

Constitutional Provisions on Right to Equality and Issues of Human Rights from the HIV-AIDS Inflicted People Perspective

*Dr. D.N. Parajuli**

1. Introduction

Human rights are rights inherent to all human beings. They define relationships between individuals and power structures, especially the State. Human rights delimit State power and, at the same time, require State to take positive measures ensuring an environment that enables all people to enjoy their human rights.¹ Human rights are universal because they are based on every human being's dignity, irrespective of race, colour, sex, ethnic or social origin, religion, language, nationality, age, sexual orientation, disability or any other distinguishing characteristic. Since they are accepted by all States and peoples, they apply equally and indiscriminately to every person and are the same for everyone everywhere.² Human rights have major relevance for shaping appropriate responses to the HIV epidemic and other global health challenges, including offering system-wide public health responses and identifying deficiencies in public health research agendas.³

In the summer of 1981, the first cases of what is known is now as AIDS were reported in the United States of America, and in 1984 HIV was identified and established as its cause.⁴ After the first clinical evidence of AIDS was reported, it has become one of the most devastating diseases humankind

* Associate Professor and Campus Chief, Nepal Law Campus, Tribhuvan University

¹ HUMAN RIGHTS HANDBOOK FOR PARLIAMENTARIANS, 2016. Inter-Parliamentary Union and the United Nations, 19

² Ibid 21

³ TWENTY FIVE QUESTIONS AND ANSWERS ON HEALTH AND HUMAN RIGHTS, World Health Organization, Geneva, 2002

⁴ M.A BELSEY, M.A. 2005. AN INTRODUCTORY OVERVIEW: IN AIDS AND FAMILY HEALTH, POLICY OPTION FOR A CRISIS IN FAMILY CAPITAL, United Nations, York., 2, (2002)

has ever faced. Since the epidemic began nearly 30 million people have died of HIV-related causes and some 60 million⁵ people have been infected with the virus. At the end of 2009, an estimated 33.3 million people globally were living with HIV. In that year alone, there were an estimated 1.8 million AIDS deaths and 2.6 million new HIV infections.⁶

HIV-AIDS is a complex problem that has adverse impacts not only on health but also on various aspects of development. This pandemic has raised several issues in human rights and public health in international level, and has created many constitutional and legal complexities at the domestic level in many countries particularly for the protection of the rights of people living with AIDS- HIV. Human rights are inextricably linked with the spread and impact of HIV on individuals and community around the world. Increased vulnerability, discrimination and stigma, and impedes an effective response are the major concerns and relationships between HIV/AIDS and human rights.

In many countries, we see several discriminatory provisions and practices against the HIV-AIDS inflicted people in the name of protection of the rights of others.⁷ The AIDS epidemic is still driven by human rights violations around the world, including discrimination, violence, punitive laws, policies and practices. Examples include denial of health care and unjust barriers in service provision, extreme violations of autonomy and bodily integrity such as forced abortions and sterilizations, undue third party authorizations for accessing services, and mandatory treatment or compulsory detention.⁸ This article analyzes the Nepalese constitutional provisions on right to equality, right to privacy and right to health especially from human rights and public health perspective.

2. Constitutional Provisions on the right to equality, privacy and health in Nepal

2.1 The Right to Equality

The existing Constitution of Nepal guarantees the right to equality as fundamental rights of the citizens of Nepal. Article 18 of the constitution provides:

⁵ <http://www.ohchr.org/english/issues/hiv/introhiv.htm> (accessed 19 May, 2019)

⁶ Ibid.

⁷ *Hoffmann v. South African Airways Case*; *John Doe v. An Oregon Resort case*; *Vickle Lesley v. Hee Man Chie case*; *Michael Nicosia v. Yellow Fright System , INC case* etc. available at : <https://www.globalhealthrights.org/africa/hoffman-v-south-african-airways/> (accessed 23 May, 2019)

⁸ [www.ohchr.org/EN/News Events/ Pages/ Display News.aspx](http://www.ohchr.org/EN/News%20Events/Pages/DisplayNews.aspx) (accessed 08 June, 2019)

Right to equality: (1) All citizens shall be equal before law. No person shall be denied the equal protection of law.

(2) No discrimination shall be made in the application of general laws on grounds of origin, religion, race, caste, tribe, sex, physical condition, condition of health, marital status, pregnancy, economic condition, language or region, ideology or on similar other grounds.

The Constitution also guarantees the right to equality before law and equal protection of the laws to all citizens. Similarly, the important guarantee made here is no discrimination shall be made on the basis of condition of health. According to this provision State cannot make any discrimination against HIV-AIDS inflicted people.

