

When Preventive Jurisprudence becomes Primitive Jurisprudence

The Story of Lucy D'Souza v. State of Goa AIR 1990 Bom. 355¹

Dayan Krishnan*

As AIDS or the Acquired Immuno Deficiency Syndrome, the scourge of the late eighties unfolded, the Legislature of Goa, in an attempt to indulge in preventive jurisprudence enacted Sections 2 (15) and 53 (1) (viii) of the Goa, Daman and Diu, Public Health Act, (1985).² The end product however was a patchy piece of barbaric legislation bordering more on panic jurisprudence than preventive. Section 53 of the Act provides in clause (1) (viii) that a person found HIV positive may be isolated. Sections 2 (15) and 49 allow for the maintenance of isolation wards and provide conditions for such isolation.

The AIDS disease strange as it is, requires a specialised approach in prevention and cure. A cure today is unknown but preventive measures like counselling, contact tracing and literacy have had varying degrees of success. In the treatment, preventive aspects especially counselling have been accepted and sensitive treatment of AIDS victims is crucial especially keeping in mind the fact that AIDS victims are either homosexuals, prostitutes or needle sharers who are people already facing social isolation. Instead of catering to AIDS and its special needs, the Act provides for isolation of AIDS victims. What must be borne in mind is that we are dealing with the Acquired Immuno Deficiency Syndrome and find ourselves at a point in history where we are hampered by ignorance of a number of factors such as (1) the probability of HIV infected individuals progressing to AIDS, (2) the contact specific risks of different acts with respect to HIV transmission and (3) technological barriers to the treatment of AIDS. Legislation to provide for prevention or succour must be sensitive to the peculiar problems of AIDS as distinct from other S.T.Ds and be based on sound scientific and sociological research. Isolation was alright for tuberculosis and smallpox but isolation of an AIDS victim will prevent AIDS patients, especially those from categories indulging in dangerous activities from seeking medical help. The medical world is unanimous in espousing the opinion that isolation and similar social ostracism is not the solution for AIDS. Alfred Yan Kquer, in his editorial note in the American Journal of Public Health says "Efforts to change sexual behaviour, and to educate, are our present weapons to control the spread of AIDS. In the absence of other measures we must continue to pursue them vigorously".³ This view is fortified by Dr. Gloria Ornealas Hall⁴ in a background paper of the WHO 'London Declaration on AIDS

* III yr., B.A. LL.B. (Hons), NLSIU

¹ Decision by Justice V. A. Mohta and Justice (Dr.) G. F. Couto.

² Hereinafter referred to as the Act.

³ Am. J. Pub. Health (1987)

⁴ WHO report on AIDS (1988) London Convention.

Control, 1988", who opined "We view counselling as caring, caring enough to listen, to understand, to help deal with the HIV infection. It is a question of not responding with good intentions but of offering up-to-date professional skills so that seropositive individuals can be assisted in problem solving, in changing their behaviour and learning to live meaningfully with HIV infection". The most notable and recent academic contribution on the subject is the Report of the Presidential Commission on Human Immuno Deficiency virus epidemic (June 1988). This report in chapter six titled "Prevention" says "If a test is confirmed positive, intensive counselling at the time the result is given is needed because of the significance of that result and the tendency of the infected person to block out much of the information given at the initial session. While concentrating on the result itself counselling of infected persons should also include means to and responsibility to avoid transmitting the virus to others". The entire prevention process is therefore built around counselling in a disease of sexual deviants and social pariahs.

However, this is not a comment on the history of AIDS and modes of prevention but a sad tale of *Smt. Lucy D'Souza v. State of Goa*,⁵ where the judiciary in all its "erudition" failed to rectify what was done or rather undone by the Goa legislature in its quest to prevent AIDS.

