47 (2009).

reason for people to not get themselves tested because if they don't, then they cannot know if they are suffering from the infection and if they don't know that they are suffering from the infection then they cannot be punished for it.<sup>47</sup> The problem of the law rewarding ignorance is that this can cause large-scale damage to the society since the HIV infected will then desist from getting checked, opening up the window of damage not only to his health, but also to the health of others.

Also, there is an absence of evidence towards the fact that criminalization will make any significant impact on the spread of HIV or on halting the epidemic, which, as has already been mentioned as the primary purpose of criminalization. This proves that the deterrence effect is inefficacious – a fact supplemented by an analogy drawn to anti-sodomy laws in USA which haven't proven to be effective in curbing sodomy.<sup>48</sup> The deterrent not only acts in the form of a direct punishment, but also in the form of community condemnation.<sup>49</sup> If a separate law is created, then it increases the likelihood of stigmatization against people afflicted by HIV. This coupled with the fact that deterrence is effective on the prong of social stigmatization for the commission of a crime will exacerbate the situation HIV-patients. Elimination of social stigma and discrimination is an important part of tackling HIV in the world.<sup>50</sup> The fear of this stigmatization will further prevent them from coming out in the open about their infection.<sup>51</sup>

It also prevents them from openly accessing the gates of justice as was shown in the *Rhodes v. Iowa* case.<sup>52</sup> In the case, an HIV positive man was made to plead guilty by his lawyer despite the fact that he had used protection during a sexual activity and even despite the partner did not contract HIV from the encounter

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<sup>47</sup> Mark A. Wainberg, *The Johnson Aziga Case: HIV Transmission Should Not Be a Crime*, MCGILL REPORTER (Feb. 23, 2014, 5:55 P.M.), <http://publications.mcgill.ca/reporter/2008/12/the-johnson-aziga-case-hiv-transmission-should-not-be-a-crime/>

<sup>48</sup> R. MOHR, GAYS/JUSTICE 51-53 (1998).

<sup>49</sup> Hart, *The Aims of Criminal Law*, 23 LAW AND CONTEMP. PROB. 401 (1958)

<sup>50</sup> Global Report, UNAIDS REPORT ON THE GLOBAL AIDS EPIDEMIC 7, (2013)

<sup>51</sup> Kajal Bharadwaj, *Do We Need a Separate law on HIV/AIDS?*, INFOCHANGE (Feb. 23, 2014, 6:06 P.M.) <http://infochangeindia.org/agenda/hivaids-big-questions/do-we-need-a-separate-law-on-hivaids.html>

<sup>52</sup> *Rhodes v. State of Iowa* 170 U.S. 412.

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because as per the law in the state of Iowa, a person commits criminal transmission of HIV if the person “engages in intimate contact with another person” while knowing that he or she is himself or herself HIV positive.<sup>53</sup> Rhoades was given a twenty-five year sentence for this ‘crime.’

At a more principle level of what the law expects from those who have to adhere by it, it can be argued that such a law that criminalizes the spread of HIV expects an unreasonably high moral standard from the people it governs. Such a law is tantamount to asking individuals to behave at the highest stages of moral development and it may be unrealistic to expect vulnerable groups such as drug users and prostitutes to do so.<sup>54</sup> People cannot be held guilty of not doing something that was too much to expect them to do in the first place. These vulnerable groups do not possess the requisite moral standard that is required for compliance with a law that imposes such a heavy burden upon them. When the standards are set too high, people will often not comply with the law thus rendering it redundant.

In a majority of ways through which the infection can be spread, the person cannot be held liable. This include situations where the person did not know that he/she was HIV positive, did not understand how the disease is transmitted, had intercourse by consent or took reasonable steps to prevent the disease from spreading.<sup>55</sup> This leaves only cases where the person maliciously intended to spread the disease and in such cases, where the infection is spread by people maliciously, laws – such as causing grievous hurt (United Kingdom),<sup>56</sup> manslaughter (Finland), poisoning (France)<sup>57</sup> and the provisions already mentioned in Sections 269 and 270 (India) – are already in place for punishing the wrongdoer.

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<sup>53</sup> Iowa Code § 709C.1.

<sup>54</sup> Gostin, *supra* note 27, at 1044.

<sup>55</sup> *10 Reasons To Oppose The Criminalization of HIV Exposure or Transmission*, OPEN SOCIETY FOUNDATIONS (Feb. 23, 2014, 6:08 P.M.)  
[http://www.opensocietyfoundations.org/sites/default/files/10reasons\\_20081201.pdf](http://www.opensocietyfoundations.org/sites/default/files/10reasons_20081201.pdf)

<sup>56</sup> Indian Penal Code § 320, No. 45 of 1860, PEN. CODE (1860).

<sup>57</sup> Moono Nyambe, *Criminalization of HIV Transmission in Europe*, GLOBAL NETWORK OF PEOPLE LIVING WITH HIV (2005).

An example of not criminalizing HIV transmission was Mauritius, wherein the Government decided not to criminalize exposure to HIV or even HIV transmission. This was done on the grounds that that such a criminalization would not withstand a constitutional challenge because of the difficulties in proof, the likely vagueness of the exposure and the risk of selective prosecution. The main reason cited, however, was the concern about detrimental impacts on public health and the belief that criminalization would not serve any preventive purpose. The Mauritian legislation believed that criminalization created more problems than it solved. Therefore, the Government decided to use the funds for a better purpose, namely that of reducing the spread of HIV, increased funding for HIV testing and counselling and for evidence-based preventive measures.<sup>58</sup>

While not advocating a complete do-away of the current legal framework against the spread of HIV, this paper simply suggests an alternative that could also work towards the eventual aim of reducing the bludgeoning predicament of HIV infections in the country. The only purpose that anti-HIV laws serve is retribution for the person who suffered as a consequence of the spread infection and the same can also be accomplished through existing laws as is done in several countries already. This eliminates the need to have a separate legal provision that directly criminalizes transmission of the HIV infection.

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<sup>58</sup> *Supra* note 44, at 21.