2.2 The Right to Privacy

The Constitution of Nepal guarantees the right to privacy as fundamental right of the person. Article 28 of the Constitution provides:

The privacy of any person, his or her residence, property, document, data, correspondence and matters relating to his or her character shall, except in accordance with law, be inviolable.”⁹ According to this provision no one can compel to HIV-AIDS inflicted people to disclose their HIV-AIDS status, unless state makes specific law relating to this.

2.3 The Right to Health

The Constitution of Nepal guarantees the right to health also as fundamental rights of the Nepalese citizens. Article 35 provides:

- (1) Every citizen shall have the right to free basic health services from the State, and no one shall be deprived of emergency health services.**
- (2) Every person shall have the right to get information about his or her medical treatment.**
- (3) Every citizen shall have equal access to health services.”¹⁰**

According to this provision people living with HIV-AIDS should get basic and emergency health services from the state. They also have right to get information regarding their medical treatment. Similarly, constitution guarantees equal access of health services to all citizens, which means HIV-AIDS infected people too.

⁹ CONSTITUTION OF NEPAL Art.28, (2015)

¹⁰ Ibid, Art. 35(1,2,3)

3. Human Rights Obligation

Many international human rights instruments recognize the right to equality the right to privacy, and the right to health. The international obligations of States to promote and protect HIV-AIDS related human rights are defined in many international human rights treaties. The HIV-AIDS related human rights include:

- The right to life¹¹;
- The right to liberty and security of the person¹²;
- The right to non-discrimination the right to equality¹³;
- The right to freedom of movement¹⁴;
- The right to health¹⁵;
- The right to privacy¹⁶;
- The right to seek asylum¹⁷;
- The right to freedom of association¹⁸;
- The right to marry and found family¹⁹;
- The right to work²⁰;
- The right to equal access to education²¹;
- The right to social security²²;
- The right to participate in public and cultural life²³;
- The right to be free from torture and other cruel, inhuman or degrading treatment or punishment²⁴ etc.

Nepal is also a party of many international human rights treaties including, the Convention on the Elimination of All Forms of Racial Discrimination, 1965; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic ,Social and Cultural Rights, 1966; The Convention on the Elimination of All Forms of Discrimination against Women, 1979;the

¹¹ UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art.3 ICCPR, Art.6, CRC, Art.6.

¹² Ibid Art.3, Ibid Art.9, CERD Art.5 & CRD Art.19

¹³ UN CHARTER, Art.1(3), 55 UDHR, Art.2, CERD, Art.5, ICCPR, Art.2(1), ICESCR, Art.2(2), CEDAW, Art.3, CRC, Art.1(1) of CAT, Art. 2.

¹⁴ UDHR, Art.13, CERD, Art.5, ICCPR, Art.18, CEDAW, Art.15, CRC, Art.10.

¹⁵ UDHR, Art.25, CERD, Art.5, CRC, Art.24, ICESCR, Art.12, CEDAW, Art.12.

¹⁶ UDHR, Art.12, ICCPR, Art.17, CRC, Art.16.

¹⁷ UDHR, Art.14, CRC, Art.22, CONVENTION RELATING TO THE STATUS OF REFUGEE, 1951.

¹⁸ UDHR, Art.20, CRC, Art.15, ICCPR, Art.21 & Art.22, CERD, Art.5.

¹⁹ UDHR, Art.16, CERD, Art.5, ICCPR, Art.23, CEDAW, Art.16

²⁰ UDHR, Art.21 & Art.23, CERD, Art.5, ICESCR, Art.6 & Art.7, CEDAW, Art.11, ICCPR, Art. 25.

²¹ Art.26 of UDHR, Art.28 of CRC, Art.5 of ICERD, Art.13 of ICESCR, Art.10 of CEDAW etc.

²² UDHR, Art.22, CERD, Art.5, ICESCR, Art.9, CEDAW, Art.13.

²³ UDHR, Art.27 of UDHR, CERD, Art.5, ICESCR, Art.15, CEDAW, Art.13, CRC, Art.31

²⁴ UDHR, Art.5 ICCPR, Art. 7, CAT, Art. 5, CRC, Art.37, ICRMW, Art.10.

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the Convention on the Rights of the Child, 1989 etc. The Sec. 9 (1) of the Treaty Act 1990 provides that:

In case of the provisions of a treaty, to which Nepal or Government of Nepal is a party upon its ratification, accession, acceptance or approval by the parliament, inconsistent with the provisions of prevailing laws, the inconsistent provision of the law shall be void for the purpose of that treaty, and the provisions of the treaty shall be enforceable as good as Nepalese laws.²⁵

This provision shows that the legal status of those signed treaties is equal to domestic laws of Nepal. However, if the provisions of any international treaty contradict with domestic laws in such case the provisions of international treaty are applied.

4. International Guidelines on HIV/AIDS

The major development took place regarding the human rights of the Second International Consultation on HIV/AIDS and Human Rights Geneva, 23-25 September 1996 Third International Consultation on HIV/AIDS and Human Rights Geneva, 25-26 July 2002. Similarly Consolidated Version of International Guidelines on HIV/AIDS and Human Rights came in 2006.