The constitutional validity of this legislation was challenged with the hope and prayer that AIDS legislations will be forced to have as their basic philosophy, cure and prevention, rather than further isolation and social boycott. This hope was fortified by recent trends in Commonwealth and American jurisprudence. In *X v. Y*,⁶ a case concerning the question of confidentiality of records of AIDS victims the court going into the nature of the disease said that basic AIDS policy guidelines revolve around three factors sought to be achieved by counselling and education. They include:

1. Care of the sick;
2. Protection of the interests of those infected;
3. Minimisation of new infections.

The Court, especially Justice Rose, not only emphasised the need for counselling but also upheld the need to be sensitive to an AIDS victim and thus disallowed disclosure to the press, of AIDS records. This was also the view of the New York⁷ Supreme Court in *Re District 27 Community School Board v. Board of Education of the City of New York* where, again in a privacy action, the Court prevented use of AIDS records due to the nature of the disease and its victims. The rationale of these decisions seem to be that in the context of the current medical struggle against AIDS progress of medical research depends on availability of individuals willing to participate in studies and such participation will not be forthcoming if primitive measures like isolation are resorted to.⁸ Our hopes were

⁵ AIR 1990 Bom. 355.

⁶ (1988) 2 All ER 648.

⁷ 502 N.Y.S. 2d 325 (Sup. Ct. 1986).

⁸ Inoculation of cytotoxicus with transmission of AIDS. 313 New Eng. J. Medicine 56 (1985) cited in *AIDS and the Law* (1987) at 34.

belied by the learned judges who have unfortunately ignored international legal trends and sought to plough a lonely furrow by holding the Act constitutionally valid. It is tragic that the learned judges having emphasised on the importance of counselling saying "There is virtually unanimity among experts that education and counselling of the patient is the most effective weapon in the fight against AIDS"⁹ and conceding that "isolation has serious consequences including social ostracisation of an already segregated class of people,"¹⁰ however go on to uphold the importance of isolation on the ground that on a balance of interest test, the public interest of prevention prevails over the individual concerns of privacy. It is submitted that the public interest of prevention is better served by counselling and prevention of social segregation; no public interest requirement is satisfied by isolation which is an unjustified invasion into the guarantees of Article 21.

The Honourable Court then relies on a publication in a university journal to back their finding ignorant of the WHO London Declaration, 1988 or the American Presidential Report.

The Legislature of Goa and the Bombay High Court have failed to realise that AIDS is a disease like no other, and it would be a mistake to include AIDS in the same category as other contagious diseases like T.B., scarlet fever, etc. Efforts to club AIDS with other S.T.D's must be avoided as the cure for AIDS is not merely physical or medical but also sociological and psychological.¹¹ Thus the sad tale ends leaving everybody with a crushing sense of disappointment at a golden opportunity lost by the Bombay High Court to herald the era of AIDS jurisprudence in this country.

Let us pause here for a moment's introspection. Let us try and find answers in an era of judicial activism. Does the fault lie merely in bad policy formulation coupled with convenient judicial restraint or does the answer come from the larger question of the values we subscribe to. With a penal code which has penal sanction for homosexuality one cannot expect judicial attitude to be humane to such deviants, the prime target of AIDS. (Nothing stops us from hoping that the highest court atleast will be sensitive to modern happenings and their special needs). But in all fairness let us admit this is a hope against hope as parliamentary legislation is on the anvil for the prevention of AIDS. The Acquired Immuno Deficiency Syndrome (AIDS) Prevention Bill 1989 in Sections 5 and 7 allows isolation. The sad part of it is that we seem stuck on reverse gear. While the world is moving towards more humane means of treatment, we are resorting to Stone Age tactics of isolation in unnecessary panic and haste.

Let us contribute to finding a solution, both medical and legal, to this mystery disease rather than shun its victims and run from its onslaught.

⁹ AIR 1990 B. 355 para 7 at 359.

¹⁰ Id para 8.

¹¹ Doctor-patient confidentiality v. duty to warn in the context of AIDS patients and their partners 47 Md L Rev 675 (spr 88).