4.1 The major provision of guidelines includes:

GUIDELINE 1: States should establish an effective national framework for their response to HIV which ensures a coordinated, participatory, transparent and accountable approach, integrating HIV policy and program responsibilities across all branches of government.

GUIDELINE 2: States should ensure, through political and financial support, that community consultation occurs in all phases of HIV policy design, program implementation and evaluation and that community organizations are enabled to carry out their activities, including in the field of ethics, law and human rights, effectively.

GUIDELINE 3: States should review and reform public health laws to ensure that they adequately address public health issues raised by HIV, that their provisions applicable to casually transmitted diseases are not inappropriately applied to HIV and that they are consistent with international human rights obligations.

²⁵ Nepal Treaty Act, Sec.9, (1990). Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs, Law Books Management Board.

GUIDELINE 4: *States should review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups.*

GUIDELINE 5: *States should enact or strengthen anti-discrimination and other protective laws that protect vulnerable groups, people living UNAIDS OHCHR 18 with HIV and people with disabilities from discrimination in both the public and private sectors, ensure privacy and confidentiality and ethics in research involving human subjects, emphasize education and conciliation, and provide for speedy and effective administrative and civil remedies.*

GUIDELINE 6 (as revised in 2002): *States should enact legislation to provide for the regulation of HIV-related goods, services and information, so as to ensure widespread availability of quality prevention measures and services, adequate HIV prevention and care information, and safe and effective medication at an affordable price. States should also take measures necessary to ensure for all persons, on a sustained and equal basis, the availability and accessibility of quality goods, services and information for HIV prevention, treatment, care and support, including antiretroviral and other safe and effective medicines, diagnostics and related technologies for preventive, curative and palliative care of HIV and related opportunistic infections and conditions. States should take such measures at both the domestic and international levels, with particular attention to vulnerable individuals and populations.*

GUIDELINE 7: *States should implement and support legal support services that will educate people affected by HIV about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices International Guidelines on HIV/AIDS and Human Rights 19*

GUIDELINE 8: *States, in collaboration with and through the community, should promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities through community dialogue, specially designed social and health services and support to community groups.*

GUIDELINE 9: *States should promote the wide and ongoing distribution of creative education, training and media programmes explicitly designed to*

change attitudes of discrimination and stigmatization associated with HIV to understanding and acceptance.

GUIDELINE 10: *States should ensure that Government and the private sector develop codes of conduct regarding HIV issues that translate human rights principles into codes of professional responsibility and practice, with accompanying mechanisms to implement and enforce these codes.*

GUIDELINE 11: *States should ensure monitoring and enforcement mechanisms to guarantee the protection of HIV-related human rights, including those of people living with HIV, their families and communities.*

GUIDELINE 12: *States should cooperate through all relevant program and agencies of the United Nations system, including UNAIDS, to share knowledge and experience concerning HIV related human rights issues and should ensure effective mechanisms to protect human rights in the context of HIV at international level.*

5. Challenges

The major challenge to a State is to balance the rights between HIV-AIDS inflicted people and others. On the one hand, there are no any differences between the rights of people living with HIV-AIDS and others in international and national normative framework, on the other hand people living with HIV-AIDS needs more preferential treatment for the protection of their rights. At the same time a State has obligation to adopt preventive measures to protect people from HIV-AIDS infections. From public health perspective, they need information, data, HIV-AIDS status etc. to adopt preventive measures but people living with HIV-AIDS have right to privacy not to disclose or not to give any information about their status. The protection of the rights of HIV-AIDS inflicted people and the protection the rights of others or protection of public health at the same time is one of the major challenges and difficult task around the world. An effective international response to the pandemic therefore must be grounded in respect for all civil, political, cultural, economic and social rights, and the right to development in accordance with international human rights standards, norms, and principles.

6. Conclusion

Nepal has got accession of International covenant on Civil and Political rights, 1966 and International Covenant on Economic, Social and Cultural Rights, 1966 on may 14 1991. Nepal has extended fundamental rights in

the constitution promulgated in 2015. Treaty Act of Nepal gives priority to international instruments in case any domestic law contradicts treaty and agreements in which Nepal is a party.

Looking at the rights of HIV/AIDS inflicted people most important ones are Right to Equality, Privacy and Health. These rights are listed in the Constitution of Nepal and we can infer, HIV/AIDS inflicted people can demand such rights, and state is expected to contribute for the progressive realization of rights of such people. Looking at the Consolidated Version of the International Guidelines on HIV/AIDS and Human Rights, there is a lot of things that state need to carry out in order to respect, adhere and enforce the rights of HIV/AIDS inflicted people.

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